Chapter 12: Nontraditional Writing Techniques

Chapter Outline:

§ 12.1 SYNTHESIZING AUTHORITY

The ability to compare and distinguish cases and apply statutes or rules are critical legal skills. Another writing strategy that can strengthen an argument is called synthesizing authority. To synthesize authority is to combine multiple forms of authority in an analysis.

Two possible methods of synthesizing authority are discussed in this chapter.

Synthesizing Primary and Secondary Authority

Secondary authority is an excellent source of definitions and it is a good strategy to use secondary authority to define a critical term. This definition then leads to an application of a case or statute that uses the term.

Analyzing Statutes and Rules: Review

When relying on statutes and rules, the author should break the rules into elements in his or her notes and discuss key elements in the memorandum. Let's assume the following statute is being analyzed:

> **Statute 123.010**
> Any person who knowingly and intentionally takes the life of another person is guilty of murder.

Arguing That a Statute or Rule Applies

To establish the applicability of a statute or rule, each element of the rule must be shown to apply. For instance, in applying the statute above, the author might state, "The defendant hit the victim on the head with a hammer. The defendant was not drunk or on drugs at the time of the murder and stated he was simply upset with the victim. He certainly knew that the effects of a hammer hitting a person's head could be fatal and the hammer blow was not an accident. The defendant is, therefore, guilty of murder."

Arguing That a Statute or Rule Does Not Apply

To argue that a rule does not apply, the author must demonstrate that at least one element of the rule does not apply. If even a single element does not apply, the entire rule is invalid in that specific case. For instance, if the above statute were being applied, the author might argue, "The cited rule states that the person accused of the crime must 'knowingly and intentionally' commit the act. The defendant in this case was in a fit of rage because he had just been informed that the victim was having an affair with the defendant's wife. In that blind rage, the defendant picked up the nearest object, which happened to be the hammer, and flung it at the victim's chest. The victim ducked, bringing the trajectory of the hammer into contact with the victim's head. There was, therefore, no 'intention' on behalf of the defendant to commit murder."

Analyzing Secondary Authority

It is always better to rely on primary, rather than secondary, authority. Secondary authority is cited for one of the following purposes:

Definitions

Dictionaries and legal treatises (such as *Restatements*) are excellent sources of definitions. For instance, the author may want to define the term "gross negligence" in a legal memorandum.

General Discussion of Court Position

Some authorities, such as *A.L.R*. and *Restatements*, do an excellent job of relating the general attitude of courts regarding a specific legal issue. They may also explain how a legal train of thought evolved.

Again, one should cite secondary authority only in combination with primary authority. In summary, synthesize the authorities!

Example § 12.1(a) | Synthesizing Primary and Secondary Authority

1. *May the defendant prevent his spouse from testifying as to private conversations made with his spouse regarding a bank robbery?*

Generally, courts have ruled that one spouse may not be forced to testify against another spouse regarding private communications. However, there are exceptions to the rule.

Restatement (Second) of Torts provides a clear definition of the spousal communications privilege, and discusses how it applies.

> Privileges exist under the theory of law to protect certain private communication that society deems worthy of an extremely high degree of confidence, no matter how relevant the information might be.
>
> . . . Society places great value upon the marital unit. The integrity of the marital unit would be severely strained if both spouses knew that even the most private conversations between them could, at any time, be forcibly exposed to public light. Therefore, in the interest of marital harmony, the spousal communications privilege may be asserted by a party to a legal action to refuse to testify, or to prevent the defendant's spouse from testifying, regarding private communications made during the marriage.

Restatements (Second) of Torts §412 (2008)

In *Smith v. Jones*, 142 F.2d 1109 (10th Cir. 1983), the defendant was charged with robbery of a jewelry store. After the robbery, the plaintiff gave several of the stolen items to his wife, who reportedly wore them regularly after that event. According to one witness, the wife actually bragged that her husband had stolen one of the items. The prosecution offered the wife immunity from prosecution for any criminal acts related to the matter, and wanted her to testify. The trial court allowed the testimony, ruling that:

> The spousal communications privilege was originally established to protect the sanctity and harmony of the marriage. Where the conduct of both parties is such that there cannot be a reasonable expectation of sanctity and harmony within the marital relationship, there by definition can be no privilege. Such conduct exists in this case, making the privilege nonexistent.

Id. at 1113

The authorities above apply to the instant case. In both cases a defendant was charged with a criminal act. The wife in both cases was not involved in the original criminal act, but did benefit from the proceeds of the act. *Smith* establishes that such conduct renders the spousal communications privilege void, since it is in violation of the concept of "marital harmony," which is the foundation of the privilege, *Id*. at 145 F.2d 1113. Therefore, the wife in the defendant's case at bar should be required to testify.

Synthesizing Statutes and Cases

Statutory authority states the law. Case law interprets the statute. That combination can make a powerful legal argument. Quote a relevant statute or rule, then analyze a case that has applied that statute to a fact situation similar to your client's and your document will be powerful.

Example § 12.1(b) | Synthesizing Statutes and Cases

1. *May the defendant prevent his spouse from testifying about private conversations made with the spouse regarding a bank robbery?*

Statutory authority has addressed the issue of the marital, or spousal, communications privilege. Nev. Rev. Stat. § 445.150 states as follows: "Any private communication between a husband and wife not for the express purpose of perpetrating, aiding, or abetting a criminal offense is privileged."

Joseph v. James, 278 Nev. 749, 464 P.2d 892 (1979), involves a defendant who was charged with murder. After the murder, the defendant's spouse allegedly helped cover up the crime, burning bloody clothes and disposing of the gun used in the commission of the crime. The trial court ruled that such conduct was not protected by the privilege and that the wife, who had been given immunity, could be forced to testify. The Nevada Supreme Court upheld the trial court's decision, and held:

> In the case at bar, the determination that must be made is whether the defendant's wife, through her conduct, constructively waived the marital privilege. Since the wife furthered the criminal offense by her conduct, no privilege attaches. (N.R.S. 445.150) Therefore, the wife, no longer in legal jeopardy due to the proffered immunity, may not refuse to testify.

Id. at 752, 961 P.2d at 898

The authority above establishes that there is conduct that may render the spousal communications privilege invalid. In the instant case, as in *Joseph v. James*, a defendant attempted by the privilege to prevent a spouse from testifying, despite the fact that the spouse had in some way assisted in the cover-up of the criminal act now being charged. *Joseph v. James*, by applying Nev. Rev. Stat. § 445.150 (2002), provides limitations to the marital communications privilege. Therefore, no privilege should attach to the defendant in the instant case.

§ 12.2 CITING DISSENTING AUTHORITY

A researcher would normally refrain from relying on dissenting authority. Occasionally, you may find yourself in a situation in which your side has very little authority upon which to rely. When this happens, the author must sometimes decide whether or not to cite a dissenting opinion. There are at least two instances when citing a dissenting opinion may be permitted:

Distinguishing Facts
Citing a dissenting opinion may be a good strategy when the dissent provides commentary which demonstrates that, had the facts been different, the majority would have ruled differently. This is often a matter of the dissenting author providing more detail about why the majority came to its conclusion, indicating that if the distinguishing facts had been interpreted differently, the court would have ruled differently.

Literary Citations
Writers sometimes quote dissenting opinions for literary, rather than legal, reasons. Suppose, for example, that a judge makes a very eloquent comment on the history of free speech in a dissenting opinion in a case involving pornography. The case you are researching is about flag burning, like pornography a free speech issue. You may quote the dissenting opinion for literary value, but you cannot rely on the decision or logic of the court to influence the decision in your client's case.

Example § 12.2 | Citing Dissenting Authority

In *Smith v. State*, 154 Or. App. 71, 961 P.2d 228 (1998), the Court of Appeals of Oregon ruled that an officer's inquiry regarding a firearm after a traffic stop was "within the latitude granted" to police officers to provide for their own safety under reasonable circumstances (*Id*. at 72, 961 P.2d at 229). The dissenting opinion disagreed with the interpretation of the facts by the majority, holding that the officer was involved in appropriate circumstances to allow the inquiry. Had the majority agreed with this fact analysis, the decision of the court would most likely support the logic of the dissent as to application of the law.

Use with caution

A paralegal or lawyer could cite the above dissenting opinion, pointing out that the dissent was based on a disagreement of fact, not an argument of law. However, using dissenting authority is not a common occurrence.

Citing dissenting authority is often done out of desperation. The author should be aware that it can be viewed as an indication of weakness of the case, whether such is true or not. Be careful when citing a dissenting opinion.

CHAPTER 12 WRAP-UP

WHAT YOU SHOULD KNOW…

After reading this chapter you should know the following:

- *What it means to synthesize authority*
- *How to synthesize primary and secondary authority*
- *How to synthesize statutes and cases*
- *When it might be appropriate to rely on dissenting opinions*

ASSIGNMENTS

There are no assignments for this chapter.