# PART ONE: LEARNING THEORY & STUDY SKILLS

## I. Introduction to the Course in Legal Analysis

### A. Methods of Legal Education

#### 1. The Last 145 Years

Professor Christopher Columbus Langdell was a brilliant teacher who introduced the "case method" system of legal education in the 1870's. He surmised that the teaching of law is not merely the memorization of legal rules but is a more comprehensive process that involves analytical and expressive skills such as synthesis, deduction, analogization, issue articulation, persuasive argumentation, etc.[1] Although Langdell's breakthrough seems obvious to us now, it was revolutionary from the perspective of legal educators and lawyers in the 1870's. Prior to Langdell's approach to law teaching, all lawyers had been trained through apprenticeships or by the tedious process of memorizing legal rules, set forth in authoritative treatises.

To implement his theory of legal education, Langdell created the first "case book." The book was an assembly of cases, without any direct reference to, or discussion of, the legal rules the cases were interpreting and applying. By presenting students with the raw cases, he forced his students to "discover" or "induce" the legal rules by extracting them from cases (finding the "holding" of the case) and synthesizing the holdings into a rule structure for that area of law. This process has become known as the "case method" of legal instruction.[2] You will notice that the contents of most, if not all, of your first year case books consist primarily of legal cases.

To a limited degree, the case method of instruction has been augmented in most law schools with *clinical*, *simulation* and *problem method* approaches to legal education. Clinical education engages the student in a "real life" clinical internship, where the student is placed as an intern with actual lawyers, judges and administrators. Typically, the clinical experience is supervised by clinical professors or others on the law school faculty.

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1. Langdell sought to "construct a rational scheme for the arrangement of legal doctrine by analytically unfolding the implications of a few foundational ideas." Kronman, THE LOST LAWYER (1993), at 182. Indeed, Langdell and his disciples, James Barr Ames and William Keener, believed that cases could be used both to identify the existence of basic legal principles (the legal rules) *and* that these legal rules are the product of a general process of legal reasoning.

2. The case method of instruction is also widely used by business schools throughout the U.S.

Simulation is similar to clinical education but students are not placed in a real life internship. Instead, the professor(s) construct a life-like setting in which students are asked to act as though they were attorneys.

Problem method legal education is a method of instruction where the professor poses a series of problems for the students that must be solved. The solution to the problems typically requires that the student first read cases and/or other sources of legal rules, elements, policies and justifications – and then apply them to solve the problem.

Although clinical, simulation and problem method courses have been present in most American law schools to one degree or another for thirty years, the central focus of law school education is still primarily the case method of instruction – especially in the first year of legal education.

### 2. More Recently

The case method process is, in fact, effective in teaching certain skills to law students. The process teaches students the skill of *rule extraction* – the process of reading a series of cases and extracting the holding of each case. The case method process is also effective in teaching students the skills of *rule synthesis* – using cases, treatises and classroom discussions to formulate a complete *rule structure* for a particular area of law.

The case method also contributes to a mastery of what is often referred to as *legal reasoning* or "thinking like a lawyer." Lawyers must be able to use cases, and statutes,[3] to support their clients' positions. They must also be able to distinguish cases that set forth holdings that are contrary to the positions of their clients.[4]

Unfortunately, the process of case method instruction is both incomplete and complex. The fundamental tasks of law students are to find, understand and organize legal rules, the elements of those legal rules, and the policies for each of the elements of the legal rules. Another fundamental objective of legal education is to train law students to *apply, in a logical and persuasive way,* the legal rules and their elements (and the policies behind the legal rules & elements) to novel factual circumstances.

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3. Many modern states, such as California, have *codified* common law rules by enacting statutes that restate the common law legal rules. States also enact statutes creating new legal rules that did not exist at common law. Once statutory rules are enacted (whether codifications or new rules), the statutes supercede any inconsistent case law. One role of the courts is to *interpret and apply* statutes.

4. Lawyers, in fact, use cases only as a *part* of their day-to-day practice of law. Most lawyers rely on statutes, treatises and experience to arm themselves with a mastery of the legal rules, elements, policies and justifications to assist their clients in resolving their problems. Occasionally, lawyers will turn to cases to bolster their position in an argument on a point of law.

The ultimate appraisal of whether students have succeeded in accomplishing these tasks is the law school examination.

Perhaps the most interesting aspect of the case method system of instruction is that it is rarely explained to students, despite its lofty goals and complexity. At virtually every law school in the country, law students begin their education by reading cases for class and then being asked to present their “briefs” or summaries of the cases in class, without any explanation of the purpose, system or process of case method instruction. Indeed, students are quickly placed on the treadmill of case method instruction without any guidance as to the goals of such training.

For approximately 120 years, American legal educators have used this "sink or swim" methodology that evolved from the Langdellian style of law teaching.

***Many students eventually figure out the objectives of this type of training and arrange their studies accordingly. Many other students get lost along the road from the first day of classes to their final exams. Indeed, some students whose profiles indicate a high likelihood of success in law school do poorly on their final exams. Both the winners (the students who figure out the system) and the losers (the students who don't) are at a disadvantage, since they all lack the information and experience necessary to efficiently and productively use their time during the first year of law school.***

Neither the methods nor the goals of legal education should be mysterious. The Legal Analysis course will help explain both. Perhaps more importantly, the course will offer recommendations for getting the most from your legal education so that you can become a capable and helpful lawyer who can solve problems for his or her clients.

**B. The Fundamental Assumptions of Legal Analysis**

The Legal Analysis course is based on the fundamental assumption that the skills of studying the law and writing law school examinations can be identified, isolated, understood and enhanced. The skills focused on in Legal Analysis are:

1. *Strategic planning for law study*: Using task identification, goal setting and short & long term planning to optimize the law school experience.

2. *Use of source materials*: Using treatises, student guides and other secondary sources to master and understand the basic rule structures all law students must know.

3. *Issue identification and articulation*: Understanding and applying the skill of succinct, clear and accurate issue identification and communication.

4. *Briefs, note taking and summarizing*: Using writing (briefs, class notes, summaries, outlines) as *tools* for mastering and understanding basic rule

structures – as well as using writing to enhance organizational clarity, understanding, memory and expression.

5. *Organizational skills*: Using cases, class, source materials and one's own written materials to construct organizational formats for complex material.

6. *Critical thinking, problem solving and judgment*: Using rule structures, policy, analogy, deduction and precedent to practice high level skills of analysis, problem solving and judgment.

7. *Expression skills*: Writing and speaking in a clear, powerful, precise and effective way. Understanding the contribution of structure, organization and methodology to effective communication in oral and written settings. Expression skills include the ability to write well-organized, cogent and effective exam answers, as well as memoranda, legal briefs and other documents.

**C. Grading & Attendance**

Grading in the Introduction to Legal Skills course will be on a pass/fail basis and ***counts for 10% of the total points in your first semester Legal Skills class.*** Attendance is mandatory and ***each absence from Introduction to Legal Skills classes (either Legal Writing or Legal Analysis) will be counted against the total number of absences permitted in your first semester Legal Skills class.*** A student who fails one portion of the Introduction to Legal Skills course will be considered to have failed the entire Introduction to Legal Skills course.

In the Legal Analysis component of the Introduction to Legal Skills course, you will be expected to attend every class, prepare for each class by doing the assigned reading and completing the assigned exercises. There will also be a written examination at the end of the week which you must satisfactorily complete to receive a passing grade.

## D. Goal Identification and Skills Identification.

### 1. Why Bother Identifying Goals?

Effective lawyering requires a clarity of mind about the objectives of the lawyer and his or her clients. For instance, a lawyer who is a truly effective negotiator has a crystal clear set of objectives to be accomplished during the negotiations. He or she will never lose track of those objectives, regardless of how complex or frenzied the negotiations may become.[1]

Learning the law is also complex, difficult and, sometimes, frenzied. It makes sense to establish appropriate goals and keep them in mind throughout the law school experience.

Law school requires the expenditure of a great deal of time, money and energy. A reasonable estimate of the time involved is about 5,760 hours![2] A reasonable estimate of the money involved is – well – staggering.[3] Perhaps most importantly, law school is the place you build the foundation for a successful law practice for the next 10 to 40 years. It makes sense that no one should begin, or continue, law school without a very clear idea of his or her goals, and a realistic game plan for achieving those goals.

### 2. Identifying Goals

The questionnaire on the next few pages is intended to stimulate some thought about your long term goals in attending law school, your intermediate range goals while in law school, and your immediate goals concerning the current semester of law school. Our thesis is that goal identification serves two important functions:

First, goals serve as motivators for performance. Many law students find that, from time to time, they lose the motivation to fully engage in their law studies. Goal setting and evaluation often serves as an excellent motivator.

Second, identification of goals assists students in optimally structuring their time and effort to achieve those goals.

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1. The art of negotiation is a difficult and complex one. In a now famous book, Professors Fisher & Ury, of the Harvard Negotiation Project, set forth in great detail the importance of clear objectives in the negotiation process. They state, as the first of four fundamental principles of effective negotiation: “Don't bargain over positions. Focus on the ***interests*** of the parties, not their positions.” GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, Fisher & Ury (2d ed. 1991)

2. About 60 hours per week, 16 weeks per semester of classes and exams for 6 semesters.

3. Three years of tuition & fees at about $40,000 per year, plus books and living expenses, etc.

Law school education is filled with opportunities to identify and achieve goals. *Our* objective is to assist you in a *functional* approach to legal education. By functional approach, we mean that you have a clear idea of your goals in law school and how to achieve them.

**EXERCISE TO PREPARE FOR CLASS:**

**For the first class session, complete the following questionnaire:**[4]

4. Be honest and complete in filling out the form. This material is confidential. You will be asked to share it in class if you desire, but you will not be required to reveal anything to anyone.

1. My primary goals in attending law school are: (examples: help people solve their problems; pursue a political career; be a successful and powerful lawyer; be able to provide a comfortable life style for myself and my family; make lots of money; do interesting and exciting work; undertake a difficult challenge; represent disadvantaged people; expand my education; get away from my parents, etc.)

2. My primary goals during the current semester of law school are (list at least two): (examples: speak effectively in class; get an "A" in at least one course; learn the law of Property, Contracts, Criminal Law, and Civil Procedure; decide which area of law to practice; make some professional contacts and friendships; improve my study habits; etc.)

3. My primary goals during the remainder of law school are (list at least three): (examples: Get a summer internship or job; figure out what area of law to specialize in; improve my writing and oral advocacy abilities; prepare for the bar, obtain a job for post-graduation, etc.)

4. My reservations, concerns, doubts and uncertainties are: (examples: I'm not as smart as everyone else; I'm not sure I want to be a lawyer; I'm not sure I want to devote the time; I don't have the money; I'm petrified of speaking in class; I'm not good at taking exams; I'm worried about my family; all the lawyers I know are jerks; all the lawyers I know are brilliant and articulate; etc.)

5. My goals for the first three weeks of school are?

The purpose of the preceding exercise is to begin to identify short, intermediate and long range goals, so that students can plan a strategy to achieve those goals. ***The primary purpose of the first part of Legal Analysis is to determine the tasks of the law student and provide strategies for accomplishing those tasks***. Hopefully, the first part of Legal Analysis will provide students with the background and information that students need to plot a course to achievement of their goals.

The goals exercise includes an identification of reservations, concerns, doubts and uncertainties, so that students can determine the factors that place some "drag" on achievement of goals. Doubts and reservations are potent, real considerations that inhibit the achievement of goals. They need to be identified and managed, so that the drag they create can be reduced. Keep in mind the fact that the stresses of economics, family, relationships and anxieties have a strong impact on success in law school.

## II. The Primary Tasks of the Law Student

### A. The #1 Task of the Law Student: Finding, Understanding and Organizing Legal Rules & Their Elements.

#### 1. The Task

The primary task of the law student is to *find*, *understand*, *organize* and be able to *apply* legal rules and their elements. Legal rules can be complex but can always be broken down into constituent elements or factors. Legal rules may have many elements, and each element may have sub-elements. The law student (and lawyer's) job is to find, understand, organize and be able to apply these rules/elements/sub-elements.

To add to the difficulty of this task, legal rules cannot always be described with certainty. Lawyers, professors and judges may have different, but equally workable, ways of describing the legal rules that are applicable in a particular case or situation. Thus, the complexity of the task of finding, understanding and organizing legal rules is compounded by the fact that the rules and their elements can be stated differently depending on the organizational skills of the law student or lawyer. There may be majority/minority viewpoints, there may be traditional/modern viewpoints or there may be well-thought/poorly-thought out viewpoints.

Legal rules are not created in a vacuum. The law is constantly expanding and contracting. The elements of any particular rule of law reflect underlying economic, social, historical and cultural policies. By understanding these policies, students and lawyers are better able to understand, organize and effectively apply the elements to new cases. To really understand the rules of law, you will also need to understand the *policies* underlying the legal rules.

**Most of what you will be tested on in your final exam is your understanding and organization of legal rules, their elements and the policies underlying them. You will also be tested on your ability to apply the rules/elements/policies to novel factual circumstances. This is true for both essay and multiple choice exams.**

The focus of this part of the Legal Analysis course is to identify and enhance the skills necessary to accomplish the tasks of understanding, organizing and applying legal rules and their elements.

### 2. What are Rules of Law and Elements?

Every law suit is based on at least one constitutional, statutory or common law "cause of action" or, synonymously, “legal claim” or "theory of recovery." A law suit may contain several claims based on more than one cause of action or theory of recovery. For instance, in a civil case, a plaintiff may have been injured when the car she was driving suddenly accelerated and caused an accident. Evidence in the case shows that the car was defectively manufactured. The plaintiff may sue the manufacturer and the dealer, seeking damages under several theories of recovery: (i) she may seek damages for breach of contract; (ii) she may seek damages for negligence; (iii) she may seek damages for breach of implied warranty of fitness; and/or, (iv) she may seek damages for strict product liability. Each of these theories of recovery is based on a distinct *legal rule*. Each legal rule has specific elements which must be satisfied for the plaintiff to succeed under that legal rule.

Suppose we focus on the negligence cause of action. To win, the plaintiff will need to prove that the defendant was negligent. The legal rule for negligence is often stated as:

A defendant is liable for negligence when:

- a duty of care was owed by the defendant to the plaintiff;
- the defendant breached that duty;
- the breach was the cause in fact of plaintiff's injury;
- the breach was also the proximate cause of the injury;
- and the plaintiff has suffered compensatory damages.[5]

To understand why *understanding* the legal rules and their elements is so important, consider what will happen if this dispute proceeds to a trial. The trial is a forum where two events will occur. First, there may be a dispute about the *facts* of the case. If the parties disagree about the facts, the ***jury*** (or the judge in a “bench trial” without a jury) is

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5. This is a simplified statement of the legal rule for negligence. You will spend much time on the tort of negligence in your Torts classes.

vested with the authority to determine the actual facts.[6] The lawyers will present witnesses and evidence to convince the jury of the true facts.

Second, the ***judge*** will have to determine *which legal rules* apply to this dispute. The attorneys will seek to convince the judge that certain legal rules should, or should not, be applied in this case. The judge will select the appropriate legal rule(s) and then instruct the jury to apply the rule(s) and each of the elements of the rule(s) to the facts of the case.

To win the case, the plaintiff must present facts convincing the jury that each of the elements of the legal rule have been satisfied. Let's use another concrete example.

### 3. Example: Defamation

Suppose that Peter is a math teacher at Valley High School. The school is located in the State of Western.[7] On March 1st, there was an evening meeting of teachers and parents in the school auditorium. At that meeting Donna (a parent) announced that Peter (a teacher) was an incompetent teacher, who often attended class intoxicated or "high on drugs," and molested children. As a result, Peter lost his job and was so embarrassed by the publicity following the meeting, that he moved to another state. In fact, Donna's statements were not true, although she believed that they were true when she made them. Donna was restating what she had heard from her son, Larry, who had received a grade of "F" from Peter.

If Peter commences a law suit against Donna, seeking money damages for the harm resulting from her false statements, he will not simply assert generally that he was wronged by Donna's actions. He will have to *prove* that there is a *legal cause of action* (i.e.: legal rule) that entitles him to the remedy of damages, *based on these facts*.

The legal rule that supports a legal claim or "cause of action" in Peter is known as the tort of "defamation". Suppose that in the State of Western, defamation is defined as a cause of action that entitles a plaintiff in a legal action to recover damages from: "A person who publishes an untrue defamatory statement, of or concerning the plaintiff, that causes damage to the plaintiff and is not privileged."[8]

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6. Prior to trial, the parties will indicate which facts they agree on and which they do not. If there is a dispute as to the facts, the parties will present witnesses and evidence so that the jury (or judge if there is no jury) can determine which facts are true.

7. In law school we traditionally use a fictitious state, like the “State of Western.” This allows us to discuss legal principles in general, without focusing on the law of any specific state.

8. Remember, these are the elements for the tort of defamation in the State of Western. The rule may be differently stated and/or applied in other states.

***Notice that the cause of action for defamation is comprised of a legal rule having several "elements" (sub-rules):***[9]

1. The statement must be "published"
2. The statement must be "untrue"
3. The statement must be "defamatory"
4. The statement must concern the plaintiff
5. The statement must cause damage
6. The statement must not be privileged.

**Each of these "elements" have special definitions, explanations, tests and justifications.** For instance, consider element #1 of the defamation cause of action.

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9. ***Special note***: The elements of defamation can be extremely complex. Defamation is typically divided into two different sub-categories: libel and slander. In cases where the defamatory statements are made by the press, or the plaintiff is a public figure, the plaintiff will have to prove additional elements to recover damages. We are using a simple statement of the elements of defamation for purposes of discussion in this course. You will study the elements in much greater detail in your Torts classes. The California Book of Approved Jury Instructions ("BAJI") provides the commonly accepted definition of defamation in the State of California:

The essential elements of a claim for defamation by [libel] [slander] are:

1. The defendant . . . made a defamatory statement about the plaintiff;
2. The defendant published the defamatory statement;
3. The defendant: [knew the statement was false and defamed plaintiff;] [or] [published the statement in reckless disregard of whether the matter was false and defamed plaintiff;] [or] [acted negligently in failing to learn whether the matter published was false and defamed plaintiff;]

    Reckless disregard for whether the matter was false and defamed plaintiff means that the defendant actually had serious doubts about the truthfulness of the statement at the time of the publication.

    A defendant acts negligently if [he] [she] does not act reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.

    In determining whether the defendant's conduct was reasonable you should consider:

    1. The time element;
    2. The nature of the interest that the defendant was seeking to promote by publishing the communication; and
    3. The extent of the injury to the plaintiff's reputation or sensibility that would be produced if the communication proves to be false.]

4. [Either] [the publication caused plaintiff to suffer special damages] [or] [the statement was defamatory on its face].

BAJI 7.04.01 (1992 Revision) 7.04.1 private Figure Plaintiff/public Figure Plaintiff–private Matters–essential Elements.

To be “published,” the statement must be communicated to a person other than the plaintiff, who understands its defamatory meaning and its application to the plaintiff.[10]

To win the case, the lawyer for Peter must prove facts sufficient to satisfy ***each*** of these elements. If any element cannot be proved, then the cause of action fails and Peter loses. The lawyer for the defendant will admit that some of the allegations of fact are true, and will deny the truth of other allegations. At the trial, Peter's lawyer will have to present evidence and witnesses to show that each of the disputed elements have been satisfied. After the attorneys complete the presentation of evidence and witnesses, the judge will read the instructions to the jury. The instructions will contain a list of the elements of defamation and a definition or test for each element. The jury then determines if each of the elements have been satisfied by the factual evidence.

A facsimile of a defamation complaint is set forth on the next page:

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10. The California Book of Approved Jury Instructions provides:

> A "publication" of defamatory matter is its communication to a person other than the plaintiff, who understands its defamatory meaning and its application to the plaintiff. To be a publication, the communication also must be made intentionally or negligently. [A publication is intentional if made for the purpose of communicating the defamatory matter to a person other than plaintiff, or with knowledge that the defamatory matter is substantially certain to be so communicated.] [A publication is negligent if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a person other than plaintiff.] [It is also essential to publication that the recipient of the defamatory communication understood the statement was intended to refer to the plaintiff. If the defendant intended to refer to the plaintiff, and the recipient so understood the statement, it is immaterial what words the defendant used to identify the plaintiff. If the recipient mistakenly, but reasonably, believed that the defamatory statement was intended to refer to the plaintiff, it is immaterial that the defendant did not intend to do so.]

BAJI 7.02 (1991 Revision) Publication.

SUPERIOR COURT OF THE STATE OF WESTERN
COUNTY OF SANTO[11]

| | |
|---|---|
| **Peter Piqued**<br><br>plaintiff,<br><br>v.<br><br>**Donna Dogood**<br><br>defendant. | **Case No. 94-12345**<br><br>**COMPLAINT**<br><br>**Defamation** |

**First Cause of Action: Defamation**

1. On March 1, 2017 the Defendant, Donna Dogood, attended a meeting of parents and teachers at Valley High School, with over 20 teachers and 100 parents.

2. At that meeting the Defendant made oral statements that the Plaintiff, Peter Piqued, was an incompetent teacher, who often attended class intoxicated or "high on drugs," and molested children.

3. The statements were untrue.

4. The statements were defamatory.

5. Defendant knew the statements were untrue, or Defendant made the statements with reckless disregard for the truth or falsity of the statements, or the Defendant was negligent with regard to the truth or falsity of the statements.

6. The statements were heard by teachers, parents, members of the School Board and members of the public, who understood the defamatory nature of the statements and that the statements concerned the Plaintiff.

7. The statements made by Defendant were not privileged.

8. The statements made by Defendant were defamatory *per se*.

9. As a result of the publication of the statements by Defendant, Plaintiff suffered actual pecuniary damages in the amount of at least one million dollars.

WHEREFORE, Plaintiff prays for the following relief:

1. Damages in the amount of $1 million.
2. Costs of this action.
3. Such other and further relief as the court shall deem appropriate.

*Alex B. Smith*

Alex B. Smith
Attorney for Plaintiff

11. This complaint is intended as a reasonably close facsimile of an actual complaint. Some allegations that would normally be separately stated have been combined. Some jurisdictional and other procedural allegations have been omitted.

## B. The #2 Task of the Law Student: Applying the Legal Rules to New, Different Facts.

If a student has *really* found, understood and organized the legal rules (and their elements and policies), then he or she should be able to apply those legal rules to new factual disputes and argue persuasively for a certain outcome in the dispute. For instance, a student who understands the rules of defamation should be able to look at the dispute between Peter and Donna and apply each element to the facts and argue persuasively that either: (i) Peter should win because he can prove each of the elements of the tort of defamation; or, (ii) Donna should win because Peter cannot prove each of the elements of defamation. To argue persuasively in favor of Peter or Donna, the student will need to be prepared with the following knowledge and understanding:

1. The definition of a cause of action for defamation (i.e.: a list of the elements and a general description of the cause of action).
2. The definition of each element.
3. The explanations, justifications and policies that are reflected in each element.

***Notice that you cannot begin to analyze new fact situations until you understand the rules and their elements for the area of law you are studying.*** Large amounts of class time are devoted to discussing hypothetical fact patterns. ***If you go to class without understanding the legal rules****, you are wasting your time and missing out on the major purpose of the classroom experience.*

**EXERCISES TO PREPARE FOR CLASS: Apply the elements of defamation to these new fact patterns:**

**(1) Suppose that instead of Donna speaking publically at the parent-teacher meeting, she makes the same remarks solely to the principal of the school in the confines of the principal's office. Does that change your conclusion about whether Donna is liable to Peter for defamation?**

**(2) Suppose Donna speaks publically at the Parent-teacher meeting, but rather than accuse Peter as in the original example Donna instead asks for his dismissal because, she says, Peter had been fired from a previous teaching job on account of his frequent political remarks in class. Actually, Peter resigned from that school in anger after the principal there criticized Peter for Peter's political remarks. Following Donna's speech at the Parent-teacher, Peter is indeed dismissed. Is Donna liable for defamation?**

**(3) Suppose Donna makes the statement to *Peter* (the plaintiff) in Peter's classroom. The classroom was vacant at the time but the principal happened to be in the hallway & overheard the conversation. Peter loses his job as a result.**

### C. The #3 Task of the Law Student: Reducing Uncertainty and Predicting Results

In the preceding materials it was stated that the #2 task of the law student is to *apply* legal rules and their elements to novel factual situations. This is done by applying the elements of the rule of law in a methodical way. However, the elements may not always be easily applied. For one thing, the case may contain new facts not covered by traditional definitions of the rule and its elements. Or, there may be disagreement among lawyers and judges regarding the proper formulation of the rule. There might be majority views, minority views, traditional views, modern views, trends, etc.

In other words, there may be a great deal of uncertainty about the legal outcome of the factual case being discussed. Good lawyers, and good law students, are expected to be able to argue rationally and persuasively for a reduction of the uncertainty.

To accomplish this task, students must be able to use their understanding of rules, elements, policies and justifications to argue cogently and persuasively for a particular outcome. This task will be intensely focused on in the materials on Legal Analysis, Problem Solving and Expression beginning at page 59 of these materials.

### D. Where Do Legal Rules Come From?

Your three primary tasks in law school require that you devote considerable concentration and effort on finding, understanding, organizing and applying legal rules and their elements. We thought it would be helpful to carefully focus on the sources of legal rules.

#### 1. The Statutory and Common Law Sources of Legal Rules

Legal rules and their elements are the culmination of centuries of law-making. Legal rules are a concrete reflection of underlying social, political and economic policies and justifications. Some legal rules are set forth in statutes by our city, county, state and federal legislatures.[12] In countries that follow "civil law" traditions, the vast bulk of legal rules are written in statutory form. In "common law" jurisdictions, such as England and the United States, many (if not most) causes of action for civil monetary damages, or

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12. Statutes are laws created by federal, state, county and municipal legislatures. So long as statutes meet the constitutional restraints imposed upon the legislative branch of government, the statutes supersede "common law" rules of law created by the courts. Statutes are often accumulated into "codes" so that they are readily accessible. For instance, the statutory law of the United States is contained in the U.S. Code. The U.S. Code is divided into "titles." Title 18, the Criminal Code contains the criminal laws enacted by the U.S. Congress. Title 11, the Bankruptcy Code, contains the Bankruptcy laws. The statutory law of the State of California is contained in a series of codes: the Penal Code, the Code of Civil Procedure, the Motor Vehicle Code, etc. The statutory law of the City of San Diego is contained in the San Diego Municipal Code.

other relief, are not codified in statutory form. The legal rules are "found" by reading reports of *cases*, in which judges reveal the legal rules they used to resolve a factual dispute between two or more parties. The judges may also reveal the social, political and economic policies that influenced them in their interpretation of prior common law cases. When interpreting these "common law" legal rules, lawyers and law students must use persuasive logic to support their interpretation of the common law legal rules.

Legal rules that are codified in statutes are relatively easy to find, although they are not necessarily easy to understand or interpret. Moreover, it is unlikely that all potential disputes were foreseen by the legislative drafters of the statute. When the statute is ambiguous or does not cover a particular dispute, the task of a lawyer (or law student) is to understand the policies and history of the statute, so that a favorable, and persuasive, interpretation of the statute can be asserted.

Here is an example of a current statute[13] concerning defamation. It is from Louisiana, and it makes the expression of certain words *criminal.* In other words, under the circumstances described in the elements of the statute, the speaker will be prosecuted by state attorneys and potentially imprisoned, rather than merely open to *civil* liability, i.e., being privately sued by the injured party without the state being directly involved in the dispute.

> "§ 47. Defamation
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> Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:
>
> (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or
>
> (2) To expose the memory of one deceased to hatred, contempt, or ridicule; or
>
> (3) To injure any person, corporation, or association of persons in his or their business or occupation.
>
> Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

**EXERCISES TO PREPARE FOR CLASS:**

**1. Construct a hypothetical scenario of a person expressing words to another that (a) satisfies the elements of the Louisiana statute; and (b) you believe justifies criminal prosecution.**

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13. Louisiana Revised Statutes 14:47 (2003).

**2. Construct a hypothetical scenario of a person expressing words to another that (a) satisfies the elements of the statute; and (b) nonetheless you DO NOT believe justifies criminal prosecution.**

**3. Construct a hypothetical scenario of a person expressing words to another "maliciously," but that could NOT result in a successful prosecution. Be prepared to explain what element of the statute is not satisfied, and why.**

**4. Speaking ill of the dead can result in criminal liability in Louisiana. Could the same words satisfy the elements of the civil law tort of defamation? (Review the elements of defamation given above). If not, what policies justify the difference? Can you construct a scenario that could result in civil liability in tort, but not result in criminal liability?**

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### E. The Importance of Understanding the Rationale and Policies Supporting Common Law Legal Rules

Legal rules are not given to us by a deity, nor are they inscribed in stone by ancient scriveners. Legal rules are produced by men and women – judges and lawyers who work hard to reflect upon historical, social, political and economic justifications for the rules that comprise case-made common law. Although there is a tradition of "*stare decisis*" or "precedent,"[14] legal rules are constantly changing, and new legal rules are always developing. To be an effective lawyer or law student, one must be familiar with the policies and justifications that motivate judges to modify, extend or narrow existing case law or statutory interpretation in the new case currently before them.

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14. The doctrine of "*stare decisis*" is a self-imposed doctrine substantially followed by the judges who decide cases. The doctrine requires that courts abide by, or adhere to, previously decided cases.

## III. Case Reading, Understanding & Briefing

The foundation of law school learning are the skills of case reading, understanding, synthesis and application. Law students are expected to learn how to:

- read a case;
- understand the elements of the cause of action discussed in the case (i.e.: the rule(s) of law discussed in the case);
- identify the important facts of the case;
- understand the historical, economic, social and political justifications for the rule(s) of law;
- synthesize the case with other cases and/or statutes to create a broad and cohesive legal rule structure; and,
- express in oral and written form all of these matters.

Obviously, this is too much to expect from beginning law students in the first week of their legal studies. However, these skills must be acquired as *fast* as possible, in order to get the most efficient use of your time and energy in preparing for class and examinations. In the next assignment you will be presented with a "Log" form that is designed to help you to practice and develop these skills.

The first case you will brief for this course is *Krona v. Brett.* It is challenging to a beginning law student because most of the concepts and some of the language are unfamiliar. However, *Krona* is not unlike many of the cases that will be assigned for you to read in the first week of your classes. A case report like *Krona* is a legal decision written by one of the judges who heard the dispute at the appellate level. It introduces the parties, the basic facts, and the nature of their legal dispute. It then declares which party prevails in the case, and explains why. Case reports are often difficult to read because they are not written for students. Rather, they announce results to the parties and explain the legal reasoning of the judges in a style that may take for granted that the reader already knows and understands the basic elements of the pertinent rules, and the infrastructure of our legal system.

Prior to briefing the case, we will present you with a method for “briefing” or “logging” the case that will help you understand the case; help you follow the conversation in class about the case; and provide you with a helpful study aid at the end of the semester when you are preparing for the exam in the course.

## A. Logging and Briefing

Lawyers and law students use cases as part of the tool set available to find, understand and organize legal rules and elements. A law school "case brief" is an attempt by the student to analyze and record the important aspects of a case. In this course we will sometimes refer to case briefs as “Logs” and the act of briefing as “Logging.” The terms were conceptualized by some professors to emphasize that a brief cannot be truly effective unless it is composed in a context of broader knowledge and understanding of the rules, elements and policies being focused on by the court. The terms "Log" and "Logging" emphasize that briefing is nothing more than logging a case into a broader understanding of legal rules, elements and policies.

A law school "brief" serves two essential functions:

1. A brief serves as a record of the important aspects of a case that can be used by the student in class or later in the semester. With regard to this function, the brief is a ***product***.

2. A brief also is an integral part of the ***process*** of learning the rules, elements and policies in an area of law. This function is often overlooked by students even though it is, by far, the more important of the two essential functions.

The second function focuses on briefing as but one part of a multi-pronged approach to finding, understanding and organizing the legal rules, elements and policies. Indeed, briefing is an essential part of the process but only if it is done correctly.

The logging exercise is a "context-creating" tool. If followed, it demands that the student take an active role in "contextualizing" the case assigned for class. By contextualization, we mean that the student understands the reason the case was assigned, its relative importance, the rules the case deals with, and the underlying policies and justifications for those rules. **This may seem like much additional work.** However, the Log assignment is offered as a work reduction process. Students who adopt this approach to class preparation are engaging in the primary task of the law student, which is to master and organize the legal rules being covered in the course. By the end of the semester, a student following this approach has achieved two invaluable objectives:

1. the student has gathered, understood and preliminarily organized all of the material for the final outline; and

2. the student has been actively sharpening the very skills that will be tested on the exam.

For each assigned case that is greater than two pages in length, you should include in the Log the following:

1. The name of the case, jurisdiction and other basic information. This section contains the important information you will need in class and will help you to remember the case. When identifying the plaintiff and defendant, try to use descriptive terms to help you recall the case. For instance, in a contract case where John Doe is suing Diane Diamond for breach of contract for failure to deliver goods, the plaintiff might be shown as "John Doe (the ***buyer***)" and the defendant might be shown as "Diane Diamond (the ***seller***)." The opinions you will be reading will almost always be appellate opinions. So, indicate who won at the trial court level, and if there was an intermediate appeal, who won at the intermediate appellate level.

2. Contextual placement of the case:

    a. Why was this case assigned *by the professor*? This is an extremely important question. Lawyers and law professors don't read cases in the abstract or just for the fun of it. They have a reason and a context for doing so.

    Cases will be assigned by your professors for different reasons and should be read differently for different reasons. Some possibilities are: (i) the case is being used to provide an overview of some new rule of law; (ii) the case is being used to focus on some element(s) of the rule of law; (iii) the case is being assigned to emphasize an outdated or poorly conceived approach to a legal issue; (iv) the case is being assigned to emphasize a minority viewpoint that is well-reasoned and might become the dominant view in the future.

    The best method of figuring out why the case was assigned is to review the table of contents of the casebook and/or syllabus for the course.

    b. What section of the table of contents is this case explaining or emphasizing?

3. Note the section of a student resource of your choice covering the material focused on in the case. Also include two or three sentences explaining the rules of law covered by the subsection (this explanation need not be repeated for two or more cases covering the same material). **The next following section in these Legal analysis materials will discuss some of these various student resources or "study aids."**

4. Note the important facts of the case. The important facts are hard to determine, unless one is aware of the rule of law (and its elements) being applied in the case. That is why it is essential that you *first* consult some resource before trying to determine the important facts. The important facts are the facts which help us to understand the case and the issues that arise in the case.

5. A clear, unequivocal, one sentence statement of the issue (or each of the issues) in the case. The issue should be stated in a way that a lawyer of average ability would understand what the dispute(s) before the court is (are). You should also state the "holding," which is the answer to the issue statement.

6. The rationale of the court. What are the logical, economic, social and other justifications offered by the court to explain the holding it has reached?

7. Your response to the case: (Use the following three questions as a guide to your response.)

    a. Does the case make a solid, logical, persuasive statement of its holding, or is the case rigidly relying on precedent?
    b. Do you agree or disagree with the rationale of the court?
    c. Will a contemporary, knowledgeable judge agree with and reaffirm the decision?

8. Dissents and concurrences. When dissents and concurrences are included in a casebook, there is usually some reason for doing so. Often, dissents and concurrences may offer some insights into changing trends or opinions in other jurisdictions. It is important to note the position set forth in the dissent or concurrence.

**DON'T DO A HALF-HEARTED JOB.** This process is highly effective only if engaged in whole-heartedly.

It is important to recognize that the initial logging/briefing form was not handed down from the heavens. Different professors will require different forms, or will stress some aspects of the information and not other aspects. The Log form was created by Prof. Ehrlich as an *initial* tool for use in Legal Analysis. Your job is to use the approach, and then modify it to fit your needs, objectives and study habits.[15]

On the next following page is a Log/Briefing form that you can use to brief your cases.

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15. For now, follow the form. After four or five weeks modify the form, if necessary, to meet your needs and objectives.

**1. Name of the case:** _____

**Jurisdiction & Date:** _____

**Plaintiff(s):** _____

**Defendant(s):** _____

**Trial Court Verdict or Judgment:** _____

**Who is appealing:** _____

**Decision in this appeal:** _____

**2. Contextual placement: (a) Why was this case assigned by the Prof.?**

**(b) What section of the table of contents is this case explaining or emphasizing?**

**3. Treatise section covering this material and two or three sentences explaining the rules of law covered by treatise section. Be clear & specific (need not be repeated for two or more cases covering the same material):**

**4. Important facts of this case:**

(a) **P's position/argument(s):**

(b) **D's position/argument(s):**

**5. A clear, unequivocal, one sentence statement of the issue (or each of the issues, if more than one) in the case. The issue should be stated in a way that a lawyer of average ability would understand what the problem is in this case:**

**6. (a) Holding (answer to issue(s)): ___yes, __no.**

**(b) Rationale of the Court:**

**(c) My response to the case (Does the case make a solid, logical, persuasive statement of its holding, or is the case rigidly relying on precedent? Do you agree or disagree with the rationale of the court? Will a contemporary, knowledgeable judge agree with and reaffirm the decision.)**

**7. Dissents and Concurrences:**

**EXERCISE TO PREPARE FOR CLASS: Read the following case, *Krona v. Brett*, and brief the case, using the Log Form.**

**KRONA v. BRETT**
Supreme Court of Washington
72 Wash. 2d 535; 433 P.2d 858 (1967)

Action to quiet title. Plaintiffs appeal from a judgment in favor of the defendant.

NEILL, J. Plaintiffs appeal from dismissal of an action to quiet title by adverse possession under the 10-year statute, RCW 7.28.010, to a tract of land 50 feet in length and 2.85 feet in width located between plaintiffs' and defendant's dwellings. The parties' properties are adjoining rectangular lots, each approximately 50 by 60 feet. A home is constructed on each lot facing the western (street) boundary. When plaintiffs acquired their property in 1923, a wooden lattice fence extended from the eastern (rear) boundary to within approximately 13 feet of the street boundary, serving to separate their property from the adjoining property. At the time of purchase, they were informed by a real-estate man and by an attorney who had made a title search that this fence constituted the boundary line. In 1932, plaintiffs constructed a concrete block wall running from the eastern boundary for a distance of approximately 10 feet along the true boundary line and thus parallel with and approximately 3 feet north from the original fence. They testified that this wall was intended as a bulkhead or retaining wall for a fish pond located in the southeast portion of their lot, was not intentionally placed along what later proved to be the true boundary line, and that the wall was so constructed in order to provide a space in which a compost heap could be concealed from the rest of their property.

Defendant acquired her property in 1938, at which time she observed the lattice fence. In 1952, defendant removed the original lattice fence and, in the same location, constructed a cyclone wire fence imbedded in a concrete foundation. She also placed a row of concrete blocks on the ground, running for a distance of approximately 13 feet from the western end of the cyclone fence to the street sidewalk. Plaintiffs testified that prior to the construction of the cyclone fence and the row of concrete blocks by defendant, they had placed a row of bricks flush with the ground in the same location as the row of concrete blocks. The property on plaintiffs' side of the row of bricks was planted in lawn; the property on defendant's side was planted in rose bushes. The purpose of these bricks was to facilitate plaintiffs' mowing the grass on their side and to keep the dirt from defendant's rose bed from falling on to plaintiffs' side. Defendant, however, testified that the row of bricks was placed in the ground by plaintiffs after she had constructed the cyclone fence and concrete blocks in 1952.

In January of 1965, after a survey of her property disclosed that the true boundary was 2.85 feet north of the cyclone fence, defendant removed the fence, but left the concrete foundation and the 13-foot line of concrete blocks undisturbed. One month later, plaintiffs constructed a new fence, running along the same line as the first two fences, reaching from the eastern boundary to the 13-foot line of concrete blocks. In April of 1965, defendant constructed a cyclone fence running from the western boundary 13 feet along the true survey line dividing the two lots and thus 2.85 feet into the lawn maintained by plaintiffs. * * * Plaintiffs removed this fence after defendant refused to do so.

Plaintiffs had never surveyed their property, had at all times considered the original fence line to be the true boundary, and had used and claimed title to all the property up to this line. They had no controversy with defendant's predecessor in title as to the existence of the original

fence; and no question as to the true boundary was raised between the parties until defendant constructed the 13-foot wire fence along the true boundary line in 1965. Defendant claimed that she had no knowledge of the location of the true boundary until the survey was made in 1965 and that she did not intend the fence constructed by her in 1952 to be the true boundary. Defendant concedes, however, that she placed the fence on the original fence line because she mistakenly thought it was the boundary between the two lots, though not necessarily the true legal boundary.

Plaintiffs' use and possession of the disputed strip of land consisted of the following: (1) mowing the lawn up to the original fence line for a distance of approximately 13 feet east of the western boundary; (2) planting flower beds along the original fence line, which beds extended approximately 20 inches out from the fence and were surrounded by a border of bricks; (3) constructing between their house and the flower beds a brick patio which extended partially onto the disputed strip; (4) placing a small removable ornamental wire fence around part of the flower beds and along the 13-foot row of concrete blocks; and (5) maintaining a compost heap on the disputed strip between the retaining wall of the fish pond and the original fence line. * * *

The trial court dismissed plaintiffs' complaint with prejudice and quieted title to the property in defendant, ruling that plaintiffs had failed to sustain their burden of proof. It concluded that (1) there was no evidence that plaintiffs had ever communicated to defendant that they were claiming the disputed strip; (2) plaintiffs' subjective thoughts or communications to a real-estate man were not communicated to defendant; (3) plaintiffs' acts were equivocal in that, about the time crucial to their claim of adverse possession, they built a fish-pond retaining wall on the true boundary line; and (4) the hostile and adverse character and quality of their claim to the strip did not manifest itself until the years of 1964 and 1965 just prior to the commencement of their action, far short of the 10-year period necessary to perfect their title by adverse possession.

When an action, as in the case at bar, is brought to establish title by adverse possession of a strip of land dividing the parties' properties, the plaintiff is not precluded from recovery merely because a fence dividing the properties was placed in that location by the mistake of the parties' predecessors in interest, if the plaintiff has openly and notoriously evinced the necessary intention to claim the land he was using up to the fence. * * *

In defining what constitutes sufficient adverse possession, this court, in *Butler v. Anderson*, 71 Wn.2d 60, 64, 426 P.2d 467 (1967), reiterated the well-established rule that:

> [To] constitute adverse possession, there must be actual possession which is uninterrupted, open and notorious, hostile and exclusive, and under a claim of right made in good faith for the statutory period. *Skansi v. Novak*, 84 Wash. 39, 146 Pac. 160 (1915). The nature of possession and attendant acts necessary to constitute adverse use as to a residential parcel or property are deemed sufficient if a person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general, in holding, managing, and caring for property of like nature and condition. *Mesher v. Connolly*, [63 Wn.2d 552, 388 P.2d 144 (1964)]. . . .

In other words, in determining whether the use and occupation of claimed lands has been sufficient to support title based on adverse possession, the character of the land should be considered. * * * The necessary use and occupancy need only be of the character that a true owner would assert in view of its nature and location. * * *

In *Mesher v. Connolly*, 63 Wn.2d 552, 388 P.2d 144 (1964), we held that the trial court must consider that where the strip crossed a lawn planted between two houses little evidence of ownership or hostile possession could be presented except for the manner in which the lawn was cut. Thus, we held that, although cutting the entire lawn between the two houses could well have been an act of neighborly accommodation, the plaintiff's cutting the lawn only along the claimed strip could be considered as indicative of a claim of ownership and should have been considered in connection with more conclusive acts of dominion, exclusive ownership and hostile possession at each end of the claimed strip in determining whether adverse possession of the entire strip had been established.

In the case at bar, plaintiffs' mowing the lawn up to the original fence line, considered in connection with their constructing a brick patio and maintaining a flower bed and compost heap on the disputed strip, clearly constituted such possession and open dominion "as ordinarily marks the conduct of owners in general, in holding, managing, and caring for property of like nature and condition." Considering the narrow width and confined location of the disputed strip, it is difficult to conceive of what more any claimant could have done to manifest his possession and control over the property.

As to the trial court's finding that the character of plaintiffs' claim was not sufficiently "hostile," this court has consistently held that: "In the law of adverse possession, 'hostile' does not mean animosity, but is a term of art which means that the claimant is in possession as owner and not in a manner subordinate to the title of the true owner." * * * The conduct of plaintiffs in the case at bar clearly does not indicate that they considered their claim to the disputed strip to be subservient to any claim defendant might have had.

With respect to the trial court's finding that plaintiffs had not communicated to defendant their intention to claim the strip, we have held that such intention may be evidence either by the acts of the adverse claimant or by his declarations. * * * In other words, an express declaration by plaintiffs that they intended to claim the disputed strip was not necessary to initiate the running of the statutory period nor to support plaintiffs' action to establish title by adverse possession. * * * As we held * * * " . . . 'the presumption is that if the adverse possession is open and notorious the owner of the title will know it.' " In the case at bar, plaintiffs used and occupied all of the disputed strip up to the original fence line in an open and notorious manner throughout the requisite term.

Finally, we cannot agree with the trial court's finding that plaintiffs' acts of adverse possession were equivocal merely because they built a fish-pond retaining wall on the true boundary line. The undisputed testimony revealed that (1) neither plaintiffs nor defendant knew at the time that the retaining wall was placed on the true boundary; (2) the retaining wall was placed approximately 3 feet from the original fence line in order to provide a space in which to conceal a compost heap from the rest of plaintiffs' property; and (3) at all times since the construction of the retaining wall, plaintiffs have maintained a compost heap in the space between the wall and the original fence line. All of plaintiffs' acts were unequivocal and consistent with their claim to the disputed strip.

Both parties cite and discuss *Niven v. Sheehan*, 46 Wn.2d 152, 278 P.2d 784 (1955), in which this court held at 155:

> When property is held continuously during the statutory period of ten years up to a barrier recognized and accepted as the boundary line between it and adjoining property, under a claim of right as owner, although the true line is on the property of the person or persons so holding, that portion between the true line and the recognized barrier is held adversely to the true owner.

The barrier, a concrete rockery, was in existence when both parties purchased their property; and both parties always used and occupied their property up to but never beyond the barrier. The party claiming according to the true boundary line admitted that until she had a survey made she believed that the barrier formed the actual boundary as did the party claiming adversely. Defendant would distinguish Niven, supra, by pointing out that the barrier therein ran the complete length of the disputed line whereas here the fence was 13 feet short of reaching the street. However, in *Frolund v. Frankland*, supra, we stated at 806: "[The] nature and use of the properties involved, and the fact that any boundary line between them necessarily followed a straight course negates . . . [the] argument." In the case at bar, the fence was in existence when both parties purchased their lots; and both parties used and occupied their property up to the fence but never beyond it.

Defendant further relies on *Brown v. Hubbard*, 42 Wn.2d 867, 259 P.2d 391 (1953). However, in that case the testimony showed the claimant intended to claim only to the true boundary line irrespective of the location of the fence which was later shown to be over on defendant's premises, whereas in the case at bar plaintiffs' testimony is unequivocal that they claimed to the fence and defendant's attempts on cross-examination to elicit testimony which would bring her within the Brown case were unsuccessful. Plaintiffs clearly considered the original fence line to be the true boundary. Although defendant contends that she never considered the fence line to be the true legal boundary, her conduct simply does not support her contention.

In *Mugaas v. Smith*, 33 Wn.2d 429, 430, 206 P.2d 332, 9 A.L.R. 846 (1949), we held that:

> The character of the respondent's possession over the statutory period is one of fact, and the trial court's finding in that regard is to be given great weight and will not be overturned unless this court is convinced that the evidence preponderates against that finding.

After a careful review of this record, we are of the opinion that there was no substantial evidence to sustain the trial court's findings of fact and its conclusions of law drawn therefrom; rather, we believe that by the evidence presented, plaintiffs met their burden of proving all the elements necessary to establish title to the disputed strip of land by adverse possession.

The judgment is reversed and the cause is remanded for entry of judgment quieting title to the disputed strip of property in the plaintiffs.

HILL, DONWORTH, and HAMILTON, JJ., and OTT, J. Pro Tem., concur.

### B. How Lawyers and Law Students "Find" the Common Law Legal Rules

Cases are the *primary source* of common law legal rules. Most lawyers are specialists in their field, or have substantial prior experience, so that they already understand the rules of law in the dispute. The experienced lawyer already understands the basic structure of the legal rules before beginning her case research and analysis.

However, **no lawyer, experienced or inexperienced, starts an inquiry into the rules of law by going directly to the cases.** Suppose that a lawyer was not experienced in the area of defamation law. Would she simply start picking up cases at random from the library? Of course not. She would use a resource tool such as a practice treatise or legal encyclopedia to read condensations of the rules of law in her jurisdiction.

These sources contain up-to-date summaries and analysis of the current rules of law in various areas of practice. They are expensive, but very helpful. They are prepared by experts in the field who have substantial experience in that area of law and who are well-paid to do the basic, difficult task of surveying the cases and constructing justifiable interpretations of causes of action and their elements.

**A lawyer would be wasting her time if she read a case without having a basic understanding of the legal rule and its elements of the law of defamation, *and so would you if you read your assigned cases without some understanding of the basic cause of action and elements being addressed by the case*.** It makes sense that you become generally familiar with the material the case is addressing before actually reading the case.

Let us look at some of the study aids available to law students. Some are very basic, some elaborate; some are free, some expensive. ***Each different aid has its uses; virtually all can be abused. None is a substitute for personally reading and briefing the cases assigned to you by your professor.***

#### 1. Tables of Contents:

We rarely think of tables of contents as a study aid. In fact, however, tables of contents are displayed at the beginning of all of your casebooks and are an excellent source of contextual and organizational information. They reflect the author's organization of the course and provide an excellent insight into the reason that the case is included in the casebook. Similarly, if your professor supplies you with a "syllabus" or "assignments" for the course, these provide an insight into the professor's organization of the material and the context for the case being assigned.

Set forth below is a portion of the table of contents for a commonly used first year property casebook. Suppose that it is the first day of class and you have been assigned the case of *Van Valkenburgh v. Lutz* referred to below in the table of contents

for this casebook. Take a look at the table and see if it helps you to understand why you are reading the case:

**Dukeminier & Krier, PROPERTY**

**PART I. An Introduction To Some Fundamentals**

**Chapter 1. First Possession: Acquisition of Property by Discovery, Capture and Creation**

A. Acquisition by Discovery
B. Acquisition by Capture
C. Acquisition by Creation

**Chapter 2. Subsequent Possession: Acquisition of Property by Find, Adverse Possession and Gift**

A. Acquisition by Find
B. Acquisition by Adverse Possession
   1. The Theory and Elements of Adverse Possession
      *Van Valkenburgh v. Lutz*
   2. The Mechanics of Adverse Possession
C. Acquisition by Gift

### 2. Nutshells:

The "In a Nutshell" series is published by West Publishing Company. These soft-cover books are highly condensed (and very general) descriptions of the rules of law for law students. They are short, easy reading. Copies of the all of the Nutshells are on Reserve in the Library. Because they are so condensed, they provide only an introduction to rules of law that you will be studying. They are good sources of information when you are learning a new cause of action.

Each nutshell is written by a different author. Some are clear, concise and helpful -- while others may not be as helpful. All of the nutshells are short, so they offer a quick overview of topics you will be studying.

Attached in Appendix A to these materials are some excerpts from the Real Property Nutshell on the topic of adverse possession. Take a moment to read those materials.

Was the Nutshell helpful? Would you use a different source for adverse possession, or was the Nutshell sufficiently clear that you would stop searching for helpful assistance on understanding the doctrine of adverse possession?

### 3. "Commercial Outlines"

Gilberts, Emanuels and several other companies publish what are commonly called "commercial outlines." They are usually well-organized statements of the rules, elements and policies for each course. These materials are specially prepared for law students. No lawyer would use this type of material, yet they might be appropriate for law students, ***if used correctly*****.**

Lawyers *do* use the equivalent of commercial outlines – lawyers' practice treatises. Practice treatises are written by experts in a particular field of law and contain authoritative discussions of the rules of law in that area.

You should *always* refer to some source for information about the rule, its elements and policies, before reading the cases assigned to you by your professors. Commercial outlines are a good source for this purpose.

It is important to note that both lawyers' practice treatises, and student resources, are sometimes incomplete and just a *tool* in finding, understanding and organizing the rules of law and their elements.

Lawyers use practice treatises as a valuable step in the process of finding, understanding and organizing rules of law and their elements. However, all good lawyers will carefully read the cases and statutes to update and polish their understanding of the rules and elements and to create the most persuasive argument they can for their own organization and interpretation of the rules. The treatises are not ***law*** -- they are merely one author's valuable organization of the rules, elements and policies.

Similarly, student commercial outlines are merely one person's interpretation of the common law rules, elements and policies that are typically taught in American law schools. ***The commercial outlines can be outdated and, occasionally, flat-out wrong about the rules. They are merely tools that good law students use as part of the process of finding, understanding and organizing the legal rules.***

The power of these outlines is in using them *before* class, *or soon thereafter*, to help you formulate your thoughts and organize an approach to the material. The **fatal mistake** that some students make is relying on such course outlines as a substitute for the process of outlining that all students must undertake if they are to be successful on their exams.

Read Appendix B now, containing an excerpt from a Gilbert's commercial outline, as though you were getting ready to read the case of *Krona v. Brett* for tomorrow's class. Read through the material carefully, but don't try to master all of the rules on the first try. Just get a handle on the basic theory of adverse possession and the *elements* of a cause of action for adverse possession.

Was Gilbert's helpful? Would you use a different source for adverse possession, or was Gilbert's sufficiently clear that you would stop searching for helpful assistance on understanding the doctrine of adverse possession?

### 4. Hardcover Treatises

Often a case assigned for class will focus in detail on a difficult element of a cause of action. For instance, the next case we will read on the topic of adverse possession is *Marengo Cave Co. v. Ross*. The case focuses on the requirement that adverse possession must be "open and notorious". This is a difficult element to master and a commercial outline may be inadequate to fully explain the intricacies of this element.[16] The professor may choose to spend extensive class time delving into the element of open and notorious. In such cases, the proper place to go for clarification is a hard cover treatise. There are several good ones for property:

Boyer, Survey of Property (3rd ed. 1981)
Powell, Real Property (abridged ed. 1968)
Cunningham, Stoebuck & Whitman, The Law of Property (1984)
Cribbet, Principles of the Law of Real Property (2nd ed. 1975)

Keep in mind that such hardcover treatises contain extensive, detailed elaboration of rules of law you study in class. Sometimes, they are *too* detailed! Use them as a resource to help illuminate concepts that are being introduced to in class.

Attached in Appendix C to these materials are some excerpts from a hardcover treatise PROPERTY, by Cunningham, Stoebuck and Whitman. The excerpt focuses on the open and notorious element of adverse possession. Read that material now.

Was the treatise helpful? Would you use a different source for adverse possession, or was the treatise sufficiently clear that you would stop searching for helpful assistance on understanding the doctrine of adverse possession?

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16. Many cases in your casebooks were selected because they focus on rules of law, or specific elements of rules of law, that are unsettled or unclear. The reasons for using such cases are to: (i) provide interesting material for discussion in class; (ii) to train students to apply the skills of case analysis, rule-articulation, organization and other skills.

### 5. Casenotes:

By now you know that one of your tasks as a law student is to be prepared to recite the facts of a case, the issue in the case, and the rule of law and elements used by the court to resolve the issue. This task is an indispensable part of your preparation for final exams and, eventually, an essential skill of good lawyering. Briefs/Logs serve as a helpful tool for fulfilling the student's obligation to recite in class. Nevertheless, briefing/logging is a far more comprehensive enterprise. It is easy to forget that the *process* of briefing is more important than the product.

Casenotes are "canned" briefs of cases assigned for class. They are nothing more than a written brief of a case assigned for class, published by a for-profit commercial enterprise. Some students use them with the mistaken belief that they can skip the process of reading the case and briefing it themselves. Canned briefs would be useful if the goal of the student was to line his or her shelves with case briefs. Of course, the whole point of reading and briefing cases is to engage in the *process* of learning and developing lawyering skills.[17]

Professors who have been teaching for a long time often wonder in amazement at the folly of some students who spend the whole semester using someone else's Briefs/Logs and are then surprised when they don't do well on their exams! No athlete would be surprised about his/her poor performance at an athletic competition – if the athlete spent the six months prior to the competition relying on someone else to do their training. In law school, and in law practice, the ability to perform is dependent on solid preparation and training. The finding, understanding and organizing of legal rules requires effort. No one ever became an authoritative and competent lawyer by submitting someone else's work.

Using casenotes circumvents the essential training that all law students must go through to succeed on their exams, and in practice. Students who continue to use casenotes are obviously failing to identify goals and plan strategically. After all, if the goal is to do well on exams, and/or be a successful practitioner, then using casenotes is completely antithetical to such a goal(s).

Attached in Appendix D to these materials are some excerpts from a casenote publication. Take a moment to read the material.

Was the material helpful? Are there some dangers in using the material? Are there some benefits?

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17. Casenotes have one other limited, but helpful, function. If a student has no idea of what a case brief looks like, casenotes provide examples of briefs (often poor examples). By the end of Legal Analysis, you will have a clear and unequivocal understanding of good case briefing, so this function of casenotes will be of minimal use to you.

## IV. Issue Identification and Articulation

### A. The Importance of Identifying and Articulating Issues

You may have found #5 on the Log form to be especially challenging. It asks for "a clear, unequivocal, one sentence statement of the *issue* (or each of the issues, if more than one) in the case." Some of the most important skills that lawyers practice are the identification and articulation of issues.[18] The reason these skills are so important is that all litigation focuses on only those aspects of a law suit that are in dispute. Lawyers must be able to separate the undisputed matters from the disputed matters. The disputed matters become the "issues" in the case. After carefully identifying the issues, the lawyers must then focus the attention of the trial judge, jurors or appellate judges on those issues. Good lawyers in a litigation setting will *identify* the issues with crystal clarity and then *articulate* them for others in a way that helps them the lawyers to persuade the judge or jury to reach a decision favorable to their clients.

Transactional lawyers also must be able to identify and articulate issues. Transactional lawyers work in tax law, real estate, contract, business organizations (corporations, partnerships, limited liability companies), financing, etc. These lawyers do not regularly engage in litigation. Their objectives usually involve advising, planning, negotiating and drafting documents. Nevertheless, when engaging in their transactional work, they must understand the rules of law that govern the transactions and whether issues arise regarding aspects of the transactions. If an issue arises, they must advise their clients accordingly and attempt to resolve the issue by planning, negotiation and drafting.

### B. What is an "issue"

An "issue" is a *legal* dispute raised by a particular set of *facts*. The statement of an issue is nothing more than a clear description of the legal dispute, phrased in a functional way so that a reader or listener has a clear, unequivocal idea of the dispute. The only way that an issue can be identified and stated is to understand the legal rules that are applicable to the dispute and the *specific facts* that give rise to the dispute. An "issue" arises when the existing body of legal rules **are not clearly applicable to the facts of this dispute.**[19]

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18. In law school, issue identification and articulation are also important skills for success. Professors will expect students to articulate the issue(s) raised by the assigned cases and the hypotheticals posed in class. On final exams, students will be graded on their ability to quickly assess the important issues raised by the fact patterns and discuss the appropriate outcomes of those issues.

19. There are some issues that are purely *factual*. For instance, in the O.J. Simpson criminal trial the defense lawyers insisted that O.J. was not at the scene of the murder of his ex-wife and her friend. The prosecution asserted that O.J. was present at the murder scene. This dispute is a factual issue: Was O.J. present at the murder scene during the crucial time or not. There is

For instance, recall the defamation dispute between Peter and Donna.[20] Suppose that Donna did not make the announcement at the Parent-teacher meeting but, instead, confronted Peter in the hallway at school. In a normal speaking voice she made her allegations directly to Peter. Unknown to Donna, the principal was in the adjacent hallway and overheard the conversation. Again, Peter loses his job and moves to a distant location. In a lawsuit by Peter against Donna for defamation, Donna has asserted that she is not liable to Peter because she did not "publish" the defamatory statement. A good statement of the issue might be:

> *In a defamation action, is a statement "published" when the defendant makes defamatory remarks directly to the plaintiff in a school hallway, if the statement is overheard by another person who was not known by defendant to be in the hallway?*

This is a good issue statement because it:

1. identifies the general area of law involved in the claim or cause of action (here, defamation)

2. then clearly identifies the legal *element* involved (when is a defamatory statement "published"), and

3. sets out specific facts that may or may not *satisfy* the definition, or test, or criteria of the element (a private statement being overheard by another person, unknown to the speaker).

Notice that to isolate one or more of the issues raised in the case of *Peter v. Donna*, you must first apply the *elements* of the tort of defamation, one-by-one, to see if any elements are subject to a dispute under the facts of this case. The issue statement is little more than the application of the element of "publication" to the facts of this hypothetical. We can break down the issue statement as follows:

> *In a defamation action*, [identifies the cause of action or legal claim]
>
> *is a statement "published"* [identifies the element of the cause of action in dispute]

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no legal rule involved in resolving this dispute. The jury will simply determine the true facts.

20. At the annual Parent-teacher meeting for San Diego High School, Donna (a parent) announced that Peter (a teacher) was an incompetent teacher, who often attended class intoxicated or "high on drugs", and molested children. As a result, Peter lost his job and was so embarrassed by the publicity following the meeting, that he moved to Arkansas. In fact, none of Donna's statements were true, although she believed that they were true. Donna was restating what she had heard from her son, Larry, who had received a grade of "F" from Peter. See page 11.

*when the defendant makes defamatory remarks directly to the plaintiff in a school hallway, if the statement is overheard by another person who was not known by defendant to be in the hallway*? [isolates and states the important facts that give rise to a dispute in this case]

### C. Stating the Issue Succinctly But Not Too Broadly

The issue statement above is succinct, yet clearly identifies the legal rule and facts that are important to a resolution of the dispute. Students and lawyers must be careful not to state the issue too broadly or too narrowly. An example of an issue statement that is too broad would be:

*Is a defendant liable for defamation when making defamatory accusations about a school teacher?*

The statement is too broad because it does not succeed in focusing on the element of the legal rule and facts that are really in dispute. In other words, the statement fails to isolate the particular element of the tort of defamation that is disputed in this case. It also fails to set forth the important facts that may or may not satisfy the element, and that thus give rise to a dispute in this case. A person reading this statement does not have an accurate picture of the central issue in the dispute between Peter and Donna.

An example of an issue statement that is too narrow would be:

*Is a defendant liable for defamation when she makes a statement that the plaintiff (a high school teacher) is often intoxicated or high in class, molests children and was an incompetent teacher, and when the statement is untrue, and defendant makes that statement in a school hallway, where (unknown to the defendant) it is overheard by the school principal, who then fires the plaintiff?*

The statement is far too specific because it includes facts that are irrelevant to resolution of the dispute. The resolution of this case will rest on whether or not a defendant has "published" a statement when it is overheard in a public hallway, unbeknownst to the defendant. The inclusion of these additional facts confuses the reader, by presenting irrelevant information. The statement fails to narrow the facts down to those that are in doubt concerning satisfying a particular element of defamation.

### D. The Problem of Multiple Issues

Often, an actual legal case or a law school fact pattern will contain multiple issues. For instance, in the case of *Peter v. Donna*, suppose Donna made the following statement about Peter, at a School Board meeting: "I have heard that a certain math

teacher is not doing a professional job of teaching his math class." Donna is a member of the School Board. There are two math teachers, Peter and Barbara. There may be several issues in the case of *Peter v. Donna*:

1. Is a statement that "I have heard that [the plaintiff] is not doing a professional job of teaching his math class" defamatory?

2. *Does a statement that "a certain math teacher is not doing a professional job of teaching his math class" concern the plaintiff, when the plaintiff is the only male school teacher in the school?*

3. *Is a communication by a school board member to the other members of the school board about the competence of a school teacher a privileged communication?*

Notice that each issue statement focuses on a specific element of the tort of defamation. One of the keys to good issue identification and articulation is to separate the issues. One of the most common mistakes made by some lawyers and law students is the *compounding* of issue statements. Compounding of issue statements is the failure to separate the issues.

Why is it so important to separate the issues? The answer is that the resolution of the law suit will depend on whether all of the elements of the tort of defamation have, or have not, been satisfied. A failure to convince the judge or jury that each and every element has been satisfied will mean that the plaintiff loses the case. In preparing their case, each lawyer must focus their full attention on each element and determine if they can present sufficient evidence to show that the element should be resolved in their favor.

Similarly, on appeal, the appellate court will focus on whether or not the trial judge properly instructed the jury about each of the elements of the tort of defamation, and whether or not there were sufficient facts to support a factual determination by the jury.

### E. A Note About Analytical Factors and Criteria

Resolution of some disputes will depend on the application of analytical factors and criteria, rather that the elements of a cause of action. For instance, think about the following hypothetical case. Suppose that an individual, Priscilla, owns a 10 acre parcel of land. An adjacent 1,000 acre parcel is owned by the County of San Diego and the County is using its parcel to build an airport. In order to make sure that the planes approaching the airport will have a clear flight path over Priscilla's land, the County enacted a zoning ordinance limiting use of Priscilla's land to agricultural uses, with no structures or plants exceeding 24 inches in height. Priscilla commences a law suit, asserting as her cause of action that the ordinance violates the United States Constitution. Specifically, the complaint alleges that the ordinance violates the "takings

clause" of the Fifth Amendment to the U.S. Constitution, which provides that government shall not take private property for public use without just compensation.

The courts have not developed a clear list of "elements" that Priscilla must satisfy to win this cause of action. Indeed, the U.S. Supreme Court stated:

> Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good . . .[21]

So, the U.S. Supreme Court has articulated several analytical factors that judges should consider in determining whether or not the ordinance constitutes a taking of private property for public use without justification. That list of analytical factors includes in part:

1. Was there a direct physical invasion authorized by the ordinance?
2. What was the economic impact of the regulation (what was the degree of harm caused by the regulation)?
3. Did the regulation control a use that was noxious or a nuisance, or on the other hand, was the restricted use a traditional use of the land in that location?
4. What was the character of the governmental action? Was the government seeking to acquire an interest in the land for governmental purposes, or was the regulation part of a scheme of land use allocation?

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21. *Penn Central Transportation Company, et al., v. City of New York, et al.*, 438 U.S. 104 (1978). Citations omitted. ***Special note***: The law of takings is complex and the list of factors quoted here is incomplete. The case is just being used as an example of the "analytical factor" approach to resolving a dispute.

5. Did the landowner have “investment backed expectations” at the time the regulation was enacted? Investment backed expectations give rise to a *vested use* that is entitled to significant respect.

In the area of constitutional litigation, a plaintiff asserting that governmental regulation is an unconstitutional taking of private property for public use without just compensation will not have to satisfy a list of "elements." However, the plaintiff's lawyer will have to find, understand, organize and explain the analytical factors or criteria that courts use to resolve these types of disputes.

***Notice that the task of the lawyer in this context is closely analogous to "element-by-element" analysis***. The lawyer must identify the "factors" or "criteria" and then proceed to apply those analytical factors and criteria to convince the court that the case should be decided in favor of his/her client.

Assume that Priscilla's attorneys have commenced an action seeking to invalidate the County zoning ordinance on the basis that it constitutes an unconstitutional taking of private property for public use without just compensation, in violation of the Fifth Amendment of the U.S. Constitution. To win, Priscilla's attorney will have to show that one or more factors strongly favor a finding by the court that the regulation constitutes a taking. A partial list of the factors are:

1. Was there a direct physical invasion authorized by the ordinance?
2. What was the economic impact of the regulation – what was the degree of harm caused by the regulation?
3. Did the regulation control a use that was noxious or a nuisance, or on the other hand, was the restricted use a traditional use of the land in that location?
4. What was the character of the governmental action? Was the government seeking to acquire an interest in the land for governmental purposes, or was the regulation part of a scheme of land use allocation?

By applying each of the analytical factors or criteria to the facts of this case, we can isolate and articulate the issues in the case. The overall, general issue in the case is whether or not the regulation constitutes a taking. To resolve the issue, we will need to focus on each of the analytical criteria. For instance, let's use analytical criteria #4 and create an issue statement:

*Where a County regulation restricts development on land adjacent to a new airport, in order to maintain an approach right of way to the airport, is the character of that governmental action equivalent to an acquisition of land for governmental purposes?*

Suppose that Priscilla' attorney is appearing before the U.S. Supreme Court. How would Priscilla's attorney handle his/her oral argument. How about this:

*May it please the Court . . .[formal introduction]*

*The facts in this case are simple: The County was constructing an airport and owned all of the land for the runways and terminals but did not own the adjacent land necessary for a safe flight path. Rather than buying the adjacent land, the County downzoned it so that no structure could be built more than 24 inches in height. It is our contention that such a regulation is in violation of the Fifth Amendment prohibition against the taking of private property for public use without just compensation. This Court, in Penn Central Transportation indicated that there is no clear test as to when a land use regulation constitutes a taking. However, this Court has enunciated a list of factors that should be considered. If we look at that list of factors, we will see that they strongly indicate that this Court should hold that an unconstitutional taking has occurred.*

*Let us look at the first factor, permanent physical invasion . . .*

* * *

*Let us consider the fourth factor, the character of the governmental action. The issue here is: Where a County regulation restricts development on land adjacent to a new airport, in order to maintain a flight pattern right of way to the airport, is the character of that governmental action equivalent to an acquisition of land for governmental purposes? . . .*

### 6. SUMMARY: Guidelines for Issue Articulation

Here are some guidelines to keep in mind as you work on issue statements.

a. State the issue(s) in the case as though you were informing a judge about the controversy in the case. The judge is generally well-informed, but unfamiliar with the facts and issues posed by this case. This means that you must isolate the element in dispute and the essential facts that give rise to the dispute.

b. State the issue(s) *objectively*. Don't state the issue in an adversarial way. If there is truly an issue about some matter, then the statement of the issue should be neutral in the description of the issue.

c. Don't compound the issues! Many cases or hypotheticals have more than one issue. Each issue should be separately stated. An issue statement that combines two or more issues becomes hopelessly confusing. Referring once again to the case of *Peter v. Donna*, assume that Donna, a member of the school board made the following

statement at an official board meeting: "A certain math teacher is molesting children, consuming drugs and is incompetent." Peter was then fired by the school board. There are two male math teachers at the school. A poorly phrased, compounded issue statement might be:

> *Is a statement by a school board member privileged when the statement is made at an official school board meeting and is the statement defamatory when it suggests the plaintiff is molesting children and is consuming drugs and does the statement concern the plaintiff when it does not mention the plaintiff by name but refers to a "certain math teacher" which most people would recognize referred to the plaintiff and did the plaintiff suffer damages if the plaintiff was fired by the school board shortly after the statement was made and was the statement true?*

Can you see that this issue statement is confusing because it fails to separately state the issues raised in the case? As we apply each of the elements of defamation we can see that there are potentially several issues in the case: Was the statement privileged?[22] Was the statement defamatory? Was the statement published? Did the statement concern Peter? Was the statement untrue? Was Peter damaged by the publication of the statement? We can isolate the really important issues that the parties will confront. Obviously, Peter will have an easy time showing: (i) that the statement was published; (ii) that the statement was defamatory; (iii) that the statement was untrue; and, (iv) that the statement caused damage. The big issues are likely to be:

> *Is a statement made by the member of a school board at an official school board meeting privileged, even though the statement was defamatory and untrue?*
>
> *Does a statement that "a certain math teacher" is molesting children concern the plaintiff, when the plaintiff is one of only two math teachers at the school and is fired shortly after the statement is made?*

**EXERCISE TO PREPARE FOR CLASS:**

**Read and Log the *Morengo v Ross* case below, and prepare to discuss it in class. Pay special attention to writing a good issue statement.**

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22. In many jurisdictions there is a complete or limited privilege with respect to defamatory remarks made by certain persons entitled to speak without high risk of liability for defamation. For instance, statements made in a court room by lawyers and parties to the action are absolutely privileged. Statements made by members of legislatures and other governmental bodies are often privileged. It is possible that Donna, as a member of the school board is entitled to a *limited* privilege to make defamatory remarks under certain circumstances.

**MARENGO CAVE CO. v. ROSS**
Supreme Court of Indiana.
212 Ind. 624, 10 N.E.2d 917 (1937).

Roll, Judge. Appellee and appellant were the owners of adjoining land in Crawford county, Indiana. On appellant's land was located the opening to a subterranean cavity known as "Marengo Cave." This cave extended under a considerable portion of appellant's land, and the southeastern portion thereof extended under lands owned by appellee. This action arose out of a dispute as to the ownership of that part of the cave that extended under appellee's land. Appellant was claiming title to all the cave and cavities, including that portion underlying appellee's land. Appellee instituted this action to quiet his title as against appellant's claim. Appellant answered by a general denial and filed a cross-complaint wherein he sought to quiet its title to all the cave, including that portion underlying appellee's land. There was a trial by jury which returned a verdict for the appellee. Appellant filed its motion for a new trial which was overruled by the court, and this is the only error assigned on appeal. Appellant assigns as grounds for a new trial that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. These are the only grounds urged for a reversal of this cause.

The facts as shown by the record are substantially as follows: In 1883 one Stewart owned the real estate now owned by appellant, and in September of that year some young people who were upon that land discovered what afterwards proved to be the entrance to the cavern since known as Marengo Cave, this entrance being approximately 700 feet from the boundary line between the lands now owned by appellant and appellee, and the only entrance to said cave. Within a week after discovery of the cave, it was explored, and the fact of its existence received wide publicity through newspaper articles, and otherwise. Shortly thereafter the then owner of the real estate upon which the entrance was located took complete possession of the entire cave as now occupied by appellant and used for exhibition purposes, and began to charge an admission fee to those who desired to enter and view the cave, and to exclude therefrom those who were unwilling to pay for admission. This practice continued from 1883, except in some few instances when persons were permitted by the persons claiming to own said cave to enter same without payment of the usual required fee, and during the following years the successive owners of the land upon which the entrance to the cave was located, advertised the existence of said cave through newspapers, magazines, posters, and otherwise, in order to attract visitors thereto; also made improvements within the cave, including the building of concrete walks, and concrete steps where there was a difference in elevation of said cavern, widened and heightened portions of passageways; had available and furnished guides, all in order to make the cave more easily accessible to visitors desiring to view the same; and continuously, during all this time, without asking or obtaining consent from any one, but claiming a right to do so, held and possessed said subterranean passages constituting said cave, excluding therefrom the "whole world," except such persons as entered after paying admission for the privilege of so doing, or by permission.

Appellee has lived in the vicinity of said cave since 1903, and purchased the real estate which he now owns in 1908. He first visited the cave in 1895, paying an admission fee for the privilege, and has visited said cave several times since. He has never, at any time, occupied or been in possession of any of the subterranean passages or cavities of which the cave consists, and the possession and use of the cave by those who have done so has never interfered with his use and enjoyment of the lands owned by him. For a period of approximately 25 years prior to the time appellee purchased his land, and for a period of 21 years afterwards, exclusive possession of the cave has been held by appellant, its immediate and remote grantors.

A part of said cave at the time of its discovery and exploration extended beneath real estate now owned by appellee, but this fact was not ascertained until the year 1932, when the boundary line between the respective tracts through the cave was established by means of a survey made by a civil engineer pursuant to an order of court entered in this cause. Previous to this survey neither of the parties to this appeal, nor any of their predecessors in title, knew that any part of the cave was in fact beneath the surface of a portion of the land now owned by appellee. Possession of the cave was taken and held by appellant's remote and immediate grantors, improvements made, and control exercised, with the belief on the part of such grantors that the entire cave as it was explored and held was under the surface of lands owned by them. There is no evidence of and dispute as to ownership of the cave, or any portion thereof, prior to the time when in 1929 appellee requested a survey, which was approximately 46 years after discovery of the cave and the exercise of complete dominion thereover by appellant and its predecessors in title.

It is appellant's contention that it has title to all of the cave; that it owns that part underlying appellee's land by adverse possession. Section 2-602, Burns' Ann.St.1933, section 61, Baldwin's Ind.St.1934, provides as follows:

> "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterward: * * * Sixth. Upon contracts in writing other than those for the payment of money, on judgments of courts of record, and for the recovery of the possession of real estate, within twenty (20) years."

It will be noted that appellee nor his predecessors in title had never effected a severance of the cave from the surface estate. Therefore the title of the appellee extends from the surface to the center but actual possession is confined to the surface. Appellee and his immediate and remote grantors have been in possession of the land and estate here in question at all times, unless it can be said that the possession of the cave by appellant as shown by the evidence above set out has met all the requirements of the law relating to the acquisition of land by adverse possession. A record title may be defeated by adverse possession. All the authorities agree that, before the owner of the legal title can be deprived of his land by another's possession, through the operation of the statute of limitation, the possession must have been actual, visible, notorious, exclusive, under claim of ownership and hostile to the owner of the legal title and to the world at large (except only the government), and continuous for the full period prescribed by the statute. The rule is not always stated in exactly the same words in the many cases dealing with the subject of adverse possession, yet the rule is so thoroughly settled that there is no doubt as to what elements are essential to establish a title by adverse possession.

(1) The possession must be actual. It must be conceded that appellant in the operation of the "Marengo Cave" used not only the cavern under its own land but also that part of the cavern that underlaid appellee's land, and assumed dominion over all of it . . . Whether the possession was actual under the peculiar facts in this case we need not decide.

(2) The possession must be open and notorious. The mere possession of the land is not enough. It is knowledge, either actual or imputed, of the possession of his lands by another, claiming to own them bona fide and openly, that affects the legal owner thereof. Where there has been no actual notice, it is necessary to show that the possession of the disseisor was so open, notorious, and visible as to warrant the inference that the owner must or should have known of it. In *Philbin v. Carr* (1920) 75 Ind.App. 560, 129 N.E. 19, 29, 706, it was said:

"However, in order that the possession of the occupying claimant may constitute notice in law, it must be visible and open to the common observer so that the owner or his agent on visiting the premises might readily see that the owner's rights are being invaded. In accordance with the general rule applicable to the subject of constructive notice, before possession can operate as such notice, it must be clear and unequivocal."

Hence, where there has been no actual notice, the possession must have been so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over his land. Insidious, desultory, and fugitive acts will not serve that purpose. To have that effect the possession should be clear and satisfactory, not doubtful and equivocal."

(4) The possession must be exclusive. It is evident that two or more persons cannot hold one tract of land adversely to each other at the same time. "It is essential that the possession of one who claims adversely must be of such an exclusive character that it will operate as an ouster of the owner of the legal title; . . ."

The facts as set out above show that appellee and his predecessors in title have been in actual and continuous possession of his real estate since the cave was discovered in 1883. At no time were they aware that any one was trespassing upon their land. No one was claiming to be in possession of appellee's land. It is true that appellant was asserting possession of the "Marengo Cave." There would seen to be quite a difference in making claim to the "Marengo Cave," and making claim to a portion of appellee's land, even though a portion of the cave extended under appellee's land, when this latter fact was unknown to any one. The evidence on both sides of this case is to the effect that the "Marengo Cave" was thought to be altogether under the land owned by appellant, and this erroneous supposition was not revealed until a survey was made at the request of appellee and ordered by the court in this case. It seems to us that the following excerpt from *Lewey v. H. C. Frick Coke Co.* (1895) 166 Pa. 536, 31 A. 261, 263, is peculiarly applicable to the situation here presented, inasmuch as we are dealing with an underground cavity. It was stated in the above case:

"The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employees could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants nor employees can he explore their recesses in search for an intruder. If an adjoining owner goes beyond his own boundaries in the course of his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible. * * *

"The reason for the distinction exists in the nature of things. The owner of land may be present by himself or his servants on the surface of his possessions, no matter how

extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him."

Even though it could be said that appellant's possession has been actual, exclusive, and continuous all these years, we would still be of the opinion that appellee has not lost his land. It has been the uniform rule in equity that the statute of limitation does not begin to run until the injured party discovers, or with reasonable diligence might have discovered, the facts constituting the injury and cause of action. Until then the owner cannot know that his possession has been invaded. Until he has knowledge, or ought to have such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary and the law does not require absurd or impossible things of any one.

. . . Appellee did not know of the trespass of appellant, and had no reasonable means of discovering the fact. It is true that appellant took no active measures to prevent the discovery, except to deny appellee the right to enter the cave for the purpose of making a survey, and disclaiming any use of appellee's lands, but nature furnished the concealment, or where the wrong conceals itself. It amounts to the taking of another's property without his knowledge of the fact that it is really being taken from him. . . . We cannot assent to the doctrine that would enable one to trespass upon another's property through a subterranean passage and under such circumstances that the owner does not know, or by the exercise of reasonable care could not know, of such secret occupancy, for 20 years or more and by so doing obtained a fee-simple title as against the holder of the legal title. The fact that appellee had knowledge that appellant was claiming to be the owner of the "Marengo Cave," and advertised it to the general public, was no knowledge to him that it was in possession of appellee's land or any part of it. We are of the opinion that appellant's possession for 20 years or more of that part of "Marengo Cave" underlying appellee's land was not open, notorious, or exclusive, as required by the law applicable to obtaining title to land by adverse possession.

We cannot say that the evidence is not sufficient to support the verdict or that the verdict is contrary to law.

Judgment affirmed.

## V. Making Your Own Study Aids– Understanding Where You are Going

The final study aids are those that you should make for yourself: your class notes, class summaries, and outlines. Before describing these aids and how they should be prepared, it is important to understand the crucial differences between legal education and much undergraduate instruction. Law study requires the student to be far more ***active*** in ***using*** the information that is assigned to be learned. Being an effective lawyer requires that the lawyer know and understand the legal rules, but even more important is that the lawyer be willing and capable of using the rules to spot relevant issues, articulate arguments concerning those issues, synthesize the various arguments into sound judgments about the clients position, and employ problem solving skills to represent the client helpfully and effectively.

Working toward those higher level skills may be helped through looking at a "learning pyramid" that we have modified to be applicable for law study.

### A. A Model Of Learning In Law School

As long ago as 1956 Dr. Benjamin Bloom proposed a "Taxonomy of Learning" that identified the levels of learning, competency and mastery that occur in a well-conducted educational environment.[23] The Taxonomy is intended for *teachers* to assist them in designing examinations to effectively measure the levels of student performance at increasing levels of abstraction from memorization to competency to mastery. The model provides a highly effective tool for understanding the tasks of students in educational environments and how teachers strive to test for increasingly more difficult levels of abstraction and mastery.

Adjusted for law school, a cumulative model of learning based on Bloom's Taxonomy looks something like this (the law school "Learning Pyramid"):

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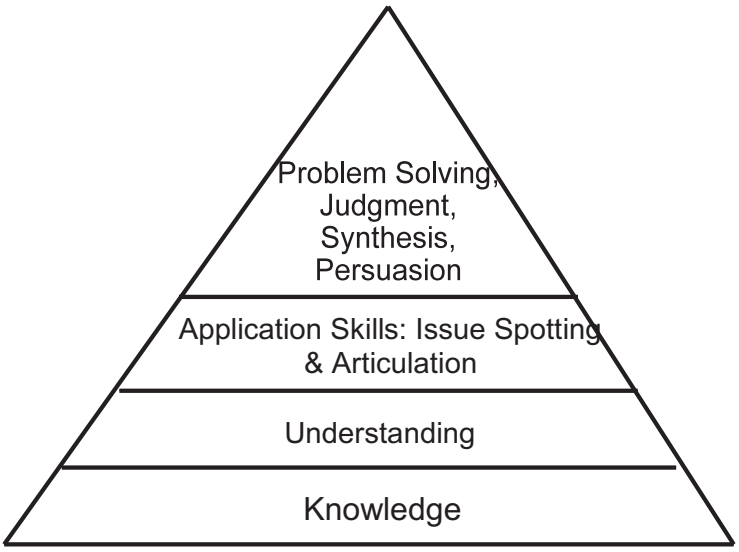
23. Bloom, B.S. (Ed.) (1956) Taxonomy of educational objectives; the classification of educational goals, by a committee of college and university examiners. The Taxonomy was adjusted for use by law professors in a very well-written but unpublished monograph by Professor Michael Josephson. *Learning and Examinations in Law School, Josephson (1984)(Submitted to the Association of American Law Schools Annual Meeting; January, 1984 Teaching Methods Sections).* Prof. Josephson is the founder and current president of the nonprofit Joseph & Edna Josephson Institute of Ethics.




We will be using this material to construct a model of law student skills and tasks in law school. If we can carefully lay out the specific learning skills and tasks that are expected of law students, then you should be able to structure your preparation, classroom and review time to accomplish those tasks. The model provides an unusually clear explanation of the goals of first year legal education – and the skills that law professors expect their students to learn.

**B. The Taxonomy Skills**

Bloom proposed six cumulative levels of cognitive learning and development. We will condense the six levels to four for our model in a legal education setting. Bloom's first level ("knowledge") serves as a foundation for the five levels built upon it. Similarly, the second level ("understanding") serves as a foundation for the four levels that build upon it. In this way, we can see the six levels as hierarchical. Each level builds upon the prior level and cannot exist without it. The pyramid shape serves to visually identify the hierarchical nature of Bloom's taxonomy.

Below is a grid showing the original six levels in the Bloom's Taxonomy and the law school equivalents:

| Skill Level | Skills | Law School Equivalent |
|---|---|---|
| **Knowledge** | observation and recall of information<br>knowledge of dates, events, places<br>knowledge of major ideas<br>*(activities such as: listing, defining, telling, describing, identifying, showing, labeling, collecting, examining, tabulating, quoting, naming, whoing, whening, whereing, etc.)* | **Knowledge**:<br>- Listing &/or memorizing the rules, elements, policies, majority/minority positions.<br>- Reading & highlighting commercial outlines.<br>- Responding to flash cards. |
| **Comprehension** | understanding information<br>grasp meaning<br>translate knowledge into new context<br>interpret facts, comparing, contrast<br>ordering, grouping, infer causes<br>predict consequences<br>*(activities such as: summarizing, describing, interpreting, contrasting, predicting, associating, distinguishing, estimating, differentiating, discussing, extend)* | **Understanding**:<br>- Comprehending the relevance of rules, elements & the policies behind them<br>- Paraphrasing, summarizing & explaining rules & elements<br>- Conceptualizing rules & elements by putting them in a broader context |
| **Application** | use information<br>use methods, concepts, theories in new situations<br>solve problems using required skills or knowledge<br>*(activities such as: applying, demonstrating, calculating, completing, illustrating, showing, solving, examining, modifying, relating, changing, classifying, experimenting, discover)* | **Application:**<br>- Apply rules & elements & policies to resolve conflicts in new factual scenarios<br>- Determine whether or not issues arise and articulate those issues.<br>- Interpretations of rules & elements & policies |

| | | |
|---|---|---|
| **Analysis** | seeing patterns<br>organization of parts<br>recognition of hidden meanings<br>identification of components<br>*(activities such as: separating, ordering, explaining, connecting, classifying, arranging, dividing, comparing, selecting, explaining, infer)* | **Problem Solving, Judgment, Synthesis, Persuasion**:<br>- Using analogy and comparison with known cases, rules & elements to predict outcomes, suggest outcomes, criticize outcomes<br>- Selecting one rule as more appropriate than another and justifying the selection<br>- Using policy arguments to justify an outcome<br>- Persuasive argument based on rules, elements, policy, analogy, comparison<br>- |
| **Synthesis** | use old ideas to create new ones<br>generalize from given facts<br>relate knowledge from several areas<br>predicting, draw conclusions<br>*(activities such as: integrating, modifying, rearranging, substituting, planing, creating, designing, inventing, what if, composing, formulating, preparing, generalizing, rewrite)* | |
| **Evaluation** | compare and discriminate between ideas<br>assess value of theorizing, presentations<br>make choices based on reasoned argument<br>verify value of evidence<br>recognize subjectivity<br>*(activities such as: deciding, ranking, grading, testing, measuring, recommending, convincing, selecting, judging, explaining, discriminating, supporting, concluding, comparing, summarize)* | |

We have reduced the categories from six to four:

1. Knowledge
2. Understanding
3. Application Skills: Issue Spotting & Articulation
4. Problem Solving: Exercising judgment, Synthesizing and Persuading

The first level, knowledge, is often unappreciated. This is the foundational level of information that law students must acquire. In each course, law students must acquire the basic rules and elements. This can be quite complex. What exactly are the rules/elements for Adverse Possession? Personal Jurisdiction? Felony murder? Defamation? What are the factors that courts will weigh in deciding whether or not land use regulation is a taking of private property for public use without just compensation?

For each rule and each element, the student must also acquire the accepted explanations, justifications and policies behind the rule and elements, as well the majority viewpoints, minority viewpoints, historical developments and future trends regarding those rules. In addition, students must learn terminology ("res ipsa loquitur" and "equitable servitudes"), and the relevance of essential cases (*Pennoyer v. Neff*, *Hadley v. Baxendale*). There are also *formulas* for damages (as well as complex formulas for intestate succession, corporate cumulative voting, etc.), different types of remedies, and complex procedural matters (jurisdiction, joinder, interpleader, *res judicata*) that must be learned.

When we consider the *volume* of this information, it is obvious that acquiring the knowledge necessary to function as a law student is a massive chore. Without knowledge, there can be no understanding, application or other higher-level learning skills. Knowledge is the foundation upon which all other skills are based. "Knowledge" is the ability to list the known information about a subject. It includes the ability to recognize the information (listening in class or reading a commercial outline) and to recall the information (memorizing lists).

Yet, knowledge is just the start. It is essential and foundational. Take the example of "Adverse Possession." A student must find and learn the basic description and elements of this cause of action. He or she must discover and be able to recognize that Adverse Possession is based on the operation of the statute of limitations. If a party takes possession of property and the true property owner waits too long, the statute of limitations will prevent the true owner from bringing an action to recover possession – but only if the six requirements are satisfied:

1. Possession (actual or constructive) that is:
2. Adverse & Hostile (i.e., possession as an owner);
3. Open and Notorious (actual or constructive notice to the true owner);
4. Continuous (no interruption of the Adverse & Hostile possession);
5. Under a Good Faith Claim of Right or Color of Title;
6. For the full Statutory Period.

These elements have lengthy historical developments, logical policies that support the existence of each element, majority and minority views regarding some of the elements, and trends that may lead to widespread modification or elimination of some of the elements.

Without finding and learning this basic knowledge about Adverse Possession, a students cannot possibly engage in the higher level skills of understanding, application and problem-solving. All teachers rely on students quickly gaining the fundamental knowledge they will need to engage in higher, more abstract levels of skill. In view of the need for this foundational knowledge as a pre-condition to understanding and other higher-level skills, it is essential that students, and teachers, strive to make foundational knowledge as available as possible. In this regard, Prof. Josephson makes an interesting point:

> A teacher who plays "hide-the-ball" with critical knowledge in order to force the student to concentrate on analysis, unintentionally places an extremely high premium on the ability of the student to discover information independently. Finding the law is a valuable skill, but it does not eclipse the importance of the ability to understand and use the law. Ironically, the more concerned a teacher is with the development of high level intellectual skills, the more conscious he/she should be to either "lay out" the basic law or see that it is easily accessible.[24]

### C. Pre-Knowledge

It is important to note a level of activity that does not appear in our Learning Pyramid that we will refer to as “pre-knowledge.” This is characterized by activities such as transcribing, recording, photocopying and similar actions. A student who merely records a class, or transcribes the professor’s presentation, or copies an outline is not operating within the Learning Pyramid. These types of activities are of little utility in a learning environment. Knowledge requires some capacity to see the order in the structures of rules, elements and policies. Many students are tempted to record classes either through electronic means, or typing as much of the class as possible. This is unfortunate because it does not engage the student in the process of building the Learning Pyramid – it merely postpones the initial task of building a knowledge base that makes sense to the student. Students should be coming to class with much of the structural foundation of knowledge already in place so that they can do two things: (i) fill in the gaps in their knowledge; and (ii) engage in higher level analytical skills higher up in the Learning Pyramid.

### D. Understanding

In this level of the Learning Pyramid, students advance to the point of comprehending the relevance of rules, elements & the policies behind them. Understanding is the ability to see the natural order of knowledge – to make sense out of the rules, elements and policies. Knowledge can be memorized and recorded but it is extremely difficult to memorize vast amounts of knowledge. Understanding is the next step of fitting the knowledge into a sensible order that can be paraphrased, explained, summarized and, eventually, applied to new factual settings. Understanding

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24. Josephson, *supra* note 23, at page 45.

is the process of conceptualizing and contextualizing knowledge by manipulating it into a structure that makes sense to the learner.

An interesting phenomenon that explains the difference between knowledge and understanding is the tutorial program at our law school. Second year law students are hired as tutors to assist first-year students in mastering the material in first year courses. Statistics for the tutorial program show low-to-moderate improvement for the students being tutored but *dramatic* improvement in performance for the tutors. For the tutors to "teach" the material to the students in the tutorial program, the tutors must fully understand the material. In the process the tutors rise up the levels of the Learning Pyramid but this is not necessarily true for students enrolled in the program who continue to operate at the level of knowledge by relying on the tutors to supply them with more data.

Understanding requires active engagement. To understand, a student must think about and struggle to make sense out of knowledge. This can only be done by re-conceptualizing the knowledge. A student must "make it his/her own." Activities that foment understanding are activities such as:

1. Paraphrasing: Explaining the rules, elements and policies in your own words, verbally or in writing.

2. Summarizing: Condensing the rules, elements and policies and articulating a summary of this knowledge.

3. Outlining: Forcing the material into a structure in written form that makes sense.

4. Criticizing and comparing: Reasoning by analogy and comparison to evaluate the integrity of the rules, elements and policies.

**E. Applications Skills: Issue Spotting & Articulation**

At this skill level Bloom refers to the ability of students to *methodically* use knowledge in new situations to identify, and begin to solve, problems. In Bloom's Taxonomy this level is identified by activities such as applying, demonstrating, calculating, completing, illustrating, showing, solving, examining, modifying, relating, changing, classifying, experimenting and discovering. This is a highly *active* level of skill, where the student can use known concepts and knowledge to resolve new situations.

In the context of legal education, these activities would focus primarily on the skill of issue spotting and articulation. A student operating at this skill level can methodically apply rules, elements and policies to identify, explain and prioritize legal issues that arise from novel factual circumstances. In addition, this level encompasses interpretation of rules and policies to isolate potential issues that may arise.

In the law school classroom, much attention is paid to "hypotheticals" presented by the professor. The point of these hypotheticals is to engage students in these upper level skills of Application and Problem Solving. Of course, the hypotheticals also help students to understand the rules and elements as well but the primary importance of the hypotheticals is to force students to operate at these higher skill levels.

It is important to note that no one can engage in these higher level skills unless he or she has already acquired the foundational knowledge *and* understood that knowledge. This creates many missed opportunities for students who come to class-after-class without having mastered the knowledge and understanding levels. These students remain stuck at these two basic levels and miss out on the training of upper level skills. Most of the final exam grade will be the teacher's evaluation of the upper skill levels above understanding.

**F. Problem Solving, Judgment, Synthesis, Persuasion**

This is the top level of the law school Learning Pyramid. At this level, students use analogy and comparison with known cases, rules & elements to predict outcomes, suggest outcomes and criticize outcomes. Students can select one rule as more appropriate than another and justify the selection. Also, this level involves the deft use of policy arguments and analogy to argue persuasively for a particular outcome.

**G. Active v. Passive Learning & The Law School Learning Pyramid**

Perhaps one of the most important points to be made about the Learning Pyramid is that "passive" learners tend to remain stuck at the level of knowledge. By "passive" we mean students who take too many notes, who try to record classes, who try to buy too many study aids, who try to type a class lecture, who try to memorize the material. This is compared to "active" learners who are engaged at the higher levels of the pyramid. Active learners tend to *use* knowledge to gain understanding, engage in application, and pursue problem solving throughout the learning experience.

There is nothing wrong with passive learning but it is insufficient to succeed in law school or other higher-level educational endeavors. Students must shift to active learning modes to engage the higher level skills of understanding, application and problem solving.

**H. Note Taking and Summarizing**

Having explained the importance of active learning in law school, we now can consider some of the study aids that you may create for yourself.

Before taking any notes in class, it would be well worth thinking about the function of the classroom experience in law school. If we can identify the objectives of the classroom experience, we can use note taking to help achieve those objectives.

Law teachers have many objectives in the classroom. Some of those objectives relate to long term goals and some relate to more immediate concerns. They are:

**1. Mastery of legal rules and elements.**

One objective in the classroom is to cover the complex rule structures that you will need to master as both a law student and a lawyer. This mastery will be tested on your law school exams, on the bar exam and in your law practice. A primary objective of your professors will be the mastery of the legal rules and their elements.

**2. Understanding the policies.**

Many professors will spend copious amounts of time exploring the policies behind the rules and their elements. The reasons for doing so are numerous. Rules of law reflect underlying social, political, economic, cultural and historical policies. The rules of law cannot be truly understood, nor can they be used effectively by lawyers, unless their underlying policies are understood. Also, understanding policies is more interesting and fun then merely memorizing "black letter law." Finally, there are too many legal rules and elements to *memorize*. By understanding the policies, it becomes easier to organize and re-state the rules without having to memorize them by rote.

**3. Applying the rules and their elements to novel factual circumstances.**

Your professors will pose many hypotheticals in the classroom. The primary reason for doing so is to provide you with opportunities to engage in the application of rules and elements to novel factual circumstances. The professors will twist, narrow and broaden the hypotheticals to force students to think about the rules, elements and policies and than apply them in a cogent and organized way.

**5. Interpreting cases and extracting rules.**

Significant periods of class time will be spent interpreting cases and extracting the rules and their elements from appellate opinions. This is an important part of being a lawyer. All lawyers must be able to interpret cases and persuasively articulate the holding of the case. Nevertheless, notice that *extraction* of the rule and elements is merely part of a process of finding, understanding and organizing the rules and elements. For the most part, rule *extraction* is not tested on final exams, although some professors will occasionally include a rule extraction exercise in their final exam. The professor will include a case or statute, in addition to a factual hypothetical and will ask the students to extract the rule and apply it.[25]

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25. The California State Bar Examination now has an entire day devoted to "performance exams." The performance exams contain a "library" of facts, opinions and statutes. Bar takers must peruse the library, extract the rules and apply them to the facts.

***Many students come to class without having done the necessary ground work to participate actively in the process of classroom education. The professors will assume that students have already mastered the basic rules and elements -- as well as the commonly accepted policies. Class will be devoted primarily to intensive analysis of the more difficult aspects of the rules, elements and policies -- and applying them to new factual hypotheticals.***

Keep in mind that the primary task of law students is to find, understand and organize: (i) the legal rules and their elements; and, (ii) the policies that give rise to the legal and their elements. The secondary task of law students is to be able to apply these legal rules, element-by-element to novel factual circumstances, and to argue persuasively for a certain outcome (using policies to support their arguments, where necessary).

Recall the multiple levels of performance in the learning pyramid: "knowing" the material; "understanding" the material; being able to identify and articulate "issues"; "problem-solving"; and being able to "evaluate, synthesis and exercise good judgment" in discussing the material. Note taking and summarizing, when done functionally, can contribute significantly to these tasks and the upper-levels of performance.

If at the end of every class (or at the end of every day) you were to sit down and organize your thoughts about the material that was recently covered, and write those thoughts down, you would be engaging in the active process of organizing the legal rules, their elements, their policies. Moreover, by struggling with the material, manipulating the material, and organizing it in your own written format, you are engaging the upper level skills of understanding, issue identification and articulation, problem solving, evaluation and synthesis.

The completion of the struggle to reduce a law school class session to a clear, written understanding is a significant contribution to the tasks of the first year law student. The temptation of many law students is to *transcribe* the classroom conversations -- seeking to obtain a word for word transcription. Indeed, many students ask their professors if they can tape the class! This type of attitude misses the point. If, in fact, a student is prepared for class,[26] then the purpose of class is to fill in the blanks and tie together the rules and elements. The function of note taking is to *summarize*, *organize* and *apply* the rules and their elements.

If you find yourself trying to transcribe what the professor is saying, then there is probably a flaw in your study methods. Much of the rules, elements and policies should have been learned and understood before even coming to class. Classroom time should be used to further organize the rules, fill in the gaps, and apply the rules to new hypotheticals.

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26. If the student has properly logged the cases, then the student has read a treatise or outline on the materials to be covered in class, and has read and understood the cases assigned for that session.

We cannot overemphasize the utility of *summarizing* rather than transcribing class lectures.

## I. Outlining

### 1. Process v. Product

When discussing "outlining" an important distinction must be made between the *process* of outlining and the *product* produced (the "outline").[27] If the sole function of outlining is to produce an excellent product, excellent outlines can be purchased in the Bookmart, and it would be far more efficient to buy one of those, rather than spend many hours preparing your own. However, the function of outlining is *not* merely to produce a written product. The far more important function is to engage in the *process* of outlining. It is a process of "active" learning in which the student must struggle and manipulate material into a well-organized, hierarchal and detailed discourse on the material. The *skill* of outlining is the process of re-conceptualizing and re-contextualizing the material in a way such that it fits with the student's own cognitive, coherent picture of the world.

The process is absolutely essential to mastering the course material. The results of outlining the material in one's own outline are many: (i) the material can only be organized and stated if the student truly understands it; (ii) a cognitive framework for the material has been created so that it can easily be remembered (long term memory is enhanced); (iii) organization of legal rules is the primary focus of final exams and outlining provides this organization; (iv) a confusing exam question will not confuse a student who has a clear, well-organized outline of the material and the material is in a form that readily accessible under stressful circumstances.

### 2. Sources

a. Logs/Briefs: Logs/briefs are a superb source of data for preparing outlines. The logs/briefs contain, if properly done, contain summaries of the rules, elements and policies. Perhaps more importantly, the *process* of preparing logs/briefs is a large part of the process of outlining. When the time to outline comes around, much work has already been done.

b. The Classroom: The process can only be undertaken with use of classroom and secondary sources. The primary source of information and coverage will often be the material presented by the professor in class. **Don't forget that the classroom experience requires pre-class preparation of your Logs!** If you are prepared for class and keep good *summaries*, by the end of the semester you already have the primary source of information and organization for your outline.

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27. When we use the term "outline" in these materials, we are including the concept of "flowcharting" as a type of outlining.

c. Summaries: If you have been preparing for class, the classroom discussion should help you to further refine and organize the legal rules and policies. An extremely helpful way to assure that the outlining process will work is to take a few minutes after class (or later in the day) to "summarize" these rules and policies. This summarizing process is a "head start" on the process of outlining and a great way to remember all those realizations that you have throughout the classroom experience.

d. Secondary Sources: Odds are that you will need to use secondary sources to help you organize your approach to your outline and to fill in gaps in knowledge about the legal rules, justifications and policies. At this point, you may want to refer to the material on Student Study Aids to remind yourself about the relative utility of the various student study aides available. There is one guiding rule: **don't merely copy from a secondary source**. ***Use*** the study aids to assist you in the *process* of organizing the material in your own contextual framework. The secondary sources are: tables of contents; nutshells; course outlines; and, treatises.

The distinction is that treatises contain *explanations* of the material. Obviously, some commercial outlines contain thorough explanations for some parts of the material. Always read a treatise anyway, at least once during the course of the semester, just to make sure that your understanding of the material is complete.

When in doubt, or if time is crucial, briefly review the outline but always, always, read and understand the explanations in the "treatise" before beginning to write.

### 3. Form

The initial "outline" is really your treatise on the subject. You cannot reduce material to an outline format until you understand what you are reducing! The task for the student is to completely master the material and write it down. Only then can it be reduced to "outline" format.

### 4. Organization

**Never write before reading and understanding sources**. By reading and understanding first, one takes on the organizational framework of the treatise, fitting it into one's own cognitive structure. For example:

Defamation:

Elements (publication, defamatory, of or concerning the plaintiff, damages)
Constitutional Restraints on State Law
Defenses/Privileges

**Structure should be hierarchical.** That is, start with broad categories (contract formation, performance, breach); then move to narrower categories (offer,

consideration, acceptance); then move to specific rules and definitions (offer is . . .); then move to elements and problems of rules and definitions (offer must be both communicated and understood by a reasonable person to constitute an intention to enter into a binding contract).

### 5. Content

The outline must include a complete discourse on each rule of law you have studied. For instance, if you studied defamation in Torts, the outline should set forth the rule/definition, the individual elements of the cause of action, the explanation and policies for each element, minority & majority viewpoints or trends, etc. For example:

| Outline Should Include | EXAMPLE: Defamation | EXAMPLE: Adverse Possession |
|---|---|---|
| (a) Definition or Rule: | "Defamation is the publication of a defamatory statement to a third person, of or concerning the plaintiff, without privilege." | "Adverse possession occurs when enough time has passed so that the statute of limitations precludes a true owner from regaining possession of his/her property from a person in possession of the property." |
| (b) Elements of Rule or Definition: | "Publication: To fulfill the publication requirement, plaintiff must show that the statement was published to a third party who understood it."<br><br>"Defamatory statement: . . .<br><br>"Of/concerning the plaintiff . . . | The adverse possessor must show:<br>"Possession:" That he/she possessed the land. Possession must be of the type that an owner would exercise with respect to property of like condition, character and location.<br><br>"Open and notorious": The possession must be open & notorious. That means . . . |
| (c) Explanations and policies: | "The reason for the publication element is . . ." Publication must be intentional or negligent, even though not intended to be defamatory. i.e. leaving the defamatory statement on the secretary's desk is publication. | The reason for the possession element is: An adverse possessor should obtain permanent ownership only if they have actually been exercising the type of possession . . . |
| (d) Special Minority Majority views or trends: | In a growing number of jurisdictions, . . . | In many states, the element of possession is now governed by statute. Some states require . . . |

A good outline of adverse possession might start as follows:

> Adverse possession occurs when enough time has passed so that the statute of limitations precludes a true owner from regaining possession of his/her property from a person in possession of the property. The justification behind the rule is that a possessor who occupies the property for a long time (10-20 years) believing that he/she is really the owner, should be able to rely on that belief, so long as the true owner had a reasonable opportunity to know of the possessor's claim and bring a repossessory action. An adverse possessor must prove six elements to be able to use the statute of limitations to preclude the true owner from regaining the land: (i) Possession; (ii) which is adverse & hostile; (iii) open & notorious; (iii) under a good faith claim of right or color of title; (iv) continuous; and, (v) for the full statutory period.
>
> "Possession:" That he/she possessed the land. Possession must be of the type that an owner would exercise with respect to property of like condition, character and location. Problems arise when, for instance, the land is a summer home occupied by the possessor only 2 months a year. So long as the possessor is possessing it like a true owner of this *type* of property would, this element should be satisfied. There is a related doctrine dealing with *Constructive* Possession. Constructive possession occurs when . . .
>
> "Adverse and hostile: . . ."

### 6. Reduction

By reducing the outline to smaller and smaller contents, a massive cognitive structuring or "tree" is being created. The "struggle" that accompanies the process of reduction is experienced by anyone who tries to impose order upon chaos. By emerging from this struggle with a self-created, orderly "outline" of the material, one has succeeded in restructuring one's own concepts of this area of law. The reduction struggle is an essential part of the outlining process. Also, the reduction struggle is a process that fully engages higher level skills such as evaluation, synthesis and judgment.

### 7. Timing

You may have noticed by now that outlining an entire course is a challenging task. Indeed, it is demanding -- but can be accomplished for all of your courses ***if*** you methodically do the ground work throughout the trimester. That is why it is so essential that you consistently use study aids throughout the semester, brief/log your cases, take good notes and do your summaries. Without such ground work, the task of outlining is virtually impossible.

## Outlining - Reminder

In doing the "outline," recall that the purpose of outlining is to place the material within an understandable, personal, cognitive framework. If the process is done "actively," rather than "passively," then: (i) a cognitive framework for the material has been created so that it can easily be remembered (long term memory is enhanced); (ii) **organization of legal rules is the primary focus of final exams and outlining provides this organization**; (iii) a confusing exam question will not confuse a student who has a clear, well-organized outline of the material and the material is in a form that readily accessible under stressful circumstances. Specifically, it is suggested that you:

a. Give the outline your own organization.

b. Write your outline only after you have read and understood the materials. You may need to refer some treatise to quickly refine your comprehension of the rules/policies/justifications for defamation.

c. Refer back to the materials only to obtain the precise definitions or elements that must be satisfied. Don't copy word for word from these or other review materials. To do so circumvents the cognitive processes that are activated when you "cogitate" the definitions, elements, explanations, policies or trends.

**EXERCISE TO PREPARE FOR CLASS:**

**Create your own outline of the law of adverse possession.**

# PART TWO: LEGAL ANALYSIS, PROBLEM SOLVING & EXPRESSION

## I. Final Exams: What is Expected From Law Students

### A. Why have exams?

Final exams serve at least three purposes. First, exams are an *evaluative* device used to determine whether students have understood, organized and applied the legal rules, their elements, policies and justifications. Professors use the exams to rate the students' mastery of the rules and the students' abilities to apply the rules to novel factual circumstances.

Second, exams serve as a motivator to impel students to complete their mastery of the course. Preparation for final exams is an intensive process – it is like the Olympics of the intellect. The pressure of exams serves as a motivator to conquer the extensive and complex material covered in the course. The *process* of preparing for exams is part of the learning experience. Without the pressure of exams, it is unlikely that most of us would be sufficiently motivated to undertake the intense and difficult process of mastering the course material.

Third, exams provide information and feedback to students about their success in accomplishing their objectives. One of the most common complaints received from law students is that they would like *more* feedback regarding whether or not they are achieving success in their law studies. Exams provide a rich source of information regarding the degree to which students efforts are achieving results.

### B. The structure of law school exams

Drafting examinations is part science and part art. There are specialists who consult with the Bar Examiners and others in drafting valid and reliable exam questions. The typical law school exam mimics the classic bar exam format and consists of one or more essay questions and, often, multiple choice or short answer questions. Usually, the essay question will consist of a factual scenario, followed by specific questions or a general directive to discuss the rights and obligations of the parties. Similarly, the multiple choice questions will contain a fact pattern followed by specific questions. For instance, in the torts final exam, the essay portion might provide:

> Donna is a member of the Western School Board. Every year, the School Board meets to discuss the hiring, promotion and/or termination of all teachers. The Board met last month. When the Board considered the high school math teacher, Peter, Donna announced that, according to her child, Peter was an incompetent teacher, who often attended class intoxicated or "high on drugs," and molested children. As a result, Peter lost his job and has been unable to find another teaching position in this community. Discuss Peter's rights, if any, to recover damages from Donna.

The multiple choice portion might contain an identical fact pattern but add a specific question and possible answers. The answers will contain one correct answer (the "key") and several incorrect answers (the "distractors").

**It is interesting to note that *both* essay and multiple choice style questions can focus on exactly the same skills: (i) does the student know the rule of law and its elements, and (ii) can the student apply the rule of law and its elements to the fact pattern and reach a logical conclusion.**

### C. What must students know for the final exam?

Law students are expected to have a complete, well-organized and detailed mastery of the legal rules, their elements, policies and justifications studied during the course of the semester. The final exam will test this mastery by asking students to evaluate novel factual circumstances to determine what the outcome of a dispute would be. Thus, the ability of the student to apply the rules of law to new factual situations is also tested. Students will often be required to state the policies and justifications behind one or more elements of the rule, so as to argue persuasively for a certain outcome. ***Professors and other exam drafters will carefully construct fact patterns that force the students to show that they have done more than memorized the basic rules.***

It is worth re-emphasizing the fact that ***the primary focus of final exams is on the student's complete, well-organized and detailed mastery of the legal rules.*** Such a complete mastery can only be accomplished by understanding the justifications and policies underlying the rules and their elements.

### D. Preparing for Final Exams: Organizing the Legal Rules

Preparing for final exams is a formidable task that requires methodical, functional and consistent preparation ***from the beginning of the semester***. If the task of law students is to understand and organize legal rules, then ***everything*** that the student does from the outset of the semester should be evaluated to determine if it is contributing to this goal! For instance, cases should be read in the context of understanding the general rules of law for the area the case deals with. Class notes and summaries should be oriented towards the legal rules and their underlying justifications and policies. Course "outlines" or "flow charts"[1] should be carefully structured to set out the legal rules and their underlying justifications and policies.

"Outlining" is an indispensable part of the process of preparing for exams. Unfortunately, many students misinterpret the term and believe, wrongly, that an

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1. Some students use a "flow chart" method for organizing the course material. A "flow chart" is more of a visual format for organizing information. When we use the term "outline" in these materials, we mean outlines or flowcharts. Both are comprehensive, well-organized accumulations of the course material.

"outline" is a bare-bones summary of the material covered during the semester. On the contrary, an "outline" is a ***complete, well-organized and detailed*** discourse on the material covered during the course.

***The fundamental mistake that is made by law students who do not succeed is believing that material can be mastered without going through the process of "outlining" the material in a complete, well-organized and detailed way.*** Keep in mind, however, that outlining is the *finishing step* to a semester-long enterprise of case reading, case-briefing, class-notes & summaries and use of secondary sources.

## II. Writing Exams: Preliminary Notes on Legal Analysis & Problem Solving

You will be exposed to many problem solving skills during your time at California Western. Set forth below is one problem-solving method geared to assist you in responding to hypothetical fact patterns. Keep in mind that this method applies to all lawyering tasks – not just responding to essay exams. Before turning to the problem-solving method, there are a few preliminary points:

### A. Problem-Solving is a set of skills

Clients hire lawyers to solve problems, using unique lawyering skills. The task of solving client problems, and the skills involved, remain the same regardless of differences in the substantive areas of law, the facts or the position lawyers advocate. Here is one central, traditional approach to problem-solving:

#### 1. Issue-identification

Lawyers and law students must understand and stay focused on the specific problems being presented and the requests of the client or law professor. In law practice, this means attending to the client's requests regarding the client's objectives. In law school, this means understanding and responding to the specific query posed to us (the "call of the question").

#### 2. Responsive Performance

Lawyers must directly, explicitly, and fully respond to the client's needs. Law students must respond to the call of the question. Both must make sure that the scope of performance and response matches the scope of the client's needs or call of the question.

#### 3. Analysis

Lawyers must justify their negotiations or persuasive arguments by interweaving the key facts of the problem with the relevant law. Similarly, law students must expressly and specifically link the facts of the problem to the rules of applicable law.

### 4. Three principles

Three principles serve both lawyers and law students:

(a) never lose sight of the specific issues raised by the client's problems or call of the question;

(b) respond to the issues or call of the question directly, explicitly, and fully; and,

(c) justify conclusions by expressly interweaving the detailed facts of the case or question with the applicable rules of law.

## B. Analytical Problem-Solving and Uncertainty

Most problems brought to lawyers or law students are beset by ambiguities, contradictions, information gaps, and other surprises that make the tasks of problem solving complex. Statutory and judge-made rules of law are often unclear, incomplete or subject to differing interpretations.

Nevertheless, there is substantial agreement on many elements of rules of law and the application of those elements to facts. We will strive to be very specific and careful about applying the elements of rules of law while embracing the fact that all problems arise when a *particular* element is the subject of uncertainty. As legal analysts and problem-solvers, successful lawyers and law students use a disciplined and balanced process to assess, suggest, or predict the probable or appropriate outcome of a legal issues. Oftentimes lawyers and law students cannot answer a problem with complete certainty. That's alright, so long as the uncertainty has been reduced to a minimum. Good lawyers and law students learn to tolerate the uncertainty that accompanies many legal problems.

## C. Analysis is not Advocacy.

Law students and lawyers must analyze first – and advocate second. "Analysis" is the even-handed and methodical evaluation of both sides of the dispute, based on the facts and applicable legal rules. "Advocacy" is arguing in favor of a particular interpretation or application of the legal rules. The job of lawyers and law students is to analyze all sides of a problem, consider the relative strengths and weaknesses of each side, and provide an even-handed evaluation of all sides.

## D. Analysis & Advocacy are constrained by the facts

Effective analysis and advocacy requires sticking to the facts of the problem. The facts are the facts and we must work with them. We can't exclude unfavorable facts, make up favorable facts or alter facts. Appropriate analysis and advocacy *may*, from time-to-time, require us to hypothesize facts (and condition our analysis and advocacy

no those facts) but only if those facts are *unknown*. The facts are the engine that drive problem-solving and a correct understanding and use of the facts is indispensable. In the context of law school exams, a mistaken reading or use of the facts will result in poor performance on the exam. In the context of legal practice, a mistaken understanding or use of the facts can result in losing the case or imperfectly negotiating a transaction.

### E. Problem-Solving Phases

Problem-solving encompasses two distinct but related phases: analysis and communication. Analysis consists of breaking the problem down to its basic components, examining the components and their inter-relationships to each other, and arriving at a persuasive conclusion. Communication, involves organizing, articulating and conveying our analysis to others in a persuasive way.

These two phases can each be divided into two sub-phases. Analysis can be broken down into: (1) the "deconstruction" of the problem into its components; and, (2) the "construction" of responses for each issue, supported by legal and analytical justifications. Communication can be broken down into: (1) the *organization* of a formal outline of the problem and persuasive responses; and, (2) the *composition* of a formal essay or memo. These phases and their respective sub-phases are briefly described below.

#### 1. Analysis: Deconstruction and Construction

Deconstruction of the problem and construction of responses covers the bulk of the substantive work of problem-solving. During the analysis phase the problem is broken down into its three basic components:

a. Rules and elements
b. Facts
c. Issues

Analysis is the process of determining how specific legal rules ought to be applied to specific facts in order to resolve a legal issues or problems.

#### 2. Communication: Organization and Composition

Even the most brilliant analysts cannot *solve* problems effectively unless they can communicate their analysis in a cogent and persuasive manner.

During the communication phase of problem-solving, analysis has been completed. Communication is no place for seat-of-the-pants analysis. On the contrary, analysis should be absolutely complete before trying to communicate it to an audience, whether a professor, a partner, a judge, or some other decision maker. During communication,

the focus is on conveying the results of analysis in an organized, thorough, precise, and accurate manner.

In law school, communication usually means answers to a final examination essay or multiple choice exam. The methodical steps set forth below are devoted to making sure that communication is smooth and thorough – after appropriate analysis. The methodical approach addresses basic points regarding analysis and communication and, to a lesser extent, techniques regarding composition and exposition.

### 3. A Note on "Policy" and Legal Analysis.

Rules of law are not created in a vacuum nor handed down by a prophet. The rules, whether constitutional, statutory or judge-made, reflect moral, economic, political and other societal values. When a rule and its elements are applied during analysis of a problem, there are times that these policy considerations become essential to a sensible analysis of the problem.

It is not *always* important to use policy considerations. If the elements of the rule clearly apply (or don't apply) to the facts of the problem, then there is no need to resort to a policy analysis – unless a party has a legitimate basis for arguing that the rule or its elements are outdated and should be overruled. Policy, unlike rules, is not *always* a front-line level of legal analysis. Policy considerations are most useful when application of existing rules/elements to the facts of a problem present a "hard" case. A "hard" case is a case where the application of existing rules and elements do not clearly dictate an outcome, or it is unclear which rules and elements to apply. In analyzing and resolving "hard" cases, legal analysts fall back on "policy" to help guide them to a justifiable conclusion that resolves the problem.

The role of policy in the analytical process is to help us justify a resolution of a problem that the rule(s)/element(s), by themselves, cannot fully justify. Policy is applied to resolve uncertainties that remain even after the rule(s)/elements of law have been applied.

## III. Essay Responses

### A. Introduction to I.R.A.C.

You may have heard or read about "I.R.A.C.," a style of communicating one's analysis to someone else. This style of ***communication*** is often phrased as:

(I)ssue
(R)ule
(A)analysis
(C)onclusion

There is nothing special about "I.R.A.C." It is neither complex nor mysterious. The four points of I.R.A.C. merely present a sensible method for discussing complex matters in a way that others can understand what we're talking about. I.R.A.C. is a natural reflection of the human thought process. When we are communicating to other people, those other people naturally want to know which *subject* or *issue* we are discussing, what *applicable rules or controlling information* is relevant to resolution of the issue, what we *think* is an appropriate analysis of the problem and what we have *concluded* as a result of this thinking process.

Note the following two discussions. The same sentences appear in both discussions. Which discussion makes more sense?

1. This type of regulation of harmful uses is a traditional function of government acting to regulate and is vastly different from governmental activities keyed to acquiring land for parks, schools, roads, airports or similar uses. Therefore, it is unlikely that the court will find that a taking has occurred. The first factor is the character of the governmental action. If the action is regulatory, rather than acquisitional, it is unlikely to be a taking. On the contrary, the temporary moratorium was part of the planning process to allow landowners to develop their land but to also protect the Lake and other resources from degradation and harm. In this case, the regulation was not part of a scheme of acquisition by government. A question arose as to whether or not the three year temporary moratorium on construction in the Lake Tahoe region was a taking of private property for public use without just compensation.

2. A question arose as to whether or not the three year temporary moratorium on construction in the Lake Tahoe region was a taking of private property for public use without just compensation. The courts apply a multi-factor test to determine if a “regulatory taking” has occurred. The first factor is the character of the governmental action. If the action is regulatory, rather than acquisitional, it is unlikely to be a taking. In this case, the regulation was not part of a scheme of acquisition by government. On the contrary, the temporary moratorium was part of the planning process to allow landowners to develop their land but to also protect the Lake and other resources from degradation and harm. This type of regulation of harmful uses is a traditional function of government acting to regulate and is vastly different from governmental activities keyed to acquiring land for parks, schools, roads, airports or similar uses. Therefore, it is unlikely that the court will find that a taking has occurred.

Obviously, the 2nd discussion uses an I.R.A.C. approach and makes it much easier for the reader to understand the issue, rules, analysis and conclusion.

In the context of legal problems, whether in practice or on law school exams, the ***communication*** of our solution to problems begins with an identification of the "issue" that arises when applicable rules of law are applied to facts.

Note that the *issue* cannot be spotted unless the *rule* is well understood and identified. In reality, the thought sequence of the speaker/writer/analyst is "R.I.A.C." However, when *communicating* it is very helpful to start with the issue first so that the reader/listener can follow our discussion.

The sequence for ***analysis*** is: Rule/elements ➜ Issue Spotting ➜ Analysis (application of rules/elements to facts) ➜ Conclusion.

The sequence for ***communication*** is: Issue Articulation ➜ Rule/elements Explanation ➜ Analysis (application of rules/elements to facts) ➜ Conclusion

One important matter to keep in mind is that I.R.A.C. is applied to *each* element of *every* rule. The amount of discussion for each element will vary depending on whether or not that element is easily satisfied/unsatisfied – or if a significant issue is raised by the facts.

### B. Ranking of Issues

Not all issues, elements, or facts have equal weight or importance. Some merit only a bare mention, some merit a sentence or two, some merit a paragraph or more. There are three tiers or categories of issues or discussion points based on levels of importance or significance to our problem-solving analysis.

#### 1. Non-issues

Non-issues arise when the element of a rule is easily satisfied (or not satisfied) by the facts given in the hypothetical. Non-issues require little analysis and are worthy of mention if time permits. At most, non-issues merit a sentence or two in our essay or memo.

> Example: In an adverse possession hypothetical, the facts indicate that Ann mistakenly occupied a ¼ acre residential parcel from 2007 to 2017. The facts are unclear about some elements of adverse possession but the fact pattern specifically states that "Ann moved onto the property in 2007 and remained there until 2017, occupying the house on the property the entire time." When discussing the *actual possession* element of adverse possession, the discussion should be succinct. For Example:
>
> *Actual & Continuous Possession: Ann will have to prove that she actually possessed the lot. The facts reveal that Ann continuously occupied a home on the lot and that the lot was residential. Occupancy of a home is the type of use a reasonable owner of a residential parcel would exercise and, therefore, constitutes actual possession.*

Any further discussion of the element of "actual possession" or further analysis of the facts is off-point. There is simply no issue worthy of discussion here. It is a "non-issue."

### 2. Pseudo-Issues

Pseudo-issues require analysis *but* lead to a clear-cut conclusion that is not realistically controversial. Pseudo-issues are those that might seem like issues of controversy initially but that ultimately are not. Accordingly, pseudo-issues merit more than a minimal mention but only a brief discussion in which we signal to the reader that we have "spotted" the potential point but it can be conclusively and readily resolved.

Example: Suppose that in the adverse possession hypothetical we are told that Ann's occupancy was interrupted for six months when she left the house to serve as a missionary in a third-world country. The facts indicate that during that time Ann padlocked the house and paid someone to check up on the house on a weekly basis. Obviously, these facts raise the element of *continuity* of possession. To succeed in her adverse possession claim, Ann must show that her possession was continuous and uninterrupted. The presence of these facts indicates that the writer is expected to discuss this element and reach a conclusion – ***but the right conclusion***. Anyone who understands the element of continuity knows that Ann's activities clearly satisfy the test for that element. However, the presence of these facts demands that we discuss this pseudo-point in more detail than a "non-issue." For example:

> *Continuity: An issue may arise regarding whether or not Ann's six-month absence constitutes a break in continuity of Ann's possession. To be continuous, the possession must be uninterrupted by third parties. This element merely stresses that Ann must continue to actually possess the land as an owner would for the entire period of the statute. Interruption occurs when a third party ousts Ann and claims the land as a true owner – or where the possessor abandons the property. In this case, Ann continued to act like a true owner.[2] She padlocked the house and hired someone to look after it from time to time. These are hardly the actions of someone who has abandoned the property. The facts reveal that no third party appeared and acted as an owner during that period. Therefore, Ann has satisfied this element.*

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2. Note the critical importance of understanding this element of adverse possession. It would be impossible to respond appropriately to this hypothetical if the writer doesn't truly understand the continuity element.

**Many, if not most, of the "issues" on the typical law school race-horse exam (and on the bar) are pseudo issues. You are expected to reach a particular conclusion that shows you understand the element and its application to the facts of this case! This is the "work-horse" area of an exam (or a trial) where the writer or speaker informs the listener of the elements of the rule and why the element is, or is not, satisfied by the unusual facts of this case.**

Pseudo-issues demand that we lay out the issue, rule for that element, appropriate facts and reach a conclusion but not drone on and on. These types of issues merit a moderate level of attention but do not require discussion of policy, competing interpretations, majority or minority views.

Students often write elaborately about pseudo-issues, wasting their time and wasting the reader's time. After all, there is no "other side" to the argument for this type of discussion. The rule is clear, the facts are clear, the analysis is clear and the conclusion is clear. Overly-lengthy discussion of the "other side" or "defendant may argue . . ." is not worthy of discussion.

On the other hand, the discussion of pseudo-issues, at an appropriate level of analysis, is critical to success. After all, the facts are there for a reason! If there are abundant facts that bring into question the application of an element of the rule, the element and facts need to be analyzed and discussed.

**3. Bona Fide Issues**

Bona fide issues are substantially controversial or open to question. Bona fide issues are important issues of discussion because they represent the gray areas of the problem that require the most careful assessments for successful problem-solving. Bona fide issues merit importance in terms of length and space in our essay or memo.

> Example: Suppose that in the adverse possession hypothetical we are told that Ann's deed described three lots, Lot A, Lot B and Lot C but the deed was defective and insufficient to pass title. Each lot is five acres in size. Ann occupied only one acre of Lot A. A significant issue arises whether or not she can claim *constructive possession* of the remainder of Lot A *and* Lot B and Lot C. The rule varies from state to state. In some states, constructive possession is available only as to lots where a portion of *that* lot is occupied. A resolution of this issue will require knowledge and discussion of the majority rule, the minority rule and the reasons for the rule. This is a *bona fide* issue where the outcome can go either way!

Bona fide issues merit as much space in our essay or memo needed to present and discuss them in a well-structured, precise, accurate, and complete I.R.A.C. format, interweaving the probative/key facts and rules of law on a detailed level. However, do not be disorganized, verbose, or rambling. Don't waste valuable space on the theory

that quantity equates to quality. We must be disciplined and direct. We should ration space in the essay or memo as to each specific bona fide point of discussion so that we are able to bring up and discuss all sides the issue. This is where our even-handed analysis takes place. Be thorough and comprehensive yet concise and precise.

### C. Answer the Call of the Question

One of the critical errors that any lawyer or law student can make is to speak or write about a question that is not in issue. This is a serious error of the worst kind. If you write about matters not called for by the question, you accomplish nothing and receive no credit on the exam for the non-responsive answer.

Suppose that a fact pattern establishes that Ann purchased land and lived on the land for 15 years but her deed was invalid and, therefore, she does not actually have good legal title to the land. The call of the question is: "Can Ann succeed in an action for adverse possession?" A student notices that Ann also has a cause of action for gaining title through the doctrine of "estoppel by deed." The student decides to spend half the essay discussing adverse possession and half on estoppel by deed. ***This student will receive no credit for the estoppel by deed discussion! Really. If the exam drafter wanted to hear about estoppel by deed, the call of the question would have been phrased "Discuss Ann's rights" or "Can Ann succeed in establishing title to the land.*** Not only is no credit received for the estoppel by deed discussion but the student will be ***downgraded*** for this disorganized and non-responsive answer.

Another example: The question is: "Does P have a prima facie case against D? Discuss." Should you discuss D's *defenses*? NO! Any discussion of D's defenses is superfluous and succeeds only in showing that you did not read the question carefully.

The tendency not to answer the call of the question arises out of the desire of the student to tell the professor how much he/she knows. The professor wants to know whether you can analyze the facts and answer the question that was asked.

### D. Don't be conclusory

Suppose in the preceding hypothetical a student wrote the following response:

> *Ann will succeed because she was in possession of the land, for the full period of the statute of limitations. She was open and notorious, acted in good faith and had color of title. Her possession was continuous and open and notorious. Therefore, Ann will succeed in her action for adverse possession.*

What's wrong with this response? Obviously, it lacks analysis and rule/element explanations. It's totally conclusory. The reader can't even begin to understand whether or not this student understands the rules and elements, and can apply the rules and elements effectively. ***No credit is received for this type of response***.

The whole point of the I.R.A.C. approach is to disentangle this type of conclusory response and lay out the writer's thoughts that *lead* to these conclusions.

### E. There are no tricks to writing a good exam or memo.

At the risk of overstating the obvious, it is impossible to write a valid memorandum or exam answer without a complete understanding of the rule of law involved, the elements of that rule of law, and the policies behind the elements. Using an "I.R.A.C." style is futile without a complete mastery of the rules, elements and policies. One cannot possibly spot issues, discuss the rules and elements, apply those elements to the facts of the case in a rational and organized manner, and reach a meaningful conclusion, unless one understands the rules and elements. The structure of I.R.A.C. presupposes that the writer has a firm mastery of the rules and elements.

Below are some “hints” and general guidance about structuring exams in I.R.A.C. format but the value of these hints resides in the fundamental assumption that I.R.A.C. is a method for sensible communication based on the application of the rules and elements to the facts – utilized by someone who already understands the applicable legal rules.

### F. Use headnotes and signposts to highlight the rule of law, and then the individual elements/issues being discussed.

Suppose the fact pattern requires the application of two different legal rules to resolve the problems raised in the fact pattern: (i) Adverse possession; and (ii) Enforcement of real covenants and equitable servitudes running with the land. These two rules of law must be discussed separately and completely. It is extremely helpful to the reader if the writer makes crystal clear when the discussion of adverse possession is over and the discussion of covenants/servitudes is beginning. This saves the reader the confusion of having to read several sentences before the reader realizes that the discussion has changed. This is even more important as the writer moves from one element to the next.

From the reader's perspective, the *failure* to headnote means that the reader must do the extra work of figuring out that the writer is changing tack and discussing a new element or rule of law. So, it is very helpful to headnote the following:

– Rules of Law
– Elements or Issues
– Changes in parties or parcels[3]

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3. If the same rule of law, adverse possession, is being applied to three different parcels, it makes sense to tell the reader that the discussion is shifting to a different parcel. Similarly, if the rule of law is felony murder and there are three defendants, it makes sense to tell the reader that the discussion is shifting from one party to another party. Or, if the facts involve more than one contract, that the discussion is shifting to the second contract.

We will be using many model answers. As we read them, notice the use of headnotes to signal changes in the discussion regarding the rule of law, or elements, or people or parcels.

**G. Use an introductory paragraph only to discuss the *format* of your response.**

Many students use a lengthy introductory paragraph. The introduction is, often, a waste of time unless it is helping the reader understand the organization of your answer. After all, you will be engaging in element-by-element, I.R.A.C. style analysis throughout your exam. The role of the introduction, if any, is merely to help the reader understand the format of your answer. Don't waste time on lengthy introductions. Lengthy introductions merely delay the well-organized, detailed and sensible analysis of the problems raised by the fact pattern – and receive almost no credit.

**H. Don't merely repeat the facts**

Many students give lengthy recitations of the facts. This is unnecessary, a waste of valuable writing time and serves no purpose with regard to informing the reader about the issues, rules and analysis. Facts should be used selectively as part of the analysis presented.

**I. Don't fight the facts.**

Many students "fight" the facts. They make up facts, they don't use the given facts, they address what might happen if the facts were different. The facts are the facts. They're the source of all issues and analysis. They must be used accurately and completely. The only time to make up facts is where an element of the rule requires factual input but there are *no* applicable facts in the fact pattern.

**J. Final conclusions should be brief.**

Many students tend to repeat their arguments in a lengthy conclusion. This is a waste of time. After all, each element of each rule has already been analyzed and a conclusion stated. The final conclusion is a place to wrap up the discussion – not *repeat* the discussion. If the outcome of the dispute is clear, then there is little to say in the final conclusion. However, if the outcome is unclear because some elements are not readily satisfied, then the conclusion can be used to summarize the arguments and possible outcomes.

**K. Write for this course and this professor**

Suppose Professor X taught contracts and spent one-half of the semester on the law of contract formation and twenty minutes on the defense of impossibility. After reading and outlining Professor X's essay question, you see that there are numerous contract formation issues – and an impossibility defense issue. It would be foolish to

spend 45 minutes discussing impossibility and then discover you have only 15 minutes to discuss the formation issues. The professor must have meant you to spend most of your hour discussing the formation issues. After all, the class spent half the semester on this material and only a few minutes on impossibility. These are matters that the professor finds are important and will test accordingly to assure that you mastered these important principles.

All exams have major and minor issues that all professor expects you to discuss within the time allotted to the question. Your task is to spend appropriate time on each type of issue: more time on major issues and less time on minor issues.

### L. Do's and Don'ts on Essay Exams

Obviously, to write a good exam, you must know the law, spot issues, apply the law, use and interpret the facts, and analyze the problem to a reasonable conclusion. The materials thus far, which have taken us through case briefing, case logging, rule-structure outlining, and problem-solving, should have helped us to understand, acquire, and sharpen these basic substantive skills.

But, there is more. Because the grader of your exam reads scores of answers to the same question, her/his reaction is often boredom or irritation if an answer is unclear or unattractive or unpersuasive. Whether we like to admit it or not, human feelings underlie all grading to some extent, thus making, inevitably, the process, to a greater or lesser extent, subjective. Knowing this, your aim should be twofold: first, to craft your answer so that it is substantively solid and organized and, second, to present your answer in such a fashion that it will be easy for the reader to comprehend.

Imagine a grader who is confronted with two essays. One essay is clear, signposted, underscored and persuasively formatted and written, while the other is disorganized, un-paragraphed, scratched out, and hastily presented. The former will most likely receive a higher grade than the latter since the reader has to struggle to understand the student's organization, presentation and analysis.

Your goal is to make your answer as substantively complete and organized as possible while also making it as visually neat and organized as possible. To that end, consider the following list of do's and don'ts -- notice that the list address both substantive as well as visual considerations.

#### a. Do's:

1. Headnote or signpost or use transition sentences. When introducing a new topic or element of a rule, tell the reader you are doing so by using a word or phrase or transition sentence at the beginning of your paragraph. For example, if you are discussing the elements of adverse possession, headnote or signpost: Possession, Open & Notorious, etc.

2. Underscore strategically. If you wish to emphasize a key fact or point of your analysis, underscore it. When underscoring in this manner, be sparing. Underscoring too many words or phrases will quickly rob the technique of its force.

3. Write short, concrete sentences. Which of the following is easier for a grader to read?

> D is liable in battery to P because, although he did not intend to strike P, he had formed the intent to throw the stone at X, and, when the stone missed X but struck P, putting out his eye, he committed a battery against P because the law creates a fiction called transferred intent that makes D's intent to hit X suffice for the required intent to commit a battery against P.
>
> -or-
>
> The harmful contact required for battery is satisfied because the stone thrown by D hit P and put his eye out. However, there is an issue regarding D's intent. D intended to hit X, not P. Under the transferred intent doctrine, D's intent to hit X will be deemed sufficient to satisfy the intent element with regard to P.

   The substance of the two samples is similar but the second sample is clearer, easier to read, and likely to make a grader well-disposed to your answer.

4. Use short paragraphs. It is disheartening to pick up a student's blue book and be confronted with a continuous mass of writing. The grader will sigh with the depressing thought that he/she must untangle this mass and try to figure out the student's analysis.

5. Fully complete your I.R.A.C.. That "C" stands for conclusion. When you have applied the law to the facts, tell the reader how you come down on the conclusion and why.

6. Write on every other page. This makes it easier for the grader to read your exam.

7. Be careful with abbreviations and be sure that you tell the reader if the abbreviation is not a common one. Examples of common abbreviations are π and Δ for plaintiff and defendant. An exam full of too many abbreviations makes it difficult to read.

9. Use legal terms and words of art. "Adverse possession," "res ipsa loquitur," "felony murder," "in personam." Lawyers and law students use phrases as a shorthand method for communicating There are words or phrases that have such well-established meaning that your appropriate use of them marks you as

one who "thinks like a lawyer" but only if they are used appropriately. Throwing a "buzz word" into an essay when not appropriate merely shows the grader that you haven't mastered the phrase and the doctrine it represents.

**b. Don'ts:**

1. Don't merely repeat the facts. Many students start their essay or their discussion of a cause of action with a restatement of the facts. Don't do this. Facts are there to be *used* to show that the rule and its elements are, or are not, satisfied.

2. Don't raise non-issues. Understandably, students are afraid that if they fail to raise appropriate issues, they will not receive the issues allotted to that issue. However, to think that you will succeed by throwing everything at the examiner, is a grave error. If there are no facts or no reasonable references from facts in the question to support an issue, it is not in the question; the issue is a non-issue.

3. Don't engage in negative issue-spotting. For example, in a torts essay that raises assault and battery issues, do not write that false imprisonment is not relevant because the plaintiff was not confined to a bounded area, defamation is not relevant because the defendant never made a statement regarding the plaintiff, or that intentional infliction of emotional distress is not relevant because the defendant's conduct was not outrageous. This tactic is very much like discussing non-issues. Instead of writing about what the examiner sought to elicit from you, you're parading knowledge of other matters that are irrelevant to this question.

4. Don't fight the facts. Suppose that you are told that Ann and Bob executed a valid contract. These facts are given and cannot be disputed. it is wasteful to spend time discussing the elements required to form a valid contract.

5. Don't qualify unnecessarily. Many factual issues can be resolved without resorting to "if, on the one hand....if on the other..." If the factual issue is ambiguous, label it that, and note that the facts support two equally plausible inferences.

6. Don't resort to the "this is a jury question" ploy. If the question raises an issue of lack of consideration as invalidating a contract, argue the facts and reach a conclusion. Don't say that the jury would decide whether the facts support the existence of consideration. Unless the call of the question is based upon a procedural motion about the sufficiency of the evidence to get to the jury, you are expected to resolve factual issues as though you were the fact-finder.

7. Don't cite case names unless you are sure you are correct and the case is on point. Most professors do not expect you to carry case names in your head.

You need to know the rules of law, not necessarily the names of the cases that contain them. In some instances, the case is of such overwhelming importance that everyone is expected to know its name. Usually, there are not more than 4 or 5 such cases per course per semester. If, out of a desire to look good, you drop case names liberally throughout your essay, and the names you drop are wrong or off-point, you don't look good, you look uninformed.

8. Don't be conclusory. Perhaps the most common student mistake on exams is to reach a conclusion without giving both the factual and legal reasons that support that conclusion. In discussing self-defense in a criminal law essay where the defendant shot the decedent who had threatened to hit the defendant with his fists, a "conclusory" answer will state: "A self-defense argument here is weak." Probably correct, but why? The use of deadly force can not be employed to ward off non-deadly force. Factually, if the defendant was roughly the same size and strength as the decedent, the decedent's threat was not deadly.

9. Don't use slang or humor. In writing a law school essay you are trying to show that you are intelligent, professional, and lawyer-like. Saying "this argument won't fly" or "P's case is blown away by the statute of frauds" is an indication of an unprofessional cast of mind. Be serious and use lawyerly language such as: "This argument is flawed [or invalid][or without foundation]." "P's case must fail because of the statute of frauds defense." Similarly, humor rarely works on exams. The grader is tediously and seriously trying to assess each exam and determine a grade that may have much significance to the student. It is a serious process. Adding humor is the wrong tone in this setting. It may offend or irritate the grader.

10. Don't write generalized encyclopedia entries on the law. If the fact pattern asks you whether P has a prima facie case in negligence, do not waste time telling the grader that negligence jurisprudence arose in the 18th and 19th centuries in response to the industrialization of England. Unless the call of the question asks for it – or it's essential to resolution of an issue – do not bother to give background information on the rules of law. Proceed directly to the issues in the fact pattern. Similarly, if the exam asks you to resolve whether or not an adverse possessor was “open & notorious”, it is inappropriate to write a lengthy discussion of the element of constructive possession. Discuss only the rules & elements in proportion to the issue being discussed.

## M. A Methodical Approach To Essay Writing

Set forth in the next few pages is a methodical approach to the task of responding to an essay question. This methodical approach may seem a bit overly-structured and tedious at the beginning. However, it is meant to be a training tool. By using it over and over it will enhance our ability to write excellent responses to essay questions and, eventually, will become a natural part of our writing skills.

### 1. Identify The Task

The first step is to understand the specific task. On a law school exam, this means checking the "call of the question" (looking at the precise question being asked) after a preliminary reading of the fact pattern and *then* delving more deeply into the facts.

a. Step 1(a): Read the Question Briefly and Identify the Call of the Question. The first reading is devoted to getting a big picture perspective of the problem **and grasping the call of the question.** Read the facts in their entirety without trying to make detailed notes, identifying the call of the question. Pay close attention to the *scope of the task(s)* being requested. To make an essay responsive to the call of the question, the scope of analysis or discussion must match the scope of the call of the question. If the call is framed broadly, the essay must respond broadly. If the call is framed narrowly, the response must be narrow.

For example, if the call of the question asks us to discuss the rights of A versus B, it would be an inexcusable waste to discuss the rights of A versus C or of B versus C. There is no value in writing a treatise to display how much is known in the abstract about A's rights. The task is to respond *only* to the call of the question.

The first reading also assists in identifying the rules of involved applicable to the fact pattern. It is helpful to resist the tendency to embrace conclusions during this early phase of analysis. Premature conclusions dull analytical alertness and serve as a distraction from the call of the question presented at the end of the fact pattern.

b. Step 1(b): Follow Instructions. It is critically important to note any instructions that are intended to limit or guide the problem-solving work. Always take a moment to focus on the all the applicable instructions, and make sure to follow them faithfully from beginning to end.

### 2. Grasp the Facts

The second step is to understand fully the facts of the problem – and this requires a thorough re-reading of the facts. The second reading is an opportunity to highlight, mark and annotate the facts that are important or critical to the call of the question.[4]

> This is the time to begin an outline of the answer. Do not try to write sentences or paragraphs – you do not have time to write an essay twice in one hour. This outline will be the blueprint for your essay; it will guarantee that you write an organized and well-balanced response.

This is the time to make sure that all of the facts have been accounted for (such as a sequence of dates or acts, the relationships among or between the parties, relevant characteristics of the parties, such as age, height, etc) and that no important issues have been missed. If you see significant parts of the fact pattern with no notes or highlighting, you should pause and think: "What is being suggested by those facts that I am missing?"

### 3. Outline The Answer and List Potential Issues.

The third step the creation of a list of the issues arising from the fact pattern – and the initial organization of response(s) to the call of the question. Remember from the earlier materials that an "issue" is a legal question that is open to controversy and that, therefore, must be discussed (and resolved) in the analysis of the legal problem that we are trying to solve. An "issue" arises when the application of a rule and its elements (or list of factors) to a set of facts raises a question with respect to the outcome. Issues worthy of discussion arise when it is unclear whether or not application of the legal rule and its elements to the facts in the hypothetical yields a clear result.

An essential part of a well-organized and responsive answer is the appropriate prioritization of issues coupled with appropriate levels of discussion. To identify and prioritize issues, a problem-solver must engage in an element-by-element analysis. To accomplish this task one must first set out the rule of law and its elements and then apply the rule, element-by-element, to the facts – and select the key facts for each potential issues. ***Of course, we cannot begin to list the rule and its elements unless we have found, understood and organized the rule and its elements prior to coming to the exam. At this point, all is lost if the rule & its elements are not readily available for application and analysis.***

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4. Also, jotting notes in the margins, underlining important passages, placing marks (like stars, checks, or questions marks) to serve as reminders of legal rules, elements, policies and facts to be addressed in the answer.

Assuming the test-taker knows the rule and its elements, one of the most prevalent errors on poorly organized exam answers is the failure to identify each element, discuss the facts relevant to that element, reach a conclusion as to that element – and then move on to the next element. Instead, poorly drafted answers mix and match elements with confusing results.

You will notice that the same facts will occur in relation to different elements of the rule of law. That makes sense. The same facts may help to show that two completely different elements have been satisfied (or not satisfied).

Special Note - Isolating Probative & Key Facts: Every problem has four types of facts: (1) irrelevant facts, (2) background facts, (3) probative facts, and (4) key facts. Though no magic formula exists for distinguishing among these types of facts, we should be aware of the distinctions among the four different types:

(1) Irrelevant facts make no difference in determining the outcome and have no function in telling the story behind the problem. If these facts are altered or deleted, comprehension of the factual scenario and analysis of the legal issues would not change at all. Irrelevant facts should not be mentioned at all in an essay or memo. For example, in the defamation problem presented earlier in these materials, the facts stated that Peter, the potential plaintiff in that scenario, was a teacher at Valley High School. We also learn that he taught math. This last fact – that math is his teaching subject – is irrelevant because it does not help us to understand any relevant circumstances of the problem nor does it help to resolve any legal issue raised by the problem. Therefore we should not waste our time, or any space in our memo or essay, on it.

(2) Background facts help to explain the background of the controversy. Background facts have no legal significance but, unlike irrelevant facts, are functional because they help to place the problem in context. These types of facts *may* receive some mention in our essay or memo because they can help the reader understand our discussion of the problem as a whole. Using the defamation example, we can see that the fact that he was a high school teacher gives us a sense of the situation that he is in as an educator in a public school. Although knowing that his specialty is math may be irrelevant, knowing that he teaches at a high school (rather than, say, a day care center or a university) helps us to contextualize the problem and makes it easier for us to comprehend the factual scenario and legal issues.

(3) Probative Facts tilt the analysis toward one conclusion or another. They help to reinforce a result but do not necessarily dictate one. In the defamation example, the fact that Donna stated that Peter was an alcoholic tends to support a conclusion that the statement is defamatory (tends to diminish his reputation in the community) but is not conclusive.

This fact is probative – it is relevant to the legal analysis and resolution of an issue.

(4) Key Facts are outcome-determinative. Key facts are indispensable to the outcome of an issue. If the key fact changed, the analysis and the outcome would change as well. Going back to the defamation hypothetical, recall that "as a result" of Donna's "untrue" statements about him, Peter "lost his job." Recall also that the fifth element of defamation requires a finding that the statement "caused damage" to the plaintiff. The facts just recited are "key" to the analysis of this element because these facts show that Peter suffered damage. These facts are outcome-determinative.

Probative facts and key facts play a crucial part in analysis and must receive prominent treatment in an essay or memo. Highlighting them with a circle or other distinguishing mark on the second or third reading can be very helpful.

### 4. Confirm & Finalize Analytical Framework

Before moving on, it is worth taking the time to confirm the issues, rules, elements, and facts of the problem to avoid false starts or wayward discussions.

While working through this step, it may be found that some issues originally identified as serious issues worthy of discussion are actually non-controversial and require less analysis. Or, it may become apparent that some of the issues duplicate or repeat others, in which case they may be grouped together or merged. On the other hand, some potential issues may be found to be more complex than previously thought and will require more detailed discussion.

When this step is complete, there will be a final and comprehensive list of the issues that are raised by the problem and that respond to the call of the question – and an outline of the rules and facts that we must mention as we analyze each issue. After carefully building this framework, care must be taken to stick to it when actually writing the memo or exam.

### 5. Organizing Issues for Discussion

#### a. Macro-Organization:

"Macro-organization" concerns the overall structure of the essay answer. There are two basic types of fact patterns: simple and complex. Simple fact patterns involves one event or transaction between two people or parties. Complex fact patterns involves multiple events and/or multiple parties. Both types have a general approach that can be followed in analysis and communication.

Simple Fact Patterns. Suppose Peter is suing Donna, alleging that Donna is liable for damages for *both* defamation *and* intentional infliction of emotional distress. Each cause of action should be separately addressed. First discuss defamation, complete the defamation discussion and only then move on to the next cause of action – intentional infliction of emotional distress cause of action.

When discussing *any* cause of action, always set out *all* of the elements of the cause of action before discussing affirmative defenses. The plaintiff's job is to show that the elements of the cause of action have been satisfied. If the outcome is possibly in the plaintiff's favor, then and only then does the issue of affirmative defenses arise.

Complex Fact Patterns. When analyzing a complex fact pattern, focus on four areas: 1) the parties; 2) the crimes/torts/contracts or other causes of action; 3) the sequence or chronology of their actions, 4) any other background circumstances or events that seem relevant under the applicable legal rules (such as multiple lots in a property exam). Think about the most logical or comprehensible order in light of the call of the question.

Suppose that five homeowners all move onto the wrong lots. Two of the homeowners know they are occupying the wrong lots. Three are unaware of their error. Some have color of title, some do not. They occupied the land for varying amounts of time. The true owners had notice with respect to some lots but not as to others.

This hypothetical involves the application of the doctrine of adverse possession to five possessors claiming title to five different lots. In responding, the answer needs to be macro-organized or the discussion will be difficult (if not impossible) to follow. The answer can be structured to analyze each lot and apply the elements methodically to each lot. Or, the answer could be macro-organized to discuss each element of adverse possession and apply it to each of the five lots. Either way, there needs to be an organizational format and the writer needs to stick to it.

### b. Micro-Organization

"Micro-organization" means organization of the smaller sections of analysis and communication.[5] ***This is where a complete I.R.A.C. analysis takes place.***

Note that at this point the blue book is still closed. ***Don't be afraid to spend 10-15 minutes carefully reading the question and organizing your answer. Professor's and bar examiners expect this and are looking for this kind of organization. A well-organized, responsive, analytical answer will receive more credit than a rambling, long, disorganized one.***

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5. Keep in mind the discussion of non-issues, pseudo-issues and actual issues at page ?. The extent of expansion of our capsule answers will depend on the type of issue being addressed.

### 5. Writing

The final step is to write the exam answer, office memo, appellate brief, or other document.

#### a. The Introduction - Beginning the Essay

The purpose of an introduction is to briefly provide a roadmap or overview for the reader so that the reader can follow your thoughts. **The introduction should be brief. It's not the place to persuade – it's the place to reveal the macro-organization to the reader.** There are several possible ways to use an introduction effectively:

1. Organizational Summary: Briefly tell the reader the rules of law you will be applying and the format the essay will be following if the question is complex. For example: "To determine if any of the five homeowners will succeed in obtaining title by adverse possession I will evaluate each of the five lots, one at a time, to determine if the six elements of adverse possession." This type of introduction works well for complex problems.

2. Bottom-Line Conclusion: If the fact pattern is not complex, it might be helpful (but not essential) to respond succinctly to the call of the question – if you have a clear "bottom-line" conclusion and a short justification for that conclusion. The bottom-line conclusion and justification can be inserted in the brief introduction but are not essential. Avoid this since it has a potential for problems if you change your mind while you're writing.

3. List of Causes of Action: If the fact pattern contains three viable causes of action and the organizational framework is going to be a sequential discussion of those causes of action, this should be briefly stated in the introduction so that the reader can understand the organizational format of the answer. For example: "Peter has three causes of action against Donna: defamation, intentional infliction of emotional distress and negligence."

#### b. Writing the Essay

After a brief introduction, begin discussing the first cause of action. Don't dilly-dally on the introduction. It's function is merely to anchor the discussion for the reader. Now it's time to fully discuss the analysis of each issue in the order that was established earlier. The answer should be thorough and comprehensive, setting forth the analysis of the problem. **Don't forget to mention each and every element of the cause of action and determine whether or not that element is satisfied. Even if the element is "obviously" satisfied, state the legal test for that element and some facts showing how the element is, or is not, satisfied.**

Always be careful about omitting explanations because they seem "obvious." The reader can't read your thoughts if they're not written down. Show the logical sequence of rules, elements and facts that lead to the conclusions. For each element, interweave the probative and key facts, show your analysis and reach a conclusion for that element.

Remember to headnote and signpost the essay or memo for the professor or partner.[6] Signposting makes it easier for the reader to follow your thinking and, therefore, your written work will have a greater persuasive impact. Signposting also helps *the writer* stay focused and on track because it serves as a reminder of the point that is supposed to be discussed under each point heading.

### c. State a Reason or Justification for your Conclusion Regarding Each Element

Make sure you state a conclusion for each element and, eventually, each cause of action. The conclusion may be qualified. Stating a conclusion does not mean ignoring ambiguities or uncertainties. On the contrary, answers must take into account and address such ambiguities to be on point. For instance, an answer might state that "maybe" or "probably" or "most likely" or "probably not" Jane's comments were defamatory. Or, after all elements have been discussed, "Jane will probably be liable to Dick for defamation." The point is to make sure that each cause of action and its elements are addressed responsively.

### d. The Final Conclusion

The final conclusion is of little potency since it follows naturally from the earlier discussion. There is no need to restate the rules, elements, analysis or facts. It is important only to confirm that the call of the question has been answered. At this point, the analysis is complete so the conclusion is merely the icing on the cake. It signals the reader (and reminds the writer) that the call of the question has been answered.

### e. A few more points to consider

After completing the essay, go back and review it. Correct any obvious mistakes and, only if necessary, cross out and rewrite (on the facing blank page) any atrocious mistakes. Keep these types of changes to a minimum. After all, there shouldn't be very many if we took the time to follow the methodical steps.

When the hour is up, move on. Spending more time on a question than the professor has allotted rarely pays off. If, however, you finish doing another part of the exam early, then of course, you may return to this essay for further editing.

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6. Don't go overboard with this. Just signpost/headnote elements or issue statements or transitions from one major discussion to the next one. Don't highlight, use different color pens or anything of that nature - those just distract the reader.

### 6. The Methodical Approach - Conclusion

These steps constitute a methodical approach to analysis and communication. They are designed as an integrated series of tasks that, if followed diligently can assist in composing a thorough and organized response to the problem before. Though these steps will seem cumbersome and will take additional time at the beginning, they provide a smooth and methodical approach to completion of problem-solving assignments, including exams. Eventually, they become second-nature. Avoid the temptation to skip even one step while we are working on mastering this process during the next several days.

## IV. Multiple-Choice Examinations: An Overview

### A. General Principles:

Over the last 30 years, multiple choice questions have gained legitimacy as effective tools for assessing law students and lawyers. The Multi-State Bar Examination, once limited to only a few states, now dominates the bar exam in almost all states. In law schools, multiple choice style questions have become common as an assessment tool. They are commonly referred to in law schools as “objective” questions.

Multiple choice questions are excellent tools for assessing whether or not students: (i) have mastered the legal rules and elements; (ii) can apply the rules and elements in a systematic and effectively way, thereby exercising higher-level analytical skills. There is an entire science dealing with the reliability and validity of multiple choice testing that confirms the legitimacy of this assessment device. Indeed, that's why we refer to these types of assessment tools as "objective" questions.

You will receive additional material on this subject in class.

### B. Terminology

An entire scientific industry is devoted to the design and efficacy of multiple choice exams. For purposes of discussion, here’s the standard industry vocabulary regarding these types of questions:

| | |
|---|---|
| Root: | The fact portion that precedes the question |
| Stem: | The question (although it may add some additional facts as well) |
| Key: | The correct response |
| Distractors: | Incorrect responses |

### C. How to Take Multiple-Choice Examinations: More Detail

Some common sense observations and tips based on experience can help you to improve performance on multiple choice exams.

#### 1. Know, Understand & Be Able to Apply the Law.

Answering a multiple choice question is really no different than answering an essay question. To answer the question correctly, one must methodically apply the rule of law and its elements and reach a conclusion as to whether or not the rule of law is, or is not satisfied – and why. Multiple choice questions seek to investigate whether students are operating at various levels of the Law School Learning Pyramid.[7] Questions are carefully drafted to determine if test-takers not only “know” the material (can recognize it

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7. See the discussion of the law school Learning Pyramid at page 46.

when they see it) but, far more importantly, the upper-level skills of understanding, application and problem-solving. There is no wiggle room or fudge factor on Objective exams. You must know *and understand* the rule and its elements *completely and fully* – and be able to apply them methodically.

**2. Read the call of the question**

Objective questions are no different than essay questions in many regards. You are asked to respond to a question after reading the facts. It makes sense to read the facts more than once, after reviewing the call of the question. The call of the question *must* be answered and will influence the answer you choose.

**3. Read the facts carefully and quickly.**

This advice is based on the assumption that you have the same time for each question as Multistate Bar Exam has - 1.8 minutes. The care with which you read the facts will, like your detailed knowledge of the law, assure that you will not miss any facts essential to a correct choice. Many of those who fail the Objective portion of the bar examination have discovered that they missed as many as 10 questions (often the measure by which they failed) because of careless or inattentive reading.

**4. After reading the call of the question, review the facts carefully, then if an answer suggests itself as you read the facts, look for a choice that matches that answer.**

This is not an infallible rule, but it is often helpful, particularly when none of the choices otherwise stands out as probably correct. Note that the wrong answers are referred to as "distractors." Therefore, you shouldn't be relying on the answers to provide the missing link. During this phase, determine the rules/elements involved, read the call of the question, review the facts to determine what the answer to the call of the question should be and then review the questions, hunting for the correct or "key" answer.

**5. Eliminate immediately any choices that either erroneously state the law or contradict the facts.**

These can not be "correct" choices; by discarding them at once, you save time and psychological stress and can focus on the more probably correct choices. There are three types of distractors: misstatements of law, misstatements of fact and misapplication of law to the facts. The first two are easy to eliminate if: (i) you have mastered the law; and, (ii) you carefully read the facts.

**6. Use the process of analysis to narrow your choices or select the correct answer.**

This is the key to the enterprise. Use analysis just as you would on an essay, selecting probative and key facts that yield an appropriate outcome when the rule and its elements are methodically applied.

**7. Do not spend time puzzling over difficult questions.**

If you have 1.8 minutes per question, it is foolish to struggle with a difficult question for six or seven minutes. You may still get the difficult question wrong and you will have used up time that could have been more profitably used in analyzing three or four easier questions. If you must now rush to finish the other questions, you are more likely to make mistakes that you would not otherwise make.

Place a check next to the difficult question and come back to it later. By all means, come back to it, however, and make a choice, even if a guess.

**8. Answer according to the majority rule, unless the call or the choice indicates otherwise.**

Most objective questions test your knowledge of the prevailing view of American law in the majority of states.

**9. If two choices seem correct, choose the one that is more narrowly or precisely correct.**

Suppose you have narrowed down to two answers a contract formation question which read as follows:

a. P should prevail.
b. P should prevail because D's acceptance was a mirror image of P's offer.

If the correct conclusion is that P should prevail, then b, being narrower and more precise, is the better answer.

**10. Beware of the choice that is a correct conclusion but with an erroneous reason.**

Consider again the example given immediately above and suppose that choice "c." stated: "P should prevail because it would be unfair not to enforce the contract against D." Generally, contract formation issues are decided on the basis of whether there is a valid offer and acceptance, consideration, and no defenses to formation. Answer "b." would be the correct answer. Whether contracts or fair or not is unrelated to the issue of contract formation (although the rules and elements may *reflect* underlying policy considerations).

### 11. Practice

A sound tip for taking objective exams is to practice taking them. The National Conference of Bar Examiners has released hundreds of questions and answers that are on reserve in the library. It may be very helpful to go over many objective questions. However, the secret to success on objective exams is the same as that on Essay exams – you simply must find, understand and organize the legal rules and be able to apply them before you walk into the exam room.

## APPENDIX A: Excerpts from Bernhardt, Real Property in a Nutshell (2nd ed.)

REAL PROPERTY IN A NUTSHELL

PART ONE
INTERESTS IN LAND

CHAPTER ONE
ADVERSE POSSESSION

# I. POSSESSION AND OWNERSHIP

### A. POSSESSION APART FROM OWNERSHIP

While it is often the case that a person in possession of land is the owner of it or is in possession by virtue of the owner's consent (e.g., a tenant), it may also happen that a possessor of land is there without either being the owner or having the owner's consent. (In all of the illustrations in this section "Olga" will refer to the record owner of the property, and "Paul" will refer to a possessor of that property who is not the owner of it.)

*Illustration*: Paul received a deed to lot 1, but mistakenly moved onto lot 2 instead. Here Paul owns lot 1, but possesses (without owning or having the consent of the owner) lot 2.

*Illustration*: Paul received a deed to lot 1, and took possession of lot 1, but in fact the deed to Paul was defectively executed (or alternatively, an earlier deed in the chain of title was defectively executed) so that he is not the owner of lot 1, although he is in possession of it.

*Illustration*: Paul received a valid deed to lot 1 and took possession of lot 1. However, by mistake, Paul built a fence which encroached 5 feet over into lot 2 and then built his house up to the fence line. Here, Paul possesses but does not own the 5 foot strip.

*Illustration*: Paul is a squatter, knowing that he does not own the property being occupied, but hoping that the real owner will not do anything about it, and intending to stay until evicted.

### B. CONSEQUENCES OF POSSESSION UNCONNECTED OWNERSHIP

Possession has always been an important concept in our legal system. The old doctrine of seisin had more to do with possession than with ownership. (On seisin, see Ch. 2, p. 31). A possessor has a legal status in the common law even when he or she is not an owner. Both rights and liabilities attach to possession.

## II. ADVERSE POSSESSION

### A. DURATION AND ADVERSE POSSESSION

It has already been said that a nonowning possessor of property may protect that possession against everyone but the owner. The last illustration shows that such possession extended long enough immunizes the possessor from even the claims of the owner. The possessor's 99% rights thus become 100%. If there is no one in the world who can eject him, and if he can bring ejectment against anyone else in the world who intrudes, then for all practical purposes he is now the owner of the property. He might as well be said to have title to the property, since he now has all of the rights which title is considered to give to the person having it. The possessor is now a successful adverse possessor. Adverse possession does not transfer the former owner' title to the possessor; rather, by eliminating the one defect which previously existed in the possessory title it operates to create a new and complete title in the possessor.

### 1. How Long Must the Possession Continue

Statutes dealing with adverse possession vary from an upper limit of 20 years to a lower one of 5 years, with even more extreme time periods covering certain special cases. There may be different periods of time even within a single state, depending on whether or not the adverse possessor has color of title and/or whether or not taxes have been paid. In some cases a longer possession is required against public entities than against individuals. (In all of the following illustrations, it will be assumed that a 10 year statute is in effect.)

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## B. ACTS OF POSSESSION REQUIRED--STANDARDS

In some states, by statute, a person may qualify as an adverse possessor only if certain acts were performed during the running of the statute of limitations, e.g., cultivating, enclosing, or residing on the property. However, in most states there is no such requirement and any acts of possession, if they have the correct quality, may justify a finding of adverse possession. Any acts by a person during the prescriptive period which establish that in fact he or she has been in possession of the property for the requisite period of time may suffice.

There is no set rule as to what sorts of activities are or are not possessory. A standard sometimes applied is to ask whether the activities of the possessor in the past were of such a sort as to support an action of ejectment by the owner. Occasional trespasses in the past would justify an action in trespass, but not ejectment, and therefore the presence of only those acts, for the statutory period would not make the trespasser an adverse possessor. However, most courts prefer to less circular requirement and use phrases such as "acts which publicly indicate a control consistent with the character of the land," or "acts such as an average owner of similar property would undertake."

### 1. Payment of Taxes

In some states by statute no person can become an adverse possessor unless he or she also pays taxes on the property being possessed. In other states the time required for adverse possession may be shortened by the payment of taxes (usually when it is coupled with a color of title in the possessor). One justification offered for this requirement is that by being able to check the tax records an owner can discover whether there is any risk of potential adverse possession. Or, possibly the requirement is based upon an attitude that squatters ought not be able to acquire land by adverse possession, and that nonsquatting possessors who really believe themselves to be owners will pay taxes anyway. In this light, payment of taxes is just another appropriate act of possession.

* * *

## C. THE REQUIRED QUALITIES OF POSSESSION

Although rarely mentioned in statutes, every court in the country requires that the possession be "open, notorious, visible, actual, adverse, exclusive, continuous, uninterrupted, hostile and under claim of right," or at least some of these adjectives. The burden of proof is usually placed upon the alleged adverse possession to establish that the possession has complied with all of the adjectives required in that jurisdiction. From a strictly technical point of view, any possession which subjected the possessor to liability in ejectment during the prescriptive period should perhaps lead to a holding of adverse possession at the end of the period. Under that analysis, none of the adjectives mentioned should be required unless they are only ways of saying that the possession had to be real (i.e., actionable) possession, or at least that the possession had to be such as would have supported a claim of prior possession had the possessor ever needed to bring ejectment against subsequent intruders. In fact, in most cases that is all that many of the adjectives do.

### 1. Open--Visible

Usually the requirement of open or visible possession is just another way of saying that there has to be real possession by a person in order to become an adverse possessor. The furtive possessor is really not a possessor at all. It is doubtful whether one could ever sustain a claim to have been a prior possessor in an ejectment action brought against a subsequent intruder by proof of nothing more than previous clandestine entries upon the land.

### 2. Notorious

"Notorious" is rarely mentioned separately from open, but it may serve a slightly different function. There is no requirement that the owner actually knew of the adverse possession, and ignorance by the owner does not extend the time allotted to sue. The omission of such a requirement can be justified by the presence of notoriety as an element of adverse possession. If a person is in notorious possession, i.e., acting so that all who are interested will know about it, then the possessor has done all that can be expected. Like as not, the possessor believes himself to own the property he is possessing, so that he can hardly be expected to notify an owner of whom he has never heard. Instead, it becomes the owner's obligation to check out the property periodically.

*Illustration*: Paul resides in a house on Lot 1, which is in fact owned by Olga, but Paul believes himself to be the owner of the house. Everyone in the neighborhood knows that Paul lives there, but Olga resides elsewhere and does not know this. Paul will become an adverse possessor after the statutory period, since it is Olga's fault for failing to check on her property rather than Paul's fault for not telling Olga.

*Illustration*: Paul's house encroaches onto Olga's property, but Olga does not realize it. Paul can still be an adverse possessor even though Olga does not have a survey taken until it is too late.

* * *

### 3. Actual (and Constructive)

"Actual" as a requirement of adverse possession, means no more than real possession. Its main function is as a counterpart to constructive possession. Constructive possession is the absence of real possession. By itself constructive possession never ripens into adverse possession. Ejectment lies only against real possessors.

*Illustration*: For 20 years Paul has claimed that he owns Olga's lot, but has never actually set foot on it. No statute of limitations will run against Olga since she has never had a cause of action against Paul for ejectment. Only if Paul actually takes possession of her land can she bring ejectment; claiming land is not the same as possessing it. (Olga might bring an action of quiet title against Paul's claim, but that is not a possessory action.)

#### a. Constructive Possession and Color of Title

An adverse possessor may ultimately be given title to more property than was ever actually adversely possessed, if there was actual adverse possession of a part of that property and an entry onto that part under a deed giving color of title to an area larger than, and including the property actually possessed.

*Illustration*: Paul has a void deed to a five acre parcel. He enters onto the parcel and lives on one acre, doing nothing as to other four acres. At the end of 10 years Paul will acquire adverse possession to all five acres. The boundaries in Paul's deed serve as a sort of substitute for a fence built by Paul (which probably would have made Paul an actual possessor of the five acres had one been built). In some states it is required that Paul have a good faith belief in the validity of his deed for this doctrine to operate. Other states require that the deed be recorded to work as color of title.

* * *

### 4. Color of Title

"Color of title," in the context of adverse possession, refers to a document which purports but fails to convey actual title, typically a void deed. If the deed is valid, then the grantee under it takes real title and may claim rights as an owner. Since the adverse possessor is always someone who is not an owner of the property in dispute, any deed he or she claims under is by definition void. Possession of a void deed, however, may have important consequences, discussed in the following sections.

**a. Color of Title as an Absolute Requirement of Adverse Possession**

In a few states there can be no adverse possession at all except under color of title. The actual possessor of property who has no document supporting the possession gets nothing.

**b. Color of Title as Affecting the Acts Required**

In a few states color of title enables an ordinary use of the property to qualify as an adverse possession, whereas more significant possessory acts (e.g., fencing or cultivating) are necessary when there is no color of title.

**c. Color of Title as Affecting the Time Period**

In a few states a possessor with a color of title needs fewer years of possession to become an adverse possessor than does a possessor without any color of title.

**d. Color of Title and Hostility**

In some states a possessor with color of title is presumed to be hostile to the owner whereas otherwise independent proof of hostility is needed.

**5. Continuous--Uninterrupted**

These words have no constant meaning, are often used interchangeably, and are sometimes entirely devoid of content, signifying no more than real possession. "Continuous" does not mean constant. There is no requirement that the possessor possess every minute of the day. Many successful adverse possessors have been persons who have merely made a seasonal use of the land (e.g., grazing or hunting). In these situations continuous means only that the activity be carried on regularly (i.e., the grazer must graze every year during the grazing season). If the acts are too irregular, they will be viewed as a series of unconnected trespasses not amounting to a dispossession of the owner.

The most common meaning of "uninterrupted" is that no one other than the possessor has possessed the land during the statutory period without the possessor's consent.

*Illustration*: Rachel intruded onto Paul's possession after Paul had been there 9 years and remained there for a year. Paul cannot claim adverse possession under a 10 year statute because his possession was interrupted after 9 years. This same result can be explained by saying that Paul was not exclusive (q.v.) for 10 years, or merely by saying that Paul was not in actual possession for 10 years.

*Illustration*: Paul was in possession for 5 years and was then ousted by Rachel. Paul (as prior possessor) brought a successful ejectment action against Rachel and Paul was thus restored to possession one year after his initial dispossession, and has since been in possession a second time for 3 years. Most authorities agree that Paul should not have to start all over again (which would mean 7 more years under a 10 year statute), but do not agree as to whether Paul can count in Rachel's time. If Paul can include Rachel's year, then Paul needs only 1 more year; if Paul cannot, then he needs 2 more years. The result depends on whether or not Olga's cause of action is viewed as continuing to run against Paul during the year that Rachel had possession.

*(Interruptions by the Owner)* A successful ejectment action (followed up by an execution of the judgment) interrupts an adverse possession by revesting possession in the owner, and a successful judgment will relate back to the date of filing the complaint, so that the action need merely be filed in time. But a complaint which is not followed up in court will not interrupt an adverse possession.

Any act by the owner which amounts to a resumption of possession is an interruption. But a furtive entry, or an accidental entry, or an entry under the possessor's consent has no such effect because these are not really possessory acts. To interrupt another's possession the owner must actually become a possessor, i.e., commit such acts as would entitle the possessor to bring ejectment were the owner someone else.

*Illustration*: Paul's deed was to lot 1 but he mistakenly possessed lot 2. Olga, who owns lot 2 possessed lot 3 under a similar mistake. During the statutory time period Olga frequently visited Paul on lot 2, and even slept over

occasionally. None of these acts by Olga interrupted Paul's possession, since they were all committed with (and as a result of) Paul's permission.

### 6. Exclusive

"Exclusive" does not mean that no one other than the possessor is every on the property. It is generally used to require that no one else is ever there without the possessor's consent. (It comes from the notion that possession is usually treated as involving an intent to exclude.) Consequently, an adverse possession which falls for want of exclusivity is probably lacking other requirements as well.

*Illustration*: During his 10 years on the property others frequently intrude and are not ousted by Paul. Paul will not become an adverse possessor because he was not exclusive. This result can also be explained by saying that there was no actual possession at all, since a "real" possessor does not tolerate intruders.

*Illustration*: During the past 10 years Paul has sometimes possessed it himself, but at other times he has brought friends with him or has leased it out to third persons. Paul is an adverse possessor; the other activities were all done under Paul's auspices which enables Paul to count them as his own possessory acts.

### 7. Hostile--Claim of Right--Adverse

Although these adjectives are almost everywhere used, there is a great disagreement as to their meaning and significance. All agree that a person possessing property under the permission of the owner is not adversely possessing. Under an objective view of adverse possession, lack of permission is all that these adjectives signify; but under a subjective view, more is required.

#### a. The Subjective Standard

The subjective view requires that a person not only possess the property but that he also have a certain state of mind throughout the time of his possession. An adverse possessor is someone who does not in fact own the land he is possession and it may be said generally that he either knows or does not know this fact. The courts requiring a mental element do not agree as to which state of mind is the "correct" one.

*(1) The Mentality of Thievery*

If the possessor knows that he does not own the property, some jurisdictions hold that he cannot become an adverse possessor. (He has a "claim of wrong" rather than a "claim of right.") If he intends to stay only until he is evicted by the owner he is held to lack true hostility. This rule is designed to keep squatters from acquiring title to land.

*(2) The Mentality of Mistake*

If the possessor believes that he is the owner, some other states hold he cannot become an adverse possessor. The rationale is that one must "claim" the property and if the possessor testifies that he only intended to claim what he owned (and would not have claimed the property if he had known the truth), then his actual nonownership of it means that he did not claim it. In these states, only the "thief" can become an adverse possessor.

#### b. The Objective Standard

Most states now do not permit the possessor to be psychoanalyzed, holding that state of mind is irrelevant if in fact the person acted as a possessor for the requisite time. "Hostility" enters in only to defeat the possessor who publicly disclaims any intent to acquire title by adverse possession during the time of possession. (This result could also be explained as an application of the doctrine of estoppel.)

## APPENDIX B: Excerpts From Gilbert Law Summaries - Property (by J. Dukeminier)

G. ADVERSE POSSESSION

1. Overview

a. **Theory of adverse possession:** [§ 94] The basic theory of adverse possession is simple: If, within the number of years specified in the state ***statute of limitations***, the owner of land does not take legal action to eject a possessor who claims adversely to the owner, the ***owner is thereafter barred*** from bringing an action in ejectment. Once the owner is barred from suing in ejectment, the adverse possessor has title to the land.

(1) **Example:** O owns Blackacre. A, a squatter, enters Blackacre in 1975 and possesses the land adversely to O for ten years. O does nothing during the ten-year period. The state statute of limitations provides that if an owner of land does not bring an action to recover possession within ten years after the cause of action first arises, the owner is forever barred from bringing such an action. In 1985, O's action in ejectment is barred and A owns Blackacre.

b. **Effect of adverse possession:** [§ 95] Adverse possession is a means of acquiring *title* to property by long, uninterrupted possession. The running of the statute of limitations on the owner's action in ejectment ***not only bars*** the owner's claim to possession, it also strips the owner of title and ***creates a new title*** in adverse possessor.

c. **Purpose of doctrine:** [§ 96] Acquiring title by adverse possession might look at first glance like acquiring title by theft, but the doctrine serves several important purposes:

(1) **To protect title:** [§ 97] Protection of possession in fact protects ownership because title may be difficult to prove (*see supra, § 3*). The same policy underlies adverse possession. [Simis v. McElroy, 160 N.Y. 156 (1899)]

(a) **Example:** O owns Blackacre in 1930. A deeds Blackacre to B in 1940, and in 1975, B deeds Blackacre to C. B is in possession from 1940 to 1975, and C is in possession after 1975. In 1985, C contracts to sell Blackacre to D. Upon searching the records, D finds no deed from O to A and alleges that C does not have title. It is possible that O gave A a deed to the property before 1940 and the deed was lost and not recorded, but in any event B and C thought they were the owners after 1940 and acted as such by taking possession. O is now barred by the statute of limitations and C can convey to D a good title based on adverse possession. [Rehoboth Heights Development Co. v. Marshall, 137 A. 83 (1927)]

(b) **Land records:** Land title records are kept in each county courthouse, but these records are deficient in many respects. The doctrine of adverse possession makes these records more reliable by protecting possessors whose record title is deficient in some way. It also tends to limit record searches of title to land to a reasonable period of time and not back to a sovereign, which would be very costly.

(2) **To bar stale claims:** [§ 98] A and B both may be claiming Blackacre, and B goes into possession. As time passes, witnesses die or their memories grow dim, and the evidence of the respective claims of A and B becomes less and less reliable. Thus, another purpose of the statute of limitations is to require a lawsuit to be brought to oust a possessor while the witnesses' memories are still fresh.

(3) **To reward those who use land productively:** [§ 99] Society likes to have land used for farming or housing or other productive enterprises. By rewarding the possessor who is productive, and penalizing the owner who would let the land lie unproductive, the doctrine of adverse possession encourages productivity.

(4) **To honor expectations:** [§ 100] Persons in possession of property quite naturally, after a long time, acquire attachments to land and expectations that they can continue to use the property as they have long done, however they came by it. *Giving effect to expectations* is a policy running all through the law of property.

d. **Length of time required:** [§ 101] The statutory period for adverse possession varies from state to state--from five to twenty-one years. The modern trend is to shorten the period of adverse possession.

e. **Possessor's rights before acquiring title:** [§ 102] Before the statute of limitations bars the true owner, the adverse possessor has all the rights of a possessor described above: He can evict a subsequent possessor who takes possession away from him ("prior possessor wins," *supra*, § 16). [Brumagin v. Bradshaw, 39 Cal. 24 (1870)] He can sue a third party for damages to the property, recovering either permanent damages or damage to the possessory interest (*see supra*, §§ 37-48). He has an interest--"possession"--which he can transfer to another (see "tacking," *infra*, § 148). [Howard v. Kunto, 477 P.2d 210 (Wash. 1970)] ***But,*** before the expiration of the statutory period, an adverse possessor has ***no interest in the property valid against the true owner.*** The true owner may retake possession at any time. (This is another example of relativity of title discussed *supra*, § 17.)

2. **Requirements of Adverse Possession:** [§ 103] In order to establish title by adverse possession, the possessor must show (i) an ***actual entry*** giving ***exclusive*** possession that is (ii) ***open and notorious,*** (iii) ***adverse and under a claim of right,*** and (iv) ***continuous*** for the statutory period. Even if the statute of limitations does not specify these requirements, courts have, on their own, added them. Hence, adverse possession law is a blend of statutes and judicial decisions.

a. **Actual entry giving exclusive possession:** [§ 104] The word "actual" merely signifies that possession must be of such a character that the community would reasonably regard the adverse possessor as the owner. It cannot be "constructive" possession--i.e., possession that the law fictionally imputes to someone for some purpose. This possession must be seen. Hence, the requirement of actual possession differs little from the requirement of open and notorious possession.

(1) **Jury function:** [§ 105] It is for the jury to decide whether the acts constitute an actual, open and notorious ***possession*** (i.e., acts that usually accompany the ownership of lands similarly situated) and not merely a series of ***trespasses.*** *Rationale:* Since the acts required are acts that "look like ownership" to the community, a jury is the best judge of that. [Brumagin v. Bradshaw, *supra*]

(2) **Purpose of entry requirement:** [§ 106] The primary purpose of the entry requirement is to ***trigger the cause of action,*** which starts the statute of limitations running. It also shows the extent of the adverse possessor's claim. (***See also*** "constructive adverse possession," *infra*, §§ 165 *et seq.*)

(3) **Constructive possession of part:** [§ 107] If there is an actual entry on ***part*** of the land described in a deed, the possessor may be deemed in constructive possession of the rest (*see* "constructive adverse possession," *infra*, §§ 165 *et seq.*). But an actual entry on some part of the land is required.

(4) **Exclusive possession:** [§ 108] The requirement that the adverse possessor be in exclusive possession means that she not be sharing possession with the ***owner*** nor with the ***public generally***. If the adverse possessor were so sharing possession, the owner would probably not realize the adverse possessor was claiming ownership against him. However, it is possible for two or more persons, acting in concert and sharing only among themselves, to acquire title by adverse possession as tenants in common.

b. **Open and notorious possession**

(1) **Definition:** [§ 109] The adverse possession must occupy the property in an ***open, notorious,*** and ***visible*** manner. Her acts must be such as will constitute ***reasonable notice*** to the owner that she is claiming dominion, so that the owner can defend his rights. Generally, open and notorious acts are those that look like typical acts of an owner of property; they are acts from which the community, observing them, would infer the actor to be claiming ownership. Obviously what types of acts are required turns on the type of land involved. The acts must be ***appropriate*** to the condition, size, and locality of the land.

(a) * * *

(b) **Possession of wild, undeveloped land:** [§ 111] Wild, undeveloped land not suitable for farming but suitable for hunting and fishing can be adversely possessed by acts indicating a claim of dominion.

1) **Example:** O owns Blackacre, wild and undeveloped land, suitable only for hunting and fishing. A erects a ***hunting cabin*** on the land, and uses it about six times a year, including each hunting season. ***A pays taxes*** on the land. ***A sells the timber on Blackacre*** to B, and ***executes a number of oil leases.*** These acts are sufficient to constitute adverse possession. Fencing the land or living on it are not necessary. [Monroe v. Rawlings, 49 N.W. 2d 55 (Mich. 1951)]

(c) * * *

c. **Adverse and under a claim of right:** [§ 117] To be an adverse possessor, a person must hold ***adversely*** to the owner and ***under a claim of right.*** Sometimes the word ***hostile*** is inserted as an element of adverse possession. It does not mean animosity but only that the possession is ***without the owner's consent--it is not subordinate to the owner.*** One purpose of the claim of right requirement is to help assure that the true owner is not lulled into believing an occupant will make no claim against him. The key question in determining whether a person is adverse and under a claim of right is: Does the court apply an ***objective*** or ***subjective*** test? This question has been the subject of much litigation and dispute.

(1) **Objective test:** [§ 118] Under the objective test, the state of mind of the possessor is not very important; what is important are the ***actions of the possessor.*** The possessor's actions, including statements, must ***look like*** they are claims of ownership. If they look that way to the community, the claim is adverse and ***under a claim of right.*** Under the objective test, a person can be an adverse possessor even though ***he is not actually claiming title*** against the true owner. The important thing is that ***he is not occupying*** the land ***with permission*** of the owner. Permission negates a claim of right. [Ottavia v. Savarese, 155 N.E.2d 432 (Mass. 1959)]

(a) **Example:** A enters land owned by O and occupies it for over twenty years. A uses the land as the average owner would, but frequently asserts that he is making no claim of title, but will surrender the land to the true owner when he appears. ***Legally, A is making a claim of right*** and is an adverse possessor. He is not occupying with the permission of the owner, and the owner ***has a cause of action*** in ejectment upon which the statute is running. Regardless of A's state of mind, his occupation of the land is ***prima facie evidence*** that he does so under a claim of title. The very nature of the act of entry and possession is the assertion of a claim of right, and triggers the owner's cause of action. [Patterson v. Reigle, 4 Pa. 201 (1846)]

(b) * * *

(3) **Color of title:** [§ 124] Do not confuse ***claim of title*** with ***color of title.*** Claim of right (or claim of title) expresses the necessary adversity, discussed *supra*. Color of title refers to a claim founded on a ***written instrument*** (a deed, a will) or a judgment or decree which is for some reason defective and invalid. *Examples:* The grantor's name is forged to the deed; the grantor does not own the land deeded; the grantor was mentally incompetent; the deed is improperly executed; the deed is a tax deed void because the owner was not given notice of the tax sale. In all these cases, the grantee takes possession ***under color of title.*** Where a person enters with color of title, no further claim of title or proof of adversity is required.

(a) **Color of title not required:** [§ 125] In most states, color of title is ***not*** required to be an adverse possessor. Even where a bona fide claim of title is required, color of title is not necessary. In the example (*supra, § 120)* where O orally gives Blackacre to A, A has no color of title, but A--believing the oral transfer was valid--possesses under a claim of title.

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2) **Constructive adverse possession:** [§ 127] Entry under color of title is an advantage in all states under the doctrine of constructive adverse possession (*infra,* § 165).

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d. **Continuous, uninterrupted possession:** [§ 142] The fourth requirement for adverse possession is that the possession continue uninterrupted throughout the statutory period.

(1) **Continuous possession:** [§ 143] Continuous possession requires only the ***degree of occupancy*** and use that the ***average owner*** would make of the particular type of property. An adverse use is continuous when it is made without a break in the essential ***attitude of mind*** required for adverse use. A person can be in continuous possession even though there are considerable intervals during which the property is not used.

(a) **Purpose:** [§144] The purpose of the continuity requirement is to give the owner notice that the possessor is claiming ownership, and that the entries are not just a series of trespasses.

(b) **Seasonal use:** [§ 145] Use of a summer home only during the summer for the statutory period is continuous use. [Howard v. Kunto, *supra*, § 102] Similarly, seasonal use of a hunting cabin during the hunting seasons, or the grazing of cattle on range lands in summer, may be sufficiently continuous possession, if such lands are normally used this way. [Monroe v. Rawlings, *supra*, § 111]

1) **Compare--easements:** [§ 146] Intermittent use may give rise to a prescriptive easement if it does not suffice to gain title by adverse possession. For example, if a house is built on the property line, going into a neighbor's yard to put up storm windows in the fall and take them down in the spring results in a prescriptive easement. (*See infra,* §§ 1358 *et seq.*)

(c) **Abandonment:** [§ 147] Abandonment is the ***intentional relinquishment*** of possession. If the possessor abandons the property for ***any period*** of time, without intent to return, continuity of adverse possession is lost. The adverse possession comes to an end, and possession returns constructively to the true owner. If the adverse possessor later returns, the statute of limitations begins to run anew.

## APPENDIX C: Excerpts From Cunningham, Stoebuck & Whitman, PROPERTY[1]

### § 11.7 Adverse Possession

Adverse possession is a strange and wonderful system, whereby the occupation of another's land gains the occupier title -- but only if the occupation is indeed wrongful. To gain title the wrongful occupant must be in "adverse possession" for at least the statutory period of limitation on the owner's action to recover possession. So, there are two aspects, the statutory period and the doctrine of adverse possession, which is a judicial gloss on the statute. In most cases if an owner has a possessory action, the defendant's possession will be "adverse," but there can be exceptions. Title gained is usually in fee simple absolute, but in cases when the fee is divided between a present possessory and future estates, the adverse possessor will get only the possessory title–that is, title replacing that of the one who had a possessory action running. Adverse possession title is not derived from the former owner but begins a new chain of title. Thus, adverse possession provides a rare instance in which original title may arise in a mature society.

Few adverse possession cases deal with the statute of limitations itself. Title cannot be gained if the owner is one against whom the statute will not run. For this reason, title cannot be gained to land owned by the United States, the states, and, at least as to land held for public use, by local governments. Statutes of limitation contain various tolling conditions, such as for owners who are insane, infants, imprisoned, absent from the state, or in military service when the cause of action first accrues. Tolling provisions may more or less delay the statute's running and so delay acquisition of title.

Nearly all the many adverse possession decisions deal with the definition and application of the judicial doctrine of adverse possession. A typical formulation, abstracted from the opinions to be cited, is that possession, to be adverse, must be: (1) actual, (2) open and notorious, (3) hostile, (4) exclusive, and (5) continuous. Sometimes courts add a couple of other troublesome elements, probably subsets of "hostile," called (6) claim of right or of title and (7) good faith. Statutes, often special ones that shorten the normal limitation period, sometimes require "color of title" or payment of taxes, perhaps combined with good faith. The balance of this section will be organized under the elements just listed.

With an important exception to be noted, adverse possession must be "actual." This certainly requires some degree of physical occupation; how much is the subject of many, many cases. Because the question is one of mixed fact and law, we simply have to reconcile ourselves to a wide range of judicial results. Of course, the clearest case is one who fences a parcel, has substantial structures on it, and maintains visible marks of use all over it. Fences or walls are not essential, though courts are sensitive to some marks that show the boundaries of possession, such as partial fence lines, mowed grass, cultivation lines, trees and shrubs, paved areas, or other objects or improvements so located as to suggest bounds. Possessory acts must be substantial and must leave some physical evidence, not only to be actual but also to meet the overlapping requirement that they be "open and notorious." If a court concludes the acts are too insubstantial or temporary, there is no actual possession. Seasonal or sporadic use of unenclosed land gives rise to many difficult questions of actual possession, as well as of open and notorious and continuous possession. Most such cases involve grazing animals, cutting timber, or harvesting natural crops. Some decisions seem to adopt a rule that these activities cannot be sufficient for adverse possession of unenclosed land, but others make the issue turn on whether the acts were normal and appropriate use of land so situated. Enclosure of the land, perhaps even use of it up to some natural physical boundary, introduces an important factor favorable to the possessor. Adverse possession on the surface of the earth is normally possession of the underlying earth, but this is generally not so as to underground minerals that, by severance, are owned by someone other than the surface owner. The best test of actual possession, increasingly recognized in the courts, is, were the acts of possession such as would be normal for an owner to make of land situated such as this in all the circumstances?

An important exception to the requirement of actual possession is the doctrine of "constructive possession." One who is in actual adverse possession of part of a parcel of land and who holds a "colorable" document of title to the entire parcel is, with qualifications to be noted, regarded as being in adverse possession of the whole parcel. Colorable title, or "color of title," is often defined as a document that appears to give title but, for some reason not apparent on its face, does not. Typical examples are sheriffs' deeds for tax or other public sales that are void for some reason such as improper sale procedures. Obviously the adverse possessor may not claim constructive possession over areas not described in the colorable instrument. There also must be some limit to how large a parcel may be constructively possessed; presumably it would have to be reasonable in size to the area actually possessed. Some decisions have imposed a requirement that the possessor have a good faith belief

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1. Professors Note: Extensive footnotes and case citations have been deleted.

that the instrument is valid, which is also required by a number of special adverse possession statutes.

"Open and notorious" possession usually means possession that gives visible evidence to one on the surface of the possessed land. The purpose of this element is to afford the owner opportunity for notice. He need not actually have seen the evidence but is charged with seeing what reasonable inspection would disclose. Possession that is "actual" is very likely to be open and notorious unless it is hidden in some unusual way. When possession is of a cave, with no entrance apparent from the disseisee's land, it is not open and notorious. one might also imagine a strange case in which possessory acts were carried out only under cover of darkness. The nature of the acts on the ground usually determines if they are notorious, but in some instances courts have given weight also to the possessor's reputation as owner or his having public records evidencing ownership.

"Hostility" is the very marrow of adverse possession; it has even redundantly been called adversity. To say that possession is hostile should mean nothing more than that it is without permission of the one legally empowered to give possession, usually the owner. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder is rightful, not hostile. The better view is that unexplained possession is presumed hostile, so that it is up to the one who wishes to do so to establish that it is rightful. Permission is usually by the owner's express act, but there are some cases in which it is proper to infer permission, as when an owner might customarily allow others to make light use of vacant land. Anytime an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred. However, the owner's mere knowledge of the possession, his demands upon the possessor, or, by the better view, even the latter's offer to compromise do not destroy hostility.

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Some question has existed whether permissive or other rightful possession may, without a break in physical possession, become adverse. Most of the cases involve lessees who enter permissively or co-tenants whose entry is rightful under the principle that a co-tenant is entitled to full possession. The answer is that such continuing possession may become adverse to the landlord or other co-tenants if the elements of adverse possession are present and especially if the element of hostility is supplied by an "ouster," which means the possessor's repudiation of the original rightful possession. A clear case would be the lessee or co-tenant who expressly notified his landlord or co-tenants that he denied their interests and was holding possession in his own right alone. For an ouster, claim of right and intent are appropriate elements. Many courts require that the disseisee be aware of the words or act of ouster. But the ouster need not be, and in most cases is not, by express claim but by circumstances showing clearly that the possessor now claims in repudiation of the disseisee's rights. Courts give weight to colorable title documents; the possessor's purporting to give conveyances, leases, and mortgages; his paying taxes; long-continued possession; intensive use of the land; community reputation; and so forth. Naturally courts are reluctant to find an ouster if the evidence of it is incomplete or ambiguous or if the disseised owner may have given permission, but in practice it is not rare.

That adverse possession must be "exclusive" means that it must not be shared with the disseised owner.Two or more persons may be co-adverse possessors; if they acquire title, it will be as tenants in common. One may be in adverse possession through another whom he has put in possession as a tenant. Some decisions have undercut the meaning of exclusivity by holding that, in cases of attempted oral conveyances, the owner, continuing in possession, becomes a tenant (adverse to himself) of the grantee, who becomes an adverse possessor. Of course an adverse possessor may be in exclusive possession of part of a parcel of land and the owner in possession of another part; that is usually so in mistaken boundary cases.

The final element, that adverse possession must be "continuous," means that it must continue without significant interruption for a solid block of time at least as long as the period of limitation. What is a significant interruption depends upon the nature of the land. Brief and ordinary absences, while the possessor goes to town, is gone overnight, or is away working or on vacation, for instance, would surely not break any adverse possession. With land that is, by its nature, suitable and normally used for seasonal pursuits, then seasonal use may be continuous enough. Again, the test should be whether the adverse possessor used the land as a true owner would. Courts seem sensitive to breaks caused by the owner's intermittent possession, such breaks of a few days or weeks every now and then are likely to defeat both exclusivity and continuity of possession.

An interesting question within the subject of continuity is "tacking," the adding together of periods of possession that are continuous but by different persons. This is allowed, provided there is a sufficient nexus, often called "privity," between successors. This nexus is provided if the earlier possessor gives the next one a colorable title document that describes the area possessed or if the next one is his heir. To ask how it is an adverse possessor, who has not yet title, can pass anything by the methods to transfer title, is to conjure up musty questions about whether possession is the source of title or is itself vestigial title. The answers are too wonderful (not to say

too lengthy) to work out here; suffice it to say the adverse possessor may tack by such methods. And tacking may occur, without any formal or even express transfer, simply by the earlier possessor's turning over possession to his successor. This may occur when an adversely possessed strip is turned over in connection with the conveyance of adjoining land the possessor owns or by a pointing out of boundaries or by other acts or words that evince a turning over. Courts seem to have more problem with an informal turning over than with a documentary transfer. The informal transfer is easier to justify in theory, thought, because a possessory "title" should be transferable by a transfer of possession.

Is the "strange and wonderful" doctrine of adverse possession justified? Some decisions smack of a desire to punish the landowner who is not diligent or to award the possessor who is. Diligence is a quality society might promote, though hardly at the expense of the owner's title. But other broader reasons exist: that after a long time uncertain boundaries be stabilized; that persons who have taken interests in the land or dealt with the adverse possessor in reliance upon his apparent ownership be protected; and that those who will keep land productive by using it be given permanence. Adverse possession is best explained as a doctrine of repose. Perhaps, too, the mystical connection between possession and title is worth something. Title by possession, along with prescription, is an old subject in English law; it had its counterparts in Roman law. If we had no doctrine of adverse possession, we should have to invent something very like it.

## APPENDIX D: Casenote,

**b. Claim of title – Mannillo v. Gorski, 54 N.J. 378 (1969)**

**1) Facts.** Gorski (D) purchased land under a contract of sale in 1946 and took possession at that time. A deed was delivered to Gorski in 1952. Gorski's Lot is 25' x 100' but in 1946 Gorski mistakenly built steps and a concrete walk, encroaching 15 inches onto an adjacent lot. In 1953 Mannillo (P) bought the adjacent lot. In 1968 Mannillo brought this action alleging "trespass" on land and seeking an injunction compelling removal of the encroachments. Gorski raised the defense of adverse possession. The Statute of Limitations in New Jersey for adverse possession is 20 years. P won at trial.

**2) Issue.** Must a party occupy another's land with an intention to invade the rights of another in order to acquire title by adverse possession?

**3) Held.** No. Judgment reversed and remanded.

a) Under the statute, to acquire adverse Possession on the possession must be adverse and hostile. The possession need not be with an actual intent to deprive another land owner of their land but it is enough that the possession is made under a mistaken belief that the land belongs to the possessor.

b) The old view (the "Maine view") that the possession must be intentional rewards the possessor who entered with the intentional wrongdoer and disfavors an honest, mistaken entrant.

c) Whether or not the entry is caused by mistake or intent, the same result eventuates -- the true owner is ousted from possession. In either event his neglect to seek recovery of possession, within the requisite time, is in all probability the result of a lack of knowledge that he is being deprived of possession of lands to which he has title.