A CONCISE GUIDE TO LEGAL RESEARCH AND WRITING

THESIS

Presented to the Graduate Council of the North Texas State University in Partial Fulfillment of the Requirements

For the Degree of

Master of Arts

By

M. P. Duncan III, B.S., J.D.
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There is an absence of any significant written material applying standard rhetorical principles to the communication of the results of basic legal research. This study attempts to fill that void. It proceeds from a discussion on the nature of legal precedents (stare decisis) to a chapter on legal research tools and techniques which enable one to discover these precedents. It continues with an explanation of what a "legal issue" is and how one discovers it among various facts relevant to a case, but not necessarily vital to it. The balance of this thesis concisely details the adaptability of traditional rhetorical techniques to legal writing, then pragmatically concludes by suggesting how one can prepare an appellate brief by combining this two-fold principle, which is both academic and legal.
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An attorney is called upon to write numerous and diverse "instruments," such as wills, contracts, pleadings, and briefs. Consequently, it is imperative that one practicing law have the ability to express himself clearly in writing. The indispensability of writing skills notwithstanding, few, if any, law schools include in their curricula courses that are devoted to the study of basic writing principles applicable to the drafting of legal instruments. They do offer "Legal Research and Writing" courses, but, contrary to the title, they generally provide little instruction on how to write either clearly or grammatically. The course is restricted to teaching fundamental legal research techniques and traditional legalese. There is no question that some of this information is essential to both the student of law as well as the practicing attorney; however, in addition to knowing how to find the law, one should also know how to write about it concisely.

Legal writing can be considered a form of technical writing in that it is restricted to a specialized area and employs a somewhat distinctive vocabulary. Even so, there are essentially two reasons why legal writing is unique: first, since the law is supposed to be specific and precise, the language one uses to write about it should be also.
Second, and possibly more significant, the general public expects lawyers to express themselves in a distinctively "legal" manner. For instance, although legally adequate, a will may not be acceptable to a majority of the public if it states simply, "I give to Margaret $5,000." Whereas, it is sure to be acceptable if it synonymously states, "I hereby devise and bequeath to my beloved daughter, Margaret, the absolute sum of $5,000." Consequently, effective legal writing is somewhat hampered by traditional phraseology.

As a result of the historical relationship between the public and lawyers, certain idiomatic words and phrases peculiar to the legal community are necessary to legal writing. However, legal writing can be improved without sacrificing tradition by applying to it fundamental writing principles. George Orwell wrote that "modern English, especially written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble."\(^1\) His observation is especially true when applied to legal writing. This work acknowledges the function of tradition in legal writing, but it also recognizes the necessity of avoiding the "bad habits"\(^2\) abundant in legal writing, and suggests ways of avoiding them.

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\(^1\) George Orwell, "Politics and the English Language," The Little Brown Reader, edited by Marcia Stubbs and Sylvan Barnet (Boston, 1977), p. 266

\(^2\) Ibid.
Further, this work is essentially dual in purpose in that it is concerned primarily with two facets of the law: the principal means of researching questions of law, and the reduction of those questions and their legal principles into correct and effective written language. Part one, or chapters one, two, and three, is devoted to identifying the nature of the law (stare decisis), investigation of the law (legal research), and the interpretation of the law (the recognition of legal issues). These three "I's" exist in any situation in which consideration of the law is relevant. Part one therefore provides both the prelaw student and the law student with an insight into the manner in which one researches and ultimately resolves a legal problem.

Part two of this study, beginning with chapter four, fills a void in our legal education system—the absence of instruction on how to apply fundamental principles of writing to the exposition of legal matters. This goal is accomplished by applying the elementary rules of argumentative prose to the various writing exercises one encounters as a law student and eventually as a practicing attorney. It can be vital to the success of both. For example, while attending law school, I observed that the student who was most knowledgable about the law was not necessarily the one who was most successful in his courses. The reason for this apparent paradox is that unless one can properly answer an essay examination question, his considerable legal knowledge is of little consequence.
Another area of emphasis is the writing of appellate briefs. Obviously, this chapter is of primary interest to the practicing attorney, but it also may be of some aid to the prelaw and law students because it is basically concerned with resolving a defect inherent in almost all appellate briefs: the absence of continuity and clarity.

In the various appendices there are additional legal aids. For example, "Appendix A" is a discussion of the American judicial system, and "Appendix B" is a sample appellate brief. (The name of the individual involved in the litigation has been changed for obvious reasons.)
CHAPTER I

IDENTIFYING THE NATURE OF LAW: STARE DECISIS

It is common knowledge that our judicial system partially functions upon the theory that decisions made by judges should, as much as is feasible, be guided by the previous decisions made by other courts in similar matters. Traditionally known as stare decisis, this doctrine of precedent is principally based upon the concept that judicial decisions should be consistent, thereby providing the individual with a foundation upon which he can anticipate the consequences of his conduct. The ideological benefit of stare decisis is that it lends to society a sense of stability through expectation: one's actions will be handled by the courts in the future as similar actions have been treated in the past. As a practical matter, the philosophy of stare decisis is useful because a legal principle emanating from or approved by a court in a particular jurisdiction binds all inferior courts in that jurisdiction when they are confronted with a comparable question. It necessarily follows that, being fundamental to the entire American judicial system, both federal and state, this concept is the principal tool employed by the courts to resolve questions of law. Consequently, the researcher or lawyer must try to discover
and identify precedential authority. Although the principle itself is uncomplicated, identifying a binding precedent is difficult for two reasons: first, a precedent is developed as a result of the judicial application of specific legal principles to a particular and restricted set of facts. Thus, the applicability of a particular precedent is restricted to identifiable analogous facts. Second, it can be unequivocally stated that no two factual situations exactly correspond. Therefore, the applicability of the precedent is inversely proportionate to the disparity between the sets of facts. In addition, the creation of a precedent establishes a rule of law that becomes known and accepted as binding in all matters that correspond to its rule. Thereafter, disputes to which the precedent appears applicable may be distinguished because of the restrictive nature of stare decisis. To exemplify the availability of a precedent-setting case, one can examine the celebrated case of Miranda vs. Arizona,¹ which established the rule of law that a criminal suspect's out-of-court confession is inadmissible as evidence during his trial unless he was advised before confessing: (1) he has a right to have a lawyer present to advise him prior to and during questioning by police officers, (2) if he is too poor to employ an attorney, he has a right to have one appointed, (3) he has the right to remain

silent and not make any statement, and (4) should he make any statement, it will be used as evidence against him. However, the law established in the *Miranda vs. Arizona* decision was predicated upon two factors: (1) the suspect's having been "in custody," and (2) the statement's having resulted from "custodial interrogation." By way of clarification, the court elaborated upon its decision, declaring: "By custodial interrogation, we [the court] mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Therefore, any situation that leaves in doubt whether an individual is "in custody" or whether the statement resulted from "custodial interrogation" produces a corresponding doubt as to the precedential applicability of *Miranda vs. Arizona*.

In *Miranda vs. Arizona* there was no doubt the suspect was "in custody" because he had been interrogated by the police at the police station after he had been arrested. Nevertheless, in *Orozco vs. Texas* the defendant was

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3 Ibid.
4 Ibid.
5 Ibid.
6 *Orozco vs. Texas*, 394 U.S. 324 (1969)
arrested and interrogated in his own home prior to his being told of his rights as mandated by *Miranda vs. Arizona*. The confession elicited during the interrogation was admitted into evidence during his trial. Applying the law set forth in *Miranda vs. Arizona*, the United States Supreme Court concluded that the applicability of *Miranda vs. Arizona* was not entirely contingent upon the location of the interrogation, but upon whether the suspect was "in custody." However, in *Oregon vs. Mathiason*, the United States Supreme Court held that the *Miranda vs. Arizona* precedent was not binding under the facts present in that case since Mathiason voluntarily appeared at the police station, where he was told that he was not under arrest; nevertheless, the suspect [Mathiason] stayed of his own free will and was subsequently questioned by the police. During the interrogation he incriminated himself in a burglary. The Court's opinion was that the incriminating statement did not arise during a "custodial interrogation" because the suspect was "not in custody or otherwise deprived of his freedom."

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7 *Miranda vs. Arizona*, op. cit.
8 Ibid.
9 Ibid.
10 *Orozco vs. Texas*, op. cit.
11 *Oregon vs. Mathiason*, 429 U.S. 492 (1977)
12 *Miranda vs. Arizona*, op. cit.
13 *Oregon vs. Mathiason*, op. cit.
One can readily observe that although the factual differences of these two cases may be slight, they were consequential enough to direct the appropriateness of the *Miranda vs. Arizona*\(^{14}\) precedent as binding in one instance and inapplicable in the other. Thus, in dealing with the concept of *stare decisis*, one must be prepared to resolve any factual disparities as irrelevant to the applicability of the precedent.

One aspect of *stare decisis* that should not be ignored is that the application of the concept is historical in the sense that it is employed because of custom and is, therefore, predominantly pragmatic. Such is the case, generally, when society as a whole dictates a change in judicial attitudes. Consequently, in addition to examining the factual events that form the basis of the precedent, one must also be aware of the social circumstances and interests which were possibly considered at the time the custom developed into a rule of law. On the other hand, if one directs his efforts at eliminating a particular rule of law, the most available and often-times most valid argument is that the precedent is antiquated, if not by time, at least by societal considerations.

The authoritative jurisdictional influence of *stare decisis* is entirely geographical. A court is not obligated to conform its decisions to precedents unless those decisions are rendered within the geographical limits of the state or

\(^{14}\) *Miranda vs. Arizona*, *op. cit.*
federal circuit. To the contrary, because of the supremacy clause in the United States Constitution, decisions of the United States Supreme Court are binding upon all inferior courts, whether state or federal.

In the event that one is unable to discover a precedent, he must extend his search for authority to the judicial opinions rendered in other jurisdictions. Although such decisions do not constitute precedential authority under the concept of *stare decisis*, the possibly persuasive effect they might have on a court is of consequence. The persuasive appeal a foreign precedent might have is based upon the similarity of the facts in both situations, the legal reputation of the foreign court, and the relative social consequence should that court's opinion be adopted.

The precedential value of a case is also determined by the express wording of the Court's written opinion. Any otherwise incidental comments made by the Court which are collateral to the main issue is *dictum* (or *obiter dictum*, i.e., "said by the way"). Even though *dictum* is not of precedential quality, it is of value as a form of persuasion. With *dictum*, one is in a position to assert that another court has at least expressed an opinion concerning the subject matter, which alone should provide some guidance to the Court faced with the task of resolving a similar dispute.

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17 United States Constitution, art. VI.

18 The word "foreign" is an idiomatic word used to identify the authority or court of another state.
CHAPTER II

INVESTIGATION: LEGAL RESEARCH TOOLS

Because of stare decisis an attorney must investigate or research the law to determine whether any applicable precedents exist. In order to accomplish this investigation, he can avail himself of a number of tools which have been developed. These research tools serve a related, but different purpose and are substantially varied; however, they are similar to the extent that each is primarily classified according to subject matter. Specifically, they include digests, legal encyclopedias, annotated reports, legal periodicals, and reported appellate court decisions.

These research tools are generally prepared by private publishing concerns that have incorporated unique editorial features within their publications for the purpose of making available virtually all information that may be of consequence to the legal question. Since the success of both law students and practicing attorneys depends substantially upon their ability to utilize these tools effectively in researching a legal matter, this portion of the work discusses in detail the most practical and prevalent means of doing legal research. Most of the examples are concerned with Texas publications and, for the most part, will not refer to official governmental publications and reports because
their value in legal research is not particularly consequential.

Case Reports: National Reporter System

Because of the vast number of cases that are decided each month by the appellate courts in both the state and federal judicial systems, the task of correlating and comparing this mass of research material would be impossible, except for the National Reporter System. Since 1887 there has been a system of publishing the written judicial opinions of each of the separate states' appellate courts, all federal Courts of Appeal, written opinions from the federal district courts, and written opinions issued by the United States Supreme Court.

Relative to state court opinions, the organizational scheme of the National Reporter System partitions the United States into a series of seven regional units, each being comprised of one or more states. The units are identified, to a certain extent, by their geographical composition: Pacific Reporter, Northwestern Reporter, Southwestern Reporter, Atlantic Reporter, Northeastern Reporter, Southeastern Reporter, New York Supplement, and the Southern Reporter. With their proper abbreviations set forth in parenthesis, the states which constitute each regional reporter unit are as follows:
Pacific Reporter (P)  Washington, California, Oregon, Nevada, Montana, Idaho, Utah, Arizona, Wyoming, Colorado, New Mexico, Kansas, Oklahoma, and Hawaii;

Northwestern Reporter (NW)  North Dakota, South Dakota, Nebraska, Alaska, Minnesota, Iowa, Wisconsin, and Michigan;

Southwestern Reporter (SW)  Texas, Arkansas, Missouri, Kentucky, and Tennessee;


Northeastern Reporter (NE)  Illinois, Indiana, Ohio, New York, and Massachusetts;

Southeastern Reporter (SE)  Georgia, North Carolina, South Carolina, Virginia, and West Virginia;

Southern Reporter (S)  Louisiana, Mississippi, Alabama, and Florida; and

New York Supplement (NYS)  New York Court of Appeals, and lower court written opinions.

The National Reporter System publishes all of the written opinions of the states' highest courts as well as all written opinions issued by any intermediate appellate courts. Thus, all written judicial decisions are reproduced in the appropriate reporters.

In addition to reporting state court opinions, the National Reporter System reports cases decided by the various lower federal courts and the United States Supreme Court. The
principal federal reporters, with their proper abbreviations set forth in parentheses, are as follows:

**Federal Supplement (F. Supp.)**
Selected written opinions arising in the United States District Courts and United States Custom Court;

**Federal Reporter (F)**
Cases arising in the United States Courts of Appeal, United States Court of Customs and Patent Appeals, and the United States Court of Claims;

**Federal Rules Decisions (F.R.D.)**
Cases which construe the various federal civil and criminal rules; and

**Supreme Court Reporter (S. Ct.)**
Opinions of the United States Supreme Court.

In addition to compiling all of the states' courts' opinions into regional volumes and publishing opinions of the federal judiciary in an organized manner, the National Reporter System includes, with the publication of the court's written opinion, several unique features. The actual decision in each published case is preceded by a single-paragraph summary of the decision. The value of this editorial feature is that by reading the summary first, one can learn the nature of the case and the result reached by the court. Another unique and invaluable aspect of the National Reporter System is the presence of headnotes which are essentially one-paragraph summaries of important conclusions on points of law which are recognized by the court in its opinion. The
importance of the headnote feature is magnified as a result of the West "key-number" system. Under this system each headnote is classified according to its subject matter; the designation of a "key-number" further sub-classifies, principally upon factors that underlie the subject matter of the headnote. The benefit of the "key-number" classification is that it is a guide to the American Digest System, which is discussed later in this chapter. Historically, all of the states had official judicial reporters, but the number has drastically decreased over the last thirty years. As a result, the responsibility for publishing appellate court opinions now exists almost exclusively with West Publishing Company, the creator of the National Reporter System. The development and continuous maintenance of the National Reporter System has significantly simplified the manner in which legal research is performed, in that it makes accessible court opinions that would otherwise be unavailable.

One cites a case in the National Reporter Series by stating in order: the numerical volume of the reporter, the accepted abbreviation of the reporter, and the page number of the opinion. Because of the length of time that has transpired since the advent of the National Reporter System and the number of cases which have been reported, the Supreme Court Reporter, the Federal Reporter, and most of the state court reports are designated as a first or second series. In the instance of cases being published in the second
series, a "2d" is added to the abbreviated title of the reporter. For example, the proper citation to the case of McCall vs. State is 540 S.W.2d 717; thus, the McCall case is found in volume 540 of the Southwestern Reporter, second series, beginning at page 717. The first page of this case is shown in Illustration 1.

The only particularly relevant official case decision reporter is the United States Reports, which is published by the United States government. This official publication is duplicated by West's Supreme Court Reporter, and the Lawyer's Edition of the United States Supreme Court Reports, which is published by Bancroft-Whitney Publishing Company. The latter service is not a part of the National Reporter System; however, in addition to reporting the decision of the court, it publishes the briefs of the attorneys, includes annotations on points of law, and provides footnote references keyed to the annotations in earlier volumes and other annotated reports.

Each hardbound volume of cases published in the National Reporter System is preceded by an "advance sheet," which is a paperback pamphlet that reports the court's opinion. The pagination set forth in the advance sheet corresponds to that in the bound volume which succeeds it. The purpose of publishing a case in the form of an "advance sheet" is to make appellate decisions available to the public as soon as possible and eliminate the delay caused by producing hardcover bindings.
In addition to the "advance sheet," there are numerous sources that make appellate court decisions available almost immediately after they have been rendered. However, their purpose is to provide immediate notice of the case, but they do not generally serve as a proper means of reference when one cites a reported decision.

Annotated Case Reports

The major publisher of annotated reports is the Lawyer's Cooperative Publishing Company, which issues the *American Law Reports*, now in its third series, and *American Law Reports Federal*. The purpose of the *American Law Reports* is to bring together and correlate all of the individual cases relevant to a significant legal matter. However, this service is selective in that it reports only those cases that are of particular legal consequence. In addition to reporting the selected case, the publishers present a discussion or annotation of the relevant legal principles discussed by the court and annotations to other decisions which are relevant to the subject matter of the reported case.

The annotation feature is the most favorable aspect of this publication. The *American Law Reports'* discussion, which follows the opinion of the court, is divided into sections, each of which has a heading which reflects its content. Preceding the annotation is an outline of how the subject matter is organized. Following the outline is an alphabetical word index that describes the content of the annotation,
with a section reference. Following the index is a list of geographical jurisdictions, both state and federal, that have cases discussed in the annotation. The text of the annotation follows and concludes with a summary of the law discussed.

The American Law Reports system is regularly updated by publication of supplements such as the second series, which consists of fifteen separately bound volumes that are also regularly supplemented. The first series of this annotated publication is supplemented by the American Law Reports Blue Book, which merely lists all other cases relevant to the point of law analyzed in the original annotation without describing or analyzing the cases. The American Law Reports (third series) and American Law Reports Federal are supplemented by cumulative supplements.

Discovering a case in the American Law Reports is accomplished by reference to the appropriate word index or digest.

Digests

One of the most prevalent methods of finding precedential authority is by referring to digests, which are actually broad indexes to judicial decisions. Basically, the digest is used to discover court opinions that deal with specific "fact" situations and limited rules of law. As to form, the digest entry is merely a series of short paragraphs which summarize the facts of a case and the points of law
The most important and widely used digest is the American Digest System, published by West Publishing Company. It constitutes the most comprehensive index to judicial opinions available. The American Digest System interacts with the National Reporter System through the headnote and "key-number" system. Under this scheme of classification, each topic in the digest is subdivided into as many subtopics as are necessary to cover the points of law arising under the main topic. Each specific subtopic is assigned a key-number. The topic name together with the key-number constitutes a reference to a particular point of law abstracted from one or more decisions. It should be emphasized that the key-number has no value except when used in conjunction with the headnote.

The value of the American Digest System to legal research is that it is national in scope and is consistent throughout the states and the federal judiciaries. The system endeavors to classify uniformly all of the reported appellate decisions in the United States. The system, on the national level, is published in ten-year units, called decennial digests. During the ten-year period, which culminates in its publication as decennial digests, the digest is referred to as the General Digest. It is published initially in monthly pamphlets which are cumulated into bound volumes that are issued quarterly.

Although the American Digest System is national in scope, of more practical utility are the regional, state,
and federal digests. These publications employ the key-number classification and follow the same format as the American Digest System. However, the decisions they report are reflected in the title of the particular digest. For example, the Texas Digest includes all reported decisions rendered by the appellate courts in Texas; the Atlantic Digest includes all cases decided in the states that comprise West’s Atlantic region.

The West digests can be utilized in basically three ways: the descriptive word approach, the topical approach, and the case method. All West digests contain an alphabetically arranged index which includes not only the headnote topics and subtopics, but also thousands of key words and phrases that may be descriptive of the facts and points of law found in the digest’s abstracts. Use of the word index can direct the researcher to the specific topic and key-number which includes cases with similar fact situations or similar legal issues, or both.

The topical approach assumes the researcher’s foreknowledge of an applicable West headnote; therefore, it is a less satisfactory method of utilizing the digest. Under this method one selects a topic, then analyzes the subtopics for appropriate key numbers. In the event one knows the style of a relevant case, the researcher may use the table of cases to find its West topic classification and the designated key number which makes available possibly precedential cases.
If one has available a case which is reported in the National Reporter System, he may obtain the appropriate digest topic and key number from the headnotes. With this information, he has easy access to all West digests. Thus, all of the cases in which a particular issue has been ruled upon are at the disposal of the researcher.

In addition to the most popular means of utilizing the digest, there are several less favorable, but acceptable, methods. The first is the "popular name" approach. Because of the notoriety associated with some cases, a label has been imposed on the decision. Occasionally, the informal name or label is available, whereas, the official style of the case is unknown. For example, one may not be acquainted with Brown vs. Board of Education of Topeka; however, he may be familiar with the "School Segregation Case," its informal title, or label. Most digests have an alphabetically arranged popular name list which provides one with the style of the case and its citation. These tables, or lists, most often appear separately in digests, but may be a part of the Table of Cases index. In using the popular name table in the West publications, one must initially be aware of the case's popular name and thereafter refer to Table of Cases volume for the topics and key numbers associated with the case.

Another less satisfactory method of using digests is by referring to judicially defined words and phrases. The legal interpretation of words and phrases being one of the essential purposes of the courts, the judicial definition of a word or phrase is significant. Consequently, a table of words and phrases is included in most digest publications. Most West digest publications which include separate words and phrases volumes are arranged alphabetically by the significant word or phrase: they provide the style and citation of the case interpreting a specific word or phrase. Once the style is obtained, reference to the Table of Cases is necessary in order to find the appropriate topic and key number.

Each West digest is kept current by the publication of cumulative annual supplements that are placed in the back of the appropriate volume. Moreover, on a semi-annual basis, a separate paperback supplement is issued. Although there are numerous other digest publications that can be of value to the researcher besides those issued by West Publishing Company, the West digests are by far the most significant because this company has systematized the vast number of cases supporting, disagreeing with, or overruling points of law. The system is, in turn, a direct consequence of the American judicial system's reliance upon the doctrine of stare decisis.
Illustration 2 reproduces the introductory page to the Texas Digest's discussion of divorce; Illustration 3 displays the first page of the cases collected in the Texas Digest which deal with certain aspects of divorce law.

Citators

Co-equally significant with the discovery of an apparently binding case, is the answer to the question: does the applicable case law really constitute stare decisis? One must therefore develop the ability to discover what has happened to that case since it was first reported: this is the purpose of a citator.

Within the United States the only citator of any significance is published by Shepard's Citations. This private publication presents an abbreviated analysis of every published decision and all major legislation. It employs a complex system that relies upon abbreviations to develop the analysis of a case or legislative act. The citation system lists a decision (published opinion) by referring to the volume, publication, and page number: the style of the case is not published. Below the citation Shepard's lists all later references to the decision. The cases referred to in the analysis are identified in the same manner as the cited decision: by volume, publication, and page. Again, the style of the case is omitted.

Because of the complex nature of "Shepardizing" a case, Shepard's Citations issues an instructional pamphlet avail-
able without charge, How to Use Shepard's Citations. Moreover, each permanent volume and the supplemental pamphlets include tables which purportedly answer all questions concerning the meaning of the abbreviations. The abbreviations and their meanings are shown in Illustration 4.

In addition to providing information about the treatment given a case, Shepard's Citations has an equally significant function: it can be used as a means of discovering additional case authority. This is possible because the cases referred to in the analysis represent all of the reported cases that make specific reference to the cited decision. Often other cases that expressly refer to the cited decision are applicable as stare decisis. Thus, utilizing Shepard's Citations in this manner is absolutely necessary for carrying out proper legal research.

Because Shepard's Citations makes use of abbreviations, it is able to give the reader a great deal of valuable information about a case in a rather limited space. Shepard's Citations issues one or more volumes which correspond to each of the West Publishing Company case reports, both federal and state. Moreover, each unit of Shepard's Citations relates information about a case by making reference to the numbered headnote with which the reference case is concerned. In addition, Shepard's Citations, through the abbreviations, indicates how the reference case affected the cited case. For example, if the cited case was overruled, this fact is shown by the appropriate abbreviation.
Because of the complexity of the Shepard's Citations and the quantity of material it presents, an example of Shepardizing a case may be more beneficial than merely explaining one. The following exercise is partially based upon the information available in Illustrations 4 and 5, and the technique that it exemplifies is applicable to any unit of the Shepard's Citations that is based upon a West Publishing Company case report. The principles to be followed in "Shepardizing" a case are as follows:

1. Acquire the citation for the case that one concludes has precedential value. (The result of this step is referred to as the "cited decision."

2. Select the West Publishing Company headnote number that presents the principle applicable to the legal issue.

3. Coordinate the West Publishing Company citation with the appropriate Shepard Citation volume, and locate the cited decision.

4. Examine all the cases listed below the cited decision for all later cases that referred "reference decision" to the cited decision.

5. The letter abbreviation before each referenced decision, if there is one, indicates whether the cited decision was affirmed, reversed, dismissed, criticized, or distinguished by the court.

6. Be aware of the small superior number that immediately precedes the page number of the reference decision. This identifies the headnote number which states the legal principle involved in the decision. (This is an invaluable service in that it eliminates the necessity of examining all of the cases that refer to the cited decision. Because of this feature one is immediately aware of the basic content of the reference decision.)
7. Refer to the current issue of the cumulative supplements and proceed in the same manner as before.

8. Shepardize all reference cases that are applicable in the same manner. Consequently, the reference case becomes the cited case.

Applying these steps to Illustration 5, one can obtain the history and judicial treatment of the case's decision. For example, the case located in volume 529 of the Southwestern Reporter (Texas cases), second series, on page 522, (reference case) is the same [as indicated by the lower case "s"] case that was reported in volume 493 of the Southwestern Reporter, second series, on page 199 (cited case). Moreover, it was followed [as indicated by the lower case "f"] in the case located in volume 533 of the same reporter on page 820 (cited case).

Additionally, the case located in 533 S.W.2d 820 commented upon the headnote number two of the reference case (529 S.W.2d 522). The remaining cited case commented upon the indicated headnotes, but did nothing to the case.

Although a great deal more is relevant and material to developing a skill at Shepardizing a case, the foregoing suggestions do give one at least a basic awareness of the purpose, scope, and significance of Shepard's Citations.

Encyclopedias

Historically, legal research was based on the lawyer's ability to focus his attention upon a particular legal issue.
Thereafter, he consulted an applicable and recognized treatise or work wherein the legal principles were extensively discussed and systematically explained. However, as the American judicial system continued to expand, the resort to treatises for a comprehensive discussion of a particular legal issue became increasingly difficult. Consequently, an alternative was developed, the legal encyclopedia.

The legal encyclopedia is like a standard encyclopedia in that each attempts to set forth in alphabetical sequence a discussion of particular areas of interest. The essential benefit of a legal encyclopedia is that it makes available to the researcher a vast amount of legal knowledge in a format that is basically easy to use. Moreover, the information presented in the encyclopedia allows the researcher to acquire at least a minimum amount of knowledge of the general or specific legal principle involved.

There are basically two types of legal encyclopedias: the general encyclopedia and the local encyclopedia. The general encyclopedia is comprised of two competing sets of encyclopedias—American Jurisprudence, Second Edition, and Corpus Juris Secundum. These sets supersede prior publications. The local encyclopedias, although their basic format is similar to that of the general encyclopedias, are restricted to the laws of a particular state. In local encyclopedias, the decisions that are cited to support the encyclopedias' text are generally confined to those of that state's courts.
and to federal court decisions that construe the state law.

Both the general encyclopedias and the local encyclopedias are similarly arranged, and the method of using them essentially uniform. The broad legal principles are set forth in standard, acceptable legal terminology, and alphabetically arranged. Thus, one need have only some knowledge of the general area of legal interest. For example, if one is researching a legal issue that arose from a criminal assault, he must be concerned with the broad, general area of criminal law. Once he discovers the general area, he may take steps to reduce the scope of the subject matter, which he can do by referring to one or more of the encyclopedia research aids.

The first aid is an alphabetical list of all legal titles which are included in the particular publications. Of more significance is the topic analysis that is a more specific and detailed table of contents. Once the researcher discovers the proper specific topic, the encyclopedias provide him with a "scope note" which takes the form of a legal topic. If one's election of the specific legal topic is incomplete, he can consult a detailed index of topics included in each volume. Moreover, he has at his disposal a general index that is offered by the publishers of both general and local encyclopedias.
The text of the legal topics can be considered a valid treatise on the subject matter. It sets forth a comprehensive analysis of the specific legal topic. Statements made in the encyclopedia are, when possible, supported by authority, with each case attributed to the appropriate National Reporter System reporter.

The legal encyclopedias are supplemented by annual cumulative pocket supplements which present an up-to-date discussion of the law.

The one aspect of local encyclopedias that sets them apart from the two general encyclopedias is that they can treat local statutes. Thus, state statutes are incorporated within the relevant legal topic, thereby expanding the relevance and reliability of the topic's text.

The encyclopedia for the State of Texas is *Texas Jurisprudence 2nd*, published by Bancroft-Whitney Publishing Company. Illustrations 6 and 7 detail two parts of *Texas Jurisprudence 2nd*. They are, respectively, excerpts from the table of contents with the scope notes, and a part of the encyclopedia's discussion of divorce.

**Statutes**

Inasmuch as the United States is democratic, most of the laws that regulate conduct within the jurisdiction of

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²In 1976 less than one-third of the states were covered by local legal encyclopedias.
both the federal and state governments are created by legislative processes. Therefore, although stare decisis is the foundation upon which judicial decisions are created, one must always consider legislative action in the form of statutes. Moreover, he must not overlook the fact that some recently enacted legislation may nullify the binding effect of a court decision. Thus, the existence or applicability of a statute must always be considered because courts must first be guided by the relevant constitutional provisions, then must apply any statutory considerations: in the absence of either constitutional or statutory regulation, the law of stare decisis can be applied. According to Mr. Justice Cardozo, "The rule that fits the case may be supplied by the constitution or by statute. If that is so, the Judge looks no farther . . . the constitution overrides the law of judges. In this sense, judge-made law is secondary and is subordinate to the law that is made by legislators." Generally speaking, a statute is a permanent rule of law that is enacted by a governing body which prescribes the conduct of the public that it is charged to govern. However, this governing legislation is delineated through the use of various and distinct terms, each being referable to its particular origin. Statutes are created by the federal government and the state government, and ordinances by the local government.

Once such legislation has been created, it must be published so as to be made available to the public.

Relative to federal legislation, essentially all of the federal statutes are found in fifty separate titles in the United States Code, an official government publication. These titles are divided into chapters and subdivided into sections. A reference to a federal statute reads like this: 28 U.S.C. §1983 (1965). There is also a general index to the United States Code which allows one to employ a subject-topic approach in researching the United States Code.

There are two unofficial publications that reproduce the same federal statutes that are found in the United States Code: United States Code Annotated, published by West Publishing Company, and the United States Code Service, published by Bancroft-Whitney Publishing Company. Both unofficial publications are similar to the extent that the text of the official United States Code is reproduced according to its official classification by title, chapter, and section. In addition, each is annotated with references to judicial decisions that are concerned with the statute. These annotations provide the style of the case, the citation, and a brief synopsis of the court's decision.

The United States Code Annotated offers a multi-volume general subject index and a subject index in each volume that includes a specific title.
States' constitutions and statutes are compiled into a separate publication for each state. Most of these publications, which are unofficial, are annotated with citations to court decisions and supplemented annually. In addition, these unofficial publications offer a general subject index and an index to each statutory topic.

When a bill is enacted into law, that statute is incorporated into the permanently published laws through the means of the annual supplementations. However, laws passed and enacted during a legislative session, and prior to the issuance of the annual supplement, are chronologically arranged into published "session laws." These session laws, which are published periodically during the legislative session, include a general subject index.

Additionally, a source of statutes that is becoming dominant is in the area of uniform state laws. These laws are drafted by the National Conference of Commissioners on the Uniform State Laws. Once drafted and approved by the American Bar Association, they are sent to the state's legislatures for consideration. The obvious purpose of the National Conference is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practical." 4

In addition to being found in the statutory publications of the states, these laws are compiled by West Publishing Company into one publication that is annotated by citations to applicable court decisions.

Of lesser overall significance are municipal charters and ordinances which are generally printed in book or pamphlet form; however, there is rarely any unofficial annotated publication of municipal laws. To the contrary, Shepard's Citations for the state in which the municipality is located provides citations to judicial construction of municipal charters and ordinances.5

Legal Periodicals

Necessary to any discussion of legal research is a brief reference to legal periodicals, of which there are several types. Most prevalent are law reviews or law journals which are published one or more times annually by the law journal staff in a law school. Each law review issue may be comprised of several features, such as the following:

(1) Leading articles, which are usually written by lawyers, judges, or persons with a specialized expertise in particular fields of law. The purpose of the leading article is to analyze closely a specific legal subject, using exhaustive authority and other citations;

5It should be emphasized that the foregoing discussion of statutes does not attempt to exhaust the numerous statute sources. That task is beyond the scope of this study. However, the sources that are discussed are the most significant to the public because they enable them to discover the legislative declarations that direct their conduct.
(2) Comments, which are generally short discussions of particular legal issues, often written by qualified upper-class law students;

(3) Case comments, which are traditionally brief student commentaries on significant court decisions; and

(4) Book reviews, which are brief evaluations of works related to the law.

One generally obtains access to relevant law review articles by referring to the Index to Legal Periodicals, which is similar to the Readers Guide to Periodical Literature. It is essentially a subject-author index to American legal periodicals. However, it does include a table of cases and a book review index.

Law reviews have no authoritative influence in the area of stare decisis. Their primary benefit to the researcher and lawyer is that they provide an analytical approach to generally specific and complex legal matters. Consequently, by employing the legal periodical, the researcher is able to view a legal matter from another's point of view.

This entire discussion of legal research principles and source materials, obviously, is not exhaustive; however, it does cover the most prevalent means of conducting legal research and the basic publications one must consult. The numerous, but less significant, publications have been ignored, not because they are unimportant, but because this introduction to legal research would have become too tedious if they had been included.
records for Ben Taub Hospital, testified that the records were under her care, custody and control at Ben Taub Hospital; that they were prepared in the regular course of business at the hospital; that they were prepared at the time of the examination of the prosecutrix by a physician who examined her. The records were properly authenticated. Gassett v. State, 532 S.W.2d 328 (Tex.Cr.App.1976); Lumpkin v. State, 524 S.W.2d 302 (Tex.Cr.App.1975).

Appellant's fourth ground of error is overruled.

The judgment is affirmed.

Opinion approved by the Court.

Simmie McCall, Appellant, v. The STATE of Texas, Appellee.
No. 52122.
Court of Criminal Appeals of Texas.

The County Court, Wichita County, Calvin Ashley, J., found defendant guilty of cruelty to animals, and he appealed. The Court of Criminal Appeals, Brown, C., held, inter alia, that statute making it a criminal offense to intentionally or knowingly fail “unreasonably to provide necessary food, care, or shelter for an animal in his custody” sufficiently informs an accused of the nature and cause of the accusation against him and is not unconstitutionally vague and indefinite; that while defendant was charged by information with intentionally and knowingly failing unreasonably to provide necessary food and care for an animal in his custody, to wit, a Great Dane dog, the rebuttal testimony of humane society member and the photographs of other emaciated dogs found on defendant’s property were clearly admissible after defendant presented testimony raising the issue of whether he had intentionally failed to care for the animals; and that where defendant kept dogs in an open field clearly in view of neighbors and passersby, and where it was apparent that the emaciated animals were not being properly cared for in possible violation of the law, it was not unreasonable for humane society members to go onto defendant’s property and seize the dogs.

Judgment affirmed.

1. Criminal Law $\equiv$13.1(2)

Statute making it a criminal offense to intentionally or knowingly fail “unreasonably to provide necessary food, care, or shelter for an animal in his custody” sufficiently informs an accused of the nature and cause of the accusation against him and is not unconstitutionally vague and indefinite. V.T.C.A., Penal Code § 42.11(a)(2).

2. Criminal Law $\equiv$394.6(3)

In prosecution for cruelty to animals, defendant’s motion to suppress photographs of emaciated Great Dane dog was not timely, and he waived his complaint as to their admissibility, where the photographs were introduced during the direct examination of humane society member and were admitted without defense objection. V.T.C.A., Penal Code § 42.11.

3. Criminal Law $\equiv$438(2), 683(1)

While defendant was charged by information with intentionally and knowingly failing unreasonably to provide necessary food and care for an animal in his custody, to wit, a Great Dane dog, the rebuttal testimony of humane society member and the photographs of other emaciated dogs found on defendant’s property were clearly admissible after defendant presented testimony raising the issue of whether he had intentionally failed to care for the animals. V.T.C.A., Penal Code § 42.11.
Illustration 2--A copy of the introductory page of the Texas Digest discussion of divorce.

DIVORCE

SUBJECTS INCLUDED

Dissolution of the relation of a valid marriage, total or partial, by legislative or judicial action

Judicial separation of husband and wife

Nature and scope of the remedy in general

Grounds of actions for divorce or separation and defenses thereto

Jurisdiction to grant divorces or separations, and proceedings therefor

Incidental relief as to alimony, disposition of property, custody, and support of children, etc.

Judgments or decrees and operation and effect thereof

Review of proceedings and costs in actions for divorce or separation

Status, rights, and liabilities of divorced persons

Foreign divorces

SUBJECTS EXCLUDED AND COVERED BY OTHER TOPICS

Agreements for separation, see HUSBAND AND WIFE

Annulment of marriage, see MARRIAGE

Particular rights and estates in property, effect of divorce, see CURTESY, DOWER, HOMESTEAD, INSURANCE, and other specific topics

Separate maintenance without divorce, see HUSBAND AND WIFE

For detailed references to other topics, see Descriptive-Word Index

Analysis.

I. NATURE AND FORM OF REMEDY, ⇨1-11.

II. GROUNDS, ⇨12-38.

III. DEFENSES, ⇨38½-56.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF, ⇨57-198.
   A. JURISDICTION, VENUE, AND LIMITATIONS, ⇨57-69.
   B. PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS, ⇨70-87.
   C. PLEADING, ⇨88-108.
   D. EVIDENCE, ⇨109-137.
Illustration 3—A copy of the first page of cases collected in the Texas Digest which deal with divorce.

-called DIVORCE

For later cases see same Topic and Key Number in Pocket Part

called Interest of state or public.

Library references
C.J.S. Divorce § 8.

Tex. 1965. Relator who was assessed three days in jail for contempt of court for alleged failure and refusal to make child support payments, with provision that he might purge himself of such contempt by paying $500 as arrearage, attorney’s fee, and court costs, was entitled to be released after he had served the three-day commitment, even though he did not pay the arrearage and court costs.

Ex parte Savelle, 392 S.W.2d 113.

Tex. Civ.App. 1941. The state and society have an interest in keeping intact all marriage contracts and in protecting them to the fullest extent, since such contracts form the basis of a decent social order. Vernon’s Ann.Civ.St. art. 4631; Vernon’s Ann.St. Const. art. 5, § 8.

Pappas v. Pappas, 146 S.W.2d 1115.

Tex. Civ.App. 1952. The marital relation is one in which not only parties thereto but government has very great interest, since permanency of marriage and maintaining home is very basis of our government and civilization, and divorce should never be granted except on full and satisfactory evidence showing that it will be intolerable for parties to continue marital relation.

Bippus v. Bippus, 246 S.W.2d 562.

II. GROUNDS.
-called Causes for divorce in general.

Library references
C.J.S. Divorce § 13 et seq.

Tex. Civ.App. 1923. Allegations of a husband’s divorce petition that defendant did not want him, and confirmed it with her acts towards him, held insufficient to entitle him to a divorce.


Ex parte Nolte, 269 S.W. 996.

Tex. Civ.App. 1928. Religious differences and breach of antenuptial promises as to church going held not ground for divorce.

Hickman v. Hickman, 10 S.W.2d 738.


Buckner v. Buckner, 27 S.W.2d 311.

For legislative history of cited statutes
Illustration 4—A copy of the page of abbreviations employed by Shepard's Citations.

<table>
<thead>
<tr>
<th>ABBREVIATIONS – ANALYSIS</th>
</tr>
</thead>
<tbody>
<tr>
<td>CASES</td>
</tr>
</tbody>
</table>

**History of Case**
- **a** (affirmed) Same case affirmed on appeal.
- **cc** (connected case) Different case from case cited but arising out of same subject matter or intimately connected therewith.
- **D** (dismissed) Appeal from same case dismissed.
- **m** (modified) Same case modified on appeal.
- **r** (reversed) Same case reversed on appeal.
- **s** (same case) Same case as case cited.
- **S** (superseded) Substitution for former opinion.
- **v** (vacated) Same case vacated.
- **US cert den** Certiorari denied by U. S. Supreme Court.
- **US cert dis** Certiorari dismissed by U. S. Supreme Court.
- **US reh den** Rehearing denied by U. S. Supreme Court.
- **US reh dis** Rehearing dismissed by U. S. Supreme Court.

**Treatment of Case**
- **c** (criticised) Soundness of decision or reasoning in cited case criticised for reasons given.
- **d** (distinguished) Case at bar different either in law or fact from case cited for reasons given.
- **e** (explained) Statement of import of decision in cited case. Not merely a restatement of the facts.
- **f** (followed) Cited as controlling.
- **h** (harmonized) Apparent inconsistency explained and shown not to exist.
- **j** (dissenting opinion) Citation in dissenting opinion.
- **L** (limited) Refusal to extend decision of cited case beyond precise issues involved.
- **o** (overruled) Ruling in cited case expressly overruled.
- **p** (parallel) Citing case substantially alike or on all fours with cited case in its law or facts.
- **q** (questioned) Soundness of decision or reasoning in cited case questioned.

**Writs**
- **CD**—Application for writ of certiorari denied.
- **D**—Application for writ of error dismissed for want of jurisdiction.
- **DAP**—Application for writ of error dismissed by agreement of parties.
- **DJC**—Application for writ of error dismissed, judgment correct.
- **DMA**—Writ dismissed on motion of applicant.
- **DWB**—Writ dismissed for want of bond.
- **DWP**—Writ dismissed for want of prosecution.
- **G**—Application for writ of error granted.
- **MA**—Writ of mandamus awarded.
- **MD**—Application for writ of mandamus dismissed for want of jurisdiction.
- **MDen**—Application for writ of mandamus denied.
- **MG**—Motion for writ of mandamus granted.
- **MGP**—Application for writ of mandamus granted in part.
- **MI**—Writ of mandamus will issue.
- **MO**—Motion for writ of mandamus overruled.
- **MR**—Application for writ of mandamus refused.
- **MRP**—Application for writ of mandamus refused in part.
- **R**—Application for writ of error refused.
DIVORCE AND SEPARATION

Scope of Title: This article discusses the dissolution of the marriage relation by divorce, the effect of divorce decrees, the rights of the respective spouses to alimony and property, matters concerning the custody and support of children of the marriage, and the effect of separation agreements between the parties.

Treated elsewhere are the subject of marriage and its annulment (see MARRIAGE), the rights of husband and wife in property (see COMMUNITY PROPERTY; HUSBAND AND WIFE), the general relationship between the spouses (see HUSBAND AND WIFE), and the rights and duties arising out of the relationship of parent and child (see PARENT AND CHILD).

Pleading check list follows § 427.

I. INTRODUCTORY (§§ 1-4)

II. GROUNDS FOR DIVORCE (§§ 5-40)
   A. GENERALLY (§§ 5-7)
   B. CRUELTY (§§ 8-26)
      1. Generally (§§ 8-14)
      2. Particular Conduct (§§ 15-26)
   C. ADULTERY (§§ 27-29)
   D. ABANDONMENT (§§ 30-37)
   E. SEPARATION FOR SEVEN YEARS (§§ 38-40)

III. DEFENSES AND MATTERS IN BAR (§§ 41-57)
   A. GENERALLY (§§ 41-44)
   B. COLLUSION (§ 45)
   C. CONNIVANCE (§ 46)
   D. RECRIMINATION (§§ 47-49)
   E. CONDONATION (§§ 50-57)

IV. REQUIREMENTS AS TO INHABITANCE AND RESIDENCE (§§ 58-71)

V. JURISDICTION (§§ 72-74)

VI. VENUE (§§ 75-77)

VII. PARTIES AND PROCESS (§§ 78-80)

[329]
§ 5  Divorce and Separation  20 Tex Jur 2d

nize the pleadings in a divorce case as to their sufficiency. It is the public policy to foster and protect marriage, prevent separation and divorce, and encourage the spouses to live together. Public policy strongly favors abandonment of divorce proceedings, reconciliation of the parties, and resumption of the marriage relation.

II. Grounds for Divorce

A. Generally

§ 5. In general.

The grounds of divorce are prescribed by statute. Without elaboration, these are: excesses and cruel treatment, adultery, abandonment, separation, conviction of a felony, and permanent and incurable insanity.

A severance of the marriage relation is allowable only in the manner prescribed for and the causes specified by law. The statute providing the grounds for divorce has been construed as denying by implication the power of the court to grant a divorce in any other case, and the power to dissolve

3. Caywood v Caywood (CA) 290 SW 889 (rule different from that in other cases).

4. Kelly v Gross (CA) 4 SW2d 296, err ref.

Unsuccessful attempts by husband to salvage marriage after separation may not bar him from urging prior acts of cruelty of wife as grounds for relief sought. Turner v Turner (CA) 289 SW2d 836, dismd w o j.

Domestic relations—laws should be amended to prevent the one million divorces granted annually, 15 Tex BJ 557.

Form: Complaint, petition, or declaration seeking reconciliation and amicable settlement of marriage controversy, Am Jur PL & PR Forms 7:1036.

5. RS art 4629.

Annotation: Grounds for divorce, 4 ALR2d 227.

6. Turman v Turman (CA) 46 SW2d 447.

7. Schulz v Whitham (L. E.) & Co. 119 Tex 211, 27 SW2d 1093. But see Harrell v Harrell (CA) 42 SW 1040, where court grants "divorce" for pregnancy of wife at time of marriage followed by birth of child of whom husband was not the father. In Schneider v Rabb 100 Tex 211,
CHAPTER III

INTERPRETATION: DISCOVERING LEGAL ISSUES

Before one can undertake legal research, he must be able to recognize the legal problem on which he expects to take a position, since any controversy must have within it at least one legal issue to be resolved or question to be answered. Moreover, the legal issue or question is discoverable among the facts that create the matter to be argued. Thus, when one speaks of a "fact" situation, he is referring to the people, events, places, and things that not only circumscribe but often create the legal issue that he must recognize, identify, analyze and detail. The legal issue in a fact situation is not simply the important or main points in a controversy: it is the point crucial to the resolution of it. It is the principle upon which the conclusion hinges. Consequently, one must be able to isolate the primary legal issue within a fact situation.

In order to segregate properly and successfully the legal issues, at the outset, one must thoroughly consider the facts. Once they have become clear, one may proceed toward concluding what legal issues exist. This process generally requires some knowledge of applicable legal principles, but even without it, one can still ascertain basic legal concerns. He can separate relevant from irrelevant facts by
employing carefully the principles of both analysis and synthesis. Initially, he must reduce the entire fact situation to its component parts, or the factual incidents, that comprise the entire situation before considering the relationship of the parts to one another and to the whole. He must resolve this question: what facts (directly or indirectly) are responsible for the issue present in a situation? The relevant facts should then be synthesized into a complex whole, which becomes the subject matter of the fact situation.

At this point, one must apply the applicable legal principles to the subject. This process results in the development of the legal question, or more appropriately the legal issue. (The entire procedure is outlined in the following example.)

Legal Principle

To obtain a divorce in Texas, the person bringing the suit must have been domiciled in the state for the preceding six months and in the county in which the suit is filed for the preceding ninety days.\footnote{3.21, \textit{Tex. Family Code} (1974).}

Facts

Paul and Joyce were married on July 12, 1971, in Oklahoma City, Oklahoma. In 1972 they moved to Iowa where Paul
worked on a pipeline for about six months. In January, 1973, he got a job overseas and moved to Iran. Shortly thereafter, Joyce returned to Oklahoma City, Oklahoma. In February, 1975, while Paul was still overseas, Joyce moved to Beaumont, Texas, to live with her cousin, Nancy. While living in Beaumont, she began seeing Nancy's friend, Robert.

On July 25, 1975, Paul returned from Iran and went to Beaumont to bring Joyce home to Oklahoma City, Oklahoma. Joyce refused to go home with Paul, saying she was in love with Robert. Enraged, Paul found where Robert worked, went there and assaulted him. Joyce, learning of this incident, filed suit for divorce the following week in the District Court of Jefferson County, Texas, alleging that their marriage was insupportable.

**Component Parts**

(1) Paul and Joyce married on July 12, 1971;
(2) They went to live in Iowa;
(3) They stayed in Iowa for six months;
(4) Paul went to Iran in January, 1973;
(5) Joyce returned to Oklahoma City, Oklahoma;
(6) Joyce moved to Beaumont, Texas;
(7) Joyce began an affair with Robert;
(8) Paul returned to Oklahoma City, Oklahoma, in July, 1975;
(9) Paul went to Beaumont, Texas, for Joyce;
(10) Joyce refused to go home with Paul;
(11) Joyce told Paul about Robert;
(12) Paul found where Robert worked;
(13) Paul assaulted Robert; and
(14) Joyce filed suit for divorce one week later.

**Relevant Facts**

(1) Parties married;
(2) Joyce moved to Beaumont, Texas, on March 14, 1975;
(3) Joyce began an affair with Robert;
(4) Joyce refused to go home with Paul;
(5) Joyce told Paul about Robert;
(6) Paul found and assaulted Robert;
(7) Joyce filed suit for divorce the "following week."

**Irrelevant Facts**

(1) Paul and Joyce moved to Iowa;
(2) Paul and Joyce stayed in Iowa six months;
(3) Paul went to Iran;
(4) Joyce moved to Oklahoma City, Oklahoma.

**Synthesis of Relevant Facts into Whole**

Material--(1) Joyce moved to Beaumont, Texas, on March, 14, 1975;
(2) Paul assaulted Robert; and
(3) Joyce filed for divorce one week later.
Immaterial--(1) Joyce began affair with Robert;
   (2) Joyce refused to go home with Paul;
   (3) Joyce told Paul about Robert; and
   (4) Joyce alleged insupportability.

Examining the "material" issues, one readily observes that
time is a factor in two of the three. Thus, in all proba-
bility the subject matter of the fact situation is the time
Joyce has been in Beaumont, Texas.

Application of Legal Principles to
Material Facts--Legal Issue

Has Joyce resided in Texas the prescribed period of
time necessary to file a suit for divorce?

Once he discovers the legal issue, the researcher is
in a position to attempt to resolve it. The manner in which
he acquires the solution, if there is one, is by following
the various avenues of legal research set forth in Chapter
II.

The incidents that make up a fact situation can be
revealed either orally or in writing. Both media of com-
munication are similar to the extent that in each the details
may be altered by individual opinion and attitude. Even
one's most sincere effort to be objective in detailing events
is influenced by his prejudices, opinions, and experiences.

For example, if one observes an automobile proceeding
through green light at a traffic-controlled intersection,
he, through experience, assumes that the traffic in the intersecting lane is facing a red stop light. If a collision does occur here, experience suggests that the person proceeding through the intersection on the green signal is the victim of the one who presumably violated the red signal. In all probability, the response to the question "what happened?" would be: "He ran a red light." However, this answer is based on assumptions formulated through experience not on observation; thus, it is subject to doubt. This incident, like most others, is susceptible to individual interpretation, that is, human error, although some aspects of it might not be.

For instance, statements concerning where and when the collision occurred are not as divergent as how the incident occurred. However, the reliability of the facts surrounding an automobile accident may be more likely or believable if they come from a thirty-one-year-old traffic engineer rather than a seventy-six-year-old grandmother with cataracts—unless, of course, the engineer's wife was driving the automobile that allegedly had the green light. The two-fold lesson is obvious. One must constantly be aware of at least these two factors which are pertinent to any fact situation: the susceptibility of the incident to individual interpretation, and the source of the information concerning the incident, the interpreter, and the individual himself. Again, one must analyze the incident not just in terms of his
information, but in terms of the relationship between it and the informant. After all, one can surmise that the intersecting automobile ran a red light because (1) someone said he saw that the other car in the collision had a green light; (2) and the collision occurred in the intersection. However, one might conclude that no one witnessed the other vehicle run the red light.

Logic aids a person in recognizing the interrelationship of one factual incident to another. To think logically, one must first accept the principle that certain valid inferences may be deduced from the facts. In the example of the collision, is it valid for one to infer that if a lane of traffic has a green light, the intersecting lane must have a red light? Or, can he validly infer that the statements of a witness who is related to an injured party is unquestionably accurate? The answer to these two questions will not be uniform because, primarily, they are based upon one's own opinions and experiences. Thus, the avenues of reason and logic are circular in nature.

To be able to make an independent judgment about a fact situation, one must examine the details with the awareness

2Logic is restricted to determining the consistent relationships between the facts based upon the reasonableness of the implications that can be derived from the facts. One merely strives to establish a static system of relationships.

When interpreting the facts one attempts to arrive at a conclusion on the basis of reasons.
that on numerous occasions the fact situation may be arguable in that it incorporates within its presentation a conclusion. A purported factual incident will often be merely a premise, or a contention given in support of another statement. Moreover, the premise is more times than not followed by a conclusion. For example, a prosecuting attorney, while detailing evidence against a defendant in a criminal case, provides an example of a fact situation which is comprised of only premises and a conclusion, by stating that a house in the defendant's neighborhood was burglarized on Saturday night, and that a witness saw a white male in his twenties, with long hair, climb out of a bedroom window of the house late that same night. The prosecutor fallaciously concludes that, because the defendant is twenty-four years old, lives two blocks from the burglarized house, is white, and has long hair, he must be guilty of the offense.

Conversely, by analyzing the structure of the prosecutor's argument, one discovers that the alleged facts are merely premises in support of an obviously weak conclusion. The premise is identified by the word "because." "Inasmuch as," "since," "for," and other words of similar import generally do identify premises. Similarly, words such as "therefore," "hence," "consequently," "so," and "it follows that," usually do introduce a conclusion derived from the premises.
In dealing with fact situations, one must distinguish between reasons and conclusions. Reasons are not, by definition, premises; thus, they do not create conclusions. In viewing a fact situation, one can separate reasons from conclusions by applying the definitions of idea and belief to the particular incident. An idea is essentially a concept which may be understood without necessarily being believed. A belief is an idea which has been accepted as being true. Accordingly, a valid conclusion is, in the first instance, a belief, whereas, a reason may be merely an idea that must be viewed in its relationship with other ideas in the fact situation.

This is not to say, however, that a fact situation can always be partitioned into cubes of reasons, premises, and conclusions. Very obviously, it cannot. Nonetheless, examining a set of facts with an awareness of the principle of logical thought, one devises the means by which he can distinguish between relevant and irrelevant information.

Since logical thought is the manner in which one develops consistent arguments, it follows that such a process is also concerned not only with the validity of a particular matter but also with its truth as well. Contrary to common opinion, these two words are not synonymous. Validity pertains to the logical, consistent interrelationship of the premises which formally create the conclusion. Truth relates to the subject matter and the relation of a proposition to what it
suggests. Thus, validity does not guarantee truth. Conversely, the truth of the premises does not necessarily authenticate the conclusion, nor does the falsity of a conclusion indicate that the premises are invalid.

As a result, when examining a set of facts, one should be aware that there are two basic methods of dealing with them, inductive and deductive reasoning. Inductive reasoning is the process through which one develops generalized conclusions based upon previous relevant, related observations (a posteriori). In the absence of inductive reasoning, a lawyer's observations would have little significance because they would remain merely isolated factual experiences. Primarily, the beneficial aspect of inductive reasoning is that it produces expectations that are generally satisfied. Significantly, inductive reasoning is the philosophical basis of stare decisis. For example, since the United States Supreme Court in Miranda vs. Arizona\(^3\) concluded that before a criminal suspect's confession taken while in custody is admissible in evidence at his trial, it must be proven that he has been told of his rights.\(^4\) Through induction, one could generalize that all criminal suspects are entitled to this warning before any confession is admissible as evidence against them. The broad concept of inductive reasoning

\(^3\)Miranda vs. Arizona, 384 U.S. 436 (1966).

\(^4\)See pp. 6-8 for a discussion of this case.
revolves around the recognition of a common factor between events—in this instance, the criminal suspect's being in custody. Moreover, inductive reasoning encourages generalized classification based upon similarities between incidents of experience. In addition, induction is the philosophical medium through which one can develop a hypothesis or supposition formulated on the basis of various experiences.

Inductive and deductive reasoning are really dependent upon each other. Deduction takes the generalizations developed through induction and applies them to a particular problem (a priori). In logic, those generalizations forming the basis of deductive reasoning are called premises. The most common form of deductive reasoning is the application of two generalized assumptions to a situation, which together lead to a conclusion. This argumentative form is called a syllogism. Basically, syllogistic reasoning merely recognizes conclusions that are logically created by the interaction of accepted premises.

For example, Mr. Wood was charged with murder. There are two alleged eye-witnesses to the offense, both of whom have had numerous felony convictions. Mr. Wood is arrested in his home without a warrant and his house is searched at the time of his arrest. As a result of the search a revolver is discovered and seized; ballistics tests indicate it could have been the murder weapon. After his arrest Mr. Wood not
only is not given his rights as required by *Miranda vs. Arizona*, but is held without bond for three days.

In this set of facts, inductive reasoning presents generalizations that effectively eliminate other aspects of the murder because Mr. Wood's house was searched without a warrant, and a gun, the possession of which would be used against him, was discovered and seized. These are the two premises that form the foundation for syllogistic reasoning. By combining them with a basic awareness of other applicable legal principles, one can become aware of the central legal issue: was the gun legally seized by the police? According to the United States Supreme Court in *Mapp vs. Ohio*, the gun was not seized constitutionally; therefore, it is not admissible in evidence against Mr. Wood.

In examining a factual incident it is not necessary that one consciously be able to designate correctly each incident that comprises the facts according to its rhetorical title. The important thing is that one must be able to work his way through a maze of information and accurately identify the details that are relevant and material. This stage of interpreting the facts will be of primary consequence in the eventual resolution of the legal issue.

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5 *Miranda vs. Arizona*, op. cit.

CHAPTER IV

THE PRE-WRITING STAGE

Once the researcher discovers the legal issue and completes the legal research, he takes a position on the issue. Therefore, in a strict sense, the legal issue is no longer an issue, because, insofar as the researcher is concerned, it is no longer a matter of dispute. Thus, the matter that was originally an issue must now take the status of either a negative or an affirmative assertion. Borrowing from conventional writing terminology, he converts the legal issue into the legal thesis, or into a summary of the legal issue. The legal thesis is a transformation of the legal issue into a definitive, written assertion which unequivocally states the position of the author and establishes the central point by demarcating the limits of the question.

Before discussing the legal thesis, one should reduce it into a single declarative sentence in which the predicate asserts or denies something about the subject matter of the legal issue. In standard rhetorical writing terminology, this statement is the "thesis sentence." Although the great majority of fact situations may contain numerous legal issues, each one must be detailed in a separate thesis sentence if it is to be dealt with properly. Consequently, a legal thesis sentence must be concise and precise. It should
detail only the position that the author takes, thereby re-
stricting the quantity of the information which will be
used to support it.

Words which comprise the thesis sentence must have pre-
cise connotations. Generally, words can be divided into two
groups: those with cognitive meanings, and those with emo-
tive meanings. Words which have a cognitive meaning inform
by referring to concrete matters. On the contrary, words
with an emotive meaning inform by revealing positive or nega-
tive attitudes. Inasmuch as the emotive meanings of words
differ from person to person, to use such words in a thesis
sentence encourages misinterpretation. Thus, words that have
cognitive meanings should be used as much as possible. A
word of caution: one should avoid using metaphorical writ-
ting in a thesis sentence because, by its very nature, it
may raise a question as to its meaning. Thus, metaphorical
usage may give rise to vagueness that distorts one's inten-
tion.

The writing of the legal thesis sentence is the first
step one takes in organizing the presentation of the infor-
mation which he found in the legal research. However, it
is almost impossible to write adequately and coherently
about a legal issue without first organizing into an outline
(either formal or informal) the position one takes. The
main benefit of the outline is that it allows one to visua-
lize the structure of the completed paper and the specific
material that is to be included within it. Consequently, a clear outline should help one compose a clear, concise, comprehensible paper.

One type of formal outline is a sentence outline, in which the writer drafts complete sentences for each principle that he uses to argue his legal thesis. The benefit of the formal outline is that it provides a complete thought upon which the writer can elaborate when he actually begins writing. However, the time that he must expend in writing a sentence outline may be better utilized in preparing the content of the paper.

The informal outline is basically a compilation of ideas that are set out in an organized but often fragmentary manner. This outline will be meaningful only to the writer because a complete thought is not necessarily written as a complete sentence. Its purpose is to guide the writer in developing the structure of the written presentation.

Notwithstanding the formality or informality of the outline, these guiding principles are applicable: (1) use uniform designations for the major divisions and subdivisions; (2) begin the outline with an "Introduction" and end it with a "Conclusion"; (3) make sure the outline proceeds logically; (4) separate long subdivisions into major divisions; (5) logically relate each division to the part of the paper it is proposing to develop. For example, relate each major division, the thesis, and the subdivisions to the
division of which they are a part; (6) document all statements with the appropriate legal reference, if any; and (7) separate a division or subdivision into at least two parts.

The following format is suggested for a legal writing outline:

THESIS SENTENCE

I. Introduction
   A. Clarify the subject
   B. Establish the point of view

II. The first major point that supports the thesis
   A. Information that supports the first major point
      1. A specific detail that supports A
      2. Another detail that supports A
   B. Additional information in support of II
      1. A specific detail that supports B
      2. Another detail that supports B

III. The second major point that supports the thesis
   A. Information that supports the second major point
      1. A specific detail that supports A
      2. Another detail that supports A
   B. Additional information in support of III
      1. A specific detail that supports B
      2. Another detail that supports B

IV. Conclusion
   A. Summary of major points
   B. Restatement of point of view
When his outline is completed, the writer may begin writing the argumentative prose.
CHAPTER V

SELECTING THE CORRECT WORDS

Few professional people so consistently exploit and abuse the English language as do lawyers. They not only exploit and abuse the language, but they also exploit and abuse one another's abuses. They tend to select abstract words, or words that symbolize one's ideas, attitudes, feelings, and intellectual qualities, rather than concrete words, or those that refer to objects and classes of actions. For example, the word "plaintiff" is a concrete word because it identifies one who files a lawsuit. The word "attorney" is also concrete because it identifies an individual by his profession. "The plaintiff's attorney" is a clear, concise, and concrete way of describing the lawyer that represents the one who files a lawsuit. Alternatively, "counsel retained on behalf of the party plaintiff" is a worthless and burdensome phrase of concrete words ("counsel" and "plaintiff") tied together by abstract words ("retained," "on behalf," "party") that mean nothing more than the "plaintiff's attorney." As these examples indicate, abstract words should

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2 Ibid.
be avoided whenever possible simply because too many of them are required to describe or identify something adequately. Basically, they encourage verbosity, redundance, and worthless word combinations. There is absolutely no difference in interpretation between "jury trial" and "trial by jury," but lawyers invariably write the latter. The following sentence is an example of verbosity common to legal writing: "The decision of the trial court in denying the Defendant's Motion to Suppress evidence was reversible error\(^3\) for the reason that it violated the Defendant's Fourth Amendment protection against unreasonable searches and seizures."

What this sentence stated in thirty-six words can be written concisely and more effectively in nineteen words: "The trial court committed a reversible error in denying the Defendant's Motion to Suppress the evidence obtained in an unlawful search."

Redundance in legal writing has deep historical roots, which to a degree insure their continued existence; however, much superfluous legal phraseology has come into use because of carelessness, not the writer's intention to conform to tradition. For instance, lawyers persist in writing "null and void," "force and effect," "free and clear," "give, devise, and bequeath," "save and except," "truth and veracity,"

\(^3\)Errors may be either reversible or harmless. Before a case can be reversed on appeal, the error must have caused an improper judgement. Therefore, the use of the word "reversible" in this instance is necessary.
"rest and residue"; the list is endless. They should be aware that most traditional, redundant legal phrases serve no particularly effective purpose, except to make the legal document look and sound as if it were prepared by an attorney. However, accurate, effective, and concise communication should be a lawyer's objective when writing legal documents. Unless the legally aesthetically pleasing word or phrase serves a valid legal or rhetorical function, it should be omitted or exchanged for a word or phrase with more legal or rhetorical validity.

The most dominant common characteristic one notices when he looks at a legal document is the almost inspired, but ineffective, combination of words. Lawyers appear to be programmed to use three or more words whenever one or two would be adequate. The following is a list of combinations of three or more such words, and their one-word or two-word equivalents:

- as a result of
- in accordance with
- inasmuch as
- in relation to
- in the event that
- prior thereto
- subsequent to
- with reference to
- with respect to

of
by, under
since
about
if
before
after
about, concerning
about
One of the most common word combinations that rarely serves any rhetorical purpose is "the fact that." For example, "The fact that the plaintiff was previously married may have influenced the jury." "The fact that" adds nothing to the sentence, which should be written: "The plaintiff's previous marriage may have influenced the jury."

The necessary care a lawyer must exercise in choosing his diction goes beyond avoiding standard legalese and making useless word combinations. Additionally, he must select his words with an awareness that legal writing is formal writing, neither colloquial nor slang, but not pretentious or pompous either. When selecting words, one should choose those that are common and familiar rather than those whose exact meaning is unknown. However, one should not ignore a word simply because it is not commonly used. On occasion, this word may be appropriate, in which case it should be used.

Moreover, the overuse of typical legalisms, such as "whereas," "heretofore," "party of the first part," and similar words and phrases should be avoided. In addition, there is rarely any necessity to use Latin phrases. An exception occurs when the Latin phrase has become a term of art. Another situation where one may use a Latin phrase is that in which the idea represented by the phrase becomes confusing. A Latin phrase is a term of art when it has an
accepted and precise meaning in the legal community, which could be expressed in English only by using many words.\footnote{An example of a Latin phrase that has become a term of art is \textit{res ipsa loquitur}. In law, this has come to mean a rebuttable presumption that a defendant was negligent, and arises upon proof that the instrumentality causing the injury was in the defendant's exclusive control, and that the accident was one which ordinarily does not occur in the absence of negligence.}

Just as perhaps no other traditional profession exploits and abuses the English language as does the law, there may be none which relies upon it more. As a result, a lawyer is obligated to be intimately familiar with the words he uses in his writing. His precise diction is essential to effectuating concise legal writing, while still insuring clarity.
CHAPTER VI

SENTENCE AND PARAGRAPH DEVELOPMENT

Lawyers acknowledge that the effectiveness of any legal document is directly dependent upon its clarity. Paradoxically, however, most lawyers construct sentences whose intent seems to be to create confusion. The reason for this problem is that most lawyers write long, complicated sentences, which, as much as anything else, promote misunderstanding. Long sentences in legal instruments are difficult to comprehend; thus, one should try to express his thoughts in relatively short sentences. For example, instead of writing one sentence to express three separate thoughts, one should write three sentences, each expressing a single thought. However, a legal document is unbearingly boring if it is comprised solely of simple, one-subject sentences. Through the principles of modification, coordination, and subordination, one can eliminate monotony without affecting the clarity of his sentences.

Modification is the technique of describing parts of a sentence by using adjectives, adverbs, phrases, or clauses. By giving the reader specific details about a part of a sentence through modification, one also makes the sentence more forceful and effective. As a result, the document becomes additionally interesting to the reader.
In modifying a part of a sentence, the modifying information must be relevant to the subject of the writing. Otherwise, an audience's attention may be diverted from the main feature of the information to some extraneous material. For instance, in arguing a specific point of law in an appellate brief, a lawyer would be imprudent to impart a great deal of detail about his client, unless the information were particularly relevant to the resolution of the legal question.

Coordination in writing is simply the combining of certain similar elements into "equal" units. Instead of writing "Rape is a type of assault. Murder is another," one could, and probably should, combine the subjects and give them the same predicate: "Rape and murder are both assaults." Coordination does not provide the reader with additional details, but it is useful in that it can be utilized to vary sentence length, thereby reducing monotony that can occur when sentences are comparable in length. In addition, by joining the information presented in several different sentences, one can eliminate or reduce wordiness.

Subordination is a writing technique that permits one to unite two complete sentences, with the subject of one being dominant. For example, "The plaintiff was hit by that car. He was standing on the sidewalk." Subordinating the subject of the second sentence to that of the first results in, "The plaintiff was struck by that car while he was standing
on the sidewalk." The effect of subordination in writing is similar to that of modification and coordination in that it eliminates or reduces monotony and wordiness.

In addition to writing productive sentences, one must also be able to join several related sentences into units of thought, or paragraphs. A well written paragraph clearly joins all the sentences within it into a unit: all the thoughts that are expressed in its sentences focus on one major point.

In legal writing, as well as in other types of writing, the best way to achieve unity within the paragraph is to make one of the sentences a topic sentence: it states the central thought or point of the paragraph, which is developed by other sentences in the paragraph. Since the topic sentence suggests the focus of the paragraph, the writer can use it as a guide in keeping the supporting detail relevant to the paragraph's purpose. This device is beneficial in that a movement away from the topic sentence generally causes a reader's attention to wander.

The location of the topic sentence in a paragraph is dependent upon the structure of the paragraph. Ideally, in a paragraph that progresses in a general to specific format, it is in the first few sentences. In the specific to general paragraph structure, the topic sentence may be used to conclude the paragraph.
Unlike sentences which are basically spontaneous mental efforts, the development of paragraphs can be, and as any other structure, should be planned in advance. Basically, insofar as legal writing is concerned, a paragraph can be structured either in the shape of a pyramid or an inverted pyramid. If one structures a paragraph like a pyramid, specific and limited details are initially presented. The paragraph is further developed by progressively broadening the scope of the information into a general paragraph thesis. Using this technique in pleading a negligence suit based upon an automobile accident, one could write:

On June 28, 1979, the defendant left work at 4:00 p.m., driving a 1979 Ford Cheyenne pickup. He drove west down Smith Street. Upon reaching the intersection of Smith Street and Jones Street, the defendant negligently failed to stop at a red-light traffic signal. As a proximate result of his negligence, the defendant collided with the plaintiff's car, causing the plaintiff to experience severe physical and mental pain, and monetary damages.

Notice how the paragraph progresses from specific details (date, time, type of vehicle) to a general thesis:

1 In Texas, a plaintiff's pleading must allege that his injury or damage was proximately caused by the defendant's
the plaintiff experienced physical and mental injuries and a mental loss.

An alternative method of writing a paragraph is by inverting the pyramid and developing the paragraph accordingly. Thus, the general thesis is presented initially and the supporting information is then presented. Using the same basic facts, one could plead the automobile accident as follows:

The plaintiff suffered severe physical and mental pain and experienced monetary losses as the proximate result of the defendant's negligently colliding with his automobile. The accident occurred about 4:00 p.m. at the intersection of Smith Street and Jones Street when the defendant negligently failed to stop at the red traffic signal. On the date of the accident, June 28, 1979, the defendant was driving a 1978 Ford Cheyenne pickup.

The proper structural development of a paragraph is a key to its coherence. A paragraph that has no structure will be incoherent because its sentences fail to coalesce into a unified thought. In developing paragraphs, one must establish some recognizable relationship between each sentence within the paragraph. Thus, a paragraph's sentences must be directly associated with one another to some degree if the paragraph is to be coherent. Achieving this
association between sentences is the purpose of transitional techniques.

Because legal issues can be comprised of many apparently unrelated elements, writing which is concerned with these matters can appear disjointed. To avoid this, one may bind the sentences together by properly using relative pronouns and demonstrative words, repetition, comparison and contrast, and specific transitional words.

There are a number of adjectives and pronouns that serve to tie sentences together by relating to something that preceded such word. Some of these words are this, that, these, those, who, whom, he, she, it, they, all of them, few, many, most, and several. Whenever one uses a word of this type, he must be absolutely sure that the transitional word or phrase has an obvious antecedent; otherwise, it merely confuses the reader.

The intentional repetition of words or phrases in consecutive sentences can serve to connect them into a group. However, unless the word or phrases can be repeated at least three times, one should avoid repetition because it would appear to be an inadvertent mistake by the author, rather than an abused transitional device. Moreover, repeating words should be used quite sparingly because repetition by its very nature creates monotony.

In addition to being the form of exposition most appropriate to legal writing (because of stare decisis), comparison
and contrast is an effective method of developing a binding relationship between sentences in a paragraph. In legal writing, as well as in other forms of writing, the writer must make sure that there is a logical relationship between the elements of the sentences that are being paired.

The most available technique for developing coherence within the paragraph is by properly using specific words or phrases that suggest a relationship between sentences. The beginning of a sentence is the most common location for such transitional words because they merely extend the thought that preceded them. Although it escapes many who write on legal matters, every transitional word or phrase has a specific purpose; therefore, one should not arbitrarily or incorrectly use a transitional word or phrase, since to do so causes confusion.

The following is a comprehensive list of common transitional words and phrases and the way they should be used to create coherence between sentences in a paragraph:

<table>
<thead>
<tr>
<th>Transitional Words or Phrases</th>
<th>Purposes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. and; or; nor; also; moreover; furthermore; indeed; in fact; in the first, second, third, etc., place; firstly, secondly, thirdly, etc.; next; again; also; finally.</td>
<td>Add or introduce another phrase of a preceding idea.</td>
</tr>
<tr>
<td>2. For instance; for example; for one thing; similarly; likewise; to illustrate; thus.</td>
<td>Illustrate, expand or add to a preceding point.</td>
</tr>
</tbody>
</table>
3. Therefore; thus; so; and so; hence; consequently; finally; on the whole; all in all; in other words; in short; in conclusion; to sum up; as a result; accordingly.

4. Frequently; occasionally; in particular; in general; specifically; especially; usually.

5. Of course; no doubt; doubtless; to be sure; granted; certainly.

6. But; however; yet; on the contrary; not at all; surely; no.

7. Although; though; whereas.

8. Because; since; for; inasmuch as.

9. If; provided; in case; unless; lest; when.

10. As if; as though; even if.

Suggest a conclusion, add up the consequences of a preceding act, summarize minor details to emphasize a major point.

Suggest an illustration (not a comparison or contrast) or qualify details.

Reflect that a concession follows.

Introduce an idea or detail contrary to that which preceded it, or impose a limitation upon a previously stated matter.

Recognize that one aspect of a preceding idea or detail is inappropriate.

Connect a reason to a previous assertion.

Impose a restriction upon a previous statement.

Suggest additional matters that clarify a previous position.

Prior to writing, one should prepare separate index cards that note transitional words or phrases and their purposes, with no more than one per card. This procedure provides the writer with immediate access to any appropriate transitional word.
Legal writing is complex in that one must compile an assortment of facts, details, and legal principles into comprehensible prose. This goal cannot be achieved if one focuses solely upon the whole of the paper, rather than upon, each of its constituents. To write legal prose properly and effectively, one must know each word he uses, the purpose of every sentence, and the focus of every paragraph. This activity is time consuming; however, since the American legal system is adversary in nature, the failure to allocate sufficient time to writing may be met with an abundance of disappointments.
CHAPTER VII

APPELLATE BRIEFS

Traditionally, the ability to persuade is an aptitude anyone must have if he is to solve a problem. Specifically, in the practice of law one's ability to write persuasive prose is essential. Aristotle suggested that one could be persuasive in three ways: (1) by appealing to one's emotions; (2) by appealing to one's reason; and (3) by appealing to one's ethics through the writer's own personality and character.\(^1\) In brief writing, depending upon the type of case that he is appealing, one can utilize any or all of these persuasive techniques.

The appellate brief is a written argument presented to a reviewing court with the objective of securing affirmation, reversal or modification of lower court action.

\[ \ldots \ldots \ldots \ldots \ldots \ldots \ldots \ldots \ldots \ldots \]

The purpose of the appellate brief is to inform and persuade. The court should be informed of the facts, the issues and points of the law involved, and the action requested of the court. The argument

based upon applicable legal principles and policy should persuade the court of the merits of the cause being advocated.  

The procedure one should follow in writing an appellate brief is similar to that used to write expository research papers. Summarily, one should

1. Select which legal issue or issues are to be argued in the brief;
2. If possible, limit the scope of the issue being appealed;
3. Concisely write each arguable issue;
4. Begin researching the issue which is being appealed;
5. Upon finding authority in support of his position, prepare a concise outline of the brief noting the authority that he has discovered;
6. Make a thorough, complete, and final topic outline of the brief, setting forth the authorities that are to be cited and a synopsis of their holdings;
7. Prepare a draft of the brief;
8. Revise the brief as needed, making it as concise as possible.


It is doubtful that any lawyer or judge has the ability to try a case perfectly. Therefore, there will always be the probability that some error will be committed by the court during the trial of a case. It follows that the more complex the case, the greater the chance of error. However, some errors that occur during a trial are not significant enough to warrant an appeal. Therefore, the lawyer preparing the appellate brief must be selective in choosing the points of error to argue. With some exceptions, the errors one elects to argue in the brief should be only those that could result in a reversal, if he is successful with his appeal.\textsuperscript{4}

One benefit of this selectivity is that the appellate court is not burdened with frivolous arguments; thus, at least theoretically, the court's attention can be focused upon the more consequential points presented in the brief.

Because of certain procedural rules, before an error during a trial can be reviewed by an appellate court, that error must be "preserved" for appeal. This preservation of the error is generally accomplished if the trial court is specifically advised by an attorney of the court's error immediately after it occurs. Once the error is selected as an issue to be appealed, a limited survey of the law should

\textsuperscript{4} The only exception to this principle occurs when one is appointed by the court to appeal an indigent defendant's conviction. In those instances, it is imperative that all possible errors be briefed and argued so as to avoid any later claim of incompetent counsel, which itself would be just cause for reversal.
be conducted. This is not to be confused with extensive research; the only purpose of this procedural step is to make sure that one's original opinion of the law concerning the error is correct.

Once he has selected the issues that comprise the appellate brief, one should further limit the questions, if possible. For example, if a trial court committed a mistake in allowing matters into evidence against a criminal defendant during his trial, such mistake would probably be comprised of several specific grounds alleging why it was erroneous. Combining each of these grounds into one allegation is labeled by appellate courts, particularly the Texas Court of Criminal Appeals, as "multifarious." The general argument supporting such broad, various charges will be rejected. Consequently, to achieve an effective appellate review of an alleged error, one should present "Each point ... to the Court [in] not more than one single legal question."

Immediately before one begins the legal research, and in order to facilitate it, he should write separate, complete sentences concisely stating the errors that are to be argued in the brief. This procedure gives the researcher a specific direction in which to focus his legal research.


Thereafter, each error being urged on appeal should be separately researched. Whenever one discovers material that could be cited as authority in the brief, he should use a 3-inch by 5-inch note card to record the following information: the point of error to which the authority is associated; the title of the authority, the reference citation of the authority, and the authority's relevance to the issue. The latter notation can be in the form of a quotation or a paraphrase. Paraphrasing complex information can be difficult and time-consuming; however, it is beneficial when one begins actually composing the brief.

Once the research is completed and the note cards are arranged according to the issue they resolve, a preliminary topic outline of the brief should be prepared, with each error identified as a main subdivision, noting thereon by abbreviation the style of the cases that are applicable to the error which is being argued. Once the first outline is completed, any apparent deficiency in documentation should be inspected for possible further research. Thereafter, a complete and comprehensive topic outline of the brief should be prepared. Once the final topic outline is completed, the brief is ready to write.

However, before writing the first draft of the brief, one should review the notes to be sure that he is thoroughly familiar with the authorities that will document the argument, for these are the foundation of the brief. When
writing, he should use the last outline as a guide. This form will make the argument more logical and unified.

Ideally, each paragraph develops a point in the outline; however, if a point is particularly complex, one may need several paragraphs to discuss it properly. On the other hand, if a point is simple, it may be combined with other related information into one paragraph. There are no binding rules to govern the length of a paragraph, but one should always make sure that he adequately develops his topic in the paragraph.

The paragraphs that are of the most practical importance in a brief are the opening and closing paragraphs. The reason for their importance is obvious: the opening paragraph establishes the "first impression," and the closing paragraph sustains it. The introductory paragraph should direct the reader into the argument; the closing paragraph should make him feel that the argument is complete.

The final step in writing the brief is revising the draft. The key to proper revision is that each sentence must be examined in three ways: individually, it should be a complete sentence; as a part of the paragraph, it should contribute something to the paragraph's topic; and, as a vital part of the whole composition, it should provide relevant detail about the composition's subject. Further, in revising a draft, if appropriate, time should be taken to alter a sentence's structure for the purpose of emphasis.
Finally, the brief should be completed at least three days before it is due. The day before it is due, it should be read again. If it is still satisfactory after two days, then it is in all probability an acceptable composition.

Although the actual preparation of the brief is similar to that of the research paper, its structure is significantly different. Initially, since the American legal system is founded on stare decisis, every statement of law in the brief should be documented by a reference to some specific authority. In addition, contrary to general research writing principles, except for briefs presented to the United States Supreme Court, all of the authority in a brief should be completely cited in the body of the paper rather than in footnotes or endnotes. However, the form of the citations should be uniform.\(^7\)

In writing the brief, most lawyers use too many direct quotations, although there are certain rules which should direct their usage. As a general rule, one should quote directly if the original wording is more concise and more precise than a paraphrase would be. In addition, one should use direct quotations if they contribute to a better

\(^7\)As a rule, most appellate courts have stated a preference for a certain citation form; however, in the absence of a known preference, one should use the citation form suggested in *The Harvard Law Review Assn. A Uniform System of Citation*. 12th ed. (Cambridge: Garrett House, 1976.)
understanding of the material. Or, they can be used if they add color to the material which paraphrasing would lack.

Direct quotations should fit smoothly into the text of the brief without interrupting the continuity of thought. In placing a quotation into the text, one may occasionally use "the following" to introduce it; however, he is establishing a better practice if he places it within the structure of a sentence—so long as it retains the clarity of the information. Short quotations should be placed within the body of the sentence and enclosed in quotation marks. Long quotations (those over five lines) should be set off from the text and indented from the left margin five spaces. The quotation marks should be omitted.

Most state courts and the federal courts have promulgated or suggested specific rules regarding the form of appellate briefs. For example, each of the appellate courts in Texas (Court of Civil Appeals, Texas Supreme Court, and Texas Court of Criminal Appeals) specifies that an appellate brief must contain the following: (1) a cover page which binds the brief and identifies the parties and the attorneys; (2) a subject index which indexes the subject matter of the brief; (3) a list of authorities, subdivided by the type of authority, then alphabetically arranged and stating the location of the authorities cited in the brief; (4) an address to the court, which is the formal introduction to the brief; (5) a statement of the case, which is the beginning of the
persuasion in that it briefly introduces the case to the court and draws the court's attention to the law involved; (6) a statement of the allegations of specific error one is to argue; (7) a fact statement which draws together the trial proceedings and the time during the trial when the error occurred—which is done by referring to the applicable page in the transcription of the trial proceedings; (8) an argument, which is the persuasive prose of the brief; and (9) a formal conclusion, which states the relief the author is requesting. 8

Writing an effectively persuasive appellate brief is difficult and quite time-consuming. However, with an awareness of certain basic writing principles, and the ability to use them, one should be able to prepare an adequate brief. Without knowing these principles, and thus without being able to use them, one's efforts at writing a brief are all but doomed at the outset. This is not to say that one will lose all his appeals, but to emphasize that he might have won at least one of those he lost.

APPENDIX A

Review of the American Judicial System
The law is essentially a body of rules and regulations enunciated by a governing authority which are intended to regulate the conduct and activities of those individuals that fall within its domain. The American legal system is essentially dual in nature. The superior source of law in the United States is the federal government; the inferior source is those laws created within the separate states. The reason for this division of authority is the Supremacy Clause of the United States Constitution: "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby." However, since the inferiority of the several states' laws extends only insofar as they may conflict with federal laws, the laws of the states are of supreme importance to individuals within the state or, in some cases, to people who live outside the geographical boundaries of the state but have some legal relationship to it.

Within the framework of both the federal and state legal systems are corresponding organizations with similar law-making functions. For example, most of the law which collectively is generated within both the federal and state legislatures is called statutes. Another type of law is an administrative regulation, which is a mandate from a particular
regulatory body that has authority under the legislative act that created them to pass whatever guidelines are necessary for them to fulfill their functions. However, the existence of a statute or an administrative order does not necessarily preempt further inquiry as to what the law is. The final word comes from the judicial branch of the government, which has the constitutional responsibility of interpreting the statute or administrative regulation.

The judicial system in the United States is somewhat like the entire structural system of government that creates the statutory laws in that it is also separated into federal and state systems. Both systems are comprised of a hierarchy of courts, each having a specific jurisdiction or authority to interpret the law in order to decide the legal questions presented before them.

The federal judicial system was created by Congress pursuant to a constitutional grant of authority. Article III, § 1 of the United States Constitution provides as follows: "The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish." Therefore, the United States Supreme Court is the only constitutionally recognized court.

The balance of the federal judicial system was created in the Congress by the Judiciary Act of 1789, while initially providing for the creation of Federal District Courts
and Circuit Courts of Appeal. This original act has been modified on several occasions and the federal judicial authority is now regulated by Title 28, United States Code, and the amendments made to such statutes. At the present time the United States is separated into eleven judicial circuits, including the District of Columbia. The Chief Justice and the Associate Justices of the United States Supreme Court are allotted as circuit judges among the circuits. Within each circuit is one Court of Appeal which is comprised of three to fifteen judges.

In addition to creation of circuits, Title 28 of the United States Code further provides for Federal District Courts within each of the states as well as the District of Columbia and Puerto Rico. Each state contains at least one judicial district with many districts being comprised of several divisions. Each judicial district has at least one Federal District Court, but oftentimes one district may be comprised of several District Courts.

The extent of federal judicial power, or jurisdiction, is constitutionally restrictive in nature. Article III, § 2 of the United State Constitution prescribed the areas in which federal judicial authority is to be exercised: "The Judicial Power shall extend to all Cases, in Law and Equity. . . ."

This broad, generalized language has been increasingly restricted by statutory and judicial limitations. However,
the authority of the federal courts essentially depends upon the character of the controversy or its statutory source.

The function of the various federal courts is substantially different from the district courts. In the federal system the Federal District Courts are the trial courts which handle civil cases within Constitutional and Congressional confines and criminal violations of federal statutes or offenses that occur on federal reservations, such as Veterans Hospitals.

The circuit courts are exclusively appellate courts which review proceedings that occurred in Federal District Courts and decisions of federal regulatory agencies. Although the Circuit Courts of Appeal may be comprised of as many as ten Circuit Judges, appeals are generally heard in panels of three. Under certain limited circumstances the entire Court of Appeals may review a case. When this situation occurs, the Court sits en banc.

The United States Supreme Court is the final judicial tribunal in the United States. With the exception of cases involving ambassadors and cases in which a state is a party, the Supreme Court's jurisdiction is entirely appellate. Generally, the Supreme Court can hear cases that are appealed directly from the Federal Circuit Courts of Appeal. In addition, the Supreme Court may hear cases appealed by petition for writ of certiorari ("made more certain") when the party seeking the writ contends that the highest court in
the state judicial system has ruled contrary to a provision in the United States Constitution.

Owing principally to the multitude of cases filed with the Supreme Court annually, very few are actually heard and decided by the Court. The majority of cases appealed to the Supreme Court are disposed of by memorandum opinions and by denials of petitions for writ of certiorari. The decision on whether to hear a case is exclusively the authority of the justices that comprise the Court, which they determine by a majority vote.

Although few decisions are ultimately issued by the Court in comparison to the number that are filed, the impact they have on the public in general is profound. For example, the Court's decision in Marbury v. Madison altered the course of the United States by declaring the concept of judicial review. "The Constitution is superior to any ordinary act of the legislature," Chief Justice John Marshall wrote in 1803, adding that "a law repugnant to the Constitution is void." In addition, Brown v. Board of Education altered the concept of public education. Moreover, the decisions of the Supreme Court in the 1960's which recognized the Constitutional rights of criminal suspects changed the entire American system of criminal justice.

Notwithstanding the importance of the Supreme Court of the United States and the inferior federal courts, the fifty separate state judicial systems are of substantial
significance. The organization of a state's court system is subject to the Constitution and statutes of that state. Although the various states' judicial systems may vary, there is one fundamental similarity: there is a progression of authority from the local trial courts to the state's highest appellate court.

Some states have relatively simple court systems, whereas other states, because of the numerous variables that are present, find a more complex system necessary. In many states there is one court that has ultimate appellate jurisdiction, whereas in other states this superior judicial authority may be shared by various courts. In addition, some states have intermediate appellate courts which, to a certain extent, alleviate the burden placed on the state's highest appellate court.

As an example of a state court system, the following summary of the Texas court system is included. In Texas, there exists a significant separation of authority between the courts. This separation is founded in the first instance on whether the matter is civil or criminal in nature. If civil, the authority of the courts is based upon the subject matter of the controversy and the extent of monetary damage involved. If the dispute is criminal, the jurisdiction of the court is determined by the statutory severity of the crime.
Cities in Texas have the authority to establish municipal courts whose statutory jurisdiction is equivalent to and concurrent with local county Justice of the Peace Courts. In the area of civil matters, both courts have authority over disputes involving no more than $200.00. In criminal matters, municipal courts have jurisdiction over municipally created offenses whose maximum punishment is by a fine not to exceed $200.00. County Justice of the Peace Courts have criminal jurisdiction over state offenses classified as Class C misdemeanors, or in which the maximum punishment for an offense is by a fine not exceeding $200.00.

The balance of the Texas court system is vested exclusively in the county or the state. The constitutional County Court has exclusive jurisdiction over civil cases where the alleged damages exceed $200.00, but are not more than $500.00; the constitutional County Courts have concurrent jurisdiction with the local District Court when the alleged damages exceed $500.00 but are not more than $1,000.00. The County Courts also have authority over probate and eminent domain matters. Insofar as criminal matters are concerned, the County Courts have jurisdiction of Class A misdemeanors (punishable by not more than one year and/or fine not to exceed $2,000.00) and Class B misdemeanors (punishable by not more than 180 days in jail and/or fine not to exceed $1,000.00). In addition to its
original jurisdiction, the County Court has appellate jurisdiction over cases appealed to it from Municipal Courts and Justice of the Peace Courts.

The highest trial court in Texas is the local District Court. Geographically, each District Court is located within a judicial district that is comprised of one or more counties. In large urban county areas there can exist numerous judicial districts, whereas in rural areas several counties may comprise one judicial district. The District Court has concurrent original jurisdiction with the local court in cases where the alleged damage exceeds $500.00 but is not more than $1,000.00. In addition, the District Court has exclusive original jurisdiction in cases in which the alleged damage exceeds $1,000.00. Moreover, the District Court has exclusive original jurisdiction in matters involving disputes as to real property. The District Courts are the exclusive trial courts for criminal offenses classed as felonies, which include all cases in which the possible punishment is incarceration in the state penitentiary or any crime punishable by death.

Appellate jurisdiction in Texas is distinctively divided as to the nature of the case—civil or criminal. In the event the matter to be appealed is civil, the litigant must first ask for appellate review by the proper Court of Civil Appeals, of which there are fourteen in Texas, each serving an appellate judicial district. The respective
Courts of Civil Appeals are comprised of three elected judges who review cases appealed to them from the County or District Courts.

The Courts of Civil Appeals are referred to as intermediate appellate courts because an adverse ruling in this Court in extremely limited circumstances may be appealed to the Texas Supreme Court. This is the highest appellate court in Texas for civil matters; however, the areas in which one may obtain appellate review are extremely narrow.

Exclusive appellate jurisdiction in criminal matters, whether the case is tried in the County Court or the District Court, is vested in the Texas Supreme Court, but it has no authority to hear civil appeals.

The previous summary does not exhaust the possible areas of authority of the various Courts discussed; however, it identifies the basic jurisdiction of the respective Courts.
APPENDIX B

Appellate Brief
IN THE
COUNTY COURT
OF
WISE COUNTY, TEXAS

IN THE
COURT OF CRIMINAL APPEALS
AT
AUSTIN, TEXAS

R. W. BLY,
APPELLANT,

VS.

STATE OF TEXAS,
APPELLEE.

BRIEF FOR APPELLANT

M. P. DUNCAN III, INC.
Attorney at Law
P. O. Box 388
Decatur, Texas 76234
817/627-5946

By: M. P. Duncan III
Attorney for Appellant
TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW R. W. BLY, hereinafter referred to as the Appellant, respectfully submitting this his trial brief specifying errors of which Appellant complains on appeal pursuant to TEX. CODE CRIM. PRO. ANN., art. 40.09(9) (1965) and shows through his attorney of record, M. P. Duncan III, the following grounds of error of which Appellant wishes to complain on appeal:

Respectfully submitted,

M. P. DUNCAN III, INC.
105 West Main
P. O. Box 388
Decatur, Texas 76234
817/627-5946

By: ______________________
M. P. Duncan III

Attorney for Appellant
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STATEMENT OF THE NATURE OF THE CASE

This is an appeal stemming from a revocation of probation proceeding. Appellant was previously convicted of driving while intoxicated, was fined $150.00 and costs, and was sentenced to sixty (60) days in jail probated for two (2) years (R. 6). Thereafter, within the probationary period, the State filed a motion to revoke the Appellant's probation (this was not included in the record) and an amended motion to revoke Appellant's probation (R. 10-11). Both of the aforementioned motions to revoke probation alleged that the Defendant violated a condition of his probation in that he committed a violation of the laws of the State of Texas (R. 10-11). The penal violation the Defendant was alleged to have committed was possession of less than two (2) ounces of marijuana (R. 10).

On August 19, 1975, a revocation of probation hearing was held before the County Court of Wise County, Texas. Following the hearing the Court concluded that the Appellant on July 2, 1975, did unlawfully possess less than two (2) ounces of marijuana, that such was in violation of the laws of the State of Texas, and that such action was in violation of the terms of the Appellant's probation (R. 21). Accordingly, the trial court revoked the Appellant's probation and sentenced him to thirty (30) days in the Wise County Jail (R. 39).
From this revocation of probation, due appeal has been perfected (R. 25).
STATEMENT OF THE GROUNDS OF ERROR PRESENTED

GROUND OF ERROR ONE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SEARCH WARRANT WHEN THE AFFIDAVIT SUPPORTING THE WARRANT CONTAINED NO FACTS WHICH INDICATED THAT A CRIME WAS BEING COMMITTED AT THE TIME THE SEARCH WARRANT WAS ISSUED.

GROUND OF ERROR TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SEARCH WARRANT WHEN THE AFFIDAVIT WAS NOT SWORN TO BEFORE AN OFFICER AUTHORIZED TO ADMINISTER OATHS.

GROUND OF ERROR THREE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SEARCH WARRANT WHEN THE SEARCH WARRANT WAS ISSUED BY AN INDIVIDUAL WHO WAS NOT A MAGISTRATE.

GROUND OF ERROR FOUR

THE TRIAL COURT ABUSED ITS DISCRETION IN REVOKING APPELLANT'S PROBATION WHEN THERE WAS NO EVIDENCE SUBMITTED TO PROVE APPELLANT VIOLATED A TERM OF HIS PROBATION.
ARGUMENT AND AUTHORITY

GROUND OF ERROR ONE RESTATED

The trial court committed reversible error in denying Appellant's motion to suppress the search warrant when the affidavit supporting the warrant contained no facts which indicated that a crime was being committed at the time the search warrant was issued.

FACTS UNDER GROUND OF ERROR ONE

A synopsis of the testimony is unnecessary in this ground of error.

ARGUMENT AND AUTHORITY UNDER GROUND OF ERROR ONE

In the initial paragraph of the affidavit for the search warrant, officers Bell and Nelson state that the Appellant "did then and there. . . and does at this time unlawfully possess a controlled substance, to-wit: marijuana, . . . " (Sx-2). In contrast to this affirmative declaration, concerning the time of the offense, the facts presented to support the above conclusion relate information concerning criminal activity only in the past tense, i.e., "that marijuana was secreted. . . " [emphasis added], "being within the past forty-eight hours. . . " [emphasis added], "informant has seen marijuana. . . . " [emphasis added] (Sx-2). There is no information in the affidavit to support the conclusion of the officers that
the appellant "at this time..." (Sx-2) unlawfully possessed marijuana.

Since 1932 the United State Supreme Court has held that to support determination of probable cause sufficient to issue a search warrant, "the proof must be of facts so closely related to the time of the issue [sic] of the warrant as to justify a finding of probable cause at that time." *Sgro vs. United States*, 287 U.S. 206 (1932) @ 140. In *Sutton vs. State*, 419 S.W.2d 857 (Tex. Crim. App. 1967) this Honorable Court decided that the use of the word "now" in connection with "recently" was "sufficiently definite and current to warrant the conclusion..." *Id*, @ 861, that probable cause existed for the issuance of the warrant. The word "now" is not found in the facts provided by the officers' informant as detailed in the affidavit (Sx-2).

Elaborating further upon *Sutton vs. State*, *Id*, the Appellant submits that although the trial court's decision was affirmed, the reasoning therein supports this ground of error. The affidavit in both cases are similar enough to make a worthwhile comparison. In both the *Sutton vs. State*, *Id* affidavit and the present affidavit the officers, in the initial portion of the affidavit, allege a "present" violation of the law (Sx-2). However, the supporting facts as found in the *Sutton vs. State*, *Id* affidavit and the present affidavit are dissimilar. In *Sutton vs. State*, *Id* the information acquired by the officers, as presented in the
affidavit, disclosed that Sutton and others "have [present tense] a large quantity of marijuana in their possession at this location." [emphasis added] Id. @ 861. As stated previously, the facts used to support the conclusions of officers Green and Jones refer only to the past and not to the present. Thus, examining the affidavit on its face (Sx-2), as the Court is permitted to do pursuant to Phenix vs. State, 488 S.W.2d 759 (Tex. Crim. App. 1971), there is no representation which indicates that a crime was "presently" being committed as alleged in the initial paragraph of the affidavit (Sx-2). Therefore, there is no information upon which a neutral and detached magistrate could effectively conclude that a crime was being committed at the time of the issuance of the warrant. Coolidge vs. New Hampshire, 403 U.S. 443 (1971).

In Heredia vs. State, 468 S.W.2d 833 (Tex. Crim. App. 1971) this Court declared a search warrant inadequate because the facts attested to therein were essentially all related to the past and therefore, failed to supply the magistrate with enough facts to enable him to conclude that the offense was not too remote in time.

As noted, the affidavit merely cited that "Information was received ... that Crux DeLao was in fact using and selling ... and actually had seen Heroin addicts ... surveillance was established ... and on
numerous occasions known Heroin addicts was [sic] observed ... mostly between the hours of 6:00 p.m. and 12 midnight each day," [emphasis supplied]. It is apparent that the magistrate could not ascertain the closeness of time sufficient to issue the warrant based up on an independent judgment of probable cause. Id. @ 835.

Appellant acknowledges that the present affidavit states that the unknown informer had been in the apartment "within the past forty-eight hours, ..." (Sx-2). With this in mind, one cannot help but inquire: "forty-eight hours" from when? Did the forty-eight hours extend from the time the officer spoke with his informant? Or, did it refer to the two days preceding the request for the warrant? The affidavit does not provide the answer. The magistrate testified he inquired no further (R. 30), thus, he could not have received information to establish a reasonable proximity in time as is required. Heredia vs. State, supra. This defect could have been cured by the officers stating in the affidavit at what time they spoke with their informant, concerning the information, as was done in Powell vs. State, 505 S.W.2d 585 (Tex. Crim. App. 1974). However, the present affidavit is devoid of this information.

Obviously it is the contention of the Appellant that because the conclusions of the officers concerning a "present"
violation of the law, as found in the initial paragraph of the affidavit (Sx-2) finds no support in the balance of the affidavit, as is required by Aguilar vs. Texas, 378 U.S. 108 (1964), and Spinelli vs. United States, 393 U.S. 410 (1969), the search warrant as a whole should be declared invalid. Consequently, the evidence should have been suppressed as requested in paragraph IV(A) of Appellant's Motion to Suppress (R. 30-31).
GROUND OF ERROR TWO RESTATED

The trial court committed reversible error in denying Appellant's Motion to Suppress the search warrant when the affidavit was not sworn to before an officer authorized to administer oaths.

GROUND OF ERROR THREE RESTATED

The trial court committed reversible error in denying Appellant's Motion to Suppress the search warrant when the search warrant was issued by an individual who was not a magistrate.

Grounds of Error Two and Three will be argued simultaneously since both are integrally related to the "magistrate's" authority.

FACTS UNDER GROUNDS OF ERROR TWO AND THREE

R. A. Hargrave, Jr., the alleged "alternate" municipal court judge of Hurst, Texas, testified that he acquired his authority as a municipal court judge through an appointment by the mayor (R. 55). This appointment was accomplished by a letter naming him as an alternate judge; it was addressed to the city secretary (R. 10), who did receive it (R. 72). He testified further that the mayor's authority to appoint him as an alternate judge was derived from the charter of the City of Hurst, which states that the mayor, with the advice of the City Council, can appoint the City Judge and
alternates to sit in his absence (R. 56-57). According to Mr. Hargrave he is not required to take an oath of office (R. 57).

Mr. Hargrave continued his testimony by identifying an ordinance of the City of Hurst setting forth the charter provision (R. 14-15; Dx-1) and acknowledging that, insofar as he knew, the request for the search warrant in the present case was never made to the Corporation Court Judge, Judge Whiteley (R. 58).

ARGUMENT AND AUTHORITY UNDER GROUNDS OF ERROR TWO AND THREE

In Appellant's Motion to Suppress as presented to the trial court, it was expressly stated that the individual taking the oath of both officers Nelson and Bell and subsequently issuing the search warrant was not a magistrate in that he (R. A. Hargrave, Jr.) held "no official judicial capacity within Tarrant County, Texas." (R. 31). Thereafter, in Appellant's Supplemental Motion to Suppress he further contended that if there existed any alleged authority for him (Mr. Hargrave) to serve as a magistrate then such authority was not sufficient (R. 35). The trial court expressly denied these contentions (R. 87), thereby presenting what Appellant believes to be a case of first impression in Texas, to-wit: Does any valid law in Texas provide for the appointment of an "assistant" or "alternate" municipal court judge?
Since 1909 the State of Texas has authorized cities or towns with a population in excess of five thousand, by way of popular election, to adopt or amend charters through which these cities or towns may be governed. TEX. CONST. art. XI, § 5. However, this Home Rule amendment contains the following limitation:

no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Id.

Coordinate with this constitutional provision is the constitutional source for the creation of corporation courts:

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, ... TEX. CONST. art. V, § 1.

Thereafter, the courts held that this constitutional provision allowed the creation of corporation courts. Hickman vs. State, 79 Tex. Crim. 125, 183 S.W.2d 1180 (1916). The legislative source of this constitutional authority is TEX. REV. CIV. STAT. ANN. art. 1194 (1963) which states:

There is hereby created and established in each of the incorporated cities, towns, and villages
of this State, a court to be known as the "Corporation Court." Id.

Apparently for the purpose of uniformity, in 1969 this name, Corporation Court, was changed to Municipal Court. TEX. REV. CIV. STAT. ANN. art. 1194a (Supp. 1969). This statute goes further and states that he (the municipal court judge) is to be selected under the provisions of the city's charter. Id.

There can be no question that a city has the authority to govern itself within the express limitation that should the State act in the same area, the city must yield to the superiority of the State. According to 59 T.J.2d Municipal Corporations, § 106 (1962)

where the state has adopted a general law and applied it to all cities of a certain class, no city of that class may pass legislation in conflict with the general enactment." Id.

Moreover, and as stated previously, the constitutional amendment providing for Home Rule cities expressly provides that no city charter or ordinance can contain any provision in which the state, in its capacity as the sovereign authority, has previously enacted regulations. Id., § 274. Therefore, any ordinance which conflicts with provision of a state statute is void. Municipal ordinances must therefore conform to the limitations imposed on them by the
superior state statutes, and only where the ordinance is consistent with the state statute will it be enforced. Bolton vs. State, 362 S.W.2d 946 (Tex. 1962). The Eastland Court of Civil Appeals forty-three years ago held that a municipal ordinance is void where it attempts to confer judicial power. City of San Antonio vs. Zogheib, 70 S.W.2d 933 (Tex. Civ. App. -- Eastland, 1932), rev'd on other gds, 129 Tex. 141, 101 S.W.2d 539.

Using the above as a reference, and comparing thereto the testimony of R. A. Hargrave, Jr., one can readily see that the City of Hurst has attempted to surpass state law. Generally, it can be stated that

in the absence of constitutional or statutory authority, no person other than the judge duly chosen may perform the judicial function of the court."

98 C.J.S. Judges, § 98 @ 1111 (1947).

The Appellant makes no pretension that the entire ordinance respecting the designation of the municipal court judge is void; however, that portion of the ordinance granting to the named parties authority to designate an alternate, or in practicality an assistant judge, metaphorically treads upon ground that the legislature has previously walked. For example, the statute relative to the designation of a municipal court judge, art. 1196, supra, refers to "a" judge.
The word "a" is used in this context as an indefinite article in that it precedes a noun (judge), thereby pointing out a particular thing among many alike. "A" as an indefinite article is defined as follows:

1. some (indefinite singular referring to one individual of a class): a man, a house, a star.


Therefore, the word "a" used as an indefinite article pointing out a singular class, the Appellant contends that the legislature simply granted to a city, in this case Hurst, through art. 1196, *supra*, authority to have one judge preside over the corporation court. This one judge is Judge Whiteley (R. 57).

The Appellant is aware of *TEX. REV. CIV. STAT. ANN.* art. 1200b (1962), but the express wording of this statute provides for two courts, not two judges. If the legislature had intended to allow a city to have more than one judge per corporation court, what is the rationale in using the word "a" to describe "judge"? If the legislative intent had been otherwise, would not they have stated, for example, "two judges," "more than one judge," "several judges," "some judge," or even "one judge per court"? The legislature in one instance has allowed for more than one judge: *TEX. REV. CIV. STAT. ANN.* art. 1200c (1962). The
Appellant submits that the legislature has previously limited the number of judges to preside over a municipal court. Therefore, any ordinance which attempts to act where the State has previously performed is void, or in the same mode, if it attempts to confer judicial authority, it is likewise void. *City of San Antonio vs. Zogheib*, supra; *Bolton vs. Sparks*, supra.

For the sake of brevity, the Appellant will acknowledge that this Court has previously decided that the legislature has expressly provided or intended the following: (1) that a municipal court judge is a magistrate, TEX. CODE CRIM. PRO. ANN. art. 2.09 (1966); (2) that a municipal court judge as a magistrate is authorized to take oaths pursuant to TEX. REV. CIV. STAT. ANN. art. 23, § 18, *O'Quinn vs. State*, 462 S.W.2d 583 (Tex. Crim. App. 1970); and (3) that a magistrate may issue a search warrant, TEX. CODE CRIM. PRO. ANN. art. 18.01 et seq (1970). If, as Appellant submits, the appointment of R. A. Hargrave, Jr. as an alternate judge is void, then the following results: (1) R. A. Hargrave, Jr. is not a magistrate because he is not a municipal court judge; (2) since he is not a municipal court judge he cannot take oaths as prescribed by art. 23, § 18, *supra*; (3) moreover, because he had no authority to act as a magistrate he had no authority to issue the search warrant authorizing a search of the premises designated therein.
Since R. A. Hargrave, Jr. could not administer the oath necessary to support an affidavit, then the affidavit in this matter is ineffective. Therefore, the requirements of TEX. CODE CRIM. PRO. ANN. art. 18.01 (1966) were not met. Thus, the search warrant is a nullity. Greer vs. State, 437 S.W.2d 558 (Tex. Crim. App. 1969).

In addition to the above, since Mr. Hargrave could not issue the search warrant, there is in effect no warrant; thus, the search of the premise was without warrant and therefore unreasonable and a violation of Appellant's Fourth Amendment rights. Mapp vs. Ohio, 367 U.S. 643 (1961). Consequently, Appellant's motion to suppress the evidence should have been granted. Id.

The Appellant suggests to the Court that the effect of the ordinance, allowing the appointment of alternate judges, is simply that one may pass out judgeships at his [the mayor's] discretion without regard for anything in the way of qualification. Judgeships, be they permanent or in this case "special," cannot be relegated to such a condition because, if for no other reason, the function of the office will not allow it.
GROUND OF ERROR FOUR RESTATED

The trial court abused its discretion in revoking Appellant's probation when there was no evidence submitted to prove Appellant violated a term of his probation.

FACTS UNDER GROUND OF ERROR FOUR

In support of the allegations contained in its Motion to Revoke, the State's attorney called four witnesses: H. D. Nelson, R. L. Bell, Ed Hueske, and N. S. Burns. A synopsis of their testimony relative to the possession of the marijuana is as follows: H. D. Nelson testified that he personally discovered only the marijuana plant (R. 101) and that he was the last to come into the apartment (R. 98), but when he did the Appellant and two others were under arrest (R. 98) in the living room (R. 101). He identified State's Exhibit Five--A & B (R. 103) as the cooler and one of the remaining plants taken from the apartment (R. 103). He further testified that his capacity on that particular day was as "Evidence Technician ..." (R. 104), and that he only "collected the evidence, and tagged the evidence" (R. 104). The evidence he tagged was "Two or three baggies containing a green plant substance, an aluminum tin, [and] several items that related to marijuana usage." (R. 105). He further testified that things were found throughout the apartment, i.e., kitchen, living room, some in the bedrooms upstairs (R. 105). "I didn't go in the bedrooms, the other officer did," he declared (R. 105).
His testimony continues by his testifying he personally saw some items on the warrant's return removed from "their resting places, ...." (R. 105). He was apparently present when only three items on the warrant's return were seized: "the smoking pipes, ... the plastic coil marijuana smoking pipe containing marijuana in the bowl ..."; and the "partially filled plastic bag of marijuana, ..." (R. 106). The only items he identified as to location were the smoking pipes. They "were in the living room on the table in an ash tray" (R. 106); and the plastic coil marijuana smoking pipe containing marijuana in the bowl, was "on an end table, I believe, by the sofa in the living room." (R. 106).

Officer Bell identified State's Exhibit Five A & B (R. 113) and stated it was the marijuana plant found at the apartment (R. 114). He further testified that when he went into the apartment, Appellant and Julie Bird were present (R. 114).

Ed Huske was not present during the search, but was called as an expert witness. He identified State's Exhibit Seven as marijuana (R. 135).

N. S. Burns testified when she first went into the apartment she found Appellant and two other people there (R. 141). She testified she personally found only "a plastic baggie with some stems in it that were, in ... [her] opinion, stems from a marijuana plant." (R. 141). She
identified a part of State's Exhibit Seven as "the plastic bag of stems." (R. 142).

She additionally testified that the balance of State's Exhibit Seven was found in separate places around the apartment (R. 143), but she did not know where in the apartment they were found (R. 144).

The Appellant submits that the above is a fair and objective synopsis of the testimony made by the State's witnesses regarding the location of the marijuana which the Appellant is alleged to have possessed.

ARGUMENT AND AUTHORITY UNDER
GROUND OF ERROR FOUR

The Appellant submits that although this Court has on previous occasions determined that a revocation of probation proceeding is not a criminal trial [Branch vs. State, 465 S.W.2d 160 (Tex. Crim. App. 1971)], and that the trial judge is the sole trier of facts [Ross vs. State, 523 S.W.2d 402 (Tex. Crim. App. 1974)], it has also expressly acknowledged "that a trial judge is not accorded absolute discretion in the decision to revoke. Scarmado vs. State, 517 S.W.2d 293 (1974). Scarmado vs. State, supra, is a case that expressly stated the trial court must be presented sufficient evidence to warrant an affirmative finding that a defendant violated a condition of his probation; that an order revoking probation must be "supported by a preponderance of the evidence." Id., @ 298. Scarmado vs.
State, supra, further asserted that the credible evidence must create in the mind of the court a reasonable belief that the defendant violated a condition of his probation.

In the present case not one of the State's witnesses testified that the Appellant was in actual physical possession of any marijuana; therefore, the State's case is entirely circumstantial. The only testimony elicited relative to the Appellant's alleged possession was that he was in the living room when Officers Nelson and Burns came into it (R. 98-100, 141). No one testified how long he had been there, whether he had clothes there, or whether there was evidence of any other character showing the Appellant had any connection with the apartment, with the exception of Officer Nelson's volunteered hearsay assertion that Appellant was one of two persons "on the lease agreement." (R. 96-97). Appellant acknowledges that such testimony was admitted without objection; however, such evidence should have been disregarded by the trial judge. Knapii vs. Edison Bros., Inc., 313 S.W.2d 335 (Tex. Civ. App. -- Waco 1958, writ ref'd).

Appellant readily acknowledges that "The possession of narcotics need not be exclusive." Bentley vs. State, 520 S.W.2d 390 (Tex. Crim. App. 1975); however,

Where joint possession is involved, the State must link the accused to the narcotic by introducing evidence of facts and circumstances which
show both knowledge of the narcotic and the exercise of control over it. Id. @ 393.

Moreover, the mere presence of a person near prohibited matter is not sufficient to show possession. *Hernandez vs. State*, 517 S.W.2d 782 (Tex. Crim. App. 1975). The State must affirmatively link the accused to the contraband in such a manner that one can reasonably infer that the defendant knew of its existence. *Curtis vs. State*, 519 S.W.2d 883 (Tex. Crim. App. 1975). In *Williams vs. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) the Court stated: "... proof amounting only to a strong suspicion or mere probability is insufficient." Id. @ 276.

The Appellant is well aware that the cases cited above are not revocation of probation cases; thus, the degree of proof necessary to convict was obviously greater than by a preponderance of the evidence. However, these cases are useful for comparison. Each of these cases cited above principally declares that the State has to prove more than what they have proven in the Appellant's case: that he was merely present at a location where narcotics were discovered.

Appellant submits that by no stretch of the imagination or under any definition of preponderance of the evidence could the evidence presented in this case "create a reasonable belief that the defendant has violated a condition of his probation." *Scarmado vs. State*, supra, @ 298.
CONCLUSION

For the reasons heretofore advanced, it is respectfully submitted that the County Court of Wise County, Texas, or upon appellate review the Court of Criminal Appeals, should reverse the judgment revoking the Appellant's probation, set aside the conviction of Appellant, and dismiss the matter.

Respectfully submitted,

M. P. DUNCAN III, INC.
Attorney at Law
105 West Main Street
P. O. Box 388
Decatur, Texas 76234
817/627-5946

By: ________________________
   M. P. Duncan III

ATTORNEY FOR APPELLANT
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellant was placed in the United States Mail, proper postage affixed thereon, addressed to County Attorney, Wise County Courthouse, Decatur, Texas, 76234, Certified Mail, Return Receipt Requested, on this the 30th day of December, 1975.

M. P. Duncan III
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