of torts involving, as it were, harm to reputation." Why not "Defamation is a tort action for harm to reputation"?

9. Reexamine paragraph structure. The first sentence should introduce the paragraph or summarize its contents.

10. Spelling. Any time that you would not give fifty-to-one odds that your spelling is correct, use the dictionary.

EVALUATE THESE FIRST-DRAFT EXCERPTS OF THE MELTON TERMINATION LETTER

1. The University of Katahdin has certain expectations of all faculty. They include, as most important, student evaluations of professors' teaching ability. We also look for a certain amount of scholastic publication or work. Lastly, a more intangible element is that all teachers approach their interactions with students with some amount of enthusiasm.

2. I have solicited advice from the university's legal counsel and have taken note of their recommendations for properly denying reappointment to Melton.

3. Although this policy provides for due process for faculty members, it may cause the university to be vulnerable to unnecessary litigation.

4. Professor Melton's community activism risks becoming another impediment to the quality of his teaching. I have concerns about the future effect his activism might have on his classroom performance. He has been arrested at least once for interfering with lawful hunting activity. Should he continue to seek arrest in an effort to bear witness to his personal beliefs, he may prove physically unable to teach.

5. It would be in the best interest of both the university and Melton's career for him to move on next year.

6. The university acknowledges Professor Melton's strength and passion for the community. However, unfortunately, under the UK's policy on employment, the university is not allowed to take these great credentials into account during the decision-making process.

IN-CLASS ROLE-PLAYING EXERCISES

1. The vice president receives a call from the chairperson of the Faculty Appointments Committee at a university in a neighboring state. He says, "We are considering Professor Herman Melton for a position in our Sociology Department. Professor Melton tells us he is considering leaving the University of

Katahdin because a reduction in legislative funding is starving the Sociology Department and making it difficult for him to do his research work. Is that correct?" The vice president apologizes to the chairperson for "an urgent meeting starting in five minutes" and sets a time for a return call. She immediately calls the counsel's office for advice. What do you tell her?

2. The vice president receives a phone call from the education reporter from the major Katahdin City daily newspaper. The reporter has a reputation for accuracy in reporting and doggedness in searching for facts. The reporter asks, "My sources tell me that the administration is unhappy with Herman Melton and plans to 'dump him.' We'd like your comment before we run our story." Once again, you stall for time and consult with the university counsel's office.

Almost certainly, the university will be reactive in this case. Legal and ethical standards regarding personnel matters would stop the campus from releasing a "Professor Melton terminated" news release to the press and electronic media. Even if those standards would not apply, the UK administration most probably doesn't want to make a public splash. Melton is gone and the less the community knows about it the better.

However, here the university's hand is being forced. The reporter's question ("plans to 'dump him'") suggests that someone, possibly Melton himself, has tipped off the press. A wide variety of motives can be imagined. Quite probably, the university spokesperson or senior official would have a standard response: "We don't talk about personnel decisions." However, that puts the university in the position of "refusing comment" or "failing to return our phone calls" when the story comes out. Particularly, if the rest of the story is favorable to Professor Melton, "no comment" may equal "bad press" for the university.

You should recognize that lawyers and journalists worship different gods. The lawyer may feel that personnel decisions are sacred and are not to be discussed with outsiders (the entire community if the press reports the story). This protects the interests of both the employer and the employee. The lawyer may also believe that conversations between attorney and client should be protected absolutely from public disclosure. Imagine that the academic vice president's letter to university counsel has been disclosed to a reporter by a whistleblower in a university office.

Those values are not likely to interest the journalist. She will contend that her obligation is to disclose the truth (or what appears to be the truth)

to the citizens of the community. The citizens can both decide whether this is newsworthy and whether it is true. Is one profession right and the other wrong? Not in any absolute sense. Each feels it is serving public goals in the values it defends.

With those thoughts in mind, craft your media response in the Melton termination matter.

Chapter Five Mr. Blaustein's Gift

As you review your first draft of the Development Office's letter to the Trustees, consider the following matters.

1. The most obvious objective of your letter is to persuade the Board of Trustees to accept the gift that will create the Blaustein Prize. Your initial reaction may be: "Well, of course, they will accept $500,000. How hard can that be?" Not so fast! Charitable organizations, including universities, can turn down gifts for a variety of reasons. The gift may not be consistent with the mission of the institution. The institution may not wish to link the donor's name with its mission. Would your university's business school be eager to begin the Kenneth Lay Program in Business Ethics? The gift may require scarce institutional dollars for maintenance and renovation. In addition, in the UK's case, the terms of the gift may run afoul of the school policy on nondiscrimination. You need a well-considered and persuasive advocacy document. An unstated purpose of your letter to the Trustees is to brag about the accomplishments of your office. This is the happy case of the potential donor contacting the university. Nevertheless, you can take credit for working with Mr. Blaustein to develop what you believe is a very attractive gift for the university. You don't have to spell this out in the letter. Nevertheless, you would want the members of the Board of Trustees and your bosses in the university to say, "Well done, Development Office."

2. A second audience for the letter is Mr. Blaustein. We would hope that Mr. Blaustein would regard the letter as a proper recognition of his generosity. This is only common courtesy on your part. It also recognizes the development officer's mantra that the best prospect for a future gift is someone who has already given. Some donors genuinely seek anonymity in their giving. This may be explained by personal modesty or by a desire to avoid letting other charities know of their wealth and generosity. However, our experience is that most

donors combine a desire to do good with a wish to be recognized for their generosity.

Mr. Blaustein seems quite comfortable to have his name associated with the university. The letter should provide a concise description of Mr. Blaustein, the gift, and his charitable objectives. If you have doubts about any matters (e.g., "One of Mr. Blaustein's more creative ventures was helping launch Iran's nuclear research program"), check with the donor or omit the item.

3. The difficult issue is the nondiscrimination provision. You don't want to create problems that may not be there. However, knowing that several Trustees closely monitor gifts for violations of the UK Regulation on Discrimination, we think you are best to be proactive. You should convey the following message: The Development Office is very sensitive to the nondiscrimination regulation and supports it fully. Here is why we believe that the Blaustein gift does not pose a problem.

THE HIERARCHY OF LEGAL AUTHORITY

In your assignments so far, you have encountered different forms of law. These include constitutional provisions (the religion clauses and the due process clause of the United States Constitution and the provision of the Katahdin Constitution that establishes the University of Katahdin), interpretations of the Constitution by the United States Supreme Court (*Lee*, *Santa Fe*, and *Roth*), provisions of Katahdin statutes (the authorization to create a faculty tenure system), and administrative regulations (the UK tenure regulations, the nondiscrimination provision in Blaustein, or the regulations on the use of UK facilities). Often several provisions or opinions may be involved in a single problem.

During our years of teaching, we have been reminded that law school does not always do a good job of explaining the hierarchies that determine which legal authority will control in a matter. Our attempt to provide guidelines follows.

It is useful to remember that all three branches of the state and national government are lawmakers. Legislatures (Congress and the state legislatures) write statutes. Officers of the Executive Branch (serving the president or a state governor) write regulations pursuant to a delegation of power from the legislature or pursuant to their independent authority. Courts (state and federal) both interpret laws made by the other branches and make law on their own as they create the common law of many fields (typically the work of state courts) and do the equivalent in areas where a single constitutional or statutory

provision (e.g., "due process of law" or "conspiracy in restraint of trade") is hardly self-explanatory.

Which laws control? Let us assume that we are operating using solely federal or state law on a matter. The highest authority is the Constitution of the United States or the State of Katahdin. The Constitution would override contrary legislation, administrative regulation, or individual action of a government official. Where the constitutional provision is clear, it may not be necessary to resort to a court to explain whether the constitutional provision applies to our factual situation. For example, if the Congress passed a law forbidding the exercise of the Lutheran faith, the law would clearly violate the First Amendment. Similarly, if the Katahdin Legislature abolished the University of Katahdin, the Katahdin Constitutional provision establishing the university would invalidate the work of the Legislature. Where the application of the constitutional provision is not so clear, we may need a decision like *Lee*, *Santa Fe*, or *Roth* to establish what the Constitution means.

The United States Constitution is specific about the powers given to the Congress to enact laws. Article I, Section 8 sets out the powers of Congress and the additional "necessary and proper" powers to carry out the specified powers. As constitutional law makes clear, many of those delegations are not self-explanatory. Recall the number of cases explaining what "interstate commerce" was or was not.

State constitutions generally do not follow the federal model. Typically, the state constitution gives all "legislative power" to the State Legislature without explaining what that is. In general, the State Legislature has all powers over matters within the state that do not infringe on powers of the federal government or that do not violate specific provisions of the state or federal constitutions, typically ones protecting individual rights or defining the authority of other units of government (e.g., local governments, the state university).

Here, it is worth emphasizing that the Legislature also has power over the common law or other matters that may typically been thought the province of the courts. As an example, the Rule Against Perpetuities in property or doctrines of medical negligence were originally created by the courts as the laws of property and torts evolved case by case in English and American courts. Is the Legislature free to intervene and change a 500-year-old doctrine of the common law? Yes, it is, and it can do it in a rushed piece of legislation at session's end that has barely been read by most members of the Legislature. In essence, the wisdom and deliberation of the most scholarly jurists can be overridden

by the legislator whose garbled answer about the Rule Against Perpetuities barely got her a passing grade on her property exam. If the court is unhappy about the change of "its" law, its basis for challenge is that the Legislature has violated the Constitution in what it has done. Moreover, in general, federal and state constitutions don't mandate public policy choices. That is the work of the Legislature.

The third level of law is the administrative regulation. Typically, the Legislature has enacted a statute to advance some aspect of public policy (cleaner air, healthier workplaces, more competitive business conditions). The Legislature normally writes in broad terms. Who is responsible for seeing that a law to ensure "healthy working conditions" means that Joe's print shop can't use paper cutters that lack protective devices? The normal legislative approach is to delegate that authority to a specialized agency that either already exists or is created by the new legislation. The statute normally includes language like "The Workplace Safety Commission shall have the power to draft appropriate regulations to implement this legislation." That is delegated legislation. The Legislature passes on its power to a specialized agency. That specialized agency can then draft and implement regulations that may be precise to the extreme. "No workplace may use a paper cutter without a protective device that prevents the worker's hands from coming within four inches of the cutter's blade."

Several factors explain the desire for delegation. First is legislative time. Imagine if the Legislature needed to draft every provision like the "four-inch rule." Sessions would be endless. Second is expertise. The average legislator may have only a modest understanding of the workings of a print shop and its equipment. He or she either would need a fast education on the subject or would have to rely on other legislators, staff, or lobbyists to explain what was going on. Far better to turn the work over to professionals whose full-time job is to understand workplace safety issues. Third, legislators may be most comfortable working in general terms and leaving hard specifics to the professionals in administrative agencies. The legislator, conscious of the next election, may be happy to be on the side of clean air that is reflected in a general legislative enactment. He or she may be very reluctant to write the regulation that forces a local employer to close down to prevent an excessive release of air pollutants. The legislator who rails against "bureaucrats gone mad" needs to reflect that the Legislature could have addressed the precise issue that caused the factory closure.

Railing against "bureaucrats" also extends to the view that regulations aren't really "law." If the regulation (any of our UK regulations, for example) is authorized by a specific or general grant of power to the administrator or agency, is properly implemented as a matter of procedure (including matters such as appropriate public notice), and does not violate the Constitution, it is law. Executive agencies and the courts will enforce it as such.

A final level of law is the acts of persons in authority, even if they proceed without reliance on specific regulations. Return to President McBee's role in the Banquet Prayer matter. Neither Katahdin statute nor a regulation of the UK tells her what to do about the request. However, her broad duties to lead the university give her jurisdiction over this decision because it involves a university-sponsored function taking place on university property. If there were not a constitutional objection to the practice, she would be free to support or oppose the prayer.

Note that administrative regulations will govern individual actions even if the individual actor has the power to enact and change the regulations. One of the most common errors of executives in either government or the private sector is a failure to follow their own regulations. If the matter is challenged in court or an administrative agency, the action may be invalidated and the executive told to "follow your own rules."

The previous sections indicate the hierarchy of laws. Constitutions control statutes, administrative regulations, and individual decisions. Statutes control administrative regulations and individual decisions. Administrative regulations control individual decisions. Judicial precedents may either interpret any of the other sources of law or define common law rules to govern the area. Be ready to run through the hierarchy as you assess which provisions of law govern your situation.

A final thought on the hierarchy. From a legal perspective, the lawyer will always be happier relying on a constitutional provision than a statute than an administrative regulation. In working in the real world, however, your most persuasive argument may come from the local rulebook or set of regulations. For example, you may want to persuade President McBee that she should not allow the prayer at the Athletic Banquet. Which line of argument is more likely to be effective? "President McBee, the First Amendment to the United States Constitution would regard this as an impermissible establishment of religion," or "President McBee, UK regulation 14.27, enacted by your immediate bosses, the Trustees of the university, says: 'No prayer shall be allowed at any university-sponsored function.'"

EVALUATE THESE FIRST-DRAFT EXTRACTS FROM THE BLAUSTEIN LETTER

1. Mr. Blaustein is an expert in nuclear engineering. Through his work designing nuclear plants, he has amassed a considerable amount of personal wealth.

2. Although at first glance Mr. Blaustein's wishes and the UK Regulations seem incompatible, I believe that it is possible to accept the generous gift and also uphold the Regulations.

3. This regulation was adopted in the 1960s when the civil rights movement caused discomfort for many donors and the university.

4. As UK Development Director, it is my duty to present all proposed private gifts to the Board for consideration.

5. If the university is unable to accept Mr. Blaustein's terms, the university should accommodate his wishes as completely as possible.

6. UK Regulation 26–18 requires the Board of Trustees to accept all gifts offered.

IN-CLASS ROLE-PLAYING EXERCISES

1. In your role as Legal Counsel to the Development Office, you have been asked to meet with the Development Officers and Mr. Blaustein. You have reviewed the UK Regulations on Nondiscrimination and the File Memoranda on prior interpretations of the Regulation. Be prepared to discuss the Regulations and Mr. Blaustein's wishes in a way that can preserve the gift and satisfy any reasonable concerns about a violation of the Regulation.

2. From past practice, you know that it is desirable not to surprise the Board of Trustees. You can envision a worst-case scenario if the Trustees first encounter the Blaustein gift at their meeting. Some Trustees question Mr. Blaustein's motives in public meeting. This controversy receives significant media coverage. Mr. Blaustein then angrily withdraws his gift from UK and offers it to your regional rival in the nuclear engineering field.

You ask for, and are granted, a private meeting with two key members of the Trustees' Committee on Gifts and Grants. Both Trustees are among the strongest supporters of the nondiscrimination policy. Discuss the Blaustein gift with the Trustees. Try to reach an agreement that will satisfy any concerns they may have about the gift. These Trustees can then be your advocates before the full Board.

CHAPTER SEVEN COUNSELING DEAN COVELLI

This may seem the least "legal" of our problems. We have no constitutional provision to interpret. No binding regulations guide the actions of the university and define the rights of the party opposing it. Yet there is a legal backdrop to the problem and the potential for legal consequences if matters are handled poorly. Among the issues that should be addressed:

1. What is your strategic objective in writing the letter? Do you regard Sharon as a superb, hard-to-replace employee who has a minor blind spot? Alternatively, does her failure to respond to your "friendly chat" about the poker games indicate that her virtues are overcome by a major flaw? That decision should guide your entire approach.

2. A crucial aspect of that choice of approach turns on the question: What is Sharon doing that is wrong? Do you object to gambling for money in general? Is Sharon abusing a power relationship? Is she playing favorites in a way that a student affairs administrator should not do? Does the conduct risk bad, even if unfair, publicity? All or some of the above? You want to be very careful that you don't set out an objection or two. Sharon corrects to meet your objections. You then still remain unhappy with the poker games.

3. Do you start with the carrot or the stick? Some praise of Sharon's excellent work is appropriate. Possibly, another recent letter has already done this: "You know from last week's performance review letter how much I think of your work." However, too much praise can hide the degree of your concern. Conversely, you should recognize that human beings tend to be much more alert to hearing criticism than praise. All of your kind words can be lost in one negative sentence.

4. What use, if any, do you make of the state gambling laws and the Staff Handbook? The first is clearly substantive criminal law. Does it clearly exempt Sharon's games from any possible criminal penalty? Or is there some room for unease even if you suspect a prosecutor would not prosecute the case? Then there's the Handbook. By its terms, it is not legally binding. Even if it were, what exactly is its guidance? If you decide to quote it, use the whole quote. Sharon is very likely to notice your omission of the language about her judgment being the best guide.

5. How insistent are you about change? Are you ordering, strongly suggesting, or leaving the ultimate decision in Sharon's hands now that you have made your formal written expression of concern?

6. What happens to the letter? The most serious sanction would be to place the letter in Sharon's official personnel file. Once there, it can have a variety of later harmful consequences for Sharon in promotions, pay increases, eligibility for awards, or recommendations for other positions. A less formal disposition of the letter ("I'll keep this in my files") may provide a record of the disagreement with fewer serious consequences. Alternatively, are there advantages of not making clear to Sharon what you propose to do with the letter?

7. Does the letter make clear what Sharon is expected to do (e.g., stop the games immediately, report back to you for further discussion)? Again, is it useful to leave uncertainty in Sharon's mind?

8. A final, minor point. What is the appropriate salutation to the letter? "Dear Sharon" is the most casual and probably reflects how you address her in office conversation. "Dear Ms. Covelli" helps express the seriousness of your concern. "Dear Assistant Dean Covelli" sounds positively icy.

WRITING FOR THE LAYPERSON

A colleague of ours often remarked on the tendency of lawyers to refer to the rest of the world as "nonlawyers." He wondered whether accountants or plumbers divided the world into "nonaccountants" or "nonplumbers."

Lawyerly arrogance aside, it is useful to remember that legal training imparts habits of mind that do show up in legal writing. If your primary audience for a writing is a judge or another lawyer, you can probably assume that those are shared habits.

However, as you have already seen, often the subject of your transactional writing will be a "nonlawyer." The Covelli problem illustrates this point. The lawyer is assisting a nonlawyer professional in writing to another nonlawyer professional. Let's review points worth remembering when writing for the layperson.

1. Not all laypersons are alike. We have known nonlaw-trained government officials whose legal knowledge in their particular realm is profound. Thirty years of work as the Motor Vehicle Department expert on license suspensions may give the government official a sophistication that far surpasses that of the

lawyer who has just encountered the topic. Be particularly cautious when the official says, "Of course, you are the legal expert." In the Sharon Covelli matter, the Dean of Students may have twenty years of experience in working with the legalities of university personnel policies. At the other extreme, the primary audience for your writing may have limited education and limited exposure to the subject matter being discussed. The mere thought of contact with a lawyer may induce fear, confusion, or resentment. Lawyers need to remember that most of the population lives their lives with only rare contact with lawyers. Think carefully about the legal sophistication of your audience.

2. In general, the layperson wants "yes" or "no" answers. He or she is being asked to do or not do something. Legal issues are a part of that decision, possibly the major part. Where you can provide the "yes" or "no," "go" or "No Go" answer, you are likely to satisfy the client, even if he or she doesn't like your definitive answer. The ambiguous answer is tougher. "Counselor, what does 'yes, but' mean?" You should be able to explain the reasons for your ambiguity. You should also be able to spell out the consequences of different responses: "Client, you could move ahead without the government permit, but if the government disagrees with your interpretation, likely you will face a criminal prosecution. I think you are much safer applying for the permit."

3. Be attentive to your essential message. You want to convey it clearly. You may want to repeat it several times. The Athletic Banquet prayer situation provided a good illustration. Your message was that the prayer would be highly likely to be held unconstitutional if challenged in court. Yet your audience (the president) may have hoped for the opposite answer. Stating your conclusion at the start, in the middle, and at the end of your writing may be useful. The old maxim in military teaching is pertinent: "Tell them what you are going to tell them; tell them; tell them what you have told them." The recipient may still miss your message through stupidity or stubbornness, but it will be hard to fault your writing.

4. As the prior section suggests, people will hear what they want to hear. In writing to Dean Covelli, you want to be careful that the praise ("Sharon, you are the best Assistant Dean we have had in the last decade") doesn't mask the concern about the card games. You may want to use some "highlighters." "In conclusion, I want to emphasize the essential point – any gambling with students is wrong and can't be tolerated."

5. A corollary of point four is that while people hear what they want to hear, they can be very attentive to anything that sounds like criticism. Don recalls a letter reviewing a faculty member's performance during the year. Student and colleague reports praised the professor's teaching. The professor was a fine colleague and participant in university work. The professor had several capable works published during the year. Don thought his letter had mentioned all those things. He did, however, add a sentence that he worried that the professor's publications were trying to cover too broad an area and that depth was being sacrificed for breadth. The professor reacted as though Don had subtly signaled that she would be fired at the next opportunity. It took several lengthy conversations to repair that damage.

6. A crucial part of thinking strategically is to understand the goal(s) of the recipient of your writing. For example, in the Blaustein gift letter, you need to appreciate Mr. Blaustein's passion for revitalizing the field to which he has dedicated his career. That may help you craft the response to the allegation that his gift would violate the university nondiscrimination policy. Try to put yourself in the recipient's shoes.

7. Always in your writing for the layperson, try your best to translate legal words and phrases into language that the layperson will understand. Often, it is useful to explain the objective of the law: "The law punishes perjury because it is highly important to the workings of the court system that people will testify accurately to the facts within their knowledge."

SOME FIRST-DRAFT APPROACHES TO THE COVELLI LETTER

1. As the Dean of Student Affairs at UK, I like to touch base with my assistant deans from time to time to offer encouragement and guidance. I also believe it is important to acknowledge when a job is being well done.

2. The advice of the handbook is not legally binding, and you have broken no rules. The handbook, though, does highlight the problem in this situation. It is a problem of perception.

3. I admire you for opening your home up to students. I have no doubt that the poker game is a good way to stay involved with the student leaders.

4. Finally, I would like to inform you that this incident has not affected the university's overall impression of your job performance during your first six months as the Assistant Dean for Student Governance.

5. Although I am assured that there is no credence to any of the students' complaints, the fact is that some students feel left out.

6. Although I understand the games are part of bonding with the students, I am afraid the games will ultimately be counterproductive to your efforts. . . . While I am sure that you would not intentionally exclude a student, perception is sometimes greater than reality.

Chapter Nine Advising Professor Melton

How strategically were you thinking in your first draft? We discussed in Chapter Nine the university's strategic interests in the Melton matter. What are Professor Melton's strategic interests?

Quite obviously, that depends on Professor Melton's thoughts on professional and personal matters. Professor Melton may love his academic life and enjoy the University of Katahdin despite some tensions with colleagues. He may feel that he is playing a significant role statewide in a cause that is dear to his heart. Under those circumstances, the termination of his UK employment would be devastating. More materially, Professor Melton may have scouted the job market and found the pickings are slim. This may highlight the importance of money in any resolution of the situation. Quite possibly, your assessment of Professor Melton and his own confidential self-assessment is that he would be delighted to leave the university if only he can do so without financial or career damage. Those factors will help shape the strategies you want to lay out to Professor Melton.

What are the matters that the letter of advice to Professor Melton should address?

1. You should make clear that there are two legal theories in play. Success on either one could empower Professor Melton. The first is the constitutional procedural due process issue. Government, including the University of Katahdin, cannot deprive Professor Melton of "liberty" or "property" without providing "due process of law." You and Professor Melton will likely argue that "due process" would include the opportunity for a hearing with examination and cross-examination of witnesses, appropriate appellate review, and so on. It doesn't compel the university to rehire Professor Melton. However, it does give

him an opportunity to present his case for retention. It may also disclose the UK's real reasons for his termination.

2. Unfortunately, the *Roth* decision is a major impediment. The Supreme Court emphasized that "liberty" rights aren't implicated in the university's action. "Property" rights are to be defined by Katahdin law. That law (statute and UK regulation) gives very limited rights to one in Professor Melton's position. The facts are uncontradicted that the university has complied with Katahdin law in its decision not to renew Professor Melton's contract.

If that were Professor Melton's only claim, your letter of advice to him would probably need to conclude: "I see no plausible legal remedy for you." That might not mean total abandonment of the case. The lawyer may be useful in negotiating favorable terms of termination for Professor Melton (e.g., his hiring for some adjunct teaching or a favorable letter of recommendation to other employers). However, the university would be negotiating out of collegiality or convenience rather than because it is at risk of losing a lawsuit.

3. The news for Professor Melton isn't that bleak. His second legal theory relies on the First Amendment promise that government shall not infringe on rights of free speech. Suggestions in *Roth* (see the Douglas dissent) and direct guidance in *Doyle* make the point: Even if Professor Melton can be terminated for minimal reasons that need not be further justified, he CANNOT be terminated for exercise of his First Amendment rights. Your evidence gathering and the university's paper record provide some support for this argument. Your letter of advice to Professor Melton should spell out the strongest case you could make to support this point.

4. Are you a clear winner if Professor Melton decides to take the case to court? *Doyle* should indicate that you are not. We are in an interesting situation. The university has permissible reasons to terminate Melton. Those are stated in the president's letters to him. However, the university also may have relied on impermissible reasons (the expression of his anti-hunting views) in reaching the decision. *Doyle* provides some guidance in this situation. You may be already eager to get university witnesses under oath at deposition or trial to ask them some hard questions.

5. Are you ready to file a complaint that will begin *Melton v. The University of Katahdin*? You may have sufficient evidence to present a plausible legal case for your client. However, you should think hard about whether the matter should stay in the prelitigation negotiation stage somewhat longer.

6. Unlike other documents you have drafted, more may be better than less in this letter. Professor Melton is intensively involved in the proceedings. He is likely quite sophisticated about university practices. He may have had, or have acquired since his interests were at stake, some knowledge of Supreme Court law in this field. The advice letter that leaves out significant facts or law may invite his response: “Yes, but what about . . .”

7. Go back to the discussion of the Opinion Letter and follow the steps. We support the frequent use of pertinent quotations from the record rather than paraphrases. That is more accurate. It also takes some of the burden off you. “I’m not saying this, Professor Melton. That is exactly what your Department Chair said in writing. And, that will likely appear in open court testimony if we litigate.”

8. Then, you should provide your summary. Even as a sophisticated and legally interested client, Professor Melton wants to know, “Do I get my job back?” Very often the client will push you for the “Yes” or “No” answer. Much of your lawyer’s training prods you to always want to respond “Maybe.” Your effectiveness will depend on providing “Yes” or “No” answers unless the facts and law clearly call for a “Maybe.”

For example, consider the procedural due process question. It is possible the Supreme Court is ready to overrule or modify the *Roth* decision in a way that could give Professor Melton the hearing and witness examination that he wants. It is also possible that a trial court could interpret the UK regulation to require a more detailed explanation of what exactly was wrong with Professor Melton’s teaching and his scholarship. Does that persuade you to a “Maybe” answer?

9. Next Steps. We think your letter should suggest a next, and possibly final, face-to-face meeting. The letter provides a launching pad for that meeting. Professor Melton will have read and reread your advice. You may need to temper his inclination to accept the favorable portions of your letter and ignore the unfavorable ones. He may raise new facts or issues that may change your advice. Most probably, he is ready for you to push him to: “What Do I Do Next?” The choices: Terminate, negotiate, or litigate. Be ready to offer your argument to support one of the three.

FIRST-DRAFT EXCERPTS FROM THE MELTON CLIENT LETTER

1. As I stated earlier, UK has broad discretion in these decisions and can point to several permissible reasons for your nonretention, but I feel we have enough evidence indicating impermissible First Amendment violations to confront them.

2. I hope you do not see this letter as harsh, but in my opinion, your situation is unfortunate, but consists of no legal merit.

3. Unfortunately, most faculty in the Sociology Department have refused to speak to me about your review, though two persons acknowledged the tension between you and Henrici. However, neither of them has any desire to testify on your behalf, should you desire to go to trial. There is the possibility of subpoenaing them, but unwilling witnesses are not strong witnesses.

4. First, under the Fourteenth Amendment the university must provide you with due process when terminating your employment.

5. The UK's regulations appear to have complied fully with *Roth*.

MOVING FROM GOOD TO MEMORABLE STRATEGIC LEGAL WRITING

We have encouraged legal writing that accomplishes its strategic missions. There need be nothing memorable about the writing for it to do its job in exemplary fashion. In fact, that is all that the author may wish or need. Recall the observation about the athletic umpire or referee, about whom, when the contest ends, people should have to ask: "Who was the referee?" His or her performance has not gotten in the way of the game.

By the same token, the lawyer needs to be cautious when she or he becomes the story rather than the client. There will be situations in which the "celebrity lawyer" is hired as much for reputation as actual performance. The client very clearly wants the lawyer's identity known to judge, opposing counsel, jury, the media, and clients. The lawyer's style orally or in writing is a crucial part of that persona. If you have reached that stature, this book is not for you. As a beginning lawyer, you want to be very careful that elements of your character or personality do not reflect adversely on your client. Your writing offers one way of identifying you.

You need to remember that you are representing a client in most of your writing. That client could be facing a life-changing crisis in the legal matter

involved. You need to be careful about the use of colorful or memorable language even if the grammar is correct and the legal argument soundly presented.

As an example, you are representing a citizen who alleges that he was roughed up by a local police officer in a traffic stop. Your client has modest physical injuries and a witness or two who are ready to testify that the police officer made the first physical contact. That statement of the case seems rather dry and lacking in emotional appeal. So, you include in your letter or motion the phrase: "This outrageous behavior bespeaks Nazi Germany and the Gestapo rather than the streets of an American city." Is this vivid? Most probably. Is it strategic? Most probably not. The comparison is certainly excessive. You are equating an unfortunate, but predictable, citizen-police confrontation with one of history's worst episodes of genocide. Furthermore, references to Hitler, Nazis, and the Gestapo may have become so overused that your expression seems trite rather than vivid. Lastly, imagine the impact of your language on a judge or opposing counsel who had family members slaughtered by the Nazi reign of terror. You may have prejudiced your client's case with a poorly chosen analogy.

You should also remember that lawyers, like other professionals, can take a cynical view of the human condition. Humor is one way to respond. However, remember that the joke among lawyers may be the most important thing going on in the life of the client. The experienced federal judge for whom Don clerked once described a new judicial clerk who wrote his summary of the facts of a case in the form of a melodrama complete with "Ma" and "Pa" type characters. The judge concluded his summary: "After I fired the clerk . . ." Message received by the young clerks.

There can be ample reasons to restrain a literary flair or avoid a vivid image. However, there can also be excellent reasons for the well-considered writing that moves from the competent to the memorable.

Consider what we regard as examples of superb writing. We offer four examples, two written by judges and two by professional writers. See how you react to the paragraphs that follow. What examples of superb writing would you offer?

We start with a passage by Pulitzer Prize–winning historian Bruce Catton in his study of the Union Army of the Potomac during the Civil War. Catton is nearing the completion of his account of the Battle of Antietam in September 1862. The battle ended Confederate General Lee's first invasion of Northern Territory. It also still stands as the single bloodiest day in American combat history.

After horrendous losses on both sides, the Union forces reached a position from which they threatened to destroy the Confederate Army. It did not happen and Catton explains why:

> What had saved [the Confederates] was the arrival from Harper's Ferry of A. P. Hill and the leading brigades of his division, which was one of the most famous organizations in the whole Confederate Army. These soldiers came upon the field at precisely the right time and place, after a terrible seventeen-mile forced march from Harper's Ferry, in which exhausted men fell out of ranks by the score and Hill himself urged laggards on with the point of his sword. A more careful and methodical general (any one of the Federal corps commanders for instance) would have set a slower pace, keeping his men together, mindful of the certainty of excessive straggling on too strenuous a march – and would have arrived, with all his men present or accounted for, a couple of hours too late to do any good. Hill drove his men so cruelly that he left fully half his division panting along the roadside – but he got up those who were left in time to stave off disaster and keep the war going for two and one-half more years.

Our second example comes from the opening paragraphs of Ernest Hemingway's short story, "Big Two-Hearted River, Part I." This is young Hemingway, no older than most of you reading this book. In an eventful life he has already worked as a journalist and been wounded in World War I. Here, his alter ego Nick Adams is doing nothing more consequent than going fishing. See how Hemingway sets the scene:

> The train went on up the track out of sight, around one of the hills of burnt timber. Nick sat down on the bundle of canvas and bedding the baggage man had pitched out of the door of the baggage car. There was no town, nothing but the rails and the burned-over country. The thirteen saloons that had lined the one street of Seney had not left a trace. The foundations of the Mansion House hotel stuck up above the ground. The stone was chipped and split by the fire. It was all that was left of the town of Seney. Even the surface had been burned off the ground.
>
> Nick looked at the burned-over stretch of hillside, where he had expected to find the scattered houses of the town and then walked down the railroad track to the bridge over the river. The river was there. It swirled against the log spiles of the bridge. Nick looked down into the clear, brown water, colored from the pebbly bottom, and watched the trout keeping themselves steady in the current with wavering fins. As he watched them they changed their positions by quick angles, only to hold steady in the fast water again. Nick watched them for a long time.

Our third and fourth examples are from United States Supreme Court opinions. In both cases, these are not the opinions of the Court in the case. That frees the author from the burden of having to craft language that will stand as precedent. However, both Justice Robert Jackson and Justice Antonin Scalia would rank in the top ten of the Supreme Court's outstanding writers.

A colleague pointed out that Justice Jackson was such an effective writer because he was the last justice who was not law school educated. Rather, Jackson was admitted to the Bar of the State of New York after serving an appropriate law office apprenticeship. We leave it to your judgment whether Jackson's facility with a phrase is due to his having escaped three years of the paper chase of law school.

Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) is a utility rate case, normally not a subject that inspires scintillating judicial prose. Justice Jackson, writing for himself, identifies the difficulty of determining what prices (rates) can be charged for natural resources like natural gas.

> The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own.

Forty years later, Justice Antonin Scalia crafted an opinion in a case no more exciting on its facts than *Hope Natural Gas*. *Morrison v. Olson* involved the balance of powers between the Congress and the Executive Branch. Specifically, the Court was asked to decide under what circumstances Congress could create special prosecutors to monitor wrongdoing in the Executive Branch, which normally has the power to determine when violations of the criminal law should be prosecuted. Justice Scalia examined the congressional intrusion on the powers of the president and attorney general.

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish – so that 'a gradual concentration of the several powers in the same department' . . . can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."*Morrison v. Olson*, 487 U.S. 654 (1988) (J. Scalia dissenting).

What are the virtues of these four very different passages? First, they are clear. You don't have to wonder at the author's meaning. Ideas move along logically.

Second, there are few wasted words. I have difficulty removing words or phrases from the passages without changing meaning and usually harming it. This is true despite the fact that Catton's passage uses complex sentences that would violate our advice on brevity of sentences. Hemingway, by contrast, rarely uses a word of over eight letters and has sentences as short as four or five words.

Third, the words that are used paint a picture. You can imagine preparing to fish on the Big Two Hearted River or exploring for a natural gas field from the descriptions provided by Hemingway and Jackson.

Fourth, the authors don't overstate. Writing about war can inspire purple prose that misses reality. Catton realizes there is no need for flowery phrases. He is describing one of history's bloodiest battles and the one that gave rise to Lincoln's Emancipation Proclamation. He reports the facts with a crushing summation of how timing can be everything in warfare. He ends with the stark reminder of what resulted from General Hill's superb military leadership. Similarly, Justice Scalia suggests the larger issue of governmental power that resides in this rather obscure challenge to legislation.

Fifth, when the authors want to create a memorable phrase, they do so. "This wolf comes as a wolf." "The wit of Midas and the wealth of man." "Even the surface had been burned off the ground." "Hill himself urged the laggards on with the point of his sword." As you prepare your writings, consider whether there is a vivid phrasing that can make your meaning even clearer and leave the reader persuaded by your analogy or turn of phrase.

Index

Aberrant behavior, 111
Administrative Procedure Act, 79
advice letter, 158
arbitrary and capricious, 80
Assistant U.S. Attorney, viii
audience, 17

Board of Regents v. Roth, 52

Certificate of Service, 89
cheating, xix
complaint, 16
Constitution, 186

Defenses, 34
denials, 35
document drafting, 98
documents, 20, 168
Don, vii
Doughty v. Sullivan, 66
drafts, xii

editing, vii
e-mail, 177
evaluation, xviii
Evan, vii

facts, 34

Hierarchy of legal authority, 185

immunity, 78
Interrogatories, 165

journalists, 183

Labor Department Art Project, 25
laypersons, 191
Lee v. Weisman, 8
legislature, 185
litigation, viii

motion, 33
motion for downward departure, 101
motion to dismiss, 60

non-lawyers, 191
Notice pleading, 37

office practice, xvii

perjury, 102
pleadings, 33
point of view, 37
procedural due process, 196
Prosecution Version, 102

regulation, 186
replevin, 19

Santa Fe School District v. Doe, 175
Seariver Maritime Financial Holdings, Inc. v. Pena, 71
self-editing, xii, 181
Sentencing Guidelines, 122

signature block, 86
Smith v. Fortenberry, 72
standard form, 17
standard of review, 82
summary judgment, 85

tenure, 52
transactional writing, 16
United States v. Orrega, 118
United States v. Bailey, 116

United States v. Langille, 142
United States v. Steinmetz, 169
University of Katahdin, xxi

venue, 63