

assignments in some stage of completion at one time. Welcome to the real world, folks! We receive the first drafts. The students are then invited to review the material in the follow-up sections at the back of the text. We open the class for general discussion on the law, on approaches to writing, and on the strategic aspects of the problem. This can be a good opportunity to do some role-plays involving the characters of the problem. The results from those role-plays can then be included as part of the background facts for later drafts of the assignment. This is also the time to discuss some of the general guidance we provide throughout the text. The advice may focus on writing, legal analysis, or strategy.

At the second meeting of the class, we assign the second problem. We alternate between litigation and nonlitigation exercises. If the course is co-taught, that spreads the instructor workload. We also have found the students enjoy the variation. However, nothing prevents doing all litigation exercises first and then all transactional exercises, or vice versa.

Instructor evaluation of the student drafts now begins. Evan applies red ink to paper. Don will prepare a general e-message to the class that addresses common problems that have shown up in many drafts. He will then prepare individual e-messages to each student that addresses their first drafts. Both of our comments address strategic, legal, and writing problems. Some matters will clearly be wrong. The student has misread a precedent case. The student has forgotten to include a verb in the sentence. The tone of the letter insults a valued client's intelligence. We normally make clear that change is needed but do not specify exactly what the change should be. Other matters invite the student to explain more of their thinking. Do you really think the Smith precedent can be taken that far? Does your attempt at humor help or hinder your message? Does your conclusion leave the other party a graceful exit from her ill-considered position? Our invitation is to a hard rethinking of "what the writing is trying to do." The student can appropriately respond: "I appreciate your concerns, but I think this sentence needs to be a tough demand rather than a soft invitation to rethink." From those critiques and from the in-class comments, students prepare the second drafts. Some students will have gotten it nearly right the first time on some exercises. The second draft may be their final. Other students may have misunderstood the assignment, misread the law, or made other major errors. Total restarts are not unknown.

In this fashion, we move through the semester. We normally take one or two weeks in which we do not make a new assignment to allow students to

catch up with the papers that are outstanding (in the less positive sense of the word) and deal with midterms, seminar papers, interview trips, and the like.

Final evaluations are by letter grade. We don't encourage pass/fail students and we have resisted requests to make the course credit/no credit. We tell the students from the start that we will not be giving them grades on individual drafts or assignments. We do promise to inform anyone who appears to be working at below a B- level. This is idiosyncratic with us. We don't want the students to lose the learning in the search for grades. We also explain that grades on each assignment will be a combination of a grade for the initial draft and for the final draft. Clearly, the students benefit from our suggestions. That should be rewarded, but not to the extent of making irrelevant the student's performance on the first draft.

Is there a danger of cheating? Of course there is. However, we don't provide model answers anywhere in the text or Teachers' Manual. Further, there is not "one right answer." Student strategies for the problems may differ and different writings may be satisfactory. We emphasize to our students that the value of the course and text is in doing this for themselves. Make the mistakes here rather than when a live client depends on the excellence of your work. We like the following analogy: Would you cheat your way through getting your pilot's license?

That is our approach. There is nothing magic about it. It also reflects the considerable generosity of the University of Maine School of Law in letting us team-teach classes of twelve to fifteen students.

We want to offer some thoughts on variants of our approach to the course. Most obviously, an instructor can choose to do only the litigation or only the transactional exercises. Law firm or agency seminars may find this appropriate depending on their practice. A single instructor or multiple instructors with larger classes may need to reduce the number of problems. We think much of the learning of the course can be achieved using six or eight problems. It will reduce the instructor workload and offer more time for individual evaluations. Lastly, we encourage instructors to create a problem or two of their own to reflect their expertise or to highlight the practice area to be emphasized. Please share with us variants that you use. We aren't persuaded that we have it perfect.

Introduction to Chapters One, Three, Five, Seven, and Nine

All of your work in these chapters (our transactional or office practice chapters) takes place in the hypothetical universe of the University of Katahdin (UK). UK is the largest public university in the mythical American state of Katahdin. You may know the real Katahdin as Maine's magic mountain, beloved by Henry David Thoreau, among others.

UK was founded in 1874 shortly after the admission of the state of Katahdin to the United States. The Constitution of the state mandates the creation of "a public university to serve the citizens of Katahdin." It also authorizes the Katahdin State Legislature to make "appropriate laws" to govern the university.

UK is the largest educational institution, public or private, in Katahdin. Its 24,000 students and 2,200 faculty and staff work in a major research university that awards associate, bachelor's, master's, professional (including law), and doctoral degrees. While 70 percent of students are Katahdin residents, the remaining 30 percent come from all states of the United States and from 58 foreign nations. Several UK academic programs are ranked in the top ten in the United States. Faculty members in almost all departments are recruited from national and international markets and are expected to be both excellent teachers and significant published scholars in their fields.

The UK is governed by a fifteen-member Board of Trustees. Trustees are appointed by the governor of Katahdin with the approval of the Katahdin State Senate. State law does not specify any qualifications to be a trustee. In practice, the majority of trustees are alumni of UK who are involved in some business or civic activity in the state. The board fairly represents the racial, religious, and gender percentages of the population of the state.

Although the Katahdin Legislature has the constitutional authority to make “appropriate laws” for UK, its major connection to the campus comes in setting the biennial budget for the university. On other occasions, the legislature may pass statutes governing the UK. However, long-standing tradition has been that the legislature lets the trustees run the university both through the enactment of University of Katahdin Regulations and in making individual decisions on important governance matters (e.g., appointment of major campus leaders, approval of academic programs, the discipline of students). The trustees and the university take pride in being “above partisan politics,” a position that has wide popular support in the state.

Four years ago the trustees appointed Dr. Susan McBee as president of UK after a national search. Dr. McBee is an eminent soil scientist by profession who has progressed from department chair to dean to academic vice president at two other state universities prior to being appointed president at UK. Her tenure has been highly successful by most measures and the trustees have just appointed her to another five-year term with a substantial raise in salary.

Dr. McBee has overall responsibility for the administration of the UK. She serves at the pleasure of the trustees and works with them in the governance of the university. The relationship follows the model of the corporate board of directors and chief executive officer. Board members typically are fully employed at other work and can dedicate only a portion of their life to university governance. Some have prior work experience in a university setting. Most do not. By contrast, the president is expected to devote herself full-time to the work of the university, and it approaches a 24/7/365 commitment.

A university like UK is as complex and expensive as a small city. It owns and manages property. It employs a workforce of several thousand. It engages in a wide variety of activities beyond the teaching of classes. Its budget runs to the hundreds of millions of dollars.

Not surprisingly, an enterprise of this complexity generates legal work. UK does much of this work through the office of University Legal Counsel. The analogy to an in-house counsel for a business corporation or the city attorney for a municipality is an accurate one. Much legal work will be done entirely by the legal counsel’s lawyers. Some matters (e.g., work involving intellectual property rights in UK symbols, logos, or faculty inventions) may be sent to outside specialist counsel.

At any one time, the lawyers of the legal counsel’s office may be engaged in a wide variety of work. They may be asked to advise the president and other

members of UK leadership on legal matters. These can range from an informal phone call to a request for a written opinion. The lawyers may be involved in drafting contracts to which the university is a party or handling matters that involve the UK's considerable physical plant and grounds. They may be involved in handling claims for and against the university (e.g., a university truck ran into my house) either short of court or in formal litigation. Your client, the university as governed by its trustees and the officers of the university, can become involved in a fascinating range of legal matters. You will be exposed to a few in the problems that follow.

You also need to remember that as a public university, UK and its leaders are acting as government and government officers. This becomes important because the Constitution of the United States and the Constitution of the state of Katahdin apply to conduct of the UK. The UK's actions, taken by its officers and employees, can implicate such important constitutional rights as freedom of speech, protections from unreasonable searches and seizures, guarantees of equal protection of the law, and entitlement to due process of law before persons are deprived of life, liberty, or property.

Introduction to Chapters Two, Four, Six, Eight, and Ten

The litigation assignments in this book (Chapters [Two](#), [Four](#), [Six](#), [Eight](#), and [Ten](#)) start from the premise that the answer to every important legal question is “It depends.” Therefore, as a litigator, your first task is to figure out what it depends on. After that, you need to gather what you need to put your case in the best possible position to reach a reasonable desired outcome.

As you will see from the litigation chapters, the strategic process begins with gathering the necessary facts to tell your client’s “story” from start to finish (Chapter [Two](#): How to Draft a Complaint). Sometimes it involves the application of a dispositive rule that might win your case as a matter of law (Chapter [Four](#): How to Draft a Motion). Other times it involves strategic choices about what to say and what not to say (Chapter [Six](#): How to Respond to a Motion). Periodically, you will also need to step back from your advocacy and consider your strategic position from the perspective of the most important target audience: the judge (Chapter [Eight](#): How to Draft a Judicial Opinion). Finally, you need to avoid getting trapped by short-term tactics and instead keep your strategic eyes on the litigation prize (Chapter [Ten](#): How to Draft a Motion for Summary Judgment).

To simplify matters, the five litigation assignments utilize only two fact patterns. Civil litigation is the subject of Chapters [Two](#), [Four](#), and [Ten](#), which utilize a fact pattern of a private person who is attempting to auction a sculpture that the federal government commissioned in the 1930s for display in a public setting. In Chapter [Two](#), you are an Assistant U.S. Attorney in the Civil Division who must draft a Complaint to recover the sculpture based on the common law action of replevin. That assignment emphasizes the facts of the case and how to present them in a way to advance your strategic goal of trying to convince the other side to settle. In Chapter [Four](#), you are the private attorney for the

woman who is attempting to auction the sculpture, and you prepare a motion to dismiss the government's complaint in order to advance your client's goals of minimizing litigation costs while educating the judge as to your "theme." In Chapter [Ten](#), you return to the role of a civil Assistant U.S. Attorney who has used the discovery process to gather the necessary evidence and admissions to win the case with a summary judgment motion.

Criminal litigation is the subject of Chapters [Six](#) and [Eight](#), which involve a defendant who has pled guilty to perjury and requests a more lenient sentence based on his motion for a "downward departure" from the federal sentencing guidelines. In Chapter [Six](#), you are an Assistant U.S. Attorney in the Criminal Division who must respond to the defendant's motion. That assignment emphasizes the strategic importance of the federal sentencing guidelines, which can yield vastly different results depending on small changes in the underlying facts. In Chapter [Eight](#), you are a judicial clerk who writes a draft opinion that rejects the government's arguments and grants the defendant's motion for leniency.

Overview

To help with strategic legal writing, we recommend two nonlegal books. For advice on *how* one writes, we recommend *The Elements of Style* by E. B. White and William Strunk, Jr. There are many imitators, but that classic remains the best and most concise guide to clear, crisp writing. For strategic advice on *why* one writes, we recommend *The Seven Habits of Highly Effective People* by Steven R. Covey. First published in 1990, it continues to be a business best seller today. You need to read the entire book for a full appreciation of its powerful insights, but one concept is particularly apt here: Covey's emphasis on what is effective. As applied to strategic legal writing, Covey might say that you need to begin each assignment "with the end in mind" and then work backwards to figure out what is necessary to achieve your goal.

Inspired by those two books, we offer the following summary of the most important elements of strategic legal writing:

1. Start by defining a reasonable goal and then gather what you need to advance your objective.
2. Develop a factual chronology that tells your client's "story" from start to finish.
3. Determine the general legal rules and exceptions, and their application in specific instances, so you can say with confidence: this is the controlling test.
4. Develop a theme and provide context so it is clear where your case fits in the larger scheme of things.
5. Organize your writing so the reader can follow the path of your argument without feeling "lost."
6. Argue by analogy so it is clear that justice is on your side because similar situations were treated the same way that you want your client to be treated.

7. Focus on the details and get to the point.
8. Select the words that are most appropriate to the situation.
9. Edit relentlessly because there is no such thing as good writing – just good rewriting.
10. Build credibility by verifying every assertion.

CHAPTER ONE

Prayer at the Athletic Banquet

You are an attorney in the office of the University Legal Counsel. Your boss, the Legal Counsel, has just given you the following file. She requests that you prepare the written opinion that she will provide to President McBee. Prepare the opinion.

THE UNIVERSITY OF KATAHDIN

To: University Legal Counsel
From: President Susan McBee
Re: Request to Open Athletic Banquet with a Prayer

Dear Counselor:

I've got a tough one for you. During my weekly Presidential Open Hour I was visited by two student athletes who are part of the student advisory committee for next month's Athletic Banquet. They politely, but strongly, requested that the Banquet be opened with what they called a "nondenominational prayer." I'm a soil scientist by training, but I do know from various Presidential Conferences that this is a sensitive issue for a public university like UK. There is also a legal dimension to it. I explained this to the students and promised I would get them an answer as soon as possible.

I need your advice in writing on this one. If the law provides a clear answer, I'd like to be able to quote that to the students and to any others with an interest in the issue. If the law doesn't provide a clear answer (and I've been around long enough to know that is often the case), I need your guidance as to how I should exercise my choice.

I have high respect for the two students. They are both fine scholars and probably headed for graduate or professional school. I don't want to blow them off on this.

THE UNIVERSITY OF KATAHDIN

To: Gary Hamilton, Athletic Director
From: Carla Martinez, Athletic Department Development Director
Re: Athletic Banquet

At your request, I have gathered some information about our annual University of Katahdin Athletic Banquet.

Our records show that the Banquet began in 1937. Prior to that time, individual teams would hold end-of-season functions. The Banquet was not meant to stop such functions. Rather the goal was to give all supporters of UK Athletics a single celebratory event each year and to allow our student-athletes, particularly in “minor” sports, a chance for wider recognition than provided by just a team-only event.

The Banquet has grown over the years. In recent years, attendance has ranged from 1,000 to 1,200 students, faculty and staff, and community supporters of UK Athletics. The Banquet is held on campus at the Activity Center. For at least the past two decades, a nationally or internationally known sports personality has served as speaker and guest of honor. The great majority of student athletes attend the banquet at no cost. The normal program includes a social hour, dinner, presentation of awards, and several speeches leading to the main address by the guest of honor. One speech is the Athletic Director’s annual “State of UK Athletics” presentation.

At least since the early 1960s, the Banquet has served as an opportunity to reward and encourage private donors to UK Athletic Programs. In recent years, private donations to UK athletic programs have raised over \$5 million annually. The Banquet, which receives excellent print and electronic media coverage, allows the School to honor major donors. An annual award is presented to our Fan of the Year.

Planning for the Banquet is the responsibility of my office. It is a year-round affair and involves all of our staff as well as other campus employees. Although we are advised by both a Student Advisory Committee and a Booster Club Advisory Committee, responsibility for the Banquet remains in this

office. We have found the two Advisory Committees are a useful way to build enthusiasm for the event and to get the perspectives of student-athletes and community supporters and major donors.

Let me know if I have missed anything.

E-mail message

To: Athletic Director Hamilton
From: Jeff Washington, Academic Counselor, UK Athletic
Department
Re: Prayer at the Athletic Banquet

You asked me to explore student-athlete sentiment about a request to begin the Athletic Banquet with a prayer. I know many of our student-athletes from my role in the academic counseling programs at UK. I talked to about a dozen student-athletes whom I know and respect about the issue. Most supported the idea of the prayer. A couple of international students, who I assume are not of the Christian faith, seemed confused or troubled about the request. I also talked to the two sports editors of the campus paper, the Daily Katahdin. Both were negative about the idea. They feared it might be divisive. They also said: "It sounds illegal to us. This is prayer in a public university."

Although I did not talk to them, I know the three students who serve on the Banquet Advisory Committee. All are outstanding students and leaders. Two are active members of the Coalition of Christian Athletes on campus. I respect their sincerity on this issue and hope we can do something for them and the majority of student-athletes who share their feelings. Don't let the ACLU liberal crazies scare you on this matter. They'd invite Osama to dinner if given half a chance.

Athletic Director Gary Hamilton
University of Katahdin

Dear Director Hamilton:

We serve as the Student Committee for the Athletic Banquet that will be held on May 4 of this year. We repeat the request we made informally to you that the Banquet be opened with a nondenominational prayer. Our conversations with our fellow student-athletes show us that this has strong support. For many of us, religious faith is an important part of our lives. Our athletic achievements are a reflection of our faiths. It seems highly appropriate to recognize that with a brief expression of appreciation to our Creator who guides and inspires us.

We are happy to work with you on this matter. Thank you.

Alicia Brooks, Co-Captain, Women's Swimming and Diving
Jeff Patterson, Captain, Men's Basketball
Shawn Jefferson, MVP, Men's Track and Field

E-mail message

To: UK Legal Counsel
From: Attorney Mary Kowalski, UK Assistant Legal
Counsel
Re: Athletic Banquet Prayer

Dear Boss: At your request, I've done some quick research on this fascinating problem. It takes me back to my Con Law classes at UK Law. Here is what I find.

Nothing in Katahdin statute law or UK regulations addresses the issue. I also find no Katahdin Supreme Court opinion that is even close to being on point. Ditto for any lower federal court cases that would be binding in Katahdin. Thus, we draw our law exclusively from United States Supreme Court cases. I attach relevant extracts from the two that seem the most pertinent and the most current. They include citations to other Supreme Court prayer cases.

I've also done some informal research on UK practices going back a half century. There is no record of starting UK events (commencements, freshman orientations, major public lectures) with a prayer or moment of silence. I think we would be breaking new ground here if we approved the request. Don't let a few right-wing religious nut jobs change sound and constitutional UK practice. Let me know if I can be of further help.

LEE v. WEISMAN, 505 U.S. 577 (1992)

JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment [“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”] provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

[Nathan Bishop Middle School Principal Robert E. Lee invited a local rabbi to deliver a prayer at the Middle School graduation. Fourteen-year-old graduate Deborah Weisman and her father objected to the prayer and sought a permanent injunction that would bar such prayers in the future, including at Deborah’s anticipated later graduation from a Providence public high school.

Rabbi Gutterman’s invocation said: “God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may see justice, we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.”]

The school board . . . argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. . . .

The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. . . . On appeal the United States Court of Appeals for the First Circuit affirmed. . . .

[T]he controlling precedents as they related to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. . . . It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion, or religious faith, or tends to do so." . . . The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. . . . The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions" and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. . . . The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend. . . .

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed

by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .

Our decisions in *Engel v. Vitale* [370 U.S. 421 (1962) [forbidding a State Regent's prayer in public school] and *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) [forbidding mandated reading from the Bible or recitation of the Lord's Prayer or both] recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group, or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . .

We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . . And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. . . . The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands. . . .

The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found,