

Legal Analysis *and* Writing

Third Edition



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CHAPTER 6

Issue Identification

Outline

- I. Introduction
- II. Definition and Types
- III. Elements
- IV. Issue Identification: Client's Case
- V. Issue Identification: Case Law
- VI. Key Points Checklist: *Identifying the Issue*
- VII. Application

Learning Objectives

After completing this chapter, you should understand:

- What a legal issue is and the various types of issues
- The elements of an issue
- How to identify (spot) the issue in a client's case
- How to identify the issue in a court case



It was the late afternoon of an already long day when Kevin realized he still had a lot of work to finish before he could go home. Kevin has been Randi McGuire's paralegal for the past five years. He admires her for her tenacity and appreciates the responsibility and independence she gives him in the performance of his assignments. Kevin's primary role is to conduct the initial interview with the client, prepare a summary of the interview, and assemble a legal memorandum containing an identification of the legal issues and an analysis of the applicable law.

Identifying the legal issue is often the trickiest part of Kevin's job. It did not seem, however, that it would be too much of a problem in Ida Carry's case. He had just finished his interview with Ms. Carry,

whose home is across the street from Roosevelt Elementary School. Ms. Carry's best friend, Karen, lives a block away. Karen's seven-year-old son attends school at Roosevelt.

Last month, on April 14, Ida was in her front yard planting tulips. It was lunchtime, and children were playing in the playground. She heard the crossing guard's whistle blow and tires squealing. She looked up and saw a car approaching a curve in the school zone at a very high rate of speed. It jumped the curb, crashed through the chain-link fence surrounding the playground, and hit the seesaw. The first thing she recognized was the car—it was Bob Barton's hot-rod Camaro. It looked like he was going too fast, lost control on the curve in the school zone, and crashed through the fence.

Bob, a local teen, continually raced in the neighborhood. Several teachers complained to his parents, who had done nothing. Bob had received several speeding tickets.

The second thing Ida noticed was that two children playing on the seesaw were injured. One of them was Karen's son, Tim. When she realized it was Tim, she became extremely upset.

Since the wreck, Ida has severe insomnia and extreme anxiety. When she can sleep, she has nightmares. Her

doctor prescribed medication for her nerves and to help her sleep, and he recently referred her to a psychologist. Ida has come to Ms. McGuire's office seeking to recover the expenses she has incurred.

After summarizing the interview, Kevin focuses on the next task and asks himself, "What is the legal issue in this case?" The process of identifying the issue is the subject of this chapter. The Application section of this chapter discusses the answer to Kevin's question.

I. INTRODUCTION

The most important task a paralegal faces when engaging in legal analysis is to identify the legal issue correctly. Identifying the issue, commonly referred to as "spotting the issue," is the first step of the legal analysis process. Identifying the legal issue(s) presented by the fact situation is the foundation and key to effective legal analysis. It guides the researcher to the specific legal problem raised by the unique facts of the client's case. You must know what the legal problem is before you can begin to solve it. Identifying the issue determines which direction the research will take. It is like selecting a road—if you select the wrong road, you will waste a lot of time before you get to your destination or you may get lost and never get there. Half the battle of legal research and analysis is knowing what you are looking for, that is, what is the issue?

If you misidentify the issue (ask the wrong legal question), you waste time and commit legal error. If you ask the wrong question, you will get the wrong answer to the client's problem.

For Example If you incorrectly identify the issue as a contract law issue when it is really a corporation law issue, you will waste time researching contract law, and the answer you find will not apply to the client's case.

The client does not retain counsel to find the answer to the wrong question. The client pays to have a problem solved. If the issue is misidentified, the problem remains unsolved, time is wasted, and you are no better off than when you started. If the error is not caught, you may have committed malpractice because the client is billed for a service not requested.

Not only is identifying the issue the most important step in the analytical process, it is often the most difficult. When you ask a professional how to spot an issue, the response often is: "I just know" or "After a while it becomes intuitive." And indeed it does become intuitive after reading and working on hundreds of cases.

This, however, does not help the beginner. Although no simple rule or magic formula exists, there are techniques and steps that are helpful and useful when identifying the issue in a client's fact situation or a court opinion. The starting point is to know what an issue is—how it is defined.

II. DEFINITION AND TYPES

issue

The precise legal question raised by the specific facts of a dispute.

In the broadest sense, the **issue** is a question—the legal question raised by the dispute. It is the legal question that must be answered before a case can be resolved. It occurs whenever there is disagreement or uncertainty about whether or how a rule of law applies to a client's facts. In a narrower sense, it is the legal question raised by the specific facts of a dispute.

Issues may be broken into three broad categories.

1. A question of which law applies

For Example

Do the traffic code provisions of Municipal Code § 2254 or state statute § 35-6-7-28 apply when an individual is stopped in a municipality for driving under the influence of intoxicants?

2. A question of how a law applies

For Example

Under the provisions of Colorado battery law, does an individual commit a battery when the individual, present at the scene of a battery, encourages others to commit the battery but does not actively participate in the actual battering of the victim?

3. A question of whether a law applies at all

For Example

Does Municipal Code § 2100, Public Sales/Auctions, govern garage sales held on private property?

Regardless of the type of legal questions raised by a dispute, the definition is the same. *The issue is the legal question raised by the specific facts of the dispute.*

Now that you know what an issue is, the next step is to determine what it is composed of. Every issue is composed of elements, and these elements must be determined to identify the issue. Identifying the elements is the key to the process of identifying the issue. In fact, once you have determined the elements, the issue can be easily identified.

III. ELEMENTS

A client enters the law office with a unique fact situation that may or may not have a legal remedy. The role of the attorney is to identify the question raised by the facts and determine whether a legal remedy is available and, if so, what legal remedy is available. Because the issue is defined as the legal question raised by the specific

facts of the client's case, a correctly identified issue is composed of the three elements presented in Exhibit 6–1.

Applicable Law	The specific law that governs the dispute. It may be a constitutional provision, statute, regulation or ordinance, or case law doctrine, principle, rule, test or guide.
Legal Question	The question concerning the law governing the dispute raised by the facts of the dispute.
Key Facts	The legally significant facts that raise the legal question of how or whether the law governing the dispute applies. Facts that, if changed, would change or affect the outcome of the application of the law.

Exhibit 6–1

Elements of an Issue

A. Applicable Law

Applicable law is the specific law that governs the dispute. This may be a constitutional provision, statute, ordinance, regulation, or case law doctrine, principle, rule, test, or guide.

For Example Under Indiana Code § 35-42-3-2, kidnapping ...
According to Florida's law governing breach of contract, ...

B. Legal Question

This refers to the legal question concerning the law governing the dispute, raised by the facts of the dispute.

For Example ... does an individual commit a battery
... does kidnapping occur when ...
... is a contract breached when ...

C. Key Facts

Key facts are the key or legally significant facts that raise the legal question of how or whether the law governing the dispute applies.

For Example ... when the individual, present at the scene of a battery, encourages others to commit the battery but does not actively participate in the actual battering of the victim?
... when the individual is held against her will but is not held for ransom?
... when the product delivered is grade A- and the contract calls for grade A?

key fact(s)

The legally significant facts of a case that raise the legal question of how or whether the law governing the dispute applies—the facts upon which the outcome of the case is determined. They are the facts that establish or satisfy the elements of a cause of action and are necessary to prove or disprove a claim.

D. Examples

These three elements of the issue—the applicable law, the legal question concerning the law, and the key facts that raise the legal question—are referred to in this text as a **comprehensive, narrow, or specific statement of the issue**. An issue including these elements is comprehensive because it includes the specific law and key facts. It is a narrow statement of the issue because the more facts that are included, the more specific (or narrow) the legal question becomes. Identify each element as precisely and completely as possible. The following are examples of statements of issues containing the three elements:

- | | |
|---|---|
| ■ Under the holographic will statute, Colo. Rev. Stat. § 15-11-503, is a holographic will valid if it is handwritten by a neighbor at the direction of the testator, but not written in the testator's handwriting? | <p><i>(Applicable Law)</i></p> <p><i>(Legal Question)</i></p> <p><i>(Key Facts)</i></p> |
| ■ Under Arizona tort law, does a battery occur when law enforcement officers, while making a lawful arrest, encounter resistance, use force to overcome that resistance, and continue to use force after resistance ceases? | <p><i>(Applicable Law)</i></p> <p><i>(Legal Question)</i></p> <p><i>(Key Facts)</i></p> |
| ■ Does Municipal Code § 3362 permit the installation of a sign that is 20 feet high by 40 feet wide, more than 15 feet from the property line, and does not block the view of traffic? | <p><i>(Applicable Law)</i></p> <p><i>(Legal Question)</i></p> <p><i>(Key Facts)</i></p> |

Each of these examples contains the precise law, legal question, and the key facts essential to the resolution of the dispute. Note that the issue is narrowly focused upon the law and specific facts of the client's case. This is often referred to as a **narrow statement of the issue**.

Failure to include these elements results in an abstract question, a **broad statement of the issue** that is missing the legal (applicable law) and factual context.

For Example

If the three previous examples were stated broadly, and did not include the specific elements discussed in this section, they would appear respectively as follows:

- Was the will valid?
- Did the police commit a battery?
- Is the sign in violation of the municipal ordinance?

Each broad statement of the issue in this example could apply to a multitude of cases involving wills, batteries, or sign ordinance violations. Each issue fails to inform the researcher of the specific factual context of the dispute, the precise law involved, and the question that must be resolved to determine if, and what, remedy is available to the client. In short, an issue broadly identified is an issue not truly identified at all.

The importance of focusing on the elements of the issue and identifying the issue in terms of the elements is critical. It reduces the chance of misidentifying the question presented by the facts and helps guide the researcher, thereby saving time and effort.

The task is to identify these elements as precisely and completely as possible. There is some overlap between the discussion of key facts in Chapter 5 and this chapter because the identification of key facts is an integral part of issue identification. Refer to Chapter 7 for an in-depth discussion of how to present the issue, that is, how to draft the issue.

A paralegal or an attorney becomes involved in issue identification in two different but related situations:

1. Identifying the issue(s) in a client's case
2. Identifying the issue(s) in a court opinion

In each situation, it is necessary to determine the three elements of the issue to identify the issue correctly. The next two sections present recommended steps for identifying the issue in a client's case and in a court opinion.

IV. ISSUE IDENTIFICATION: CLIENT'S CASE

The client's fact situation presents a legal question (issue) or set of questions that must be identified before the case can be resolved. A helpful tool to keep in mind from the outset is the question: "*What must be decided about which facts?*" or, phrased another way, "*What question concerning which law is raised by these facts?*" This keeps you focused on the elements of the issue—the law, question, and key facts of the case. It helps you avoid being sidetracked by related or interesting questions raised by the facts that are not necessary to resolve the legal question(s) of the case. The value of keeping these questions in mind will be illustrated throughout this section.

Identifying the legal issue(s) in a client's case is primarily a four-step process (see Exhibit 6–2). Steps 1 through 3 are essentially the same as steps 1 through 4 of the Key Facts Identification: Client's Case section of Chapter 5. They are summarized here with different examples so that you will not have to refer to that chapter.

Steps in the identification or spotting of the issue in a client's case

- Step 1.** Identify each possible type of cause of action and area of law involved.
- Step 2.** Determine the elements of each cause of action identified in step 1.
- Step 3.** Determine which of the facts of the client's case apply to establish or satisfy the elements of each cause of action—the key facts.
- Step 4.** Assemble the issue from the law and key facts identified in steps 2 and 3. Follow the format—Rule of Law + Legal Question + Key Facts.

Exhibit 6–2

Issue Identification—Client's Case: Four Steps

A. Step 1: Identify Each Type of Cause of Action

Identify each type of cause of action and area of law possibly involved. The first step is to identify the potential cause(s) of action and area(s) of law raised by the client's fact situation.

For Example

Mary is stopped at a stoplight waiting for the light to change. She is drinking a soft drink. She has been stopped for about 10 seconds when a pickup, driven by Sam, slams into the back of her vehicle. Her automobile is knocked into the intersection and narrowly misses being struck by a vehicle passing through the intersection. Sam jumps out of his pickup, runs to Mary's vehicle, and screams at her that she should not have been stopped and she caused the wreck. Mary thinks he is either crazy or drugged. She is afraid he might hit her. He yanks open her vehicle door and pulls her out of the automobile screaming, "It's all your fault, it's all your fault." He pulls out a knife and waves it around. A couple of pedestrians approach, and Sam runs back to his pickup.

As a result of the incident, Mary suffered whiplash injuries and bruises on her arm, she experiences anxiety whenever she is stopped at a light, and she has severe insomnia. This hypothetical is referred to as the rear-end collision example throughout this chapter.

On the basis of experience and tort classes, the paralegal identifies four possible causes of action involving four broad areas of law: Was Sam's failure to stop negligence? Did he commit an assault? Did he commit a battery? Did his actions constitute intentional infliction of emotional distress?

This initial identification of the broad issues and areas of law may be expanded or reduced after subsequent research is conducted. The purpose is twofold.

- To identify in general terms the issues involved
- To provide a starting point for the identification and clarification of each specific issue that must be resolved in the case

B. Step 2: Determine the Elements of Each Cause of Action

Determine the elements of each cause of action identified in step 1. Steps 2, 3, and 4 should be applied separately to each potential issue or cause of action identified in step 1. In other words

- choose one potential issue identified in step 1
- apply steps 2, 3, and 4 to that issue
- complete the identification of that issue before addressing the next potential issue.

For Example

In the rear-end collision example, there are four broad issues and areas of law involved: negligence, assault, battery, and emotional distress. Choose one area, such as negligence, and complete steps 2 through 4. Be careful to identify and finish with that issue before addressing the next issue.

Focusing on one issue at a time avoids the confusion that may occur when dealing with multiple causes of action that often have overlapping elements. In this example, some of Sam's conduct may constitute elements of both assault and intentional infliction of emotional distress. Researching both issues at the same time could cause confusion.

Step 2 requires researching the area of law to determine the elements necessary to establish a cause of action.

For Example Using the rear-end collision example, suppose the paralegal begins with the issue involving intentional infliction of emotional distress.

Research reveals that the following elements must be established to prevail:

1. The defendant's conduct must be intentional.
2. The conduct must be extreme and outrageous.
3. There must be a causal connection between the defendant's conduct and the plaintiff's mental distress.
4. The plaintiff's mental distress must be extreme or severe.

Once the elements are identified, proceed to step 3.

C. Step 3: Determine the Key Facts

Determine which of the facts of the client's case apply to establish or satisfy the elements of each cause of action—the key facts. Steps 1 and 2 identify the law that must be included in the issue, and step 3 identifies the facts that must be included in the issue—the key facts.

Identify the key facts by determining which facts of the client's case apply to satisfy the requirements of each element of the cause of action.

For Example Using the rear-end collision example, apply the client's facts to the elements:

1. Defendant's conduct must be intentional. In this case, the defendant's running toward the client screaming, opening her car door, pulling her out, and waving his knife are the facts showing intentional conduct that satisfy or apply to establish this element. This conduct is clearly intentional.
2. The conduct must be extreme and outrageous. The acts identified in the first element are the facts showing extreme and outrageous conduct that establish this element.
3. There must be a causal connection between the defendant's conduct and the plaintiff's mental distress. Since the accident, the client has been unable to sleep and is anxious when stopped at a light. These facts satisfy the third element.
4. Plaintiff's distress must be extreme or severe. Anxiety whenever stopped at a light and severe insomnia are facts showing extreme or severe distress and are the facts that establish the fourth element.

By matching the facts with the required elements, the key facts of the emotional distress issue are identified. Because the question is how the law applies to the

facts, these facts become part of the issue and must be included. Once step 3 is completed, all the elements necessary to identify the issue are in place. All that is left is to proceed to step 4 and assemble the issue.

If there are no facts that satisfy or establish an element, there probably is no cause of action or issue. In this example, if Mary did not suffer anxiety or insomnia, there would be no facts that would meet the requirements of the fourth element, and there most likely would be no emotional distress issue.

D. Step 4: Assemble the Issue

The last step is the easiest. *Gather and assemble the elements of the issue from the law and key facts identified in steps 2 and 3.* The law is emotional distress, the legal question is whether emotional distress occurred, and the key facts are the facts identified in step 3. Putting it all together, the issue is as follows:

Under (name of state) law of emotional distress, does emotional distress occur when the driver of the rear vehicle in a rear-end collision runs screaming toward the other driver, opens her car door, pulls her out, and waves a knife, and the other driver suffers anxiety and insomnia as a result of the conduct?

The four steps presented here simplify the issue identification process by breaking it down into workable steps. It may not be necessary to follow all the steps. The issue may be apparent in step 1 or at some other point. This process, however, takes some of the mystery out of issue identification and provides a useful tool when the issues are not clear or easy to identify. It allows you to answer the question: “What question concerning which law is raised by the client’s facts?”

The answer to the emotional distress issue identified in the preceding example may be determined by reference to case law. The important thing to remember is that by concisely identifying the issue in the context of the key facts, the key facts are less likely to be overlooked. By including the key facts in the issue, the researcher’s focus is narrowed, and the researcher is less likely to omit a critical fact and thereby ignore a crucial line of inquiry or misidentify the issue entirely. In the rear-end collision example, it may be that Sam’s actions are not sufficiently outrageous to constitute emotional distress—maybe there is not sufficient evidence to connect the anxiety and insomnia to the acts or maybe the harm is not the type of harm for which relief is granted in emotional distress cases.

As mentioned in step 2, steps 2 through 4 are applied to each of the issues broadly identified in step 1. *Identify and address each issue separately and completely before proceeding to the next issue.* It may be that certain issues are eliminated as the other steps are followed, such as when research reveals that there are not sufficient facts present to support a cause of action. It may be that additional issues are identified as research takes place.

For Example

In the preceding example, it may be that emotional distress was not considered until research on another issue, such as assault, revealed a case with similar facts that included a discussion of emotional distress.

E. Multiple Issues

Often there are **multiple issues** in a case. In the rear-end collision example, there were four possible causes of action, each one involving a separate issue. Be sure to list

all the facts in the client's case and examine each one to determine whether it relates to any identified issue or in any way gives rise to a new issue. In the rear-end collision example, the fact that Mary was drinking a soda may not be important. The fact that Sam ran from his car rather than walked may be critical. It is important to ensure that all the facts are considered and nothing is overlooked. All potential issues should be identified, and the four-step process helps ensure nothing is missed.

Also, note that a single issue may have multiple parts or subissues.

For Example

In the rear-end collision example, the intentional infliction of emotional distress issue may have separate subissues.

- Was Sam's conduct sufficiently extreme and outrageous?
- Are anxiety and severe insomnia "extreme or severe distress" within the meaning of the law?

Each part or subissue should be considered and addressed separately.

Caveat: The steps presented in this section are useful tools and guides. These steps will usually help you quickly identify the issue. Remember that the process gets easier with experience.

V. ISSUE IDENTIFICATION: CASE LAW

This section focuses on the identification or spotting of the issue or issues in a court opinion. The issue is the legal question addressed and answered by the court. It is what the case is about. If you do not know what question was addressed by the court, it is possible to misunderstand the rule of law applied or adopted in the opinion. As a result, it is likely that you will misunderstand how or if the rule of law applies in your client's case.

This section does not address those situations where the issue is easily identified because the court clearly states the issue somewhere in the opinion.

For Example

"In this case we decide whether an individual's Fourth Amendment right to be free from unreasonable searches is violated when officers executing a search warrant for a stolen television search the individual's pockets and discover drugs."

This section is concerned with those situations where the identification of the issue is difficult because the court does not identify the issue, states the issue in such broad terms that it is not helpful, or states the issue in terms of the procedural context in which the case was brought before the court.

- *Issue not stated*—In some opinions, the court never clearly states what the issue is in the case.
- *Broad statement of the issue*—"The issue in this case is whether the defendant breached the contract."

Comment: This is a broad statement of the issue. It fails to inform the reader what the case is about. In the ultimate sense, the court decided whether the defen-

dant breached the contract, but in reality, it reached that conclusion by making a substantive decision concerning the specific facts of the defendant's conduct.

For Example The court may have concluded that the defendant's delivery of the order on time 95 percent of the time was substantial compliance with the contract and, therefore, not a breach.

■ *Issue stated in the procedural context*—"The issue in this case is whether the trial court erred when it granted the motion to suppress the evidence."

Comment: The court stated the issue in the context of how the case came before the court procedurally—an appeal of a trial court order granting a motion to suppress. To answer this question, the court actually addressed a substantive question raised by the facts of the case, and the substantive issue is what the case is actually about.

For Example The substantive issue decided was: "Under the provisions of the exclusionary rule, should evidence be suppressed when law enforcement officers obtained the evidence as a result of requiring the defendant to allow them to inspect the glove box when they were making a routine stop for speeding?"

Beginning students often make the mistake of identifying the issue in the procedural context stated by the court when, in reality, the issue involves a substantive determination of the application of the law to the facts of the case.

The goal when reading a case should be the identification of the substantive issue(s) in the case. Ask yourself when reading the case: "*What was decided about which facts in this case?*" or "*What question concerning which law and key facts was decided by the court?*" Like a client's case, a court case is about a dispute concerning how the law applies to the facts. Had there been no dispute involving how the law applied to the facts, the case would not have gone to trial. If your identification of the issue in a court opinion fails to include the rule of law applied and the key facts, you have failed to identify the issue correctly.

How, then, is issue identification in a court opinion accomplished? Again, there is no magic formula. The three-step process presented in Exhibit 6-3 is suggested as a useful tool. Steps 1 and 2 include the requirements of steps 1 through 3 of the Key Facts Identification: Case Law section discussed in Chapter 5. They are summarized here with a focus on the issue identification aspect of each step.

A. Step 1: General Question

The first part of this step is to *read the entire court opinion before attempting to identify the issue*. Important information concerning an issue may be scattered throughout the opinion. An initial reading of the entire case provides the researcher with an awareness of where information is located in the opinion and an overview of the case. This is helpful when you begin to analyze specific portions of the opinion. *Read the entire opinion at the outset, even if the court clearly identifies the issue.*

Steps in identifying or spotting the issue in a court opinion

Step 1. General question	Read the entire opinion before attempting to identify the issue. While reading, keep this question in mind: <i>What was decided about which facts in this case?</i>
Step 2. Look to the holding	Focus on the holding and ask the following questions: <i>To identify the law applied, ask:</i> What statute, rule of law, or principle did the court apply to reach its decision? <i>To identify the question addressed by the court, ask:</i> What legal question was addressed and answered by the holding? <i>To identify the key facts, ask:</i> Which of the facts presented in the case, if, changed, would change or affect the question addressed in the holding?
Step 3. Assemble the issue	Assemble the issue from the answers to the questions in step 2. Rule of Law + Legal Question + Key Facts.

Exhibit 6–3

Issue Identification: Case Law: Three Steps

While reading the case, keep in mind the question: “*What was decided about which facts in this case?*” This question helps keep your mind focused on what you need to look for while reading the case in order to identify the elements of the issue.

- “*What was decided?*” keeps the mind focused on searching for the legal issue that was resolved and the law necessary for its resolution.
- “*About which facts?*” keeps the mind focused on looking for the facts essential to the resolution of the legal question.

If you keep this question in mind as you read the case, you will stay focused on the essence of the case: the court’s application of a rule of law to the legal question raised by the facts. Asking this question forces you to keep the facts in mind as you read because you are aware that you must decide which of the facts relate to the holding.

Do not attempt to identify the issue(s) from the Syllabus or Headnotes of the opinion. As noted in Chapter 4, these are prepared by the publisher of the opinion. They are not part of the court opinion and are not intended to be used to identify the issue(s) addressed in the opinion.

If you have not identified the issue by the time you have finished reading the case, proceed to step 2.

B. Step 2: Look to the Holding

As noted in Chapter 4, the holding is the court’s application of the rule of law to the legal issue raised by the facts of the case. It is the court’s answer to the issue. In a court opinion, the key facts, legal question, and holding are all related. Finding one will help you find the others. Therefore, often the fastest way to track down the issue is to focus on the holding and ask the following questions:

1. *“What was decided in the holding?”* In other words, “What issue was addressed and answered by the holding?” This identifies the second element of the issue, the legal question addressed by the court.
2. *“What statute, rule of law, principle, and so on, did the court apply to reach this holding?”* This question helps identify the relevant rule of law, the first element of the issue.
3. *“Which of the facts presented in this case are related and necessary to the determination of the question identified as addressed in the holding?”* or *“Which of the facts, if changed, would change the outcome of the holding?”* These questions help identify the third element of the issue, the key facts.

By answering these questions, the elements of the issue are identified: the rule of law, question, and key facts. You can state the issue by adding the rule of law and key facts to the holding and stating the holding in question form. It sounds complicated, but it is not.

For Example

In a workers’ compensation case, the court presents several facts concerning the plaintiff before and after she joined a monastery, including the following:

1. Her duties as a monastic
2. Her written application for admission as a volunteer to the service of God
3. The written invitation from the monastery, which included an offer of spiritual guidance and room and board in exchange for volunteer service
4. Information concerning her previous career
5. The fact that she did not receive a paycheck
6. Her spiritual motivation
7. Her daily duties
8. The fact that she was injured while mopping the floor
9. Her family relationships
10. The fact that there was no contract of employment

The plaintiff appealed the decision of the trial court granting the defendant’s motion to dismiss for failure to state a claim. The issue is not stated in the opinion. The holding in the case was: “Plaintiff rendered services out of religious devotion as indicated by her application as a volunteer, lack of employment agreement, and lack of a paycheck; therefore, she was not an employee within the meaning of the law, and the trial court’s dismissal of the complaint is affirmed.” This example is referred to in this chapter as the monastery example.

A quick way to identify the issue in the case in this example is to focus on the holding and keep in mind the question: “What was decided about which facts to reach this holding?” Then, identify the elements of the issue by asking

1. *“What question was decided in this holding?”* The question decided is whether the plaintiff was an employee. The answer to this question provides the legal question element of the issue.
2. *“What rule of law or principle did the court apply to reach this holding?”* The answer to this question provides the rule of law element of the issue. It may be a

statute, case law principle, doctrine, and so on. Assume here it is the Workers' Compensation Act § 36-9-7.

3. *“Which facts mentioned in the opinion are related and necessary to the determination of the question of whether the plaintiff is an employee?”* The answer to this question provides the key facts element of the issue. In this case, the court focused on the written application as a volunteer, the absence of an employment agreement, and the lack of a paycheck. These facts, if changed, would probably change the outcome. If treated as a group, the changing of all these facts would change the outcome.

C. Step 3: Assemble the Issue

Assemble the identified elements in the Law + Legal Question + Key Facts format presented in Chapter 7. The rule of law is the Workers' Compensation Act § 36-9-7. The question is whether the plaintiff was an employee. The key facts are the written application for admission to the monastery as a volunteer, the absence of an employment agreement, and the lack of a paycheck. The issue, when assembled, is: “Under the provisions of Workers' Compensation Act § 36-9-7, is an individual an employee when the individual is admitted to a monastery upon a written application as a volunteer, does not receive a paycheck, and does not have an agreement of employment?”

D. Other Aids: Case Law Issue Identification

1. Concurring or Dissenting Opinion

In a concurring or dissenting opinion, the issue may be set out more clearly than in the majority opinion. Therefore, these opinions should not be overlooked when identifying the issue. Be aware, however, that the concurring or dissenting judge may have a different view of what the issue is, especially in the case of a dissent. Even if the formulation is different, the discussion of the issue by the concurring or dissenting judge may be helpful in determining the issue in the majority opinion.

2. Other Opinions

Reading other opinions cited in the case may provide guidance concerning the issue in the case you are researching. Also, reading a later court's discussion of the case may prove helpful, as it may summarize and clarify the issue in the case you are reading. *Shepard's Citator* will guide you to subsequent cases.

E. Multiple Issues

The foregoing discussion focuses on locating a single issue. Often there are multiple issues in a court opinion. Apply the steps discussed previously to all the issues in the case. Be sure to follow all the steps presented in this section completely when identifying an issue before proceeding to identify the next issue. Remember, for each issue, you must identify the rule of law, specific question, and relevant facts.

You may read a case to find the answer to a single question relevant to your client's fact situation or you may be looking for a specific legal principle, doctrine, or rule of law addressed by the court.

For Example

You are researching a court opinion that involves several torts, but you are interested only in the court's discussion of the emotional distress issue. Follow the steps mentioned previously to identify the emotional distress issue, but make sure that the court's resolution of the other issues does not in some way impact the emotional distress issue. You can accomplish this by reading the entire opinion and checking for any overlap of the issues or interconnectedness of the reasoning.

Caveat: As in the Issue Identification: Client's Case section, consider the steps presented in this section as useful tools and helpful guidelines. When followed, they will usually, but not always, help you quickly identify the issue in a court opinion. There are instances when the opinion is so obscure that you may not be able to identify the issue. Also, as you read more and more cases, a sort of intuition develops, and you may immediately spot the issue without the use of any of the steps.

VI. Key Points Checklist: *Identifying the Issue*

- ☐ When determining the issue(s) in a *client's case*, it is helpful to keep in mind the question: "What must be decided about which facts in this case?" This question helps keep the mind focused on the rule of law in conjunction with the facts.
- ☐ When identifying the issue(s) in a *court opinion*, as you read, keep asking the question: "What was decided about which facts in this opinion?" All cases are about how the law applies to facts. By keeping focused on the law and facts of the case, you are less likely to be sidetracked by issues and questions that do not need to be addressed.
- ☐ Address one issue at a time. For each issue under consideration, follow each of the steps presented in this chapter before proceeding to the next issue. In multiple issue cases, separate the issues and identify one completely before addressing the next one.
- ☐ When reading a court opinion or working on a client's case, keep in mind the three elements of the issue: *rule of law*, *question*, and *key facts*. This helps you stay focused on what you need to determine to identify the issue.
- ☐ Do not be concerned if you cannot immediately identify the issue or issues in a client's case. The complete identification of the issue may not take place until research is conducted, laws and cases read, and the required elements of the cause of action identified. The existence of additional issues likewise may not be known until research reveals their presence.
- ☐ Do not stop when you have identified one issue. Most cases have more than one legal question. Separate areas of law, such as torts and contracts, may occur in one fact situation. Always look for all possible causes of action that may arise from a fact situation.
- ☐ Use any technique that works for you. The steps suggested here are designed as guidelines to assist you. Use any or all of them and anything else that works.

VII. Application

This section presents two examples of issue identification. Each example illustrates the principles discussed throughout this chapter and includes a discussion of the application of those principles.

A. Client's Fact Situation

The following example involves the application of the principles to the hypothetical presented at the beginning of the chapter.

Step 1 *Identify each possible cause of action and area of law involved.* The first step is to identify each type of cause of action and area of law that may be raised by the client's fact situation. Kevin, as a result of his training, realizes that this is a civil, not a criminal, matter. No crime has been committed against Ms. Carry. He also knows that the applicable area of civil law is tort. By a process of elimination, as a result of his experience, he focuses on infliction of emotional distress. There is no assault or battery because there is no act directly or indirectly aimed at the client. Step 1 may require no research. Kevin may arrive at this point as a result solely of his education and experience, although he may realize, as he conducts research into the emotional distress issue, that other causes of action also are present. If more than one claim is identified, steps 2 through 4 are to be followed separately for each.

For Example If a part from the car flew off and hit Ms. Carry, there are potential battery or negligence issues, and Kevin would follow steps 2 through 4 for each issue.

Step 2 *Determine the elements of each cause of action identified in step 1.* Kevin's research reveals that emotional distress is a common law doctrine developed in case law. The legislature has not adopted a statute concerning emotional distress. The state's highest court has recognized the tort of intentional infliction of emotional distress. The court requires that the following elements be established to state a claim:

- Element 1 The defendant's conduct must be either intentional or grossly or recklessly negligent.
- Element 2 The conduct must be extreme and outrageous.
- Element 3 There must be a causal connection between the defendant's conduct and the plaintiff's mental distress.
- Element 4 The plaintiff's mental distress must be extreme or severe.

Step 3 *Determine which of the facts of the client's case apply to establish or satisfy the elements of each cause of action.* In other words, decide which of the facts are key facts.

- Element 1 Defendant's conduct of driving at a very high rate of speed, crashing through the fence, hitting the seesaw, and injuring plaintiff's friend's son are the facts that apply to satisfy the first element of intentional or grossly negligent conduct.

- Element 2 Driving through a school zone at an extremely high rate of speed is the fact that satisfies the second element of extreme or outrageous conduct.
- Element 3 Ms. Carry's insomnia and anxiety immediately after the event are facts that apply to the third element of causation.
- Element 4 Ms. Carry's anxiety and insomnia are extreme and apply to establish the fourth element.

If Kevin could not find a fact that would arguably apply to each element, there would be no issue involving that area of law, and that cause of action would have to be abandoned as a potential avenue of redress for Ms. Carry.

For Example If Ms. Carry did not suffer any anxiety or insomnia, there probably would be no cause of action for emotional distress.

Note: As discussed in the Issue Identification: Client's Case section of this chapter, you may not be certain whether a fact meets the established standard for an element. Just make sure there is some fact that *arguably* meets the requirements of each of the elements of the cause of action.

For Example A determination of whether Ms. Carry's insomnia and anxiety are extreme enough to warrant relief may not be decided until trial. But her symptoms are arguably sufficient to meet the requirements of the fourth element. If research reveals that this harm is not sufficiently extreme to meet the requirements of emotional distress, there is no emotional distress issue.

Step 4 Assemble the issue. Assemble the elements and state the issue. Kevin now has all the elements necessary to identify and state the issue: the area of law, the legal question, and the key facts. He identifies the issue as: "Under (name of state) tort law, does intentional infliction of emotional distress occur when a person suffers severe insomnia and anxiety as a result of witnessing a friend's child being injured by a vehicle that is out of control as a result of being driven at a high rate of speed through a school zone?"

By following the four steps, moving from a broad identification of the possible causes of action to the specific elements and facts involved under each cause of action, Kevin has identified an issue. He knows what must be decided about which facts for this cause of action. His research is focused on cases in which the conduct involved accidents in school zones where witnesses suffered harm similar to that of Ms. Carry.

If there were other possible causes of action identified in step 1, steps 2 through 4 would be followed for each potential cause.

B. Court Opinion

The following example illustrates the application of the principles to the identification of the issues in a court opinion. There are three steps to follow.

Step 1 General Question—While reading the case, keep in mind the general question: “What was decided about which facts in the case?”

Step 2 Look to the Holding—Identify the rule of law and key facts relevant to the holding.

Step 3 Assemble the Issue.

Read *Acacia Mutual Life Insurance Company v. American General Life Insurance Company* in the following text.

ACACIA MUTUAL LIFE
INSURANCE COMPANY,
et al., Plaintiffs,

v.

AMERICAN GENERAL LIFE
INSURANCE COMPANY, et
al., Involuntary Plaintiff,

111 N.M. 106, 802 P.2d 11 (1990)

OPINION

BACA, Justice.

Appellant David Silver was the general partner of the Santa Fe Private Equity Fund II, L.P. (SFPEF II), a limited partnership. He appeals from a court order that affirms a settlement agreement arrived upon by the limited partners through their receiver, John Clark, appellee.

The order distributes the assets of the limited partnership in order of priority mandated by the legislature in Section 54-2-23 of the Uniform Limited Partnership Act. *See* NMSA 1978, §§ 54-2-1 to -30 (Repl.Pamp. 1988). Silver claims that this order unjustly bars his contractual indemnification claim as set out in the partnership agreement. The right to contract is jealously guarded by this court, but if a contractual clause clearly contravenes a positive rule of law, it cannot be enforced, *General Electric Credit Corp. v. Tidenberg*,⁷⁸ N.M. 59, 428 P.2d 33 (1967). The indemnification clause clearly contravenes the order of priority in the distribution of assets of a dissolved limited partnership as set out by the legislature. We, therefore, affirm.

FACTS

In February 1987 the limited partners unanimously voted to terminate their failing partnership, which had shown a loss from the outset, and filed in district court for a confirmation of the dissolution of SFPEF II. They also voted to remove Silver as general partner, but allowed him to resign. Clark was named as receiver and published a notice of dissolution of the partnership in *The Santa Fe New Mexican* on March 23, 1987. This notice requested creditors to respond with claims against the partnership within fourteen days. Silver wrote a letter within this time, asserting his claim under the partnership agreement for indemnification and reimbursement from the partnership for any partnership debts he paid.

After the notification of dissolution, Clark began negotiations with known creditors of the limited partnership and a determination of the status of the SFPEF II. In analyzing the assets and liabilities of SFPEF II, Clark determined that the limited partners had contributed in excess of \$7 million, but he could document only \$2.4 million in investments. The estimated value of SFPEF II was eventually determined to be negative \$1.4 million, equaling a loss to the limited partners of \$8.4 million. Aside from checks written to the general partners in excess of \$1 million, the balance of the limited partners' contributions remains unaccounted for.

Clark determined the amount necessary to settle all creditors' claims and

on that basis made a third, partial capital call to limited partners to wind up affairs and terminate the partnership. At this point some of the limited partners refused to pay a third partial capital call, claiming other limited partners had not yet paid on the second call.

Approximately a year after the request for confirmation of dissolution was filed, the dispute finally was settled. Clark arrived upon a global settlement agreement that allowed creditors to be paid and the receivership to be terminated. Under the settlement the limited partners were to contribute a final \$1.3 million. The settlement agreement also provided for payment of creditors, distribution of any remaining liquid assets to the limited partners, and assignment of all of the partnership's claims against the general partners to one limited partner. Approval of the settlement by the court would bar all claims of creditors who had not asserted a claim. The motion for confirmation was served on Silver, who objected and asserted his indemnification claim from SFPEF II. This was over a year after notification of dissolution and the letter written by Silver to the receiver in March of 1987—the only notice of Silver's indemnification claim. The district court held that Silver's claim was untimely and approved the settlement that foreclosed Silver's indemnification claim. This appeal is taken from that order.

ISSUES—AND NON-ISSUES

Silver phrases the six points of his appeal in terms of his timely notice of a claim against the partnership and of an improper “bar” to this claim for indemnification, along with related claims of procedural due process, equal protection violations, and laches. We identify the issues differently.

We are dealing here with the time-worn principles underlying limited partnerships that restrict the potential li-

ability of a “limited” partner and hold a “general” partner to general, personal liability. “[L]imited partners * * * take no part in management, share profits and *do not share losses beyond their capital contributions to the firm.*” A. Bromberg, *Crane & Bromberg on Partnership*, § 26 at 143 (1968) (emphasis added).

Indemnifying a general partner for partnership debts by essentially forcing limited partners to pay for them violates the general public policy of limited partnership law. However, it is not necessary to decide this case on general policy grounds alone because such grounds are incorporated into specific statutory provisions that control the order of priority of distribution of assets in these circumstances, and the general partner is statutorily the last in priority. A court cannot depart from the express language of an act, but can only say what the legislature intended. *Security Escrow Corp. v. Taxation & Revenue Dep't*, 107 N.M. 540, 760 P.2d 1306 (Ct.App.1988); *State v. Michael R.*, 107 N.M. 794, 765 P.2d 767 (Ct.App.1988).

The partnership agreement itself supports our interpretation. Silver argues that in the partnership agreement a clause existed, 13(b), which provides that the “Partnership * * * shall indemnify * * * the General Partner [and] its partners * * * against all claims * * * incurred by them in connection with their activities on behalf of the Partnership * * *.” This clause, however, is subject to paragraph 6(f) of the partnership agreement, which deals with liability of limited partners and states in pertinent part: “No limited Partner shall be liable for any debts or obligations of the Partnership, including obligations in respect of indemnification provided in paragraph 13, in excess of its unpaid Capital Contribution * * *.”

The partnership was terminated, pursuant to its requirements, when the limited partners unanimously voted to

terminate. At this point the partnership, along with potential remaining capital calls, went into receivership and dissolution, and this dissolution came under the New Mexico Limited Partnership Act. NMSA 1978, Section 54-2-23 (Repl.Pamp.1988) sets out the order of priority for the distribution of assets:

- A. In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:
 - (1) those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners;
 - (2) those to *limited partners* in respect to their share of the profits and other compensation by way of income on their contributions;
 - (3) those to *limited partners* in respect to the capital of their contributions;
 - (4) those to *general partners* other than for capital and profits;

- (5) those to general partners in respect to profits;

- (6) those to general partners in respect to capital.

(Emphasis added.)

The law of New Mexico mandates that in a dissolution of a limited partnership, the limited partners are to be paid off before the general partners. The interpretation of the indemnification clause in the contract urged by Silver would have the general partners paid off *by* the limited partners. Since there are no assets left in this terminated partnership, to indemnify the general partner would require the limited partners to contribute even more funds to a dead entity. The clear language of a statute must be given its full meaning. *Schoonover v. Caudill*, 65 N.M. 335, 337 P.2d 402 (1959); *Weiser v. Albuquerque Oil & Gasoline Co.*, 64 N.M. 137, 325 P.2d 720 (1958). To indemnify the general partners would contravene this statute and is therefore unenforceable.

We AFFIRM.

IT IS SO ORDERED.

Step 1 General question. Read the entire case. While reading the case, ask yourself: “What did the court decide about which facts?” To answer this question, it is necessary to keep in mind the elements of the issue—the rule of law, legal question, and key facts. Keeping this question in mind helps you focus on these elements.

Step 2 Look to the holding. You probably cannot identify the issue after completing step 1. The court did not specifically state the issue, nor is the issue clear from a simple reading of the case. Follow step 2 and find the holding. Here, the holding is presented in the next to the last sentence: “To indemnify the general partners would contravene this statute and is therefore unenforceable.” Once identified, locate the elements of the issue relevant to this holding. Ask the following questions:

1. “What was decided in the holding?” In other words, “What legal question or issue was addressed and answered by the court?” Determine the answer to this question by looking to the holding and deciding what question was answered by the holding.

Here, Silver, a general partner and an appellant in the case, argued that section 13(b) of the partnership agreement allowed him to be reimbursed, by additional contributions from the limited partners, for partnership debts he paid. In other words, section 13(b) would require limited partners to share losses

beyond their capital contributions to the partnership and require limited partners to pay off general partners. The court held that the section, so interpreted, would clearly contravene the provisions of the statute. The legal question, then, is whether an interpretation of the section of the agreement that would require such payments by limited partners is enforceable.

In this case, it is difficult to identify the issue without this step because there is information included in the opinion that tends to mislead the reader.

For Example The last two sentences in the “Facts” section of the opinion indicate that the appeal was taken from a trial court ruling that Silver’s claim was untimely. With those statements, the reader is led to believe the case involves a timeliness issue and looks for the court’s discussion of that question. The court, however, never mentions timeliness in the rest of the opinion. By looking to the holding and following this step, the reader is directed to the issue actually decided by the court.

2. “*What statute, rule of law, or principle, did the court apply to reach this holding?*” In this case, the court looked to section 54-2-23 of the New Mexico Limited Partnership Act.

3. “*Which facts mentioned in the opinion are related and necessary to the determination of the question addressed in the holding?*” What are the key facts? In this case, as in many cases, the court presents several facts that have nothing to do with the holding. Usually these facts are presented to give the reader the background and context of the holding. The presentation of too many background facts, however, may mislead the reader and make it difficult to determine what the case is actually about.

This is especially true in this case. The opinion contains several paragraphs discussing the financial status of the partnership and the details of the global settlement agreement arranged by the receiver. So much is presented concerning these facts that the reader tends to focus on them, and not on the key facts that involve the provisions of the partnership agreement.

When the holding, however, is referred to and the question is asked, “Which facts are necessary or related to this holding?”, it is clear that the facts relevant to the holding are the facts concerning section 13(b) of the partnership agreement, and Silver’s interpretation of that section. The key facts are the section of the partnership agreement that provides that the partnership shall indemnify the general partner against all claims, and Silver’s interpretation of that section to require limited partners, upon dissolution of the partnership, to reimburse general partners with contributions beyond their capital contributions.

Step 3 Assemble the issue. The final step is to assemble the issue. All the elements have been identified in step 2.

- The rule of law is section 54-2-23 of the New Mexico Limited Partnership Act.
- The question is whether an indemnification provision of the partnership agreement is enforceable.
- The key fact is an interpretation of the indemnification provision that requires limited partners, upon dissolution of the partnership, to reim-

burse general partners with additional contributions beyond their capital contributions.

The assembled issue is: “Under the provisions of § 54-2-23 of the New Mexico Limited Partnership Act, is an indemnification provision of a partnership agreement enforceable when it is interpreted to require limited partners, upon dissolution of the partnership, to reimburse general partners with additional contributions beyond their capital contributions?”

Quick References

applicable law	000	key facts	000
broad statement of the issue	000	multiple issues	000
elements of an issue	000	narrow statement of	
issue	000	the issue	000

Summary

The most important task in analyzing a client’s case or reading a court opinion is to identify the issue(s) correctly. You must identify the problem before it can be solved. A misidentified issue results not only in wasted time but also in malpractice.

The issue is the precise legal question raised by the facts of the dispute. Therefore, each issue is unique because the facts of each case are different, and each issue must be narrowly stated within the context of the facts of that case. The issue is composed of the applicable law, the legal question relevant to the law, and the facts that raise the question. These elements must be precisely identified to determine the issue.

There is no magic formula. This chapter includes steps that help in issue identification. When working on a client’s case, there are four recommended steps.

1. Identify each area of law possibly involved.
2. Identify the elements necessary for a cause of action under each law identified in the first step.
3. Apply the elements of the law to the client’s facts to determine the key facts.
4. Assemble the issue from the law, elements, and key facts identified in the first three steps.

There are three steps to follow to identify the issue in a court opinion.

1. General question—while reading the case, keep in mind the question: “What was decided about which facts?”
2. Look to the holding to identify the rule of law, legal question, and key facts of the case.
3. Assemble the issue.

These are the recommended steps. They usually work when followed and are always helpful in focusing the practitioner’s attention on that which is essential—the rule of law, legal question, and facts.

Internet Resources

As of the date of the publication of this text, there are no Web sites dedicated specifically to issue identification. However, searching for “legal analysis spotting issues” using [http://www.google.com] will locate a wide range of Web sites that address some aspect of legal analysis and issue spotting. Some sites discuss identifying legal issues in specific areas such as labor law; others discuss the topic in relation to taking exams.

Exercises

Additional assignments are located on Online Companion and the Student CD-ROM accompanying the text.

ASSIGNMENT 1

Describe in detail the steps for identifying the issue(s) in a client’s case.

ASSIGNMENT 2

Describe in detail the steps for identifying the issue(s) in a court opinion.

ASSIGNMENT 3 STATUTES:

Criminal code section 18-760, Robbery.

A person who knowingly takes anything of value from the person or presence of another by use of force, threats, or intimidation commits robbery.

Criminal code section 18-773, Larceny. Any person who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind, with intent permanently to deprive another person of the use and benefit of property is guilty of larceny.

Facts: Over the years Larry borrowed several tools from his next door neighbor. Usually he returned the items, but on occasion he forgot. One of the tools he did not return is a drill. The neighbor goes to Larry’s house and tells him that if he doesn’t return the drill he will file criminal charges. Larry says, “I’m keeping your drill and if you try to come get it or file charges I’ll beat you up.”

Question: Identify the issue(s) involving criminal law raised by this fact situation.

ASSIGNMENT 4

Perform ASSIGNMENT 3 using your state’s larceny and robbery statutes.

ASSIGNMENT 5

Identify the issue in the following two fact situations.

Part A

Beth loaned Allen \$5,000. The agreement was oral. Allen commutes to a nearby city to work. Beth needs to go to the city three times in May. Allen told her he would give her three free rides to the city to help repay the loan. On one of the trips, Allen was not paying attention, lost control of the car, and wrecked. Beth suffered severe injuries and wants to sue Allen to recover damages.

The state automobile guest statute bars suits against drivers by automobile guests. The statute does not apply if the passenger confers a substantial benefit on the driver and that is the reason the driver provided the ride.

Part B

Tom and Alex are next-door neighbors. While arguing with Tom, Alex breaks Tom’s lawn chair, and as Alex begins to break more lawn furniture, Tom makes a citizen’s arrest of Alex. Tom’s sons help Tom, and after Alex is subdued, they continue to hit and kick him for a few moments. Alex wants to sue Tom.

The state's case law defines battery as unauthorized harmful contact; it also allows a citizen's arrest when the purpose is to prevent the destruction of property.

ASSIGNMENT 6

Part A

Read *Dean v. Dickey* in Appendix A. Identify the validity of the will issue.

Part B

Read *United States v. Martinez-Jimenez* in Appendix A. Identify the issue concerning whether the weapon was a dangerous weapon.

Part C

Read *Wolcott v. Wolcott* in Appendix A. Identify the issue concerning the modification of child support owing to a change of circumstances.

Part D

Read *People v. Sanders* in Appendix A. Identify the issue concerning the existence of spousal privilege for communications made in the presence of the children.

ASSIGNMENT 7

Read *Paur v. Rose City Dodge, Inc.* presented in the following text. Identify the battery issue involving defendants Green and DeVon.

PAUR v. ROSE CITY DODGE, INC.
438 P.2d 994 (Or. 1968)

HOLMAN, Justice.

Defendants in this action for damages for an alleged battery appeal from a judgment entered upon a jury verdict for plaintiff, assessing damages as \$5,000 general, \$499.50 special, and \$15,000 punitive.

Plaintiff, Louis Paur, was employed as a salesman at defendant Rose City Dodge (Rose City), a car dealership. Defendant Anthony ("Tony") Moss was employed as a lot boy at Rose City. Defendant Robert Green was general manager, and defendant James DeVon was sales manager.

Plaintiff testified that as he was leaving the Rose City premises, he was attacked from behind, knocked down, and beaten by defendant Moss. Plaintiff claims that defendants Green and DeVon directed Moss to commit the alleged battery. Prior to the attack, Green and DeVon had been informed that plaintiff had interfered with a deal between Rose City and a Mrs. Betty Tuttle, a friend of plaintiff. Plaintiff told Mrs. Tuttle not to sign a contract for the sale of an automobile which was tendered her, and he

marked changes on it which would have resulted in a substantial price reduction. As a result he had been discharged.

We first consider the assignments of error which challenge the denial of the motion of defendants Rose City, Green and DeVon for a directed verdict. The question presented is whether there was any substantial evidence to show that the individual defendants participated in the battery, and that defendant Rose City was liable vicariously.

There was testimony that Green, after learning of plaintiff's action, told plaintiff he was fired, and then told Moss in the presence of DeVon and plaintiff: "If Mr. Paur comes back throw him out." Later, according to plaintiff, Green told the plaintiff, who had come back to Rose City to return the keys of a car: "Get out of here, if you ever come back I will have you thrown out." According to plaintiff, he left the premises and then returned after noticing that Green had gone home. Plaintiff asked DeVon to assist plaintiff in collecting outstanding commissions. At the conclusion of their conversation, DeVon, according to plaintiff, made the following statements in the presence of Moss and plaintiff:

“* * * If you think I’m going to see that you get any of your commissions, you have coming after you screwed us out of a start of a deal you are carzy. * * *”

* * * * *

“* * * Get out of here. * * * I will have you thrown out.

* * * Well, you can’t lose an \$800 deal for us and want me to still be your friend. * * * Tony, throw him out. * * *”

The battery immediately followed.

To be liable for battery, each defendant must have participated in, aided, or procured the battery. *Tauscher v. Doernbecher Mfg. Co.*, 153 Or. 152, 160, 56 P.2d 318 (1936). The evidence that Green and DeVon told Moss to “throw out” plaintiff was sufficient to raise a jury question whether Moss’s battery upon plaintiff was pursuant to the directions of Green and DeVon.

Also, it was a jury question whether Green, as general manager, and DeVon, as sales manager, had authority to direct removal by force of unauthorized persons from Rose City’s premises. If either of them did, and such one as had authority ordered plaintiff’s removal pursuant to such authority, and excessive force was used in carrying out the order, the corporate principal is responsible for the resultant injury. 10 Fletcher, Corporations 463, § 4883.

“* * * where the use of force at times is part of the duty of the servant, the master is not excused from liability when the servant uses excessive, and even unjustifiable, force in the performance of his duty, and even though in so doing the servant disobeys positive instructions of the master. * * *” *Barry v. Oregon Trunk Railway*, 197

Or. 246, 261, 253 P.2d 260, 266, 267 (1953).

We next consider the assignments which challenge the trial court’s refusal to withdraw the issue of punitive damages from the jury.

Defendants contend that there was no evidence of malice on the part of Green and DeVon, and therefore punitive damages should have been withdrawn as to all in accord with the rule in this state that plaintiff waives punitive damages if he joins as defendant one who is not liable therefor. *Gill v. Selling et al.*, 125 Or. 587, 594–595, 267 P. 812 (1928).

Both Green and DeVon knew that plaintiff had interfered with a profitable deal Rose City had proposed to Mrs. Tuttle. The purported statements of both is evidence indicating that individually they resented plaintiff’s interference. From these statements the jury could infer malice.

Since Green and DeVon were entrusted with executive management of Rose City, the corporation could be found liable vicariously for their malicious acts. *Pelton v. Gen. Motors Accept. Corp.*, 139 Or. 198, 204–205, 7 P.2d 263, 9 P.2d 128 (1932); *Barry v. Oregon Trunk Railway*, *supra*, at 257; 10 Fletcher, Corporations 452, § 4882.

* * * * *

It is only fair to remark that, on both sides, the trial of this case was a bare-knuckled affair with more emphasis on the prejudicial than on the relevant. There is no necessity to consider the charges of error relating to instructions. The judgment is reversed and the case is remanded for a new trial.

ASSIGNMENT 8

Read *In re Maltby* presented in the following text and identify the issue con-

cerning the representation of antagonistic clients.

IN RE MALTBY

202 P.2d 908 (Ariz. 1949)

PER CURIAM.

Several complaints of improper and unethical practice were filed with the Local Administrative Committee for Maricopa County of the State Bar of Arizona, hereafter referred to as the State Bar, against A. L. Maltby, a duly licensed and practicing attorney in Phoenix, Arizona, hereafter referred to as respondent.

On March 29, 1947, a hearing was had by said committee at which time one of the complainants dropped his charges. The committee heard the case wherein respondent was charged with not properly accounting for his client's funds. The committee itself lodged a charge against respondent for using and distributing book matches with his name thereon as a form of advertising.

While the committee had the matter under advisement, two written complaints were filed against the respondent with the secretary of the State Bar on June 20 and July 8, 1947, by Mrs. Dell Adair. Mrs. Adair alleged that respondent represented her in a divorce suit and was not representing her former husband, Mr. Isaacs, in the same action.

Altogether the committee held three hearings. Respondent was present at two of them but did not appear at one hearing, although invited. Testimony and other evidence were duly introduced. The committee reported a summary of its proceedings to the Board of Governors of the State Bar with findings of fact. Respondent argued the matter before the board on October 22, 1948. The board then instructed its secretary to certify the entire record to this court for appropriate action. A formal hearing was had here January 10, 1949.

The most serious matter is respondent's action in representing

Mr. Isaacs, husband of his former client. On February 12, 1946, respondent, as attorney for Mrs. Isaacs, now Mrs. Dell Adair, filed a divorce complaint in cause No. 17107, Superior Court, Maricopa County, styled *Isaacs v. Isaacs*. He secured a divorce judgment for his client which gave her the custody of the minor children of the parties. His services were completed in September, 1946. In the spring or summer of 1947 he undertook to represent Mr. Isaacs in the same cause, asking for a change in the custody of the children. He persisted in that course over objections of his former client made both to him and to the court below. His defense was that facts and circumstances had changed; that he had at no time gained any evidence while he was her attorney to use against her.

Nonetheless Mrs. Adair complained that he betrayed her confidence and wanted him out of the case. The court below denied the change in the custody of the children so her rights were not affected. Evidently respondent misconceived his duty in the matter.

It should go without saying that a lawyer must not represent clients antagonistic to one another in the same case. Even though Mrs. Isaacs was not damaged she might well have been. A lawyer must not only avoid evil, he must also avoid the appearance of evil when placed in a position of trust and confidence by a client.

It is the opinion of this court that respondent has been guilty of indiscretions and unethical practice by:

1. Not keeping the accounts of his client in a manner respecting the confidence and trust placed in him.
2. Advertising by means of book matches with his name, as an attorney, printed on them.

3. Representing a client against a former client in the same cause of action.

Respondent's actions and attitude in this matter are wholly unbecoming to a member of the legal profession. While his actions are not deserving of suspension or disbarment, he has been guilty of infractions of the Canons of Ethics. Respondent's own conscience, in the absence of any objection by Mrs. Adair, should have dictated to him the utter impropriety of representing any interest in the Isaacs' divorce case adverse to her.

This court owes a duty both to the public and to the profession to the extent at least that such things shall not go unnoticed. We cannot, and will not,

countenance such practice without censure. We adopt in substance the language employed by this court in the case of *In re Myrland*, 43 Ariz. 126, 29 P.2d 483, and are of the opinion that in view of all the circumstances a disbarment or even a suspension of respondent would be too severe a penalty for the offenses of which he has been guilty. Therefore, we confine our action to a statement of our opinion of the character of his conduct and a formal reprimand of respondent therefor. Further infraction of the Canons of Ethics by the respondent will result in suspension or disbarment.

LA PRADE, C. J., and UDALL, STANFORD, PHELPS, and DE CONCINI, JJ., concur.



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