

Chapter 4

Finding Your Argument

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The previous chapters discussed how to read the authorities that will answer your client's legal question. Moving from a desktop of authorities to an answer to your client's question requires three initial steps:

1. **Identify the rule that will govern your client's legal question.**
2. **Inventory the governing rule's working parts.**
3. **See the governing rule as individual legal arguments.**

Those three steps will allow you to identify the individual legal arguments that, when taken together, will answer your client's legal question.

I. Identify the Governing Rule

To answer your client's legal question, you must first determine the rule that governs the question. A "rule" sets a standard by telling people what they must or can do, what they must not or should not do, or what they are entitled to do under certain conditions. Rules also describe the consequences of breaking a rule.

The "governing rule" sets the standard in your client's case. It will control the answer to your client's question and create a structure around which your argument should be organized. Think of the governing rule as the backbone of your discussion. A human backbone creates the

structural foundation for the body, giving the muscles, tendons, and ligaments a rigid structure on which to hold. Likewise, the governing rule creates the structural foundation for your legal argument; thus, every piece of your argument will be connected to that governing rule.

Typically, you will find the governing rule either in a statute or in the common law, or maybe in a combination of both. Because case law is subordinate to the statute it interprets, if you do not know whether a client's question is governed by statute or by common law, begin by looking for a statute.

A. A Statute as the Governing Rule

If a statute governs your client's legal problem, identifying the governing rule is rather straightforward. For example, suppose your client has been charged with burglary. Generally, the question of whether a person has committed a burglary is controlled by statute. Example 4-A describes a typical burglary statute. This statute is the governing rule that would control whether your client will be found guilty of burglary.

Example 4-A • A governing rule from a typical burglary statute

A person commits burglary if that person knowingly and without authority enters the dwelling place of another with intent to commit therein a felony or theft.

B. Common Law as the Governing Rule

Sometimes, however, no statute governs the legal question. In that case, the governing rule will come from common law.

For example, California allows people to seek compensation for emotional distress they suffered after witnessing an injury to a family member. In California, courts have defined a governing rule for such claims. The court's description of the governing rule is provided in Example 4-B.

Example 4-B • Common law sets forth the governing rule

"[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."

Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989) (footnotes omitted).

C. A Synthesized Rule as the Governing Rule

Sometimes, you may have to synthesize a governing rule. To “synthesize” means to combine or blend parts to create a whole. When you synthesize a governing rule, you combine principles from more than one authority to set forth the governing rule that controls your client’s legal question.

For example, in many jurisdictions the governing rule that controls an employment discrimination claim would draw on both a statute and case law. Ohio is one such jurisdiction. An Ohio statute prohibits age-based employment discrimination (Example 4-C).

Example 4-C • Ohio’s anti-discrimination in employment statute

Ohio Rev. Code § 4112.02

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

The shaded text will become a part of the synthesized rule in Example 4-E.

Ohio case law, however, has explained the steps an employee must take to prove discrimination under the statute (Example 4-D).

Example 4-D • Case law explains how to implement statute

“In cases brought pursuant to R.C. 4112.02 for ‘disparate treatment,’ Ohio courts have adopted the three-step formula set forth by the United States Supreme Court ... according to which the plaintiff must first prove by a preponderance of the evidence a prima facie case of disparate treatment. That done, the burden shifts to the defendant to provide a legal justification for the differentiation. The plaintiff must then be given the opportunity to prove that the justification was merely pretextual.”

The shaded text will become a part of the synthesized rule in Example 4-E.

Myers v. Goodwill Indus. of Akron, Inc., 701 N.E.2d 738, 743 (Ohio Ct. App. 1997).

If you were working on a memorandum assessing whether a client had been subjected to age-based employment discrimination in Ohio, you might draw on both the statute and case law to state a governing rule like the one in Example 4-E.

Example 4-E • Governing rule combines language of statute and case law

The governing rule draws
on statutory language.

The remainder of the
governing rule draws
on language from
case law.

Whether a court will hold that a discharge is an “unlawful discriminatory practice” based on age depends on a three-step analysis. See Ohio Rev. Code Ann. § 4112.02 (2017); *Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997). First, the employee must establish a prima facie case of disparate treatment. *Myers*, 701 N.E.2d at 743. If the employee succeeds, then the burden shifts to the employer, who must provide a legal justification for the disparate treatment. *Id.* If the employer does present a legal justification, then the burden shifts back to the employee to prove that the reason was a pretext. *Id.*

Once you have found the governing rule, your next step is to inventory its working parts.

II. Inventory the Governing Rule

Lawyers inventory the parts of the governing rule for two reasons. First, as explained in Section 3.1, *Reading Statutes for Comprehension*, examining each component part of a statute allows lawyers to think critically about how a statute functions.

Second, and as discussed in more detail at the end of this chapter, lawyers analyze legal questions part by part. They first examine each part of the rule individually. Only then—after examining each part of the rule individually—will a lawyer reach a conclusion about whether the standard as a whole has been met. Lawyers with whom you work will also expect you to analyze legal questions in this way: part by part.

Thus, your job is to figure out what parts make up each rule. Most frequently, governing rules include some combination of elements, factors, and red flag words. No matter the components of the rule, breaking down the governing rule into its constituent parts is a critical step. Doing so will allow you to organize your research and your analysis part by part.

A. Elements

An element is a condition that *must* be proved to establish that a standard is met. For example, the burglary statute in Example 4-F is a governing rule composed of elements. In that statute, you might identify five elements, all of which must be established before someone can be found guilty of burglary.

Example 4-F • Elements in a burglary statute

A person commits the crime of burglary in the first degree if [1] the person [2] knowingly and [3] without authority enters [4] a dwelling [5] with intent to commit a felony or theft therein.

Because an element must be proved for a standard to be met, you would think that it would be easy to identify each element in a rule. Unfortunately, elements are not always so easy to isolate and identify.

Let's look again at the burglary statute in Example 4-F. Different people might identify the elements in different ways. Above, Example 4-F, identifies five elements. However, there are other ways a lawyer might break the statute down into its component elements. As you can see, in Table 4-G, Lawyer A and Lawyer B combine or separate concepts in different ways, and thus have different lists of elements. Neither is the right or wrong way to divide the statute. Rather each identifies all the conditions that must exist for a person to be guilty of burglary.

Example 4-G • Lawyers may vary in how they identify the component parts of a governing rule

Lawyer A	Lawyer B
1. Person	1. Person
2. Knowingly enters AND	2. Enters
3. Without authority enters	(a) Knowingly AND
4. A dwelling	(b) Without authority
5. With intent to commit a felony therein OR	3. A dwelling
6. With intent to commit a theft therein	4. With intent to commit
	(a) A felony OR
	(b) A theft
	5. Therein

Importantly, each list of elements provides a starting point for thinking about a client's legal problem. As you research your client's case, you might want to adjust your list of elements. Perhaps there is no doubt that the defendant entered a building. The only question is whether the defendant "knowingly" entered. Thus, you might decide to think about the statute in terms of whether the defendant "knowingly entered." In a different case, however, there might be a real question about whether the defendant even "entered" the building. Therefore, you would need to think separately about whether the defendant "entered" and, if so, whether he did so "knowingly." Consequently, depending on the facts of the case, you might make different decisions about how to divide the governing rule into its constituent elements.

Other times, additional legal research will lead you to adjust your list of elements. For example, the rule for adverse possession, in Example 4-H, appears to have seven elements.

Example 4-H • Identifying elements in the governing rule for adverse possession

"To succeed on their adverse possession claim, defendants must establish by clear and convincing evidence, that the use of the property was [1] actual, [2] open, [3] notorious, [4] exclusive, [5] continuous, and [6] hostile for a [7] 10-year period." *Hoffman v. Freeman Land and Timber, LLC*, 994 P.2d 106, 109-10 (Or. 1999).

However, additional research reveals that all courts examine "open and notorious" as one element. You would, therefore, revise your original understanding to account for that judicial interpretation. What you thought would be two elements is actually just one.

For these reasons, you may sometimes have difficulty deciding which concepts in the governing rule constitute a single element. If so, reach a reasonable conclusion about which concepts form distinct elements. Then, be open to revising your initial understanding.

B. Factors

A factor is a condition that is weighed against another condition. Not all factors must be met for the standard to weigh in favor of one party; instead, the factors will be judged on their individual and cumulative strength.

An example of a rule composed of factors is Idaho's standard for child custody, such as the rule provided in Example 4-I. To determine who will be awarded custody, a court considers "the best interests of the children" and evaluates all of the factors listed—and potentially other factors. No one factor must exist to award custody to one parent or another. Rather, the court considers the *degree* to which each factor is present and weighs the strength of the factors on one side against the strength of the factors on the other side to reach its conclusion.

Example 4-I • Factors comprise the governing rule

32-717. CUSTODY OF CHILDREN — BEST INTEREST. (1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors, which may include:

- (a) The wishes of the child's parent or parents as to his or her custody;
- (b) The wishes of the child as to his or her custodian;

- (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
- (d) The child's adjustment to his or her home, school, and community;
- (e) The character and circumstances of all individuals involved;
- (f) The need to promote continuity and stability in the life of the child; and
- (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

C. Red Flag Words

Red flag words, which were first introduced in Section 3.1, *Reading Statutes*, are words that restrict, expand, or order the contents of a rule. These words are called “red flag words” because, when you see one, you must stop and carefully consider its impact on the content of the rule. Red flag words are also called “operative words” because they change how the substantive parts of the rule will operate in relationship to each other. Red flag—or operative words—can create exceptions, limitations, requirements, or sequences in which events must occur. Thus, when you see a red flag word, slow down, and consider its relationship to the other parts of the statute and how it will impact the statute's effect on your client.

Table 4-J lists common red flag words, and Example 4-K highlights the red flag words in a burglary statute.

Table 4-J • Red flag words

• And	Requires all elements that it joins to be present for a standard to be met, or requires all factors that it joins to be considered.
• Or	Only one of the elements it joins must be present for a standard to be met, or
• Either	only one of the factors that it joins must be considered.
• Unless	Creates an exception to the standard.
• Except	
• If ... then	
• Shall*	Mandates conduct.
• Must	
• Shall not	Prohibits conduct.
• May not	
• Must not	
• Provided that**	Creates a condition, an exception, or adds an additional requirement.

* Although “shall” is typically interpreted as mandatory language, courts sometimes construe it as permissive. See Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 125-26 (2d ed. 2013).

** See *id.* at 128-29 (discussing the multiple meanings of “provided that” and recommending that drafters avoid the phrase).

In Example 4-K, the red flag word “and” signals that multiple elements must be present for a person to be guilty. The prosecutor must prove all

Example 4-K • Red flag words in a statute

A person commits the crime of burglary in the first degree if the person knowingly and without authority enters a dwelling with intent to commit a felony or theft therein.

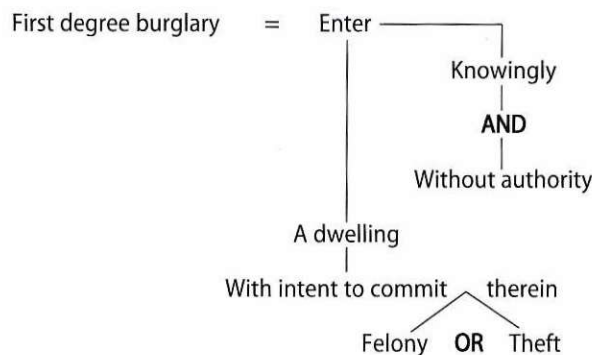
of the conjoined elements. By contrast, the red flag word “or” signals that only one of several elements must be present. When the statute uses the word “or,” the prosecutor can make choices about how to prove that a person is guilty of burglary. Finally, although the word “with” is not listed in Table 4-J, here, it adds a restriction, and thus acts as a red flag—or operative—word.

D. Diagramming the Governing Rule

After you have identified the elements or factors and operative words in a statute, you may want to diagram the governing rule. When you diagram a governing rule, you are, essentially, drawing a picture of how the rule works. A picture can help you better understand how the parts of a governing rule work together, and it can help you isolate the individual parts of a governing rule that you will need to research and analyze.

The burglary statute, first mentioned in Example 4-F, might be diagrammed as in Figure 4-L.

Example 4-L • Diagramming a governing rule



E. Tests

Elements, factors, and special operative words are the component parts of a governing rule. They combine to form different kinds of tests that courts use to determine whether the standard in the governing rule has been met.

Many kinds of tests exist, and attorneys and judges may use different names for the tests. The important thing is to recognize what kind of test is being used, how it affects the way the governing rule operates, and whether the test dictates the organizational structure of your analysis. Although the list below is not exhaustive, it names the most common tests you will see.

1. Elemental analysis

First, evaluating a rule composed of elements may be called an elemental analysis; that analysis will require each element to be met before the standard is satisfied. In an elemental analysis, you will march through an analysis of each element, usually following the same order in which that element was presented in the governing rule.

2. Balancing test

A second kind of test, a balancing test, is used to evaluate a rule composed of factors. The test is so named because the court will balance competing factors against each other to reach its conclusion.

In a balancing test, a party does not need to satisfy each factor for the court to rule in that party's favor. "The best interests of the children" example, described earlier, is a good example. Although several factors may weigh in favor of one parent, if the factor of a child's emotional ties strongly weighs in favor of the other parent, that parent may get custody of the child. So, even if a parent has only one factor weighing in that parent's favor, if the court believes that factor carries enough weight, that parent wins.

When imagining how a balancing test works, think of the traditional two-pan scale, like the scale of justice. For a party to win under a balancing test, the scale can weigh greatly in his favor or slightly in his favor. The amount of weight placed on either side of the scale depends on the court's assessment of how all the factors balance both individually and cumulatively.

In a balancing test, you will typically try to organize your analysis around the individual factors that make up the balancing test. Organizing around factors, though, is sometimes challenging. Because courts weigh factors against each other, the factors often become intertwined in a court's analysis. Thus, although you should try to organize your analysis around the individual factors, if the prior case law does not allow you to separate out the factors, you may have to examine the factors as a group.

Moreover, when the test is a balancing test, predicting an outcome in a future case may be challenging. Because balancing tests weigh a multitude of factors, the holdings that result are often case-specific. That is to say, a change in a single fact may tip the scales in the opposite way.

3. Totality of the circumstances test

Third, courts sometimes employ a "totality of the circumstances" test. When a court looks at the totality of the circumstances, it reviews all

relevant facts together to determine whether the governing rule's standard is met. A totality of the circumstances test allows the court to look at a broad spectrum of facts and weigh them; however, unlike a pure factor-balancing test, the court does not have a defined list of factors to consider.¹ Rather, the court can consider any relevant fact.

4. Prong test

Finally, in a prong test, a court determines whether a standard is met by using a multi-part inquiry. Each inquiry is one prong of the test, and the court evaluates each prong in turn.

Be aware that the term "prong test" can be applied to many kinds of analyses. The name is sometimes applied to basic elemental analyses or to balancing tests. Thus, a prong can be an element, and each prong represents a requirement that must be met. Or, a prong can be a factor that must be balanced with factors in other prongs. The term can also be used when the court presents the test as a series of questions.

Ohio's test for establishing a discriminatory discharge (Example 4-E, above) is an example of a prong test. It has three prongs. The first prong requires an employee to establish a prima facie case of disparate treatment. If the employee does so, the second prong requires the employer to justify the disparate treatment. Finally, if the employer provides a justification, the employee must prove under the third prong that the justification is pretext for a discriminatory purpose.

If the governing rule in your client's question involves a prong test, such as Ohio's test for a discriminatory discharge, your analysis will be structured around those prongs, and you will evaluate each prong in turn, just as a court would.

When taking inventory of a rule's working parts, understanding the test used can show you how the rule functions and how to structure the analysis of the governing rule in your memo.

III. Think Like a Lawyer: See the Governing Rule as Individual Legal Arguments

After determining the governing rule and inventorying its working parts, the next step is to identify the individual legal arguments that you will develop. Identifying individual arguments is an essential step in "thinking like a lawyer." To explain why, back up for a moment and remember some basic information about rules.

1. David Romantz & Kathleen Vinson, *Legal Analysis: The Fundamental Skill* 25-26 (1998).

As discussed above, a rule tells people what they must do, what they cannot do, or what they are entitled to do. In all cases, however, people must do something, must not do something, or are entitled to do something only under certain circumstances. Those circumstances are the various elements or factors of the rule.

To discuss a legal question, a lawyer examines each element or factor individually. Then, the lawyer structures an argument that tests for the presence of each element or factor in the client's case.² Only after determining whether each component is present (or the extent to which it is present) will a lawyer decide whether the standard in the governing rule has been met. The important point is that each aspect of the governing rule will likely become the subject of a single legal argument.

The senior attorney who asked you to “get back to her with your analysis” will expect you to examine each element or factor in the governing rule and develop a separate legal argument for each. Her expectation, which all attorneys share, will affect how you think about, organize, and write about your client's legal problem.

Remember, the governing rule is the backbone of your legal argument. Just as the human backbone is composed of multiple vertebrae, a complete legal discussion is usually composed of multiple legal arguments. Each element or factor in the governing rule is the source of an individual legal argument, which, similar to an individual vertebra, must support the body of the discussion.

2. Sometimes attorneys will analyze factors as a group rather than individually. Whether to analyze factors as a group or individually is discussed in §7.1, *Structuring Factor Analyses* in Joan Rocklin, Bob Rocklin, Christine Coughlin, and Sandy Patrick, *An Advocate Persuades* 151-160 (2016).