CHAPTER 12

NONTRADITIONAL WRITING TECHNIQUES

Chapter Outline

VOLUME 2, CHAPTER 12

§ 12.1 Synthesizing Authority
§ 12.2 Citing Dissenting Authority
§ 12.3 Social Media

ASSIGNMENTS

There are no assignments for this chapter.

Chapter 12 Introduction

THE GREAT DISSENTER

Citing dissenting case law is a rarely used technique and should be approached with caution. However, there is one U.S. Supreme Court Justice who made his name, in large part, out of writing powerful and compelling dissenting opinions.

William O. Douglas

Born in 1898, William O. Douglas survived a difficult childhood. He overcame polio at age 4, lost his father at age 6, and struggled with poverty throughout his early life. Yet he became the longest serving Justice in the history of the Supreme Court.

It was not an easy road. When Douglas arrived in New York City in 1922 to attend Columbia Law School, he had only six cents in his pocket.

Nominated by F.D.R.

After graduating from law school, Douglas was hired by a prestigious N.Y. law firm. He later taught at Columbia and Yale Law Schools. In the mid-1930s he moved to Washington D.C. to work on Franklin Roosevelt's New Deal, part of his efforts to bring the country out of the Great Depression. In 1939, Roosevelt nominated Douglas as an Associate Justice to the U.S. Supreme Court. Douglas was an ardent advocate of civil rights. He also believed in regulating business and strengthening antitrust laws.

Douglas found himself dissenting from the majority in many cases. Because his dissents were often more powerful and compelling than the majority opinions, Douglas earned the moniker "The Great Dissenter." He retired from the court in 1975 following a stroke. William O. Douglas died in 1980.

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SYNTHESIZING PRIMARY & SECONDARY

SYNTHESIZING CASES & STATUTES

CITING DISSENTING AUTHORITY

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§ 12.1

Synthesizing Authority

Reinforcing Analysis

ALMOST THERE

The last couple of chapters in this textbook are not demanding or strenuous. That is by design. If you have gotten to this point you have learned the foundational skills you need to be a paralegal.

These chapters give you a chance to expand skills already possessed, enhance knowledge already obtained, and enables you to proceed in your career with the mindset of an advocate.

Do not relax quite yet. The skills presented in these last pages may be the skills that give you an edge in seeking employment.

These skills will certainly be part of the foundation upon which you build your paralegal career. The stronger that foundation, the higher your career can go.

As we said when we started. This is *your* career, so give it everything you've got!

CASES. STATUTES. COURT RULES. REGULATIONS. SECONDARY SOURCES.

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. This can result in a much more powerful legal argument. The opposing party, and the court, must deal with two authorities working in concert.

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

SYNTHESIZING PRIMARY AND SECONDARY AUTHORITY

Secondary authority is an excellent source of definitions 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 Secondary Authority

It is almost always safer 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. In addition, in specialty fields, such as intellectual property or medical malpractice, secondary authority is often needed to define certain technical terms or medical procedures.

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 other words, synthesize the authorities!

EXAMPLE | SYNTHESIZING PRIMARY AND SECONDARY AUTHORITY

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 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 the instant case and in *Smith*, 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.

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QUICK REVIEW: ANALYZING ENACTED LAW (STATUTES AND RULES)

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 impaired by alcohol or 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."

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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 | 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:

   > Any private communication between a husband and wife not for the express purpose of perpetrating, aiding, or abetting a criminal offense is privileged.

   In *Joseph v. James*, 278 Nev. 749, 464 P.2d 892 (1979), the defendant 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 provides limitations to the marital communications privilege.

Therefore, no privilege should attach to the defendant in the instant case.

§ 12.2

Citing Dissenting Authority

Never, ever rely on a dissenting opinion. (But if you do...)

A researcher would normally refrain from relying on dissenting authority. After all, a dissenting opinion does not carry the weight of law. Occasionally, you may find yourself in a situation in which your side has little authority upon which to rely. When this happens, the author must sometimes decide whether to cite a dissenting opinion. There are at least three instances when citing a dissenting opinion may be considered:

Responding to the opposing party's reliance on a case
If the opposing party has cited a case and that case has a dissent that works in your favor it may be a good strategy to cite to the dissent. Also, if the opposing party has already cited a dissent, you may consider doing so. Of course, in that case it may be even better strategy to go to the majority opinion within the same case.

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.