

Chapter 7

Explaining the Law

- §7.1 Rules
 - §7.2 Case Illustrations
 - §7.3 Citing and Avoiding Plagiarism
-

When writing a legal argument, you must explain the law on which your conclusion will rest. To explain the law, you will explain how the relevant authorities you located in your research fit together—that is, you will draw on all the authorities you have researched and synthesize a cohesive explanation of the law as it pertains to your client. That synthesized explanation of the law will set out the rules governing your client's legal question and will explain how courts have applied those rules in past, similar cases.

By explaining the law, you explain the legal foundation for your argument. Providing that legal foundation is the primary purpose of your explanation of the law.

In addition, your explanation of the law educates the reader about the relevant law. By explaining the rules and how courts have applied those rules in the past, you will educate the reader about the law that will apply to your client's case.

Finally, your explanation of the law previews the analytical steps you will follow in your analysis. The framework you present when you explain the law is the same framework you will later apply to your client's case in the application section of your argument.

As you explain the law, remember two things: First, an explanation of the law is a *focused* description of the law. Because the explanation is a focused description of the law, it should include only the information needed to analyze the element or factor relevant to your client's case. Your explanation of the law should not include an idea just because it is "interesting." Attorneys do not like to waste time. They do not want to read about tangential issues, nor do they want to read about how the law evolved. Attorneys want to read *only* those ideas relevant to understanding the law applicable to a client's case. Therefore, any explanation of the law that you will not rely on to analyze your client's facts should be omitted from your explanation of the law.

Sidebar

When you choose what to include in your explanation of the law, you should *think* about your client and the law that is relevant to your client's case; however, when *writing* the explanation of the law, do not write anything specifically about your client. Remember, your client's situation will be addressed in the application section.

Second, your explanation of the law should not mention your client's case. Attorneys prefer that their first look at the relevant law be stripped of any mention of a particular client. In that way, the attorney can absorb a clear understanding of the law without it becoming muddled with the particulars of a client's case. (You will connect the law and your client's facts later in the application section.)

In fact, one test for a well-organized argument is whether a line can be drawn that will separate your explanation of the law from your application of the law. Look at a basic explanation of the law in Example 7-A, and you can see how this line might be drawn.

The argument begins with a **conclusion**.

Example 7-A • Basic explanation of the law

The **explanation of the law** describes the rules that determine whether the element of "actual possession" is present. It then illustrates those rules by describing cases.

Notice that, after the conclusion, there is no mention of the client, the Nero family.

Mr. and Mrs. Nero can most likely prove actual possession. Plaintiffs must establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). The courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. *See, e.g., Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995); *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994). In *Davis*, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. 898 P.2d at 806-07. In *Slak*, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. 875 P.2d at 518.

The **application of the law** begins here when the client is introduced.

Mr. and Mrs. Nero should be able to prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. Like the landowners in *Davis*, the Neros used the disputed land exactly as they did their adjacent land: in both parcels of land, they planted and maintained a garden and fruit trees. In addition, like the plaintiffs in *Slak* who showed actual possession by building a fence and planting vegetation, the Neros built a fence and planted vegetation in their garden and orchard. The Neros should, therefore, be able to prove that they actually possessed the disputed land.

To draft an effective explanation of the law, you will need to understand its two most common components—rules and case illustrations. In this chapter, you will become more familiar with those components and how to use them to create a logical, cohesive explanation of the law.

Section 7.1

Explaining the Law: Rules

- I. The Role of Rules
 - II. Finding the Rules
 - A. Explicit Rules
 - B. Implicit Rules
 - III. Writing the Rules
-

I. The Role of Rules

When you begin explaining the law relevant to a particular element or factor, first explain the rules. As we discussed earlier, a rule sets a standard.¹ With respect to a given element or factor, rules tell a court how to determine whether that element or factor was present in your client's case. Any explanation of the law must start with the prevailing standard that controls the conduct at issue.

To explain the prevailing standard, you will usually need to explain a group of rules. Some rules will describe broad, over-arching principles. Other rules, sometimes called sub-rules, provide smaller, more specific explanations about the standard.

Example 7.1-A shows a group of rules in an explanation of the law. In that example, the rules explain what a plaintiff must do to prove he actually possessed land long enough to claim ownership in a claim for adverse possession. The first sentence is a broad rule that defines the standard for when actual possession is proven. The second sentence identifies two smaller, more specific sub-rules that describe the kinds of facts courts look for to determine actual possession. Together, these rules

1. The "governing rule," described in Chapter 4, *Finding Your Argument*, is one kind of rule. It describes the standard that governs one legal issue. As explained in Chapter 4, lawyers break the governing rule down into elements and factors and then develop one legal argument for each. This chapter focuses on how to explain the rules within one legal argument.

describe how a court will determine whether a person “actually possessed” the land in dispute.

Example 7.1-A • Rules describe a prevailing standard

Broad rule	→	Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. <i>Zambrotto v. Superior Lumber Co.</i> , 4 P.3d 62, 65 (Or. Ct. App. 2000). The courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. <i>Id.</i>
More specific rule explains the broad standard.	→	

Table 7.1-B shows graphically the relationship amongst the rules that define “actual possession.”

Table 7.1-B • Relationship of rules that define “actual possession”

Adverse Possession Governing rule	Is established by proving actual , open, notorious, exclusive, hostile, and continuous possession for 10 years.	
Actual Possession Broad rule	Is established by proving.... Plaintiffs used the land as an owner would use that particular type of land.	} Broad rule and sub-rules for one element
Sub-rule 1	Courts focus on whether the plaintiff’s use conforms to the uses for which the land is suited.	
Sub-rule 2	Courts do not focus on the amount of activity or use on the land.	

To explain the rules, you must first identify the rules that will be relevant to your client’s case.

II. Finding the Rules

As you research the law, you will look for those rules—both broad and narrow—that will determine whether an element or factor is present in your client’s case. The rules will likely come from two places: statutes and case law. Sometimes a statute or case law will clearly state the rules that govern the element or factor you are analyzing. Those rules are called explicit rules. Other times, however, finding the relevant rules requires you to sift through case law and synthesize a rule. Those rules are called implicit rules. To explain the relevant law, you will need to gather together both explicit and implicit rules relating to the element or factor being explored. (As explained in Chapter 5, *Organizing Your*

Legal Authority, case charts can help you identify both explicit and implicit rules.)

A. Explicit Rules

Statutes and case law will usually explicitly state the standards that govern an element or factor. For example, in Example 7.1-C, a statute defines when a person is “stopped.”

Example 7.1-C • A statute provides an explicit rule

A “stop” occurs if a person’s liberty is restrained by a peace officer lawfully present in any place. Or. Rev. Stat. § 131.605(6) (2017).

Case law may then provide sub-rules that further define when that element is met, as in the next example, Example 7.1-D.

Example 7.1-D • Rules derived from a statute and case law explaining the statute

A “stop” occurs if a person’s liberty is restrained, by physical force or a show of authority, by a peace officer lawfully present in any place. Or. Rev. Stat. § 131.605(6) (2017); *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). A person’s liberty may be restrained if an individual believes that his liberty has been restrained and that belief is objectively reasonable. *Warner*, 901 P.2d at 942. To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996). If, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained, the encounter is “mere conversation.” See, e.g., *State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985).

← Broad rule

More specific sub-rules explain the broad standard.

In the absence of a statute, case law may provide all the rules you need to explain an element, as in Example 7.1-E.

Example 7.1-E • Rules derived from case law only

Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.*

← Broad rule

← More specific sub-rule explains the broad standard.

Usually, you will find the necessary rules explicitly stated in a statute or case law; some rules, however, are not clearly stated but implicit in the courts’ decisions.

B. Implicit Rules

When courts do not state explicitly the standard they used to conclude whether an element or factor is present, you will have to explain the standard by weaving together a rule from the cases you have read. When attorneys explain a standard that courts are relying on, but which is hidden within the case law, we call the standard an “implicit rule.”

Experienced attorneys read cases with an eye toward making explicit what the courts are doing implicitly. An implicit rule can explain why courts consistently reach the same decision. It can explain why seemingly inconsistent court decisions are, in fact, consistent. And it can explain a new element or factor that courts will consider when reaching a conclusion.

Sidebar

Synthesizing means combining principles stated in a series of authorities to form one rule.

1. When to synthesize an implicit rule

When the standard has not been explicitly stated, you will need to synthesize cases to find that implicit rule. When you synthesize a rule, you derive one rule by looking at the principles courts relied on in a series of cases. Let’s look at the three typical circumstances in which an attorney might derive an implicit rule—that is, synthesize a rule—from a series of authorities.

(a) Example 1: Finding an implicit rule from consistent decisions

Sometimes after reading a series of cases, you will see that every time a certain fact is present a court will usually reach a particular conclusion. This fact is a common denominator. If you see a common denominator in a series of cases, you should identify it for your supervising attorney.

Let’s assume that you have just met with a client who owns a biotechnology company in Cary, North Carolina. His ex-business partner has started a blog and published false personal statements about him. The false statements have resulted in a significant loss of business. Your client wants to know whether he can sue for intentional infliction of emotional distress.

In North Carolina, the courts have established an explicit three-element test to determine when someone may be liable for intentional infliction of emotional distress.

Example 7.1-F • North Carolina’s test for intentional infliction of emotional distress

In North Carolina, the elements of intentional infliction of emotional distress are “(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.” *Dickens v. Puryear*, 276 S.E.2d 325, 332 (N.C. 1981).

Even though North Carolina has an explicit governing rule, it turns out that the courts have not clearly defined the first element—when someone’s

conduct is extreme and outrageous. As a result, you will need to extract an implicit rule to define when someone's conduct is extreme and outrageous.

Two cases appear to be relevant to your client's question. Read the synopses of the two cases in Table 7.1-G, and see if you can determine a common denominator.

Table 7.1-G • Synthesize these cases

Case	Facts	Holding
<i>Woodruff v. Miller</i> , 307 S.E.2d 176, 178 (N.C. Ct. App. 1983).	Defendant posted copies of warrants on a wanted board to create the impression that plaintiff had broken the law and had not been punished.	Yes. Conduct was extreme and outrageous.
<i>West v. King's Dep't Store, Inc.</i> , 365 S.E.2d 621, 623-25 (N.C. 1988).	A store manager repeatedly accused innocent customers of shoplifting in the presence of other store patrons.	Yes. Conduct was extreme and outrageous.

The common denominator you might identify is that in both cases (1) defendants made public accusations, and (2) defendants accused plaintiffs of socially unacceptable behavior. Based on those common denominators you could now create a rule, such as the one in Example 7.1-H.

Example 7.1-H • Synthesized rule

The business partner's statements in his blog likely constitute extreme and outrageous conduct. A public accusation of socially unacceptable behavior is evidence of extreme and outrageous conduct. See *Woodruff v. Miller*, 307 S.E.2d 176, 178 (N.C. Ct. App. 1983); *West v. King's Dep't Store, Inc.*, 365 S.E.2d 621, 623-25 (N.C. 1988). In *Woodruff v. Miller*, for example, the defendant posted copies of warrants....

← Conclusion about the element

← Synthesized rule

← Beginning of a case illustration

This new rule would be included in your explanation of the law describing when someone's conduct is extreme and outrageous, even though no court had ever explained it that way.

Relying on your own reading and understanding of cases to create a synthesized rule can be uncomfortable at first. This task is a major part of an attorney's work, and you will get more comfortable with this process as you gain experience in reading and understanding cases.

(b) Example 2: Finding consistency in seemingly inconsistent cases

Sometimes courts will reach opposite conclusions in cases that seem to have similar facts. When that occurs, do not immediately assume that

the decisions are inconsistent. Rather, look for a reason why the courts came to opposite conclusions and explain that reason to your reader.

Even when court decisions *seem* inconsistent, attorneys nevertheless assume that the decisions *are consistent*. Stare decisis requires a court to reach the same decision as a prior court given similar facts. Therefore, if two courts come to different conclusions on cases with similar facts, attorneys assume a reasoned distinction exists to explain the different outcomes. Explaining that reasoned distinction will help the senior attorney with whom you are working.

Here is a second example of synthesizing a rule, but this time the synthesized rule identifies a reasoned distinction to explain why two cases reach opposite conclusions.

A client was out bicycling in Arcata, California, with her husband. She saw him round a curve, then heard a crash and a scream. When she rounded the curve, she saw her husband had been hit by a car. You would like to consider whether your client, the wife, can sue the driver for her emotional damages after seeing her injured husband. In California, a person who witnesses an accident to a family member can sue for emotional damages if, among other things, she was “then aware” of the injury to the family member.

You need to find out more about what it means to be “then aware” of the injury. You find two relevant cases that seem factually similar in that the plaintiff in neither case actually saw the accident or the injury to the family member. Yet, in the first case, *Krouse*, the court held that the plaintiff was “then aware” of the injury, and in the second case, *Fife*, the plaintiff was not “then aware.” Look at the case excerpts in Table 7.1-I and think about how the cases can be reconciled.

Table 7.1-I · Reconcile these cases

Case	Facts	Holding
<i>Krouse v. Graham</i> , 137 Cal. Rptr. 863 (Cal. 1977).	A husband knew his wife was standing by the trunk of his car. In his rear view mirror he saw a car approach. He then felt his car being hit by the other car. The plaintiff admitted that he did not actually see the other car strike his wife.	Yes. The husband was “then aware” of the injury to his wife.
<i>Fife v. Astenius</i> , 284 Cal. Rptr. 16 (Cal. App. 4th Dist. 1991).	A father heard a crash and saw debris fly over a wall. The father rushed out to the street and within seconds discovered his daughter was in the car accident.	No. Father was not “then aware.”

Looking for a reasoned distinction to explain the different outcomes, you might notice that in *Krouse* the plaintiff knew the family member was in the precise location of the accident and, therefore, knew that the family member was almost certainly in the accident. By contrast, in *Fife*, although the plaintiff knew of the accident, the plaintiff did not know the family member's location prior to the accident. You might synthesize a rule that explains that whether a person is "then aware" of an injury depends on knowing the family member's location at the time of the accident, as in Example 7.1-J.

Example 7.1-J • Synthesized rule explains seemingly inconsistent cases

Gabrielle Lafille has a strong argument that she was "then aware" of her husband's injury. For a plaintiff to be then aware, a plaintiff need not see the injury occur. *Krouse*, 137 Cal. Rptr. at 871. Rather a plaintiff is then aware of a family member's injury if she was aware of the accident's location and knew the family member was in exactly that location as the accident occurred. *Krouse*, 137 Cal. Rptr. at 871; *Fife*, 284 Cal. Rptr. at 18. In *Krouse*, the court held that the plaintiff was then aware of the accident that injured a family member....

← Conclusion about the element

← Synthesized rule begins explanation of the law

← Beginning of case illustration

The synthesized rule in Example 7.1-J (shaded) refines our understanding of when someone is "then aware" by explaining that the plaintiff does not need to see a family member get injured; rather, a plaintiff can prove she was then aware if she knew the family member's location and the location of the accident as it was occurring. By identifying a reasoned distinction, you will help your reader understand how courts reach their conclusions.

(c) Example 3: Bringing parts together to form a whole

Sometimes, over time, courts add to the requirements necessary to establish an element. When you describe the law, you may need to acknowledge the additional requirements in your rules. An Oregon court did just that when it explained Oregon's standard for determining whether a stop had occurred. In Oregon, a statute defines when a stop occurs, as shown in Example 7.1-K. According to the statute, a stop occurs when a police officer restrains a person's liberty.

Example 7.1-K • Statute defines element

A "stop" is a temporary restraint of a person's liberty by a peace officer lawfully present in any place. Or. Rev. Stat. § 131.605 (2017).

When the Oregon Court of Appeals later described when a stop occurs, it reviewed the relevant case law and added that a "restraint" may be by physical force or a show of authority (Example 7.1-L).

Example 7.1-L • Case law adds to statutory definition

A “stop” is a temporary restraint, whether by physical force or a show of authority, of a person’s liberty by a peace officer lawfully present in any place. *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995).

Thus, the court reviewed prior case law, determined that prior case law added to the statutory definition of a stop, and the court included that information in the rule so that the reader would have a concise, complete definition of a stop in one place. In doing so, the court helped the reader by establishing an explicit rule that combines the statutory rule with case law.

2. Dare to explicitly state an implicit rule

New lawyers often get nervous about explaining implicit rules. New lawyers feel safer putting in their arguments only the language that they have seen in cases. But remember this: An attorney adds value by making explicit those themes that would otherwise remain obscured in a morass of case law.

To clarify case law and add value for your client, you must read the case law at multiple levels. To do so, ask questions:

- What are the courts *saying* the rules are?
- What are the courts actually *doing*?

By comparing what the courts are *saying* the rules are with what the courts are *doing*, you may see unexplained areas of the law. By looking at what courts are doing over a series of cases, you may also see themes, which when explained will clarify the standard courts are using to reach a decision.

You will be more valuable to other attorneys you work with and to your client if you can see and explain both the explicit and implicit rules in the case law. So, when you see a theme in the case law that will help explain how courts reach their conclusions, don’t be shy, share it.

Now, that doesn’t mean that you can put any old thing you want into your rules. Remember, each rule must have a basis in the case law. Any rule that you draw out of the cases must be consistent with all the other law that bears on the issue, including other case law, statutes, and legislative history.

Finally, although this section spends a lot of time discussing how to extract implicit rules from the case law, please realize that courts are usually explicit about the rules they are relying on, so you will not always have to dig out the implicit rules. We have spent more time discussing implicit rules simply because it is relatively easy to find explicit rules and relatively difficult to find implicit rules.