A METHOD FOR WRITING FACTUAL COMPLAINTS

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A factual complaint narrates a story. The story constructs an event from the world outside court into numbered paragraphs. Those paragraphs, or allegations, relate enough facts to identify the parties, to make sense of the story, to cover the elements of the cause of action, and to anticipate defenses that are certain to be raised. This article will teach you how to write factual allegations.

Allegations are not like the paragraphs of a brief, which develop a single topic through narration of detail or explanation of a line of reasoning. I will discuss what to put into an allegation paragraph, when to begin a new paragraph, and how to arrange these paragraphs. Through two sample problems, on exclusionary zoning and civil appellate malpractice, I will illustrate the process and principles of drafting a factual complaint. The first problem (Part I) relies on a cause of action that is well defined in its jurisdiction. In the second problem (Part II), the cause of action has been recognized in its jurisdiction, but not all its elements have been defined.

This article is both a manual for practitioners-whom I address as "you"-and a treatise for law professors. For my academic readers, theories of narrative, rhetoric and English composition that inform the writing of factual allegations are discussed in the concluding section (Part III), on "Constructing the world into numbered paragraphs."

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INTRODUCTION

Pleading is rarely taught in law school. Most of you learned to draft complaints on the job. In consequence, complaints heavily mimic those found in office files, which themselves were paraphrased from complaints in other files and from form books. The result is a progression of mediocrity, spiritually akin to succeeding generations of pale grey photocopies.

Instead, write a complaint that you yourself would want to read. Let the complaint be a product of your professional judgment. That judgment begins with research. By researching during the drafting of a complaint, you can reinvent the cause of action, shore up the complaint against a demurrer, and avoid scrambling to learn the elements after you have been served with a motion for summary judgment.

As my academic readers know, a lawyer should set up his or her authority over the law at the inception of a case. Law students need to be taught ways that law is made not by judges but by the practice of it. This manual is written to suggest such a pedagogy. Drafting a factual complaint entails analysis so fundamental to legal reasoning that it should be taught during the first year.[1] Complaints map the way that lawyers think. Lawyers think in allegations, with the steps in reasoning left implicit. Lawyers list. Lawyers tell the client's story in skeletal form: Here are the basic facts of my client's claim or defense. Yet pleading does not receive the introduction that Legal Writing and Research provides for briefs and memoranda. Law students must learn processes of writing that will enable them to think like lawyers, so that as lawyers they will write the way they are expected to think.

Practitioners, you already know that throughout your handling of a case, you sort out facts by the legal elements or tests you hope they may satisfy. If you are fortunate enough to practice in a factual pleading jurisdiction-*i.e.*, Arkansas, California, Connecticut, Florida, Illinois, Louisiana, Michigan, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, or Virginia-then the state court rules, in effect, require you to complete that sorting process before you expose a client to litigation.[2] Do not assume that the form books will sort the facts for you. Factual pleadings drafted from form books tend to clog the reader's comprehension with language not descriptive of the case at hand.

I want to help you replace the forms, with *pleading templates* of your own design. A pleading template consists of the elements organized as a story-the story defining that cause of action. Draft the template as you research the law, so that it may articulate categories of fact through language that evokes the cause of action. Working off the template, you will draft complaints for that cause of action. If the controlling law has developed by the next time you write a complaint, then revise the template.[3]

Constructing an element-by-element template from research may help you to adhere to court rules on pleading. Under the procedure of factual-pleading jurisdictions a complaint states, without repetition, the facts on which the cause of action relies. Facts are to be alleged with enough specificity to inform the adverse party of the nature of the claims against which it must defend.

To determine the client's causes of action and how to allege them, you must research for law that fits the facts. From research you will learn the elements, which usually cannot be found in a single source. Thus drafting a complaint begins with research-again, not in the form books, but in the lawbooks.

You do not have to claim every conceivable cause of action that your facts might be stretched to cover. I recommend a conservative approach that would allow you to write well, rather than excessively: Anticipate claiming only those causes of action which the facts of your file support. Search for those causes of action that the applicable law may allow you to plead in the complaint. If your research reveals that the facts do not sufficiently cover elements of a particular cause of action, then do not plead it. Investigate for facts, but do not create facts to fit a cause of action.[4]

By *facts,* therefore, I mean the facts that are available or likely to become available to you. Fortunately for all writers, facts are not hard little things, but fairly fluid, permitting a range of inferences and interpretations. A legal writer shapes the facts to suit the purpose of the legal document and the body of law that gives those facts significance. The more you research the law applicable to a case, the more you can investigate your own case for what may become its facts. In the Law, we not only give events the form required for legal documents, we arrange and tell those events so that they may merge with some legal doctrine favorable to the client. We call that "developing the facts of a case." It begins in earnest with drafting the complaint.

As a writer you will develop the facts through language, language gleaned not only from prior complaints in the office files, but from case law, which evolves. *Apply the facts* of your own case *to the law* you are reading to select the cases you will need. Although complaints only rarely cite cases,[5] the drafting of a complaint should depend on developments in case law as often as does the drafting of a brief. Every type of legal document has its own demands for research.

Initially, you would want your complaint to survive a motion for dismissal on the ground that the complaint failed to state its causes of action sufficiently. After discovery, if defendant moves for summary judgment, your allegations will serve as an outline for your opposing brief. Too many attorneys find themselves writing their first element-by-element breakdown of the facts at that point in the case. That is too late to be researching your cause of action.

If your clerk writes a memorandum reporting and analyzing the research, then warn the clerk not to evaluate or predict whether you will win. Predicting success is a bad habit picked up in law school. Law students learn first to write memoranda. The recognized function of the legal memorandum is to predict judicial action. But in the typical assignment, a conclusion that the client will prevail is tacitly preordained. Law students are, in effect, taught to imagine themselves as judges persuaded by the reasoning they are writing. Drafting a complaint, however, does not require a prediction of victory. You are concerned with whether the case can be sufficiently alleged. Write in anticipation of demurrer or a motion for summary judgment, not in anticipation of trial. Ultimately, your evidence may not convince the trier of fact. Perhaps the defendant's version of events will prevail during proofs. The rules of evidence guide how propositions get proven rather than merely alleged. Of course you will always consider whether you could win before filing a complaint; but your concern as a writer is with how to draft it.

A. What the Court Rules Require of Factual Allegations

Factual pleading in actions at law began with New York's original Code of Procedure, the Field Code of 1848.[6] The requirements of factual pleading are typified by the court rules of Michigan:

A complaint . . . must contain the following:

(1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action,[7] with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.[8]

Factual pleading requires allegation of categories of fact that a plaintiff is expected to know. This requirement is reinforced by its exception, under Michigan Court Rule 2.112(B)(2), which permits that "[m]alice, intent,

knowledge, and other conditions of mind"-*i.e.*, facts that a pleader can only infer from the file-"may be alleged generally." The pleader simply names the state of mind.

A factual complaint consists of short, numbered paragraphs. Thus "[e]ach allegation of a pleading must be clear, concise, and direct."[9] Furthermore, "[a]ll allegations must be made in numbered paragraphs . . . ."[10] At first, this requirement does not seem tough. We attorneys have an oral habit of listing. We number our points, "First, . . . Second, . . . Finally, . . . Also . . ." and so forth, almost compulsively. It is a habit readily adapted to dictation of a complaint. Because most allegations consist of a single sentence, we simply start the next paragraph when we are ready to start a new sentence. Only one more organizational principle is provided by the rule, which prescribes that "[t]he content of each paragraph must be limited as far as practicable to a single set of circumstances."[11]

A single set of circumstances is a result, rather than a process for arranging your facts. Courthouses remain full of civil complaints in which allegations are not each confined to a set of circumstances, and into which key sets of circumstances are scattered, not arranged.

Michigan Court Rule 2.113(E) corresponds to Federal Rule of Civil Procedure 10(b), which states: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances . . . ."[12] Other than California and Nebraska (both factual-pleading jurisdictions), every state has a statute or court rule similar or identical to Federal Rule 10(b); single sets of circumstances must be separated into numbered paragraphs.[13] Through the two sample problems, I will demonstrate how to organize a complaint in compliance with Rule 10(b).

B. Introduction to the Sample Problems

I have created two sample problems for the purpose of providing step-by-step guidance for the practitioner, and for the professor who wishes to teach factual-based pleading and analysis. Together, the problems illustrate the construction of pleading templates, and the drafting of one count of a complaint off each template. Although the sample problems are set in two particular states, the techniques they teach will work for drafting factual allegations in any jurisdiction that does not restrict its complaints to notice pleading.

The first problem relies on a cause of action, exclusionary zoning, that is well defined in the jurisdiction I have selected, Michigan. The second problem uses civil appellate legal malpractice in a jurisdiction, Pennsylvania, that recognizes two theories of recovery, but has not yet defined the elements for either theory.[14] Where the elements of a cause have not been defined, your job as a writer is to construct them. But even if a cause of action has been defined, and its elements listed, do not place trust in a list created by a judge or the legislature. To insure the allegation of facts covering all the elements of a cause of action, you should reconstruct those elements. While reconstructing the elements, you may even split an element into component parts that the facts in your file cover particularly well.

I. THE FIRST SAMPLE PROBLEM: EXCLUSIONARY ZONING

A complaint for exclusionary zoning challenges a particular zoning ordinance, on constitutional grounds, for excluding an otherwise lawful use of land from the municipal area that includes plaintiff's land. Exclusionary zoning was defined by the Michigan Supreme Court, in *Kropf v. City of Sterling Heights*,[15] to have two alternative grounds under constitutional law: (i) a zoning ordinance denies a landowner equal protection by "a policy of discriminating against" an otherwise lawful use; and (ii) a zoning ordinance denies a landowner substantive due process as "unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[16] Only substantive due process was at issue in *Kropf*, where the Supreme Court found no violation.[17]

Michigan's equal protection clause[18] has been interpreted to protect the property rights of a plaintiff from ill-founded state action.[19] But in *English v. Augusta Township*,[20] equal protection was enforced on the basis of a municipality's interference with the need of persons other than the plaintiff to use the plaintiff's property. The definition of exclusionary zoning in *English* opens with the language of substantive due process and concludes with the language of equal protection: "A zoning ordinance that totally excludes an otherwise legitimate use carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law with regard to the excluded use."[21] The analysis in *English* will allow a pleader to allege a single cause of action that relies on both approaches. As I will explain, alternative bases for a single cause of action may be pleaded in subparagraphs.

Let me emphasize the theme of this article. *To insure allegation of facts composing all the elements, you should reconstruct the elements of a cause of action rather than implicitly trusting what a single judge or the legislature might list.* I have constructed Michigan's cause of action for exclusionary zoning into seven elements that are not listed in any single case or statute, but rather have been gleaned from the following line of authority:

Township Rural Zoning Act, Mich. Comp. Laws Ann. § 125.297a (West 1996); Mich. Stat. Ann. § 5.2963(27a).

Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974).

Schwartz v. City of Flint, 426 Mich. 295; 395 N.W.2d 678 (1986).

Bell River Assoc. v. China Charter Township, 223 Mich. App. 124; 565 N.W.2d 695 (1997).

English v. Augusta Township, 204 Mich. App. 33, 514 N.W.2d 172 (1994).

Eveline Township v. H & D Trucking Co., 181 Mich. App. 25, 448 N.W.2d 727 (1989).

Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 81, 136 L. Ed. 2d 39 (1996).

Although I have determined that there are seven elements to exclusionary zoning, two or more elements of a cause of action may be alleged in a single allegation if they comprehend the same set of circumstances. To construct a template, however, you should articulate the elements separately. From the statutes and case law, the elements of exclusionary zoning can be written in the following language and constructed into the following template.

A. The Template for Exclusionary Zoning

Concepts key to each element have been put into italics:

Template for exclusionary zoning

(1) Plaintiff *owns* [or leases] certain *land* withing the [defendant] municipality.
(2) Plaintiff *proposes* to the court [i.e., pleader alleges] a *use* for plaintiff's land that plaintiff *proposed* to the defendant municipality.
(3) The proposal for use of plaintiff's land is *specific*.
(4) A zoning ordinance in effect excludes the use proposed for plaintiff's land, and [where facts permit] accomplishes a *policy of excluding* the proposed use by designating no appropriate site for that use. (Pleader must cite section of ordinance, and may quote them in Exhibits.)
(5) Plaintiff *demonstrates* [i.e.,, pleader alleges] there is a *need* for the proposed use within the municipality or surrounding area. [Subparagraphs may include]:
a. [Municipality or region] *needs* the proposed use.
b. The defendant *discriminates* against [describe group of people in the municipality or region] through a *policy*

of excluding the proposed use, which [those people] *need*.
(6) Plaintiff's land *suits* the proposed use.
(7) The proposed use is otherwise *lawful*.

Note that the seven elements are arranged to outline a story. It is the paradigmatic story for exclusionary zoning. Written in prose, the story might be told as follows:

The owner of land proposed to use the land, but the use specifically proposed by the owner is prohibited by a zoning ordinance. The proposed use is suited to the land and, in the owner's view, needed in the municipality. The use is legal under state or federal law. For these reasons, the owner has arrived in court claiming the zoning ordinance to be unconstitutional.

B. Facts of the First Sample Problem

Your client is Planned Parenting, a non-profit corporation that provides counseling and medical services related to a woman's reproductive system. Planned Parenting structures its fees according to the income of the patient or client. Patients with income below a certain level, for example, pay no fees at all.

The nature of the client requires comment. Many of you, including colleagues who have taught me much about pleading, may consider the goals of "Planned Parenting" repugnant. Do not let that stop you from reading. You may find yourselves at an advantage. Each cause of action in a complaint furnishes ground for relief. Although settlement may be the implicit goal of a lawsuit, judicial relief is the explicit goal. A client comes to you wanting a result. You would file a lawsuit to obtain that result through the relief awarded by a court. The client is rarely interested in the type or number of causes of action in the complaint. Even for you, a cause of action should have no intrinsic value. A cause of action has value only if it fits the facts of your case and could, under the law, bring your client relief worth pursuing litigation. Even if you believe in the justice of your client's case, even if you volunteered to represent the client, that does not give you license to select a particularly engaging cause of action.

The facts are set in fictional Weaver Township, Toronto County, Michigan. Land use in Weaver Township is controlled by a 1980 zoning ordinance, which prescribes five zoning classifications: CM, R-1, R-2, R-3, and AR. CM allows for "Commercial" zoning within roughly one-quarter mile of either side of two main highways that pass through the township. Commercial zoning permits any use legal under Michigan or federal law, other than industrial and agricultural uses. AR is "Agricultural" zoning, which includes any legal agricultural use as well as all uses permitted under the three "Residential" classifications, R-1, R-2 and R-3. Single family dwellings on plots of no less than one acre are permitted by R-1 zoning. R-2 zoning permits single family dwellings on plots of no less than one-half acre. R-3 zoning permits single family dwellings without restriction on plot size as well as multiple-family dwellings and mobile home parks.

All three Residential classifications list "physician's office" as a permitted use. However, the zoning ordinance defines a "physician's office" narrowly:

Physician's office. A professional medical office constituting the primary location, outside of a hospital or institution of higher education, for the medical practices of each of the physicians or dentists who provide services within that office.

The zoning ordinance explicitly excludes a "clinic" from R classifications (and thereby from AR as well). CM zoning lists "clinic" as a permissible use. A "clinic" is not defined in the zoning ordinance. There are no medical clinics in Weaver Township, just a hospital and physicians' offices as defined by the ordinance.

Seven Mile Road divides Weaver Township from Silo Township to the east. In 1975, Planned Parenting purchased and occupied a building located at 27829 Seven Mile Road, on the Weaver Township side. Since its acquisition, the building has been used by Planned Parenting for administrative offices and counseling services-

pre-existing uses that were not affected by the 1980 zoning ordinance.[22] The 1980 ordinance zoned Planned Parenting's parcel R-3.

The side of Weaver Township bordered by Seven Mile Road consists mostly of houses on plots of various sizes, along with some farms and a few apartment complexes and office buildings. The area by the Silo Township side of the road is similarly constituted. Planned Parenting chose the Seven Mile Road site because of its accessibility to low and middle-income families in both townships, and because the building was substantial enough for eventual conversion of a portion of the premises into a clinic. Planned Parenting had decided to avoid the commercial strips within both townships because they are further from such neighborhoods-and for one other reason. Planned Parenting was aware that, should it open a medical clinic and provide abortions, a clinic on a commercial strip would be more visible and, therefore, it was feared, more vulnerable to demonstrations by anti-abortion activists than a neighborhood clinic would be.

On August 29, 1997, Planned Parenting applied for a building permit that would have permitted a portion of the building's interior to be constructed into a medical clinic. At the clinic, women would be able to obtain a range of reproductive medical services, including abortions to be performed by qualified physicians.[23]

The building permit was not granted. The denial letter from the Weaver Township building inspector, dated September 7, 1997, explained: "A clinic is not permitted within an R-3 zone. Nor is the proposed clinic a valid continuation of the existing use." Planned Parenting appealed to Weaver Township's Zoning Board, arguing *inter alia* that the zoning ordinance effected exclusionary zoning. While the administrative appeal was pending, a group of residents from the Seven Mile Road neighborhood demonstrated weekly in front of Planned Parenting's building.

On February 7, 1998, the Zoning Board ruled in writing that the building permit was prohibited by the zoning ordinance. The ruling states in part:

> Under Weaver Township's zoning ordinance, R-3 zoning explicitly excludes clinics of all sorts, not just abortion or reproductive clinics. Instead, R-3 zoning does permit medical services, including abortions, to be provided in professional medical offices. The Board notes the concern of neighbors that this particular kind of clinic will attract protesters who will create noise, obstruct traffic on streets and sidewalks, and perhaps even commit acts of violence. Such disturbances are likely to cross over into Silo Township; and this Board considers itself obligated to recognize the effect of its zoning decisions on neighboring municipalities. The stated concern, while not a factor in the present decision, does demonstrate the soundness of Weaver Township's zoning ordinance, which limits neighborhood medical offices to the traditional practices of physicians committed to the community.

C. Drafting the Exclusionary Zoning Complaint

Being determined to build and operate a clinic at its present location, Planned Parenting wants to sue Weaver Township. As the new attorney for Planned Parenting, you have decided to file an action in the Circuit Court for Toronto County. Now you must draft a complaint. The facts allow for several causes of action,[24] including exclusionary zoning.

For many causes of action, elements may be listed in a judicial opinion or in a statute. How each element gets written in that list, however, will provide only some understanding of the cause of action, and only some utility for writing a complaint. Nor may the list be complete. You cannot depend on any one case for a list of the elements of exclusionary zoning, nor on the controlling statute. In *English v. Augusta Township,* the Court of Appeals began its explanation of the law with the controlling statute.

> The Legislature addressed the problem of exclusionary zoning with the enactment of §27a of the Township Rural Zoning Act, M.C.L. § 125.297a; M.S.A. § 5.2963(27a), which provides:
>
> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.[25]

The Township Rural Zoning Act is explained in *English* and in *Eveline Township v. H & D Trucking Co.*,[26] which provides the longest judicial listing of elements for exclusionary zoning. In *Eveline Township*, the municipality sued the landowner, who was already violating the ordinance. The owner counter-claimed exclusionary zoning. The Court of Appeals relied on *Kropf v. Sterling Heights* and on the statutory language from § 27a of the Township Rural Zoning Act,[27] to recite a test consisting of three "prongs": "Under § 27a, a zoning ordinance may not totally exclude a land use where (1) there is a demonstrated need for that land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful."[28]

Writing a complaint, you can properly rely on the prongs numbered by the appellate court to be elements of the cause of action. But you should not assume that the list in a single legal source is either complete or correctly enumerated. Your job is to reconstruct rather than recite the lists given to you. *Eveline Township*'s three-pronged test can be constructed into at least four elements. Let me use the construction of elements (4), (5), (6) and (7) of the template to demonstrate principles of legal writing and a method for writing factual allegations.

(4) *A zoning ordinance, in effect, excludes* the use proposed for plaintiff's land, and [where facts permit] accomplishes a *policy of excluding* the proposed use by designating no appropriate site for that use.

The three pronged-test of *Eveline Township* offers five elements. Two of them are in the introductory phrase, "a zoning ordinance may not totally exclude a land use."[29] A rich source of information about the cause of action, the phrase begins with the defendant's instrumentality-"a zoning ordinance" that must be specified by the pleader-and the action effected by the instrumentality, to "totally exclude." In other words, defendant by means of its instrumentality has harmed plaintiff's property and thereby harmed the plaintiff. Although both a constitutional and statutory cause of action, exclusionary zoning is at heart a traditional action to enforce the right to enjoyment of one's property.

1. *Grammar Lesson Number One of Two: Use Verbs to Communicate the Wrongdoer's Actions*

Plaintiff sues because defendant did or failed to do something. This theme, that defendant acted wrongly, can be reinforced by the style of your allegations. Where an element contains a component of wrongful action by the defendant, or anything that can be viewed as if it were action by the defendant, try to rewrite the element using a verb-make it the main verb, if possible-to carry that action. Allege through verbs, and create a verb-based narrative template for the cause of action. The task is not arduous. You need mainly be aware of verbs and words that can be turned into verbs.[30]

Take the verb from the language of your source. *Eveline Township* provides the wrongful action in verb form, "excludes". This indicates that the verb "excludes" carries as much legal significance as its noun form "exclusion", which of course names the plaintiff's cause of action. Every cause of action is a verb transformed into the name for a wrongful act. The writer of a complaint should not overlook an opportunity to use a verb instead of a noun. The verb allows for a sentence in which defendant, directly or through its instrumentalities, carries out unlawful actions. In a complaint for exclusionary zoning, the verb "exclude" should be used at least once in a sentence about action by the defendant through its ordinance.

2. *Grammar Lesson Number Two: Modify Verbs Where the Law Does, if That Allows You to Allege Less Than the Total Action by Defendant*

A modifier qualifies the meaning of a word. *A verb that is modified has, in most instances, had its meaning reduced rather than enhanced*-as I will illustrate. In the definition of an element, a modifier allows the writer to allege less than total action on the part of the defendant, or a less than absolute consequence from the defendant's action. The modifier thereby broadens the range of facts constituting the element. Putting a modifier to advantage, the pleader could allege more actions or consequences than an unmodified verb would permit.

But learn to recognize those modifiers that require no pleading. In its opening clause, "[a] zoning ordinance or zoning decision shall not have the effect of totally prohibiting . . .",[31] the Township Rural Zoning Act attaches two modifiers to the verb "prohibiting" (its synonym for "excluding"). The more obvious modifier is "totally", which appears as well in *Eveline Township,* where the rule opens with "a zoning ordinance may not totally exclude."[32] The modifier "totally" neither reduces nor increases the quantity of wrongdoing a landowner must plead. Unmodified, an exclusion would be total anyway. *A word that, in the context of your document, already means what you intend it to mean will need no modification.* Remember that in all your legal writing. Unless your complaint mentions some other, *partial* exclusion that has to be distinguished, the modifier "total" is fluff, mere legalese, in a complaint.

Let me return your attention to element (4) of the template, where I have used "exclude"-*i.e., keep out*-for its appropriately spatial connotation:

> (4) *A zoning ordinance, in effect, excludes* the use proposed for plaintiff's land, and [where facts permit] accomplishes a *policy of excluding* the proposed use by designating no appropriate site for that use.

The modifier "in effect" has been adapted from the statutory language "shall not have the effect of totally prohibiting", and from *English v. Augusta Township,* where-applying both the Township Rural Zoning Act and the definition of exclusionary zoning from *Kropf v. Sterling Heights*-the Court of Appeals interpreted the element of the exclusion to be "[a]n ordinance that has the effect of totally prohibiting a particular land use within a township."[33] The verb "have" or "has" conveys no action, nor even a status as if it were an action. So the verb may be dropped, with "has the effect" becoming the modifier "in effect". Because "in effect" dilutes the meaning of "excludes", it broadens the range of facts that will constitute an exclusion.

The modifier "in effect" will allow the pleader to allege facts in anticipation of a defense, here, the defendant's inevitable assertion that zoning elsewhere in the township, *i.e.* CM zoning, does permit clinics.[34] The pleader may anticipate the defense by alleging facts that constitute, at least in their effect, an exclusion.

3. *An Element Is Defined by Facts That Have Been Held to Constitute That Element*

Bare definition of an element in a reported case is not as helpful as the way the court examines the facts of its decision against that element. An element is more usefully defined through the facts of each case in which it gets applied. The element of exclusion, according to *English,* may be satisfied by an "unwritten policy" accomplished by the zoning ordinance. Where a reported case discusses the sufficiency of evidence presented either at trial or during a pre-trial stage, *read the case to learn which facts were held to constitute, or not to constitute, the element in controversy.* If proofs on an element were held sufficient, then the sort of facts proven in that case, if, and only if, they exist in your own file, may suffice to allege that element.

As you read the cases, *be on alert for language used to narrate the facts.* You, in turn, might adapt such language to narrate the facts of your own case. By "language" I do not mean the names of elements. Rather, examine the words by which the judge describes the facts of that case.

Accordingly, the rest of the element (4) is derived not from any rule recited in *Eveline Township* or *English,* but from the findings of fact in *English v. Augusta Township.* The only area zoned for mobile home parks in Augusta Township was a parcel found unsuitable for any development. The Court of Appeals found that:

> [T]here was ample evidence that the zoning of that [unsuitable] parcel for mobile homes was nothing less than a subterfuge for the township's unwritten policy of excluding mobile-home parks altogether . . . . Thus, in effect, the township has designated no appropriate site for a mobile-home park.
> . . . .
> There was also testimony that township officials exerted pressure to limit low-cost housing in general.[35]

Whether Planned Parenting can produce evidence of subterfuge is not yet known to you. But note that the Zoning Board's written opinion praises "the soundness of Weaver Township's zoning ordinance, which limits neighborhood medical offices to the traditional practices of physicians committed to their community." This raises a suspicion of an unwritten policy to exclude clinics, which generally provide services for low-income families. The pleader might ethically consider such an allegation. Certainly your client would take a position, comparable to the reasoning in *English*, that by designating only the CM category for clinics, "in effect, the township has designated no appropriate site for" medical or reproductive health clinics.[36] Allegation in the complaint of element (4) of the template, therefore, requires several sets of circumstances:

> The defendant's ordinance, the Weaver Township Zoning Ordinance of 1980, [citation], zoned the area containing Planned Parenting's parcel R-3.
>
> The defendant's zoning ordinance provides that . . . [describe the provisions defining R-1, R-2, R-3 and AR zoning; the provisions excluding a clinic from R zoning; the provisions defining CM zoning and listing "clinic" as a permitted use; the provisions locating the CM zones; and the provision defining a physician's office]. [Cite the provisions.] These provisions are attached as Exhibit A.
>
> By prohibiting clinics in the areas zoned R-1, R-2, R-3 and AR, and by limiting all clinics to the two commercial strips zoned CM, the defendant's zoning ordinance, in effect, excludes neighborhood medical clinics from Weaver Township.
>
> The defendant has a policy of excluding medical clinics for low-income families, which is accomplished through the zoning ordinance's prohibition of clinics in the areas zoned R-1, R-2, R-3 and AR.

Note that the defendant township is called "the defendant," rather than by its name, so that "Weaver Township" may be used in the complaint to designate the community. The desired implication is that the government of Weaver Township has not served the interests of Weaver Township.

4. *Avoid Parentheticals*

Notice that, in the second paragraph of the allegations, the reference to the Exhibit is written as a separate sentence, rather than as a parenthetical that may interrupt a reader's attention to facts. You do not want the reader to turn to an Exhibit until after reading the allegation in that paragraph. Parentheticals tend to intrude (except for those that translate a term) upon the reader's need to follow a sentence.

5. *Main Paragraphs Narrate; Subparagraphs Analyze*

Element (5) of the template broadens the substance of what a pleader can allege by allowing for subparagraphs that raise alternative theories for why the use is needed. Let me begin by focusing on which words work as verbs for telling this portion of the story, in which an exclusion has deprived people of something they needed.

> (5) Plaintiff *demonstrates* [i.e.,, pleader alleges] there is a *need* for the proposed use within the municipality or surrounding area. [Subparagraphs may include]:
> a. [Municipality or region] *needs* the proposed use.
> b. The defendant *discriminates* against [describe group of people in the municipality or region] through a *policy* of excluding the proposed use, which [those people] *need*.

The first prong in *Eveline Township* states: "there is a demonstrated need for that land use in the township or surrounding area."[37] Several words here might be used as verbs to convey action. "[T]hat land use" could provide the verb *use*; but since plaintiff would use the land, not defendant, the verb *use* does not support a theme of wrongdoing.[38] The complaint's theme, or unifying idea, is the defendant's wrongdoing. Verbs should communicate what the defendant did more often than what plaintiff has done or would do.[39]

"A demonstrated need" provides the verb *demonstrate*, which also refers to action by a plaintiff, not a defendant. More important for the writer, this action is an event during the litigation, not an event that led to litigation. A plaintiff *demonstrates* by alleging, and, later, by proving. The first prong of *Eveline Township* is not to be copied obsequiously. Rather, this prong instructs the pleader on exactly what to allege: that there is a need.

As a verb, *need* is not an action; it is a condition. But *need* conveys a sense of action because it takes on the same grammatical structure: Someone needs something. If you can allege exactly who needs the land to be used as the plaintiff proposes, then do so. Under a substantive due process approach to exclusionary zoning, the grammatical subject of "needs" may be the municipality or a greater area that includes the municipality. Under an equal protection approach to exclusionary zoning, the grammatical subject of "needs" may be a group of people. The people might be named through an accepted label, or they might simply be identified by what they need.

These permutations can be alleged through subparagraphs. Unlike the main numbered paragraph, *subparagraphs do not move the story forward. Rather, they pause the narrative movement of the complaint in favor of analysis.* Analysis allows you to clarify the purpose of the allegation in the main paragraph. Such analysis may include a variety of legal imports or consequences to the action alleged in the main paragraph. The analysis may consist of inferences that you want the reader to draw from the facts. Subparagraphs may name the elements that the facts in the allegation might constitute, if more than one element is entailed.

As the Sixth Circuit recently explained in *Gustafson v. City of Lake Angelus*,[40] a complaint for exclusionary zoning under Michigan law must articulate a "public need" for the proposed use.[41] In *English v. Augusta Township*, the Court of Appeals found that low income housing was needed in the township by persons whom the court specified only by that need.[42] *Kropf v. Sterling Heights* would look for exclusionary zoning in a municipality that "has a policy of discriminating against" an otherwise lawful use.[43] Thus, policy becomes a component of this element. "Has" is not a verb that conveys any meaning; but "discrimination" yields the verb "discriminates," with "policy" being relegated to a modifier, *i.e.*, "through a policy . . . ." A subparagraph could allege that the municipality discriminates against a group of people, who can be defined in the complaint by no more than what they need.

Development of analytical subparagraphs comes easily to a legal writer. It is an opportunity to allege every ground the writer can conceive for liability, as subparagraphs in complaints often do. But this should not be an opportunity to rattle off every theory or legal phrase that might be needed at trial. Limit your subparagraphs to analysis that follows from the fact alleged in the main paragraph.

As with element (4), a fact from *English v. Augusta Township* can be adapted to the allegation of element (5). Narration of facts in *English* begins with "the township had no *existing* mobile-home parks,"[44] a fact that is pertinent to the court's findings of exclusion and need. Once you decide that a fact in your file corresponds to a material fact in a reported case, *adopt the language used by that court to report or characterize your fact*. As no clinics operate in Weaver Township, we can use that fact to allege element (5), and adopt the language of *English* by using the verb *exist* in the sample complaint:

The proposed use is needed within Weaver Township, where no medical clinics exist, because:

a. Weaver Township needs neighborhood medical clinics that serve persons who may not be able to afford the private medical offices located in their neighborhood.

b. Weaver Township needs a neighborhood medical clinic that structures its fees according to the income of the patient, providing free medical services to patients with income below a designated level.

c. Weaver Township needs a neighborhood medical clinic that provides reproductive health services.

d. Weaver Township needs a medical clinic where abortions may be performed in accordance with Michigan law.

e. The defendant's zoning ordinance discriminates against women living in the region containing Weaver Township who need a medical clinic that provides reproductive health services, including legal abortions, while structuring its fees according to the income of the patient.

f. The defendant's zoning ordinance discriminates against women living in the region containing Weaver Township who need a medical clinic that provides legal abortions in a relatively safe area.

g. The defendant's zoning ordinance discriminates against low- and middle-income persons living in the Seven Mile Road area, who need geographically accessible medical clinics.

Because abortions are so controversial, the term "abortion clinic" does not appear in the allegation of element (5).

The second prong of *Eveline Township* states that "the use is appropriate for the location."[45] In *English*, in its application of the second prong from *Eveline Township*, the Court of Appeals occasionally uses the synonym "suitable."[46] The recent decision of *Bell River Assoc. v. China Charter Township*[47] uses "appropriate" and "reasonable."[48] This allows the drafter a choice. Choose one of the three words, and stick to it. I have chosen "suitable" because it can be written as a verb:

(6) Plaintiff's land *suits* the proposed use.

Suitability of the land for a mobile home park was evaluated in detail in *English*, while the land in *Bell River Assoc.* was distinguished fact by fact from *English*, to justify a conclusion that the land did not suit a mobile home park.[49] A Michigan court, therefore, will not find an exclusion unless the facts demonstrate that the land in litigation is suitable for the use proposed. The analysis in *English* produces one fact adaptable to Planned Parenting's case: "The local roads were found sufficient to handle the proposed development."[50] Planned Parenting has provided services to the public from the location in controversy for over twenty years. That fact should be alleged in element (6):

The described premises suit the proposed use.

a. Services have been provided to the public on the premises for more than twenty years.

b. A clinic may be constructed inside the building on the premises in compliance with state and township codes.

(7) The proposed use is otherwise *lawful*.

I have copied the third prong from *Eveline Township*. Because abortions are controversial, their legality has already been alleged in connection with element (5). But for element (7), the complaint must allege any enabling or protective statute or constitutional provision:

The proposed use is protected by . . .

[Cite constitutions, and cite statutes allowing and regulating medical clinics.]

A complaint would open not with element (1) of its template, but rather with facts identifying the parties and establishing subject matter jurisdiction and venue. Element (1) of the template for exclusionary zoning does, conveniently, establish venue as well as standing. The plaintiff owns or leases land that the complaint must identify. Thus:

(1) Plaintiff *owns* [or leases] certain *land* withing the [defendant] *municipality*.

Element (1) presents the municipality as a location rather than a defendant:

Since 1975, Planned Parenting has owned a parcel of land and the building thereon at 27829 Seven Mile Road, Weaver Township, Toronto County, Michigan, described as:

[Quote the recorded property description unless in your judgment, an address sufficiently identifies the parcel for litigation in which title or right to the land is not contested.]

6. *An Element May Name a Requirement for Pleading*

Element (2) allows a transition from who plaintiff is to why the plaintiff has come into court:

(2) Plaintiff *proposes* to the court [*i.e.*, pleader alleges] a *use* for plaintiff's land that plaintiff *proposed* to the defendant municipality.

Continually through its opinion in *English v. Augusta Township*, the Court of Appeals refers to the "proposed use" and mentions details of the plaintiffs' proposal where pertinent to its analysis.[51] In every exclusionary zoning case brought by a landowner, the landowner has already proposed a use for the land. The proposal before the court began as part of the event leading to litigation; the landowner proposed something.

Some elements provided by case law are about actions a plaintiff must take during litigation.[52] The verb "propose" signals a requirement for pleading. References in *English* to the "proposed use" comprehend an event of the litigation as much as the event of proposing a use to the municipality. Therefore, element (2) consists of proposing a use to the Court, and alleging that the use had been proposed by plaintiff to the defendant. The term "use," while potentially a verb, can be left in subject form, as a term of art in land use planning and zoning law. In the sample problem, as in many such cases, the municipality denied a request for a building permit. Because recent denial of a permit has precipitated the lawsuit, that event may be alleged for the sake of the narrative; but that event does not contribute to any of the elements.[53] The act of wrongdoing commenced in 1980 when the municipality passed a zoning ordinance that continues to exclude the proposed use, not when the municipality recently issued a decision pursuant to that ordinance.[54]

7. *Narrative Continuity and Sequence*

Element (2) has been alleged to include facts providing narrative continuity:

On the described premises, Planned Parenting has continuously conducted its business, which consists of providing professional services related to a woman's reproductive system, and charging fees structured according to the income of the patient or client.

Planned Parenting proposes to construct a portion of the premises into a medical clinic, built in compliance with state and township codes, in which licensed health care professionals would provide reproductive medical services to women.

The defendant was informed by Planned Parenting of the proposed use on August 29, 1997, when Planned Parenting applied for a building permit. The defendant denied Planned Parenting a permit on September 7, 1997. On February 7, 1998, the defendant's Zoning Board refused to permit the proposed use.

The final paragraph contains more than one sentence. It is useful to remember that an allegation is a paragraph. The court rule requires paragraphs. A paragraph may state a set of circumstances, not just a single circumstance. *No court rule requires that allegation paragraphs be written as a single sentence.*

The three sentences of the final paragraph of element (2) narrate a sequence of circumstances within that element. Sequences within a set of circumstances may be written as consecutive sentences of a single paragraph. Do not use subparagraphs. Subparagraphs subordinate analysis to the narrative of the main paragraph. None of the circumstances in a sequence are subordinate to the other circumstances. They are to be narrated in chronological order, not put into a hierarchy.

Writing the verb "proposes" to introduce the proposal will lead you to specify, in element (2), the use first proposed to the municipality and now proposed to the court. The allegations constituting element (2) also constitute element (3):

(3) The proposal for use of plaintiff's land is *specific*.

Specificity must be demonstrated by the pleader, not used as a word in the complaint. The element requiring the proposal to be specific comes from *English,* following the Michigan Supreme Court opinion in *Schwartz v. Flint*.[55] *Schwartz* is the leading case prescribing the cause of action and the relief allowed for the unconstitutional *application* of a zoning ordinance to a particular parcel. *Schwartz* limits relief to an injunction rather than re-zoning.[56] Applying this limitation on relief to exclusionary zoning cases, *English* holds that a landowner who proves exclusionary zoning may be allowed an injunction prohibiting the municipality from interfering with the proposed use of the land.[57] As a prerequisite for relief, *English* applies the "specific reasonable use" standard from *Schwartz v. Flint*, which holds that for an injunction to issue, "[a] plaintiff's proposed use must be specific, but it need not amount to a 'plan.'"[58] Although the element of a specific *proposed* use is part of the standard in *Schwartz* requiring a "specific reasonable use", both *English* and *Bell River Assoc.* treat the requirement that the proposed use be "reasonable" as equivalent to the prong requiring that plaintiffs' property be appropriate or "suitable." In *Bell River Assoc.*, the Court of Appeals uses "unreasonable" to mean unsuitable.[59] The reasonableness requirement of *Schwartz*, therefore, is covered by element (6) on suitability.

D. The Exclusionary Zoning Complaint

Let me pull the complaint together. The allegations drafted above are now preceded by three paragraphs identifying the parties and alleging the facts of subject matter jurisdiction.

1. The plaintiff, Planned Parenting, is a non-profit Michigan corporation with its principle office in Lansing, Michigan, and an office located on premises specified below, in Weaver Township, Toronto County, Michigan.

2. The defendant is Weaver Township.

3. Planned Parenting seeks injunctive relief from a zoning ordinance of Weaver Township, and from the zoning of the Planned Parenting's premises in Weaver Township.

4. Since 1975, Planned Parenting has owned a parcel of land and the building thereon at 27829 Seven Mile Road, Weaver Township, Toronto County, Michigan, described as:

[Quote the recorded property description, unless you are satisfied that an address sufficiently identifies the parcel for litigation in which title or right to the land is not contested.]

5. On the described premises, Planned Parenting has continuously conducted its business, which consists of providing professional services related to a woman's reproductive system, and charging fees structured according to the income of the patient or client.

6. Planned Parenting proposes to construct a portion of the premises into a medical clinic, built in compliance with state and township codes, in which licensed health care professionals would provide reproductive medical services to women.

7. The defendant was informed by Planned Parenting of the proposed use on August 29, 1997, when Planned Parenting applied for a building permit. The defendant denied Planned Parenting a permit on September 7, 1997. On February 7, 1998, the defendant's Zoning Board refused to permit the proposed use.

8. The defendant's ordinance, the Weaver Township Zoning Ordinance of 1980, [citation], zoned the area containing Planned Parenting's parcel R-3.

9. The defendant's zoning ordinance provides that . . . [describe the provisions defining R-1, R-2, R-3 and "R zoning; the provisions excluding a clinic from R zoning; the provisions defining CM zoning and listing "clinic" as a permitted use; the provisions locating the CM zones; and the provision defining a physician's office]. [Cite the provisions.] These provisions are attached as Exhibit A.

10. By prohibiting clinics in the areas zoned R-1, R-2, R-3 and AR, and by limiting all clinics to the two commercial strips zoned CM, the defendant's zoning ordinance, in effect, excludes neighborhood medical clinics from Weaver Township.

11. The defendant has a policy of excluding medical clinics for low-income families, which is accomplished through the zoning ordinance's prohibition of clinics in the areas zoned R-1, R-2, R-3 and AR.

12. The proposed use is needed within Weaver Township, where no medical clinics exist, because:

a. Weaver Township needs neighborhood medical clinics that serve persons who may not be able to afford the private medical offices located in their neighborhood.

b. Weaver Township needs a neighborhood medical clinic that structures its fees according to the income of the patient, providing free medical services to patients with income below a designated level.

c. Weaver Township needs a neighborhood medical clinic that provides reproductive health services.

d. Weaver Township needs a medical clinic where abortions may be performed in accordance with Michigan law.

e. The defendant's zoning ordinance discriminates against women living in the region containing Weaver Township who need a medical clinic that provides reproductive health services, including legal abortions, while structuring its fees according to the income of the patient.

f. The defendant's zoning ordinance discriminates against women living in the region containing Weaver Township who need a medical clinic that provides legal abortions in a relatively safe area.

g. The defendant's zoning ordinance discriminates against low- and middle-income persons living in the Seven Mile Road area, who need geographically accessible medical clinics.

13. The described premises suit the proposed use.

a. Services have been provided to the public on the premises for more than twenty years.

b. A clinic may be constructed inside the building on the premises in compliance with state and township codes.

14. The proposed use is protected by . . .[Cite constitutions, and cite statutes allowing and regulating medical clinics.]

The body of the complaint would conclude with a section on relief.

E. An Additional Element to Anticipate a Defense

In researching your case, you may learn of an affirmative defense which the defendant would be likely to raise. Under the law of your jurisdiction, there may be facts beyond the elements of your cause of action which, if eventually proven, would rebut the anticipated defense. If so, you may decide to anticipate the defense by alleging such facts, even though the rules of pleading may not require anticipating affirmative defenses.[60] But do not name the affirmative defense in your complaint.

For a claim of exclusionary zoning, the optional element consists of facts that would establish an absence of "special circumstances." The Michigan Court of Appeals, elaborating on the element of exclusion in *English*,

stated: "An ordinance that has the effect of totally prohibiting a particular land use within a township is impermissible in the absence of special circumstances."[61]

Facts composing any "special circumstances" likely to be alleged by a municipality could be found in paper that the municipality generated during its efforts to block the proposed use of the land. When the Weaver Township Zoning Board ruled on Planned Parenting's administrative appeal, it expressed the following concern:

> The Board notes the concern of neighbors that this particular kind of clinic will attract protesters who will create noise, obstruct traffic on streets and sidewalks, and perhaps even commit acts of violence. Such disturbances are likely to cross over into Silo Township; and this Board considers itself obligated to recognize the effect of its zoning decisions on neighboring municipalities. The stated concern, while not a factor in the present decision, does demonstrate the soundness of Weaver Township's zoning ordinance, which limits neighborhood medical offices to the traditional practices of physicians committed to their community.

The stated concern may amount to a special circumstance that would support the defendant. But it has already been anticipated in the subparagraph alleging that women need "a medical clinic that provides legal abortions in a relatively safe area."

Please remember that at this opening stage of litigation, neither party has to *prove* anything. The defendant does not have to prove special circumstances; nor does the plaintiff have to prove their absence. The complaint should not allege the empty legal conclusion that there is an absence of special circumstances. If the defendant is likely to *allege* special circumstances, the complaint may allege facts to anticipate that defense.

II. THE SECOND SAMPLE PROBLEM: CIVIL APPELLATE MALPRACTICE

(*N.B.* This problem, set in Pennsylvania, will rely on techniques already explained in the first sample problem, while presenting additional techniques.)

The elements of civil malpractice at the appellate level have not been provided by the Pennsylvania courts. Nor have the courts, as of yet, listed the elements of civil malpractice, whether committed at the trial or appellate levels, as an action for breach of contract. Yet both appellate malpractice and malpractice as a breach of contract have been recognized as causes of action in Pennsylvania.[62] The writer of a complaint alleging either cause of action has the task of constructing its elements. In this second problem, I will construct the templates and draft a complaint for civil appellate malpractice in two counts, negligence and breach of contract.

In 1985, the Eastern District of Pennsylvania noted that "[t]he Pennsylvania Supreme Court has acknowledged the legitimacy of an action in either assumpsit [*i.e.*, contract] or trespass [*i.e.*, negligence] by a client against his attorney for malpractice . . . . However, the supreme court has yet to address . . . the specific elements required to prove such causes . . . ."[63] Subsequently, the Pennsylvania Supreme Court, in *Rizzo v. Haines*,[64] listed three elements for an attorney's negligence. Subsequent cases uniformly recite the *Rizzo* elements, which are: "(1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff."[65] Although the second and third elements specify negligence, *Rizzo* further defined the element of proximate cause in terms that allow for a cause of action in contract: "an essential element of the cause of action, *whether the action be denominated in assumpsit or trespass,* is proof of actual loss."'[66] However, the precise elements of legal malpractice as a breach of contract have not been established in Pennsylvania. In *Fiorentino v. Rapoport*,[67] a 1997 case, the Superior Court acknowledged that malpractice as a breach of contract "requires the proof of different elements" than malpractice as negligence, but did not attempt to explain or even list all the elements of breach of contract.[68]

The writer of a complaint should research for cases that hold a complaint for the same cause of action to be sufficient. In 1996, Pennsylvania's Superior Court held that a complaint for civil appellate malpractice sufficiently alleged causes of action for negligence and breach of contract. The attorney in *Perkovic v. Barrett*[69]

had obtained a remand for his clients from the Superior Court in the underlying appeal, but "did not inform appellants [*i.e.*, clients] of our reversal and remand[,] and subsequently judgment was entered against appellants."[70] Explicitly construing a contract providing that counsel "was retained for the purpose of 'perfecting . . . this appeal'", the Superior Court held that a breach of contract as well as a violation of duty were alleged sufficiently in the complaint.[71] By implication from *Perkovic*, a duty imposed by the contract and the breach of that duty might be substituted for the second element of the *Rizzo* list, failure of the attorney to exercise ordinary skill and knowledge. This reading of *Perkovic* is reinforced by *Fiorentino*, which states that "the attorney's liability must be assessed under the terms of the contract."[72]

I have constructed the tort template for civil appellate malpractice in Pennsylvania into five elements, and the breach of contract template into four elements. As elements are already established for civil malpractice as a tort committed at trial level, the template for the tort should be constructed first. The negligence count should be Count I of the complaint for a similar reason; the law will be more familiar to the judge.

The elements of the two templates have been gleaned from the following authorities:

McMahon v. Shea, 547 Pa. 124; 688 A.2d 1179 (1997).

Bailey v. Tucker, 533 Pa. 237; 621 A.2d 108 (1993).

Rizzo v. Haines, 520 Pa. 484; 555 A.2d 58 (1989).

Guy v. Liederbach, 501 Pa. 47; 459 A.2d 744 (1983).

Lichow v. Sowers, 334 Pa. 353; 6 A.2d 285 (1939).

Fiorentino v. Rapoport, Pa. Super. 693 A.2d 208, *appeal denied*, 701 A.2d 577 (1997).

Kituskie v. Corbman, 452 Pa. Super. 467; 682 A.2d 378 (1996), *appeal granted*, 693 A.2d 967 (1997).

Perkovic v. Barrett, 448 Pa. Super. 356; 671 A.2d 740 (1996).

Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996)), *aff'd mem.*, 114 F.3d 1172 (3d Cir. 1997) (listing elements for breach of contract in Pennsylvania).

A. Two Templates for Civil Appellate Malpractice

Template for civil appellate malpractice as an action in negligence

(1) Plaintiff client [use name of client] *employed* the defendant attorney, [name], to represent plaintiff client in the *appeal* by plaintiff [*or* by the opposing party] of the Judgment [or other appealable order] of the Court of Common Pleas [*or* other court], dated [*or* filed] on [date] in [name of case, including client's name] ("underlying litigation"), case no. [docket], to the [appellate court] of [*or* for] [jurisdiction], case no. [docket]. A copy of the attorney-client attorney-client agreement, dated [date], is attached as Exhibit A.
(2) During the representation of plaintiff [use name] on appeal, defendant [use name] had a *duty* under [court rule or rule of law] to [perform a certain task].
(3) Defendant *violated* such duty of care by *neglecting* to [omission]. [And if applicable:] Instead, defendant [negligent act].
(4) In consequence of that breach of duty, the [appellate court] [*or* court below after remand] in the underlying litigation *ruled*, by Order [and Opinion] dated [*or* filed] on [date], that [client lost for a particular reason].
(5) The breach of duty proximately caused actual loss to plaintiff, who would otherwise have prevailed in the underlying litigation, both on and after appeal.
a. Plaintiff would have prevailed as appellant [or appellee] in the underlying litigation on the following

grounds: [i, ii, iii . . . If client was the appellant, list grounds that were raised or should have been raised by the attorney; but refrain from listing grounds on which the standard of review is only abuse of discretion. If client was the appellee, specify the grounds that had no merit.]

b. On remand [or after appeal] in the underlying litigation, a judgment would have been entered for plaintiff.

c. The Judgment entered in the underlying litigation [caused a particular loss].

The five elements of the tort have been arranged to outline the paradigmatic story for appellate malpractice. That story includes: background on what led the client to hire the attorney; the central event of the malpractice; and extrapolation of a result in the underlying case as if it would have happened. Written in prose, the story might be told as follows:

The client was represented by an attorney at the appellate level of certain litigation in which: either the client had lost and appealed; or the client had prevailed and the other party appealed. On appeal the attorney either committed a procedural error or insufficiently presented the merits of the client's case. In consequence, the appeal was lost. On the merits of the appeal, the client should have prevailed. If prevailing on appeal would have entailed a remand to the lower court, then the client would have prevailed in the lower court as well.

Template for civil appellate malpractice as an action in contract

(1) For *consideration*, plaintiff client [use name of client] *employed* the defendant attorney, [name], to represent client in the *appeal* by plaintiff [*or* by the opposing party] of the Judgment [or other appealable order] of the Court of Common Pleas [*or* other court], dated [*or* filed] on [date] in [name of case, including client's name] ("underlying litigation"), case no. [docket], to the [appellate court] of [*or* for] [jurisdiction], case no. [docket]. A copy of the attorney-client agreement, dated [date], is attached as Exhibit A.
(2) The client specifically instructed the defendant, in accordance with defendant's representation of the client, to [task or goal] by [manner].
OR:
The *attorney-client contract specified* that the defendant was to [task or goal] by [manner].
OR:
During the representation of plaintiff on appeal, a *duty* arose from the *attorney-client contract* for defendant to [task or goal] by [manner].
(3) Defendant *breached* such contractual duty by [omission]. *Instead* [act].
(4) Defendant's breach of contractual duty *cost* [or *caused*] the plaintiff contractual *damages*.

B. Facts of the Second Sample Problem

Your client is Katherine Monaghan, who lives in fictional Jenkinburgh, Limekiln County, Pennsylvania. Through local attorney William Rockey, Ms. Monaghan sued Exterminator, Inc., a pesticide service, for negligent contamination of her house. The case was tried in April 1997 in the Court of Common Pleas for Limekiln County. The jury found for Exterminator, Inc. Judgment was entered on April 30, 1997. Still representing Ms. Monaghan, Mr. Rockey appealed to the Pennsylvania Superior Court, where the errors argued on appeal were held waived, and the Judgment affirmed, by reason of an appellate procedural error by Mr. Rockey.

Ms. Monaghan had contracted with Exterminator, Inc., to treat her house for carpenter ants. She claimed personal injury as well as damage to the house and furnishings through Exterminator's excessive application of pesticide in July 1994. The state department of agriculture measured pesticide residue from the walls, furniture, and air ducts. A physician specializing in pharmacology and toxicology concluded that pesticides had contaminated the house. On the physician's advice, Ms. Monaghan moved into an apartment while the house was decontaminated. Decontamination, which was completed in May 1995, required discarding furniture,

removing carpeting, replacing air ducts, and reconstructing the interior of the house. At trial, Ms. Monaghan's psychiatrist testified to emotional consequences of the contamination.

Instructing the jury on negligence, the trial judge said: "If the individual who's hurt is so odd and peculiar, idiosyncratic, that it is not foreseeable such a person would be hurt, then the defendant would not be negligent." Mr. Rockey objected to the instruction. As he would argue on appeal, this was not a defense to the cause of action against Exterminator, Inc. Rather, the jury had been charged on the defense of unusual susceptibility of plaintiff to a product the *ordinary use* of which would not harm a normal person.[73] In *Morris v. Pathmark Corp.*,[74] which held that no duty to warn was created by an idiosyncratic sensitivity to a toiletry selected by the customer, the Superior Court distinguished its holding from "cases permitting recovery for . . . situations in which the seller has selected and/or applied the product for the consumer."[75] Exterminator, Inc. had been sued for negligently rather than normally applying pesticides; pesticides that its agents had selected. Nevertheless, the judge overruled Mr. Rockey's objection, and Ms. Monaghan lost the lawsuit.

Mr. Rockey and Ms. Monaghan had entered into a contingent fee agreement dated the first of March 1995. On the day after the verdict, Mr. Rockey wrote to Ms. Monaghan that a transcript of the *Exterminator* trial had to be ordered from the court reporter to pursue an appeal, and that he would need an advance of $2,000 to pay the reporter. Ms. Monaghan immediately advanced him the money. Mr. Rockey ordered the transcript and appealed the *Exterminator* decision to the Superior Court of Pennsylvania. As the chief claim of error, Mr. Rockey argued in his brief that the charge to the jury was erroneous and prejudicial. Other claims of error were based on evidentiary rulings.

The Pennsylvania Rules of Appellate Procedure provide that: "[t]he record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 40 days after the filing of the notice of appeal."[76] Mr. Rockey filed the Notice of Appeal on May 5, 1997. Forty days elapsed on June 14, 1997. On that day or the next, the Common Pleas clerk would have forwarded the lower court record. The Superior Court docket reveals that on June 16, 1997, the record was received. The Court of Common Pleas docket reveals that on June 30, 1997, two weeks after the 40-day deadline of Pa. R. App. P. 1931(a), the stenographer's Notes of Testimony were filed.

In a letter sent to Mr. Rockey in October 1997, Ms. Monaghan wrote:

> It has come to my attention that the Notes of Testimony of my trial are at the court house. I was told that the Notes would have been sent with my file if they had been available. Why were they not available when they were ordered in a timely manner? I did not order a Court transcript for it to languish, unseen by those who will decide if I am entitled to a new trial.

Writing to Ms. Monaghan a few days later, Mr. Rockey replied :

> The entire record is in the possession of the Superior Court. A reproduced record has been filed in the Superior Court as part of an appendix and are available, in their entirety, for the Court to review.

Mr. Rockey had confused the appendix with the actual trial transcript.[77] The direct consequence of his misunderstanding was a decision by the Superior Court, filed April 1, 1998, that all of Ms. Monaghan's claims of error had been waived.

C. Drafting the Complaint for Civil Appellate Malpractice: Alleging Negligence

Ms. Monaghan wishes to sue Mr. Rockey. As her attorney, you decide to file an action for civil appellate malpractice in the Court of Common Pleas for Limekiln County. You can allege malpractice in counts for negligence and breach of contract. You begin by constructing a template and drafting the count for negligence.

There can be no negligence without a duty. The *sine qua non* of an attorney's duty is the employment of that attorney, which is the first element under *Rizzo* and will be the first element of the template.[78] Begin the process of drafting with the element of employment, for it is where a malpractice attorney's evaluation of the case begins.

In the allegation of element (1), the attorney's employment and facts identifying the underlying litigation constitute a single set of circumstances. The identifying details of the appeal include the title of the case and its docket numbers:

(1) Plaintiff client [use name of client] *employed* the defendant attorney, [name], to represent plaintiff client in the *appeal* by plaintiff [*or* by the opposing party] of the Judgment [or other appealable order] of the Court of Common Pleas [*or* other court], dated [*or* filed] on [date] in [name of case, including client's name] ("underlying litigation"), case no. [docket], to the [appellate court] of [*or* for] [jurisdiction], case no. [docket]. A copy of the attorney-client attorney-client agreement, dated [date], is attached as Exhibit A.

1. *Finding the Verb*

The principle of using verbs to name acts can be applied to name an act of the plaintiff-if by that act the plaintiff became entitled to defendant's performance. Therefore, the noun "employment" from *Rizzo*'s first element becomes the verb "employed" in element (1) of the template. Although the plaintiff had appealed in the underlying action, "appeal" is written as a noun. Employing, not appealing, was the act by plaintiff that created a duty in the attorney. Nor should the act of appealing be ascribed to the attorney; it was not a wrongful act.

Ms. Monaghan and Mr. Rockey entered into a contingent fee agreement dated March 1, 1995. That agreement should be referenced in element (1) as an Exhibit. The agreement was supplemented when Mr. Rockey obtained the $2,000 that he solicited from Ms. Monaghan for the trial transcript in his letter of May 1, 1997. The letter should be referenced as an Exhibit, too. Failure to deliver to the Superior Court a transcript he had solicited constituted Mr. Rockey's negligence. In Ms. Monaghan's complaint, element (1) may allege more than a prerequisite for duty; it may allege the very event with which a narrative of negligence can begin.

By a contingent fee agreement and, subsequently, upon Mr. Rockey's solicitation and receipt of moneys from Ms. Monaghan for the purchase of a transcript of trial proceedings, Ms. Monaghan employed Mr. Rockey to represent Ms. Monaghan in her appeal of the Judgment of the Court of Common Pleas for Limekiln County, dated April 30, 1997, in *Katherine Monaghan v. Exterminator, Inc.* ("the underlying litigation"), case no. 1023 Jan. Term 1996, to the Superior Court of Pennsylvania, case no. 3456 PHL 1997. The contingent fee agreement, dated March 1, 1995, is attached as Exhibit A. The letter of solicitation, dated May 1, 1997, is attached as Exhibit B.

The breach of a duty and its immediate consequence will be narrated by elements (2), (3) and (4) of the negligence template. Those elements, however, are not the next step of your analysis, nor of your drafting. The order of the allegations in the complaint need not reflect the order in which you approach and draft them. "Composing is not a linear process, though what it creates has linear form."[79]

2. *Alleging Harm: Using Subparagraphs for Analysis*

A malpractice attorney next examines whether there was any actionable harm. As *Rizzo* states, "an essential element of the cause of action . . . is proof of actual loss."'[80] Expanding on that proviso, the Superior Court, in *Kituskie v. Corbman*, explains that: "until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice."'[81] Actual harm in the attorney's handling of litigation requires scrutiny of the case-within-a-case. "[T]he plaintiff must be able to establish by a preponderance of the evidence that he or she would have prevailed in the underlying litigation."[82] Thus, the writer must allege facts to show that the client would have prevailed in the underlying case.

Proximate cause and actual harm are not separate elements, for the case-within-a-case rule combines them into a single set of circumstances. These circumstances should be confined to a single numbered paragraph, so as not to display the weakest allegation in the complaint, your extrapolation of a result for the underlying case as if that were a fact. The only real facts, procedural events from the underlying case, may be included if they provide narrative continuity. In an appellate malpractice complaint, these extrapolations and procedural events entail two levels of harm: in the appellate court; and at the subsequent, anticipated remand. Levels, by definition, require the writing of analysis. In a complaint, analysis occupies subparagraphs. If both liability and damages are speculated on remand, then you may expect to draft at least three subparagraphs:

(5) The breach of duty proximately caused actual loss to plaintiff, who would otherwise have prevailed in the underlying litigation, both on and after appeal.
a. Plaintiff would have prevailed as appellant [or appellee] in the underlying litigation on the following grounds: [i, ii, iii . . . If client was the appellant, list grounds that were raised or should have been raised by the attorney; but refrain from listing grounds on which the standard of review is only abuse of discretion. If client was the appellee, specify the grounds that had no merit.]
b. On remand [or after appeal] in the underlying litigation, a judgment would have been entered for plaintiff.
c. The Judgment entered in the underlying litigation [caused a particular loss].

The main paragraph of element (5) rewrites the third element of *Rizzo*, that the defendant's negligence was the proximate cause of actual loss. Both "cause" and "loss" could be transformed into verbs. What the plaintiff lost will be alleged in the analysis. For the main paragraph, emphasize that the wrongdoing "caused actual loss . . . ." The legal requirement of *proximate* cause becomes "proximately caused . . . ."[83]

Where your client was an appellant, the drafting of subparagraph (a) requires you to sift through the issues that were argued, or could have been argued, in the client's appellate brief. You must determine which issues are supported sufficiently by the facts of the underlying case and by the law.

Do not allege issues in the prior appeal for which the standard of review was abuse of discretion.[84] Review of a court's exercise of discretion is too constrained to favor a reversal-*unless* the appellant can establish either (i) that the trial court exceeded its permissible range of discretion, or (ii) that the court misinterpreted or misapplied the law while exercising what would otherwise constitute discretion.[85] Mr. Rockey's brief in the *Exterminator* appeal raised evidentiary issues. Generally, the standard of review for a ruling admitting or excluding evidence is abuse of discretion.[86] Given the difficulty of obtaining reversal on that standard, evidentiary issues should not be alleged in an appellate malpractice complaint.

Subparagraphs (b) and (c) extrapolate from rulings, never obtained from the Superior Court, that on remand before a trial court guided by those rulings, the client would have won:

Mr. Rockey's procedural error proximately caused actual loss to Ms. Monaghan, who would otherwise have prevailed in the underlying litigation, both on and after appeal. a. Ms. Monaghan would have prevailed as appellant in the underlying litigation on the following ground: The jury was prejudiced against Ms. Monaghan when they were charged that: "If the individual who's hurt is so odd and peculiar, idiosyncratic, and it is not foreseeable such a person would be hurt, then the defendant would not be negligent." The jury was not thereby charged on a defense to the underlying litigation; it was charged on the defense of unique or unusual susceptibility to the ordinary use of a product applied by the consumer rather than the seller.

b. On remand of the underlying litigation for retrial, judgment would have been entered for Ms. Monaghan.

c. The Judgment that was entered in the underlying litigation caused Ms. Monaghan to lose damages in excess of $_____.

Only if you have satisfied yourself that the underlying appeal was meritorious enough that your client could have prevailed, and that the client could have subsequently won the litigation, may you proceed to draft the rest of the allegations.

3. *Alleging a Duty and its Violation as Separate Circumstances*

The attorney's failure to exercise ordinary skill and knowledge should be alleged as two elements: a duty of care and its violation. Although these elements may form a single set of circumstances, the components of the attorney's duty, including its basis in the law, will be easier for a reader to follow if they are introduced by the writer prior to narrating the breach of that duty in a subsequent paragraph.

(2) During the representation of plaintiff [use name] on appeal, defendant [use name] had a *duty* under [court rule or rule of law] to [perform a certain task]. (3) Defendant *violated* such duty of care by *neglecting* to [omission]. [And if applicable:] Instead, defendant [negligent act].

In an appellate malpractice case, duty is determined not only by terms of the attorney-client contract,[87] but by the rule of procedure that the appellate court in the underlying case found violated. In Ms. Monaghan's case, the Superior Court relied on Pennsylvania authority that imposes responsibility on appellate counsel for compliance with Pa. R. App. P. 1931(a)[88] by the lower court clerk's office: "It is the obligation of the appellant *to make sure* that the record forwarded to an appellant court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal."[89] As "make sure" may sound weak in a complaint, I will use two other verbs, "ascertain" and "request."

In the underlying decision, the Superior Court stated what the appellant, *i.e.*, her attorney, should have done but failed to do: "The record certified to us on appeal does not contain transcripts of the proceedings below or of the instructions provided to the jury."[90] In this, you may find language to adapt to the allegation of element (2):

During the representation of Ms. Monaghan on appeal, Mr. Rockey had a duty under Pa. R. App. P. 1931(a) to ascertain and request that the record certified by the Court of Common Pleas to the Superior Court contain transcripts of the proceedings below and of the instructions provided to the jury.

The Superior Court wrote: "Because paper may not be made part of the certified record simply by reproducing it, appellant may not cure the defect by including the relevant transcripts in the reproduced record."[91] That was exactly how Mr. Rockey acted negligently. That language may be adapted to the allegation of element (3). Element (3) may include as well what you have learned from Mr. Rockey's correspondence, that he erred on a procedure basic to American appellate practice. He confused the appendix with the actual trial transcript.[92] Thus may be alleged Mr. Rockey's failure to exercise ordinary skill and knowledge:

Mr. Rockey breached his duty of care under Pa. R. App. P. 1931(a) by failing to learn its requirements and neglecting to forward the relevant transcripts to the Superior Court. Instead, Mr. Rockey reproduced a copy of the entire transcript in the Reproduced Record.

4. *Creating an Additional Element to Strengthen the Complaint*

According to the elements listed in Rizzo, the negligence template should consist of elements (1), (2), (3) and (5). But from the Superior Court's opinions in *Fiorentino v. Rapoport*[93] and *Perkovic v. Barrett*,[94] a researcher may infer yet another element, which I would call efficient causation.[95]

In *Fiorentino*, the Superior Court decided that "transformation of a reasonably funded corporate liability into an uncollectible debt"[96] by the buyer of a business was caused by defendant attorneys' failure "to exercise the ordinary skill and knowledge of a lawyer engaged to prepare a contract for the sale of a business."[97] By implication in *Fiorentino*, the flawed contract itself was the immediate consequence of the defendants' breach of duty. In *Perkovic*, where the "appellants' amended complaint sets forth with sufficient specificity appellee's [attorney's] failure to inform appellants of the results of their appeal,"[98] the Superior Court narrates the pertinent chain of events in one sentence: "Thereafter, appellee did not inform appellants of our reversal and remand[,] and subsequently judgment was entered against appellants."[99] The analysis in *Perkovic* reveals that the first

event caused the second event.[100] In a comparable reasoning, the Superior Court in Ms. Monaghan's case decided not to review her claims of error on their merits because:

> The record certified to us on appeal does not contain transcripts of the proceedings below or of the instructions provided to the jury. Because paper may not be made part of the certified record simply by reproducing it, appellant may not cure the defect by including the relevant transcripts in the reproduced record.[101]

Mr. Rockey's misunderstanding of appellate procedure caused the Superior Court's decision. In *Perkovic*, the attorney's failure to inform his client of the appellate court's decision caused a judgment to enter against the client on remand. This is not proximate causation as required by *Rizzo* and alleged in element (5) of the template, because it does not entail actual harm, for which case-within-a-case analysis is required. Rather, the logical principle of efficient causation is implied here. Counsel erred and thereby caused a court to rule against the client. That principle can be alleged as an element, or as if it were an element. Its facts, after all, are what have brought the client to the malpractice attorney's office. They will read well. Thus:

> (4) In consequence of that breach of duty, the [appellate court] [*or* court below after remand] in the underlying litigation *ruled*, by Order [and Opinion] dated [*or* filed] on [date], that [client lost for a particular reason].

In Ms. Monaghan's case, efficient causation is unambiguous:

> In consequence of Mr. Rockey's failure to comply with Pa. R. App. P. 1931(a), and his decision to confine the trial transcripts to a reproduced record, the Superior Court in the underlying litigation ruled, by Order and Opinion filed April 1, 1998, that Ms. Monaghan's claims of error were waived and would not be reviewed on the merits.

The addition of this as element (4) may prepare a reader to accept the extrapolations of element (5).

D. Multiple counts

Count I of a complaint should be the cause of action most comprehensive in its coverage of facts or, as in Ms. Monaghan's case, the cause of action more familiar to the judicial reader.[102] It is the ground-level cause of action. Facts pertinent to subsequent counts will have been narrated in Count I. Therefore subsequent counts will require adoption by reference of allegations under the first count.

Typically the first or second paragraph of a subsequent count states that the allegations of specified numbered paragraphs are "adopted by reference." Attorneys take the language from rules of civil procedure, such as Federal Rule 10(c): "Adoption by Reference . . . Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion . . . ."[103] To get rid of redundancy, omit the phrase "by reference" from your pleadings. *Referring* is an action taken by the drafter, who refers to the paragraphs being adopted by specifying their numbers. Just write:

> "The allegations in paragraphs __ through __ are adopted."

Check and recheck that you have written exactly the right paragraph numbers.

E. Drafting the Complaint for Civil Appellate Malpractice: Alleging Breach of Contract

It is not the purpose of this article to reconstruct the basic elements of a breach of contract in Pennsylvania. Rather, I will rely on the elements recently listed by the federal district court for the Eastern District of Pennsylvania, in *Gundlach v. Reinstein*:[104]

> In order to plead a proper claim for breach of contract under Pennsylvania law, a plaintiff must allege: (1) the existence of a valid and binding contract to which [s]he and the defendant[] were parties; (2) the contract's essential terms; (3) that [s]he complied with the contract's terms; (4) that the defendant[] breached a duty imposed by the contract; and (5) damages resulting from the breach. [105]

As part of the first element, existence of the contract, the pleader may have to allege facts showing consideration.[106] If consideration has not been alleged in element (1) of the tort count, then it must be alleged as element (1) of the contract count, by recasting element (1) of the negligence template to include consideration:

> (1) For *consideration*, plaintiff client [use name of client] *employed* the defendant attorney, [name], to represent client in the *appeal* by plaintiff [*or* by the opposing party] of the Judgment [or other appealable order] of the Court of Common Pleas [*or* other court], dated [*or* filed] on [date] in [name of case, including client's name] ("underlying litigation"), case no. [docket], to the [appellate court] of [*or* for] [jurisdiction], case no. [docket]. A copy of the attorney-client agreement, dated [date], is attached as Exhibit A.

In the Monaghan complaint, consideration is already covered by element (1) of the negligence count. It need not be separately alleged in the contract count.

1. *Alleging the Breach as an Omission and as an Act*

In *Gundlach*, breach of a duty is listed as a single element. But it should be alleged as separate elements, for the same reasons that breach of duty is separated in composing the negligence template, and for another reason. Although in *Perkovic* the breach of duty consisted of an omission, in cases such as Ms. Monaghan's the attorney did perform, but erroneously. Mr. Rockey failed to have the transcript forwarded to the appellate court because, instead, he reproduced the whole transcript in the appendix-believing, as he informed his client, that his appendix was all the Superior Court required. While the omission alone constitutes the breach, the erroneous performance narrates the breach as a tangible event.

> (3) Defendant *breached* such contractual duty by [omission]. *Instead* [act].

Breach of contract analyses in the reported malpractice cases do not offer language that can be adapted to element (3) in Katherine Monaghan's complaint. In *McMahon v. Shea*,[107] for example, the action by the attorney was that he "advised" the client, who, relying on that advice, consented to a divorce judgment that harmed the client financially.[108] Mr. Rockey incorrectly advised Ms. Monaghan that he had already filed an adequate record, but she did not rely on that advice. Rather, her discovery of the transcript in the trial court's files provided Mr. Rockey with an opportunity, ignored by him, to cure a breach he had already committed. Superb language for describing the breach may be found in the client's letter of warning to Mr. Rockey: "I did not order a Court transcript for it to languish, unseen by those who will decide if I am entitled to a new trial."[109]

The Pennsylvania Superior Court has consistently refused to consider, as part of its record, a document contained only in the reproduced record.[110] The consequence of Mr. Rockey's error was the decision by the Superior Court, filed April 1, 1998, that all claims of error had been waived:

> The record certified to us on appeal does not contain transcripts of the proceedings below or of the instructions provided to the jury. Because paper may not be made part of the certified record simply by reproducing it, appellant may not cure the defect by including the relevant transcripts in the reproduced record. [111]

Language from the underlying decision may, therefore, be used to describe what the attorney *did instead* of doing what the contract required. Finally, the verbs that I used to allege Mr. Rockey's duty under the negligence count, "ascertain" and "request," can be used to describe his breach under the contract count:

> Mr. Rockey breached the above duties by failing to ascertain and request that the record forwarded to the Superior Court in the underlying litigation include the transcript of the trial. Instead, Mr. Rockey copied the transcript into the reproduced record, allowing the transcript filed in the lower court to languish, unseen by the judges who were to decide whether Ms. Monaghan was entitled to a new trial.

Separation of breach from duty is reinforced by the analysis in *Perkovic v. Barrett*-where first the allegations in the complaint are reviewed for facts of a possible breach of duty, and next the attached fee agreement is reviewed for the existence of that duty. The analysis in *Perkovic* implies, not an order in which to allege the elements in your complaint, but rather a process for writing, *i.e.*, an order in which to draft your elements. Before you comb the fee agreement, or other contractual communications between attorney and client, for a duty, you should determine just what the attorney did or failed to do that harmed the client.

2. *Finding a Duty in the Contract and in the Law*

The defendant should have performed otherwise. That is the essence of a breached contractual duty. In legal malpractice, according to *Fiorentino*, "the plaintiff must show that the defendant attorney failed to follow the client's instructions."[112] Thus, even where a duty cannot be read into a contractual document signed by the attorney, the complaint will survive demurrer if it alleges that the client "specifically instructed" the attorney to perform the contracted-for service in a certain fashion.[113] From this phrase comes the first version of element (2) below.

(2) The client specifically instructed the defendant, in accordance with defendant's representation of the client, to [task or goal] by [manner].

In a contract action for civil appellate malpractice, a duty may be specified by the contract or implied in the law-*i.e.*, inferred by the reviewing court-from the terms of the contract. A contractual specification controlled in *Lichow v. Sowers*,[114] where the state supreme court held sufficient a complaint alleging "that defendant [attorney] was expressly employed to take specified measures on behalf of plaintiff [client] . . . ."[115] From "specified measures" in *Lichow* comes the verb "specify" for the second version of element (2) below.

(2)...OR: The *attorney-client contract specified* that the defendant was to [task or goal] by [manner].

Following a more interpretive approach to determining duty, the Superior Court in *Perkovic v. Barrett* scoured the fee agreement attached to the complaint for duties placed upon the attorney, and held that a duty to inform clients of the result of the appeal was implied by terms of the agreement. The court explained:

> As the express language of this agreement indicates, appellee was retained for the purpose of "perfecting . . . this appeal." While we have found no Pennsylvania authority on point, it is undeniable that notification of appeal results, especially where an attorney is the sole recipient of those results, is necessary to "perfecting" an appeal.[116]

Thus, in *Perkovic*, a provision of the fee agreement was interpreted to imply a duty. For that duty to exist, however, the court must read the duty into the agreement. How is that to be alleged in a complaint? Although a malpractice complaint extrapolates a result in the underlying case as if that were fact, the complaint cannot allege as fact the judicial action it seeks; *i.e.*, the court's act of interpretation cannot be turned into a verb. The third version of element (2) relies not on an action verb but on its grammatical subject, "duty." The verb is filler: Duties arise.

(2)...OR: During the representation of plaintiff on appeal, a *duty* arose from the *attorney-client contract* for defendant to [task or goal] by [manner].

The second and third versions of element (2) may be alleged in Ms. Monaghan's case. In the second version, although no provision of the original fee agreement specified a duty to have the transcript forwarded, that duty can be inferred directly from Mr. Rockey's written solicitation of monies for the transcript. In the third version,

cases interpreting Pa. R. App. P. 1931(a), including the Superior Court's decision in the underlying case, impose a duty on the appellant to make sure the transcript is forwarded to the Superior Court.[117] *A fortiori*, the duty will arise out of any contract to represent an appellant.

The contingent fee agreement was amended by letter from Mr. Rockey to Ms. Monaghan dated May 1, 1997, to provide that Mr. Rockey would obtain and properly use a transcript of the trial in an appeal of the underlying litigation if Ms. Monaghan promptly advanced him the monies for the transcript, which she did.

Under the agreement, Mr. Rockey had a duty to ascertain and request that the record forwarded to the Superior Court in the underlying litigation included the transcript of the trial.

3. *Alleging Contractual Damages in Malpractice*

The final element listed in *Gundlach* is "damages resulting from the breach."[118]

(4) Defendant's breach of contractual duty *cost* [or *caused*] the plaintiff contractual *damages*.

In *Bailey v. Tucker*,[119] Pennsylvania Supreme Court established the elements of malpractice in a criminal case. *Bailey* held that contractual damages, although not limited by the criminal correlate to the case-within-a-case rule,[120] are "limited to the amount actually paid for the services plus statutory interest."[121] The attorney's liability for breach of the attorney-client contract "will be based on the terms of that contract."[122] Ms. Monaghan paid $2,000 for a transcript that was never delivered to the Superior Court.[123] She had purchased the transcript from the attorney for use in an appeal of that trial. Under *Bailey*, her contractual damages are $2,000 plus interest.

In *Bailey*, the Supreme Court held that no consequential damages would be permitted for breach of an attorney-client contract for criminal representation. Although no such restriction applies to civil malpractice, *Rizzo* still requires that: "'an essential element of the cause of action, *whether the action be denominated in assumpsit or trespass*, is proof of actual loss.'"[124] Thus, there is no point to alleging consequential damages for breach of contract in civil appellate malpractice. Those damages are comprehended by the negligence count. Element (4), contractual damages, is simply:

Mr. Rockey's breach cost Ms. Monaghan the $2,000 that she paid for the transcript, for which damage she is entitled to that amount plus statutory interest.

F. The Civil Appellate Malpractice Complaint

Let me pull the complaint together. The allegations drafted above are now preceded by two paragraphs identifying the parties and alleging the facts of venue.

1. The plaintiff, Katherine Monaghan, during all times pertinent to this action, has resided and still resides at 125 Meetinghouse Lane, Jenkinburgh, Limekiln County, Pennsylvania.

2. The defendant, William F. Rockey, during all times pertinent to this action, is an attorney licensed to practice in the Commonwealth of Pennsylvania, with an office at 3679 Penn Street, Jenkinburgh, Limekiln County, Pennsylvania.

COUNT I: NEGLIGENCE

3. The allegations in paragraphs 1 and 2 are adopted.

4. By a contingent fee agreement and, subsequently, upon Mr. Rockey's solicitation and receipt of moneys from Ms. Monaghan for the purchase of a transcript of trial proceedings, Ms. Monaghan employed Mr. Rockey to represent Ms. Monaghan in her appeal of the Judgment of the Court of Common Pleas for Limekiln County, dated April 30, 1997, in *Katherine Monaghan v. Exterminator, Inc.* ("the underlying litigation"), case no. 1023 Jan. Term 1996, to the Superior Court of Pennsylvania, case no. 3456 PHL 1997. The

contingent fee agreement, dated March 1, 1995, is attached as Exhibit A. The letter of solicitation, dated May 1, 1997, is attached as Exhibit B.

5. During the representation of Ms. Monaghan on appeal, Mr. Rockey had a duty under Pa. R. App. P. 1931(a) to ascertain and request that the record certified by the Court of Common Pleas to the Superior Court contain transcripts of the proceedings below and of the instructions provided to the jury.

6. Mr. Rockey breached his duty of care under Pa. R. App. P. 1931(a) by failing to learn its requirements and neglecting to forward the relevant transcripts to the Superior Court. Instead, Mr. Rockey reproduced a copy of the entire transcript in the Reproduced Record.

7. In consequence of Mr. Rockey's failure to comply with Pa. R. App. P. 1931(a), and his decision to confine the trial transcripts to a reproduced record, the Superior Court in the underlying litigation ruled, by Order and Opinion filed April 1, 1998, that Ms. Monaghan's claims of error were waived and would not be reviewed on the merits.

8. Mr. Rockey's procedural error proximately caused actual loss to Ms. Monaghan, who would otherwise have prevailed in the underlying litigation, both on and after appeal.

a. Ms. Monaghan would have prevailed as appellant in the underlying litigation on the following ground: The jury was prejudiced against Ms. Monaghan when they were charged that:

If the individual who's hurt is so odd and peculiar, idiosyncratic, that it is not foreseeable such a person would be hurt, then the defendant would not be negligent.

The jury was not thereby charged on a defense to the underlying litigation; it was charged on the defense of unique or unusual susceptibility to the ordinary use of a product applied by the consumer rather than the seller.

b. On remand of the underlying litigation for retrial, judgment would have been entered for Ms. Monaghan.

c. The Judgment that was entered in the underlying litigation caused Ms. Monaghan to lose damages in excess of $_____.

COUNT II: BREACH OF CONTRACT

9. The allegations in paragraphs 1, 2, and 4 through 7 are adopted.

10. The contingent fee agreement was amended by letter from Mr. Rockey to Ms. Monaghan dated May 1, 1997, to provide that Mr. Rockey would obtain and properly use a transcript of the trial in an appeal of the underlying litigation if Ms. Monaghan promptly advanced him the monies for the transcript, which she did.

11. Under the agreement, Mr. Rockey had a duty to ascertain and request that the record forwarded to the Superior Court in the underlying litigation included the transcript of the trial.

12. Mr. Rockey breached the above duties by failing to ascertain and request that the record forwarded to the Superior Court in the underlying litigation include the transcript of the trial. Instead, Mr. Rockey copied the transcript into the reproduced record, allowing the transcript filed in the lower court to languish, unseen by the judges who were to decide whether Ms. Monaghan was entitled to a new trial.

13. Mr. Rockey's breach cost Ms. Monaghan the $2,000 that she paid for the transcript, for which damage she is entitled to that amount plus statutory interest. The body of the complaint would conclude with a section on relief, and a demand for trial by jury if desired.

III. CONSTRUCTING THE WORLD INTO NUMBERED PARAGRAPHS

Without a basis in theory, an article on legal composition amounts to little more than one writer's account of here's-what-works. "[A] sequence of activities undertaken for one or another often unexamined purpose" does not amount to a method, cautions composition scholar Ann Berthoff.[125] For a method to develop, Berthoff writes, theory and practice must inform each other. "A method is a way of bringing together what we think we

are doing and how we are doing it . . . ."[126] I have attempted to do just that. The method described in these pages is grounded in rhetorical and compositional theory.

The numbered paragraphs of a complaint do more than impose narrative form upon legally significant facts. Through the process of composing form, a writer discovers what may be written, writes Berthoff. She explains: "[C]omposing is preeminently a matter of forming structures . . . .The composer develops and organizes ideas, makes statements, and creates images by way of discovering the parts he or she wants to assemble and, in the process, invents and orders an assembly to suit purpose and audience."[127]

So that the cause of action may be composed by the facts of a client's case, the legal writer must reconstruct the elements, rather than implicitly trusting what a single judge or the legislature has listed. I recommend that each law office compose its own pleading templates. A template never hardens into set form. Even within the confines of a law office, the story of a cause of action changes a little with each case, and changes the cause of action along with it. The pleader will revise the office's template based on developments in the law. Even if the law has not developed, the pleader must scour the case law for language by which facts of the new case might be articulated.

A lawyer must read like a writer. Reading by legal writers is utilitarian, yet creative. Reading multiple stories into a statute or reported decision, we become what French literary theorist Roland Barthes called "writerly" readers. "[N]o longer a consumer, but a producer of the text" he writes, the writerly reader interprets a text critically, ceaselessly, even playfully; thus: "To interpret a text is not to give it a . . . meaning, but on the contrary to appreciate what *plural* constitutes it."[128] For lawyers, a statute or reported decision opens a plurality of opportunities for writing.[129] We reread them searching for language with which to articulate the new client's circumstances.

A. What Is a Set of Circumstances?

I have constructed this method in response to the quandary of how to comply with Federal Rule 10(b) and its progeny, requiring the contents of a numbered paragraph to be limited to a single set of circumstances. As a writing teacher, I was intrigued; here was a rule of civil procedure, uniformly adopted throughout the country, that prescribed an organization by paragraphs; yet judges despaired at enforcing it,[130] nor could the experts teach it. Notwithstanding a Committee Comment to Tennessee's version of the rule, that it "sets out a technique for achieving clarity and simplicity in pleading",[131] a "set of circumstances" by itself is yet another rule that dictates a result, rather than offering guidance in how to get there. "Unfortunately," admit Wright and Miller, "no easy rule can be extracted from the cases to advise a pleader as to when separate paragraphs will be necessary."[132] No rule of law has ever explained what a writer is to do. Wright and Miller advise reliance on "common sense."[133] But among writers, *common sense* consists of a common understanding. Among legal writers there is one common understanding of the process of organizing numbered allegations. Except where a discrete fact allows for the inference of more than one element, attorneys wisely limit an allegation to facts constituting a single element, or a portion of an element.

The practice works well. A cause of action is a judicial or legislative construct of the same sort of event repeating itself over time, among one group of people after another. Its elements function not only as analytical but as narrative components. The practice works best when a pleader constructs the elements themselves. For example, I inferred an element of efficient causation from Pennsylvania cases on legal malpractice, and wrote that element as a set of circumstances:

7. In consequence . . . the Superior Court . . . ruled . . . that Ms. Monaghan's claims of error were waived . . . .

Other sets of circumstances are formed by the substantive law of a cause of action. Recall that proximate cause and actual harm are not separate elements in Pennsylvania legal malpractice, for the case-within-a-case rule combines them into a single set of circumstances, as in:

8. Mr. Rockey's procedural error proximately caused actual loss to Ms. Monaghan, who would otherwise have prevailed . . . .

Where the law allows alternative approaches to a single element, each approach will occupy a set of circumstances. After I determined that an attorney's contractual duty is either specified by the contract or implied (*i.e.*, read into the contract) by the law, I had to allege both sources of duty in paragraphs 10 and 11, respectively, of the sample complaint:

10. The contingent fee agreement was amended by letter from Mr. Rockey . . . to provide that Mr. Rockey would obtain and properly use a transcript . . . if Ms. Monaghan promptly advanced him the monies for the transcript, which she did.

11. Under the agreement, Mr. Rockey had a duty to ascertain and request . . . .

A set of circumstances may be more than a single circumstance. Each circumstance may be given a sentence within the allegation paragraph. For example, a breach of contract often consists not only of an omission but also an erroneous performance:

12. Mr. Rockey breached the above duties by failing to ascertain and request . . . . Instead, Mr. Rockey copied the transcript into the reproduced record, allowing the transcript filed in the lower court to languish . . . .

A circumstance is an action, an instrumentality,[134] a duty, or a status. Where a circumstance consists of either (i) wrongful action by the defendant, or (ii) a status that can be written as if it were action by the defendant, then that action should be formed by a verb, preferably the main verb of a sentence,[135] *e.g.*:

8. The defendant's ordinance ... *zoned* the area containing Planned Parenting's parcel R-3.

10. . . . the defendant's zoning ordinance in effect *excludes* neighborhood medical clinics from Weaver Township.

Sets of circumstances are delimited by their verbs. Every cause of action is a verb transformed into the name for a wrongful act. The main verbs in the above two paragraphs name the cause of action for exclusionary zoning. For the writing lawyer, English grammar is not a list of proscriptions, but rather a finely graded tool for constructing a case.

Wrongful acts may be communicated through the verbs in phrases that modify the main verb. The introductory clauses to paragraph 10, from above, are built upon verbs for the wrongful acts of "prohibiting" and "limiting":

10. By *prohibiting* clinics in the areas zoned R-1, R-2, R-3 and AR, and by *limiting* all clinics to the two commercial strips zoned CM, the defendant's zoning ordinance in effect excludes neighborhood medical clinics from Weaver Township.

Allegation of a defendant's breach of duty-than which no act could be more civilly wrongful-may involve several verbs, as in the civil appellate malpractice complaint:

6. Mr. Rockey *breached* his duty of care under Pa. R. App. P. 1931(a) by *failing to learn* its requirements and *neglecting to forward* the relevant transcripts to the Superior Court. Instead, Mr. Rockey *reproduced* a copy . . . .

The pleader should be alert for grammatical modifiers in definitions or descriptions of an element. Looking again at paragraph 10 from the exclusionary zoning complaint, we see can see an advantage in modifying the verb "excludes" by "in effect":

10. . . . the defendant's zoning ordinance *in effect excludes* neighborhood medical clinics from Weaver Township.

The grammatical modifier "in effect" broadens the range of facts that will satisfy that element. It was adapted from the language "shall not have the effect of totally prohibiting", in the Township Rural Zoning Act,[136] and from the interpretation of that element by the Michigan Court of Appeals, writing that "[a]n ordinance that has the effect of totally prohibiting a particular land use within a township is impermissible . . . ." [137]

By selecting modifiers from legal sources, therefore, a pleader may allege less than total action on the part of the defendant, or a less than absolute consequence flowing from the defendant's action.[138] But a lawyer must learn to recognize modifiers that require no pleading. In its opening clause of the Township Rural Zoning Act, the more obvious modifier is "totally", which the Court of Appeals uses as well.[139] The modifier "totally" does not reduce the quantity of wrongdoing a landowner must plead. Nor does the modifier "totally" add meaning to the verb "prohibit". Unmodified, an exclusion or prohibition would be total anyway. In contrast, the statute's use of "totally", in "totally prohibiting", appropriately prevents the legislation from being misapplied to ordinances that only partially exclude a use.[140] A complaint, however, is not concerned with circumscribing the judicial review of ordinances, but rather with seeking judicial review of a single ordinance.

The bare verb "have" or "has" may suit some allegations better than an action verb, as in the allegation of a duty that must precede an allegation of its breach. In the allegation of an appellate attorney's duty, the bare verb "had" cannot be avoided; but the verb phrases that follow it may convey the action or failure to act:

5. Mr. Rockey *had* a duty under Pa. R. App. P. 1931(a) *to ascertain* and *request* that the record . . . *contain* transcripts . . . .

The exclusionary zoning complaint alleges an illegal policy through the language, "has a policy . . ." But then a verb phrase follows to convey the action or failure to act:

11. The defendant *has* a policy of *excluding* medical clinics for low-income families . . . .

Finally, the principle of using verbs to name acts can be applied to an act or even a status of the plaintiff, if the plaintiff became entitled to protection thereby:

4. . . . Ms. Monaghan *employed* Mr. Rockey . . . .

In the exclusionary zoning complaint, the present perfect tense (*n.b.*, not the same as "have" or "has" standing alone) communicates actions that have continued from the past through to the present:

4. . . . Planned Parenting *has owned* a parcel of land . . . .

5. . . . Planned Parenting *has* continuously *conducted* its business . . . .

Where the act of pleading itself constitutes an element of the cause of action, the main verb of that element will be written in the present tense:

6. Planned Parenting *proposes* to construct . . . .

Note that the next allegation of the exclusionary zoning complaint creates a transition from plaintiff establishing a property right to defendant acting wrongly:

7. The defendant *was informed* by Planned Parenting . . . . [T]he defendant's Zoning Board *refused to permit* the proposed use.

To form this transition, I used the passive voice, "was informed", which pushes the plaintiff, still an actor, to the back side of the verb, and moves the defendant into position as grammatical subject. The verb phrase of the second sentence, "refused to permit . . ." is not part of any element; but it commences the complaint's narration of the defendant's wrongdoing. The defendant is now the actor.

Only initially, however, must key actions be communicated through verbs. Once written as a verb, the action may be transformed into other parts of speech. In the complaint for exclusionary zoning, "proposes" becomes "the proposed use":

6. Planned Parenting *proposes* to construct . . . .

7. The defendant was informed by Planned Parenting of the *proposed* use . . . .

And "zoned"-a wrongful act-becomes "The . . . zoning ordinance", which itself then commits a wrongful act; it "excludes":

8. The defendant's ordinance . . . *zoned* the area containing Planned Parenting's parcel R-3.

9. The defendant's *zoning* ordinance *provides* that . . . .

10. . . . the defendant's *zoning* ordinance in effect *excludes* neighborhood medical clinics from Weaver Township.

Note that the verb "provides" in paragraph 9 could have been transformed into a grammatical subject, "provision," to produce an alternative version of paragraph 10:

10. . . . the zoning ordinance's provision in effect excludes *neighborhood medical clinics from Weaver Township.*

In the complaint for civil appellate malpractice, "Mr. Rockey breached" becomes "Mr. Rockey's breach":

12. Mr. Rockey *breached* the above duties . . . .

13. Mr. Rockey's *breach* cost Ms. Monaghan the $2,000 . . . .

In the grammatical transformations from "proposes" to "the proposed use", from "zoned" to "The . . . zoning ordinance", and from "Mr. Rockey breached" to "Mr. Rockey's breach", actions become the actors of succeeding allegations. This transformation of action into actor is a process intrinsic to legal narrative, in which consequences take on consequences of their own.

B. What Makes a Text a Narrative?

English teachers have traditionally classified writing into four "modes": description, narration, exposition, and argumentation. The modes were established by Scottish rhetorician Alexander Bain in the earlier 1860's editions of his *English Composition and Rhetoric: A Manual*.[141] Bain defined "exposition" as the language of science, i.e., of analysis,[142] while "Argumentative Persuasion is closely allied with Logical Proof . . . ."[143] In contrast to these loftier modes, Bain thought narrative was language in its natural state.[144] Together with description, the narrative mode of writing provided "the natural method of observing" events, which "may also be called the Traveller's point of view."[145] This colonialist, British Empirical notion of narrative as natural language-inherently non-analytical, less than logical, and, therefore, unnecessary to teach-persisted until recently in primary, secondary, and higher education. It continues its grip upon the education of legal professionals.

The method described in this article demonstrates that narrative, at least in the form of a factual complaint, does not render the world directly into language (as if that were even possible). Rather, narrative is a complex construction that its practitioners must be taught. As legal writing specialists Chris Rideout and Jill Ramsfield observe: "[l]egal writing is a complex act that requires rigorous and continuous training."[146] "After their first year, most students fend for themselves in an atmosphere that tests their writing abilities in only two of several potential genres-exams and seminar papers . . . ."[147]

Narrative requires selection. A pleader actively selects the circumstances to be narrated, and through language not only relates them but creates them. Yet even the process of selection does not define the narrative quality of a text. For a text to be a narrative, it must be perceived as such by both writer and reader. A writer's ability to create a narrative, and a reader's subsequent comprehension of that text as narrative,[148] both depend on the *sequentiality* and the *successivity* of the text.

Narrative relies on sequence. Just as every text on its face is linear, with word following word, a narrative text demonstrates sequentiality, in that event follows event. The prior narrated event provides a context for understanding subsequently narrated events. The writer may create a chronology, so that the order of events corresponds to what the writer has learned about their sequence in time; or the writer may narrate non-chronologically by moving portions of an event into the preceding past. Both the chronological and non-chronological approaches to pleading are sequential: As an element is narrated, it provides a context by which to anticipate and understand elements subsequently narrated. Events narrated in the preceding past (marked in an ordinary prose narrative by the past perfect tense) rely on the context provided by events subsequent in time but prior in the narrative. In a complaint for nuisance, for example, where the cause of action is defined by a consequence rather than by the wrongdoing, the narrative can commence with the consequences for plaintiff's property, consequences that provide a context of wrongfulness for the defendant's acts.[149]

Sequentiality is as necessary to a line of reasoning as it is to a storyline. Therefore, sequentiality does not by itself account for a reader's comprehension of a pleading as a narrative, or for the writer's ability to create that narrative. The *and-then* quality of narrative depends as well on its successivity.

The writer, and then the reader, construct successive layers of meaning. Narrative, wrote Roland Barthes, is "subject to the successivity of sentences, in which meaning proliferates by layering . . . ."[150] In a complaint, each layer of the narrative is constituted by a set of circumstances. Each set of circumstances layers meaning upon the preceding set of circumstances, allowing a cause of action to grow in the mind of the reader. Without successivity, the text would not be coherent as a narrative.

The pleader creates a layered succession of actions and consequences through grammar, by transforming actions, already narrated, into actors. The preceding set of circumstances becomes the subject of an allegation that follows.[151] This grammatical transformation before the eyes of the reader is intrinsic to the comprehension of legal narrative.[152] Successivity, by layering of meaning upon preceding actions, enables the construction of legal consequences.

Narrative cohesion in a complaint is created out of grammar. Yet attorneys still feel compelled to layer succeeding allegations through the overly referential *said*, as in "the said premises" or "said breach." *Said*, the flagship adjective of Legalese, may prove at last unnecessary for factual complaints.

C. What Makes a Narrative an Argument?

A factual complaint communicates an argument to judges and lawyers by reason of its form: Numbered paragraphs tell the story of the cause of action. The allegation paragraphs of a factual complaint are as much a form of narrative as the more ordinary paragraphs of prose that we read in a novel, or in the Statement of Facts of a brief; for the form of a narrative depends on the rules or practices of the community of readers and writers to whom it is addressed. The legal discourse community[153] determines as well what constitutes an argument. Thus, the factual complaint is a legal genre in which argument is expected to take a narrative rather than a logical form.

The Oxford English Dictionary defines "argument" as, *inter alia*:
"4. A connected series of statements or reasons intended to establish a position (and *hence*, to refute the opposite); a process of reasoning; argumentation."[154] The argument in a factual complaint supports more than a claim that the cause of action has been alleged. The argument supports a claim that the cause of action has been narrated.[155] In a factual-pleading jurisdiction, a narrative is the only form that the argument of a complaint may take.

Non-lawyers customarily acknowledge as argumentative only textual features in the form of logic, the classical form of which is the Aristotelian model of major premise/minor premise/conclusion. Yet lawyers rarely rely on syllogisms. Recognizing that most argumentation relies on context- and genre-related non-logical structures,

British philosopher Stephen Toulmin created what he considered a jurisprudential, as distinguished from Aristotelian, model of reasoning.[156] In keeping with jurisprudence, Toulmin was concerned with how a position is to be justified rather than how the claimant arrived at that position.[157] A lawyer arrives at a claim because lawbooks reveal that the claim would be advantageous to the client. Then the lawyer constructs a form of reasoning by which to justify the claim to the decision-maker.

Toulmin's model of reasoning permits the analysis of "the sources of [the] validity" of an argument in any field of discourse.[158] The model consists of elements to which Toulmin gave jurisprudential names: A lawyer argues from "facts" to a "claim" by means of a "warrant;" that is, the "facts" alleged will "warrant" the decision-maker in concluding that a "claim" is sound.[159] As originally defined by Toulmin, a warrant is a statement indicating how the claim may be derived from the facts. As such, the warrant determines relevance; it is a principle for selecting the facts of an argument.[160]

But more pertinent to the writing process, Toulmin later explained the warrant as a way of arguing.[161] Recall that a writer discovers what is to be written, according to Ann Berthoff, through the process of composing form.[162] *The narrative that is to be constructed out of the elements of a cause of action* is *the warrant of a complaint.* Because the warrant of a complaint consists of the narrative form, overt analysis must be relegated to subparagraphs, where the narrative may pause.

Let me repeat the paradigmatic stories I created from the elements for exclusionary zoning, and for civil appellate malpractice as negligence:

[Exclusionary Zoning]. The owner of land proposed to use the land, but the use specifically proposed by the owner is prohibited by a zoning ordinance. The proposed use is suited to the land and, in the owner's view, needed in the municipality. The use is legal under state or federal law. For these reasons the owner has arrived in court claiming the zoning ordinance to be unconstitutional.

[Civil Appellate Malpractice/ Negligence.] The client was represented by an attorney at the appellate level of certain litigation in which: either the client had lost and appealed; or the client had prevailed and the other party appealed. On appeal the attorney either committed a procedural error or insufficiently presented the merits of the client's case. In consequence, the appeal was lost. On the merits of the appeal, the client should have prevailed. If prevailing on appeal would have entailed a remand to the lower court, then the client would have prevailed in the lower court as well.

Each story is a narrative way of thinking about that cause of action; that is, each story demonstrates a warrant.

Let me bring in a fourth component of Toulmin's model. Justifying every warrant is its underlying "backing", which is the basis for the trustworthiness of the ways of arguing applied in a particular case.[163] Backing for the warrant of a factual complaint consists of case law. That is, the argument of a factual complaint is built upon connections that the pleader has made from the client's story to the stories and language gleaned from the cases being used as precedents. Those stories and that language have been certified by judicial authorities to constitute the cause of action, or an element of it. An element gets defined through stories. As these constituent stories accumulate case by case, the warrant itself evolves. Thus, through language adapted from precedent, a complaint brings the facts of the present case in line with the facts of prior cases. If the lawyer is successful, the facts in the complaint join the backing, for the purpose of writing the next such complaint.

The warrant and its backing, not the client, guide the lawyer in selecting the facts to be narrated. I agree with Cathy Lesser Mansfield, who argues that the job of the lawyer, and by implication the legal writer: "is to take utilitarian control of a client's story toward achieving the client's legal goal . . . .[Lawyers] accept and reject facts and legal arguments as they impose legal paradigm on the client's story and begin the process of distilling client story toward client goal."[164] For example, the desire of the plaintiffs in *English* to build a mobile home park for profit motivated their lawsuit against Augusta Township;[165] but an action for exclusionary zoning is not about, and does not allege, what the plaintiff desires. A private developer will not care whether the use is allowed within the rest of the municipality; indeed a developer would prefer its use to be exclusive; but the cause of action requires a plaintiff to plead a situation in or around the municipality, as if the plaintiff had

standing or were even concerned enough to represent the needs of potential customers or fellow developers. The plaintiff of the sample problem on exclusionary zoning, being a public service organization, is atypical; its allegation of concern for others may be genuine. But even in *pro bono* litigation, sincerity in the expression of concern for others is a luxury rarely allowed a pleader.

A pleader is constrained to tell a story that judges and opposing counsel can recognize as constituting a cause of action. Writing in all professions involves articulating otherwise undefined or ill-defined events and ideas. The bard does not serve his king, nor the lawyer her client, who does not select and form events into what the court may recognize as song.

D. Old Battles

In presenting a method for writing factual complaints, I chose *not* to address two complementary and troublesome distinctions: between evidentiary facts and ultimate facts; and between ultimate facts and conclusions of law and in the wake of the Federal Rules of Civil Procedure, a majority of states adopted notice pleading.[166] Professor Henry McMahon, in his memorandum entitled *The Case Against Fact Pleading in Louisiana*, correctly observed that lawyers drafting pleadings often had difficulty distinguishing an "ultimate fact," which had to be pled, from a fact that was "evidentiary" and not to be pled. A judicial reader might read a poorly drafted ultimate fact as a conclusion of law, thereby rendering a factual complaint insufficient.[167] To these objections even the president of the Louisiana State Law Institute, who successfully defended the retention of factual pleading in that state, could only suggest amending a complaint that runs into difficulty. Thus, a proponent, as well as the opponents, of factual allegations gave up on explaining how to write them.

The question of what constitutes an "ultimate fact" has refused to go away.[168] The pertinent procedural rules in two factual pleading states explicitly require ultimate facts.[169] The requirement of pleading only ultimate facts has provided no guidance to lawyers as writers. The solution was not to abandon factual pleading for notice pleading, however, but to consult writing specialists, "experts whose experience and study offer the best methods for ushering novices into a new discourse."[170]

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1. Some instruction on writing pleadings may be found in textbooks on advanced legal writing, *see, e.g.*, Susan L. Brody et al, Legal Drafting, ch. 6, *Drafting Pleadings* (1994); *see also* Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing, ch. 11, *Pleadings* (1991).

2. *See* Ark. R. Civ. P. 8(a)(1); Cal. Civ. Proc. Code § 452; Conn. Super. Ct. Civ. Proc. § 108; Fla. R. Civ. P. 1.110(b)(2); Ill. Code Civ. P. § 2-603(a); La. Code Civ. P. 891; Md. R. 2-303(b) & 2-305; Mich. Ct. R. 2.111(B)(1); Mo. R. Ct. 55.05(1); Neb. Rev. Stat. § 25-804(2); N.J. R. 4:5-2; N.Y. Civ. Prac. R. § 3013; Or. R. Civ. P. Rules 13A & 18A; Pa. R. Civ. P. 1019(a); S.C. R. Civ. P. 8(a)(2); Tex. R. Civ. P. 47(a); Va. Sup. Ct. R 1:4(d).

3. Create a file to hold the template and its revisions, along with complaints written alleging that cause of action, and any memoranda written for the office or the court to explain the cause of action.

4. This ethical mandate is a rule of law. *See, e.g.*, Fed. R. Civ. P. 11(b)(3). *See, e.g.*, Fed. R. Civ. P. 11(b)(3). The ethic of legal writing consists of persuading without distorting.

5. The exception would be if a cause of action has been created, or imported, by a fairly recent decision in your jurisdiction-cite that decision.

6. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1375 (1986); *See also* Henry G. McMahon, *The Case Against Fact Pleading in Louisiana*, 13 La. L. Rev. 369, 371 (1953).

7. "[C]ause of action," the signal for requiring fact-based complaints, appears in: Cal. Civ. Proc. Code § 425 ("statement of the facts constituting the cause of action"); Ill. Code Civ. P. § 2-603(a) ("statement of the pleader's cause of action"); La. Code Civ. P. 891 ("statement of the object of the demand and of the material facts upon which the cause of action is based"); Md. R. 2-303(b) ("statement of the facts necessary to constitute a cause of action") and Md. R. 2-305; Mich. Ct. R. 2.111(B)(1); Neb. Rev. Stat. § 25-804(2) ("facts constituting the cause of action"); N.Y. Civ. Prac. R. § 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense"); Pa. R. Civ. P. 1019(a) ("[t]he material facts on which a cause of action . . . is based"); S.C. R. Civ. P. 8(a)(2); Tex. R. Civ. P. 47(a) ("statement of the cause of action").

8. Mich. Ct. R. 2.111(B)(1).

9. Mich. Ct. R. 2.111(A)(1).

10. Mich. Ct. R. 2.113(E)(1).

11. Mich. Ct. R. 2.113(E)(2).

12. Fed. R. Civ. P. 10(b).

13. The rule began with New York's Field Code. Section 120 provided that a complaint should contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Although not all jurisdictions require factual pleading, when facts are pleaded they must be written in paragraphs each containing a "single set of circumstances"-according to Federal Rule 10(b) and the rules of all states but California and Nebraska. *See, e.g.*, Ala. R. Civ. P. 10(b); Alaska R. Civ. P. 10(b); Ariz. R. Civ. P. 10(b); Ark. R. Civ. P. 10(b); Colo. R. Civ. P. 10(b); Del. Ct. C.P.R. 10(b); Fla. R. Civ. P. 1.110(F); Ga. R. Civ. Prac. 9-11-10(b); Haw. R. Civ. P. 10(b); Idaho R. Civ. P. 10(b); Ind. R. Trial P. 10; Iowa R. Civ. P. 79; Kan. R. Civ. Proc. 60-210(b); Ky.

R. Civ. P. 10.02; La. Code Civ. P. art. 854; Me. R. Civ. P. 10(b); Md. Cir. Ct. R. 2-303(A); Mass. R. Civ. P. 10(b); Mich. Ct. R. 2.113(E)(2); Minn. R. Civ. P. 10.02; Miss. R. Civ. P.10(b); Mo. R. Civ. P. 55.11; Mont. R. Civ. P. 10(b); Nev. R. Civ. P. 10(b); N.J. R. 1:4-2; N.M. R. Civ. P. Dist. Ct. 1-010; N.C. R. Civ. P. 10(b); N.D. R. Civ. P. 10(b); Ohio R. Civ. P. 10; 12 Okla. Stat. Ann. § 2010; Ore. R. Civ. P. 16; R.I. Ct. R. 10(b); S.C. R. Civ. P. 10(b); S.D. Stat. 15-6-10(b); Tenn. R. Civ. P. 10.02; Tex. R. Civ. P. 50; Utah. R. Civ. P. 10(b); Vt. R. Civ. P. 10(b); Wash. Super. Ct. R. 10(b); W.Va. R. Civ. P. 10(b); Wisc. Stat. Ann. § 802.04(2); Wyo. R. Civ. P. 10(b).

Variations on Federal Rule 10(b) are:

N.Y. Civ. Prac. L. & R. 3014: "Each paragraph shall contain, as far as practicable, a single allegation." *Id.* One trial court explained: "The purpose of this rule is to require a pleading to be in such form that the opposing party may make his denials with clearness and certainty and also to aid him in his preparation for trial." *Arel Inc. v. Optics Mfg. Corp*., 231 N.Y.S.2d 800, 802 (1962).

Conn. R. Super. Ct. 108: "such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation." *Id.*

Ill. Code Civ. P. 2-603(b): "Each separate cause of action . . . shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as maybe, a separate allegation." *Id.*

N.H. Super. Ct. R. 121: "Each allegation of distinct and separate facts should be placed in a paragraph by itself . . . ." *Id.*

Pa. R. Civ. P. 1022: "Each paragraph shall contain as far as practicable only one material allegation." *Id.*

Va. Sup. Ct. R. 1:4(j): "Brevity is enjoined as the outstanding characteristic of good pleading. In any pleading a simple statement, in numbered paragraphs, of the essential facts is sufficient." *Id.*

14. In December 1997, the Pennsylvania Superior Court affirmed a summary judgment against a complaint for civil appellate malpractice, on the ground that the underlying appeal would not have succeeded. *See Kenig v. Casey*, 706 A.2d 1264, (Pa. Super., Dec. 18, 1997) No. 1393 PHL 1997) (unpublished table decision). The plaintiffs petitioned the Pennsylvania Supreme Court for review and were denied. *See Kenig v. Casey*, 1998 WL 323249 (Pa. June 22, 1998) (order denying appeal). The facts of the second sample problem are a simplified version of the facts in *Kenig*.

15. 391 Mich. 139; 215 N.W.2d. 179 (1974).

16. *Kropf*, 391 Mich. at 157; 215 N.W.2d at 186. *Kropf* holds that even where an ordinance excludes a use from a zoning district, the municipality does not have the burden of proving the constitutional validity of the ordinance. *See Kropf*, 391 Mich. at 156; 215 N.W.2d at 186.

N.B. For the convenience of readers who practice law in Michigan and Pennsylvania, where the two problems are respectively set, I have provided full parallel citations. I have used a semi-colon rather than a comma to separate the parallel components, following the reasoning of the Michigan Uniform System of Citation, point I A 5 j(2): "Parallel citations are separated from official citations and from other parallel citations by semi-colons to avoid confusion with the commas which frequently separate page numbers in one citation." Please hold the author, rather than the editors of this journal, responsible for these departures from *The Bluebook*.

17. 391 Mich. at 157-159; 215 N.W.2d at 186-87.

18. Mich. Const. 1963, art. I, § 2.

19. *See Van Slooten v. Larsen*, 410 Mich. 21, 55; 299 N.W.2d 704, 716 (1980); *see Baldwin v. North Shores Estates Ass'n.*, 384 Mich. 42, 54; 179 N.W.2d 398, 402 (1970). In the most recent such case, a complaint for exclusionary zoning was held to have stated a *prima facie* case for violation of plaintiff property owner's own right to equal protection. *See Countrywalk Condominiums, Inc. v. City of Orchard Lake Village*, 221 Mich. App. 19, 23-24; 561 N.W.2d 405, 407 (1997). But *Countrywalk* specifically rules only on a shift in burden upon a motion for summary disposition against an exclusionary zoning complaint. *See* Mich. Ct. R. 2.116(C)(8) and (C)(10).

20. 204 Mich. App. 33; 514 N.W.2d 172 (1994).

21. *Kropf v. Sterling Heights*, 391 Mich. 139, 155-156; 215 N.W.2d 179 (1974). *See English*, 204 Mich. App. at 37; 514 N.W.2d at 174. Under Mich. S. Ct. Admin. Order 1994-4, a decision by the Michigan Court of Appeals issued on or after November 1, 1990, is the law in that jurisdiction, "unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals . . . ." *English v. Augusta Township* has, therefore, effectively refined Kropf's definition of exclusionary zoning in Michigan.

22. *See* Mich. Comp. Laws Ann. § 125.286 (West 1996); Mich. Stat. Ann. § 5.2963(16)(1) (providing limited protection for pre-existing uses).

23. Other facts pertinent to the underlying politics may be likely in this situation: Planned Parenting does not need and cannot afford to hire any physician full time. So far, all of the physicians interested in working at the proposed clinic will continue to work primarily outside of Toronto County. No local physician is willing to become known as an abortion provider. A few local physicians perform abortions, but only privately and without publicity.

24. For example, by regulating the extent to which a physician practices, the municipality may be exercising a function preempted by the state.

25. *English*, 204 Mich. App. at 37; 514 N.W.2d at 174. The statute is identical to Mich. Comp. Laws Ann. § 125.592; Mich. Stat. Ann. § 5.2942, which applies to cities rather than townships. *See Adams Outdoor Advertising, Inc. v. City of Holland*, 883 F. Supp. 207, 209 (W.D. Mich. 1995).

26. 181 Mich. App. 25; 448 N.W.2d 727 (1989).

27. *See* Mich. Comp. Laws Ann. §125.297a (West 1996); Mich. Stat. Ann. § 5.2963(27a).

28. *Eveline*, 181 Mich. App. at 32; 448 N.W.2d at 730.

29. *Id.* Note that in *English v. Augusta Township*, the Court of Appeals turned *Eveline Township*'s three prongs into two prongs by putting "lawful" into an introductory phrase. *See English*, 204 Mich. App. at 14; 514 N.W.2d at 174.

30. On using verbs to communicate a wrongdoer's action in documents of litigation, *See, e.g.*, George D. Gopen, Writing from a Legal Perspective, 18-43 (1981); Terri LeClercq, Guide to Legal Writing Style (1995), *passim*; Joseph M. Williams & Gregory G. Columb, *Telling Clear Stories: A Principle of Revision That Demands a Good Character*, 5 Perspectives: Teaching Legal Research & Writing 14 (1996); Gregory G. Columb & Joseph M. Williams, *Shaping Stories: Managing the Appearance of Responsibility*, 6 Perspectives: Teaching Legal Research & Writing 16 (1997); Joseph M. Williams, Style: Ten Lessons in Clarity & Grace, 35-61 (4th ed. 1994). Professor Williams, whose work on style began through consulting for law firms, has written the best style manual available for any professional whose work requires writing.

31. Mich. Comp. Laws Ann. § 125.297a (West 1996); Mich. Stat. Ann. § 5.2963(27a).

32. *Eveline,* 181 Mich. App. at 32; 448 N.W.2d at 730.

33. *English,* 204 Mich. App. at 37; 514 N.W.2d at 174. *English v. Augusta Township* also refers to "[a] zoning ordinance that totally excludes an otherwise legitimate use." *Id.*

34. At trial, the Township would likely go forward with proof that its ordinance permits construction of the clinic in CM zones.

35. *English,* 204 Mich. App. at 38; 514 N.W.2d at 175. The facts of *English* were emphasized to distinguish them in *Bell River Assoc. v. Charter Tp. of China,* 223 Mich. App. 124, 135-37; 565 N.W.2d 695, 700-01 (1997). In *Kropf,* the Michigan Supreme Court explains the equal protection approach to exclusionary zoning as established by "a policy of discriminating against" an otherwise lawful use. *Kropf,* 391 Mich. at 157; 215 N.W.2d at 186.

36. *English,* 204 Mich. App. at 38; 514 N.W.2d. at 175.

37. *Eveline,* 181 Mich. App. at 32; 448 N.W.2d at 730.

38. That plaintiff cannot use the land is a separate cause of action: depriving a landowner of property without just compensation. A plaintiff may not claim an ordinance to be confiscatory, however, without first having sought a variance. *See Countrywalk Condominiums, Inc. v. City of Orchard Lake Village,* 221 Mich. App. 19, 23; 561 N.W.2d 405, 407 (1997).

39. See discussion of element (2), *infra*.

40. 76 F.3d 778 (6th Cir. 1996).

41. *See Gustafson,* 76 F.3d at 790.

42. *English,* 204 Mich. App. at 38-39; 514 N.W. 2d at 175.

43. *Kropf,* 391 Mich. at 157, 215 N.W.2d. at 186.

44. *English,* 204 Mich. App. at 35; 514 N.W.2d at 173 (emphasis added).

45. *Eveline Township,* 181 Mich. App. at 32; 448 N.W.2d at 730. In place of "the location," which may be ambiguous in a complaint, I have substituted "plaintiff's land".

46. *See English,* 204 Mich. App. at 36, 41; 514 N.W.2d at 174, 176.

47. *See Bell River,* 223 Mich. App. at 135-37; 565 N.W.2d at 700-01.

48. 223 Mich. App. 124, 565 N.W.2d 695 (1997).

49. *See id.*

50. *English,* 204 Mich. App. at 36; 514 N.W. 2d at 174. Similarly, the appropriateness of the land for a commercial port is covered at length in *Eveline Township;* but there I can find no factors that sufficiently correspond to Planned Parenting's situation.

51. *See English,* 204 Mich. App. at 33; 519 N.W.2d at 172.

52. Two stories are told in a judicial opinion: what happened out in the world that brought the parties into court, and the procedural story of the litigation itself.

53. The decision of the Zoning Board does not constitute an element; "it is not necessary for a party to exhaust available administrative remedies prior to challenging a zoning ordinance as unlawful or unconstitutional." *Eveline Township,* 181 Mich. App. at 35; 448 N.W.2d at 731 (citation omitted).

54. If the fact of the denial constitutes an element of an alternative cause of action, to be alleged in a later count, then that fact should be alleged here.

55. 426 Mich. 295; 395 N.W.2d 678 (1986).

56. *See Schwartz,* 426 Mich. at 325, 329; 395 N.W.2d at 691, 693.

57. *See English,* 204 Mich. App. at 39-41; 514 N.W. 2d at 175-176.

58. *Schwartz,* 426 Mich. at 328; 395 N.W.2d at 692 (citation omitted), cited in *English,* 204 Mich. App. at 41; 514 N.W. 2d at 176. The Court of Appeals elaborates in *English*:

The abundant record in this case not only supports the trial court's finding that plaintiffs' property was suitable for the proposed use under the test for exclusionary zoning, *Eveline Township, supra* at 32, but also that plaintiffs' proposal was a "specific reasonable use" under the standard adopted in *Schwartz, supra* at 327-328. Stated differently . . . plaintiffs have satisfied the burden of demonstrating that the mobile-home park was a "specific reasonable use." Notably, while a proposed use must be specific, "it need not amount to a "plan." *Id.* at 328.

Id.

59. *See Bell River,* 223 Mich. App. at 135-37; 565 N.W.2d at 700-01.

60. In the abstract, let us say that cause of action X requires plaintiff to allege facts constituting Elements A, B and C. Under the facts of the assignment, defendant is likely to answer the complaint by alleging Affirmative Defense D. Proving Affirmative Defense D would either negate cause of action X or limit the extent of relief available, even though plaintiff might prove Elements A, B and C. However, there may be other types of facts which, if proven, would keep defendant from establishing Affirmative Defense D. Because fact E would rebut Affirmative Defense D, fact E in effect becomes part of the plaintiff's cause of action. The complaint would allege facts constituting Elements A, B and C, and your provisional element E.

61. *English,* 204 Mich. App. at 37; 514 N.W.2d at 174.

62. *See generally Bailey v. Tucker,* 533 Pa. 237; 621 A.2d 108 (1993) (breach of contract); *Guy v. Liederbach,* 501 Pa. 47; 459 A.2d 744 (1983) (breach of contract); *Lichow v. Sowers,* 334 Pa. 353; 6 A.2d 285 (1939) (breach of contract); *Fiorentino v. Rapoport* (Pa. Super. 1997); 693 A.2d 208, *appeal denied,* 701 A.2d 577 (1997); *Perkovic v. Barrett,* 448 Pa. Super. 356; 671 A.2d 740 (1996) (appellate malpractice and breach of contract). *N.B.* For the convenience of readers who practice law in Michigan and Pennsylvania, where the two problems are respectively set, I have provided full parallel citations. I use a semi-colon rather than a comma to separate the parallel components, following the reasoning of the Michigan Uniform System of Citation, point I

A 5 j(2): "Parallel citations are separated from official citations and from other parallel citations by semi-colons to avoid confusion with the commas which frequently separate page numbers in one citation." Please hold the author, rather than the editors of this journal, responsible for these departures from *The Bluebook*.

63. *Gans v. Gray*, 612 F. Supp. 608, 613 (E.D. Pa. 1985) (citing *Guy v. Liederbach*, 501 Pa. 47, 57; 459 A.2d 744, 748 (1983)).

64. 520 Pa. 484; 555 A.2d 58 (1989).

65. *McMahon v. Shea*, 547 Pa. 124, 129; 688 A.2d 1179, 1181 (1997) (citing *Rizzo v. Haines*, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989)). *Rizzo* adopted its three elements verbatim from R. Mallen & V. Levit, Legal *Malpractice* 123 (1977).

66. *Rizzo*, 520 Pa. at 504; 555 A.2d at 68 (emphasis added) (quoting *Duke & Co. v. Anderson*, 275 Pa.Super. 65, 73-74, 418 A.2d 613, 617 (1980)) (internal quotes omitted).

67. Pa. Super. 693 A.2d 208, *appeal denied*, 701 A.2d 577 (1997).

68. *See Fiorentino*, 693 A.2d at 212.

69. 448 Pa. Super. 356; 671 A.2d 740 (1996).

70. *Perkovic*, 448 Pa. Super. at 358; 671 A.2d at 742 (1996). *Perkovic v. Barrett* held that the complaint sufficiently alleged a breach of fiduciary duty as well. *See id.*

71. *Id.* at 743. "While we have found no Pennsylvania authority on point, it is undeniable that notification of appeal results, especially where an attorney is the sole recipient of those results, is necessary to 'perfecting' an appeal." *Id.*

72. *Fiorentino*, 693 A.2d at 213, (citing *Bailey v. Tucker*, 533 Pa. 237, 251; 621 A.2d 108, 115 (1993)).

73. Thus, in *Barrett v. S.S. Kresge Co.*, 144 Pa. Super. 516, 19 A.2d 502 (1941), the seller of a garment that was selected by the plaintiff customer was held not to warrant it to be fit for a customer with an idiosyncratic allergy. *See Barrett*, 144 Pa. Super at 516; 19 A.2d. at 502.

74. 405 Pa. Super 274; 592 A.2d 331 (1991), *appeal dismissed*, 536 Pa. 104; 638 A.2d 193 (1993).

75. *Morris*, 405 Pa. Super. at 278-80; 592 A.2d at 333-34.

76. Pa. R. App. P. 1931(a).

77. For the reproduced record, appellant's attorney is to select and copy pages from the transcript. *Compare* Pa. R. App. P. 2151 *et seq.*, regulating contents of the reproduced record, *with* Pa. R. App. P. 1921, on certification of the record on appeal by the clerk of the lower court.

78. *See Rizzo*, 520 Pa. at 499; 555 A.2d at 65. The first element of *Rizzo* is employment of the attorney "or other legal basis" for a duty. *See id.* Only if your client was the third-party beneficiary of a contract to employ civil appellate counsel on the client's behalf, (e.g. counsel employed by an insurance company pursuant to its own contract with the insured) would an alternative basis for duty be alleged. In *Guy v. Liederbach*, 501 Pa. 47; 459 A.2d 744 (1983), the basis for liability was plaintiff's status as intended third party beneficiary of a contract to write a will. *See Guy*, 501 Pa. at 47; 459 A.2d. at 744.

79. Ann E. Berthoff, The Making of Meaning 20 (1981).

80. *Rizzo*, 520 Pa. at 504; 555 A.2d at 68 (quoting *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 73-74, 418 A.2d 613, 617 (1980)) (internal quotes omitted).

81. 452 Pa. Super. 467, 472; 682 A.2d 378, 380 (1996); *appeal granted*, 693 A.2d 967 (1997) (quoting *Ammon v. McCloskey*, 440 Pa. Super. 251, 257-58; 655 A.2d 549, 552 (1995)); *accord, Fiorentino*, 693 A.2d at 219-20. *Kituskie* holds that the malpractice defendant has the burden of proving, as an affirmative defense, non-collectibility of the underlying judgment. *See Kituskie*, 452 Pa. Super at 467; 682 A.2d. at 378.

82. *Kituskie*, 452 Pa. Super. at 472; 682 A.2d at 380 (quoting *Rogers v. Williams*, 420 Pa. Super. 396, 401; 616 A.2d 1031, 1034 (1992)). The continuing viability of the case-within-a-case rule in Pennsylvania legal malpractice law has been discussed elsewhere. *See* Jerome E. Bogutz, et al., *Recent Developments in Pennsylvania's Legal Malpractice Law*, 67 Pa. B.Q. 152, 165 (1996).

83. Consider, however, an insight of the Michigan Supreme Court into whether this element is to be called proximate causation, or rather cause-in-fact: "Yet, the question is more appropriately considered an issue of cause in fact because no causation in fact occurred if the underlying appeal would have failed. In any event, whether the issue is categorized as an issue of cause in fact or proximate, *i.e.*, legal causation, is irrelevant to the resolution of the instant case." *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 588 n.4; 513 N.W.2d 773, 776 n.4 (1994) (plurality opinion). The addition of the modifier "proximately" to element (5) reminds the judicial reader that elements of negligence will be satisfied; but as *Charles Reinhart* indicates, the word does not otherwise affect the facts and speculations of this causation-of-harm element.

84. For appellate review of a jury trial, standards of review fall into two categories, according to Judge Aldisert: "review of the trial court's exercise of discretion; and plenary review of the choice, interpretation and application of the controlling legal precepts." Ruggero Aldisert, Winning on Appeal § 5.02, at 58 (1992).

85. See *id.* § 5.10, at 71-72.

86. *See Harkins v. Calumet Realty Co.*, 418 Pa. Super. 405, 412; 614 A.2d 699, 703 (1992). For example, a decision on the competency of an expert will not be reversed on appeal absent an abuse of discretion. *See Rigler v. Treen*, 442 Pa. Super. 533, 543; 660 A.2d 111, 116 (1995).

87. *See Perkovic v. Barrett*, 448 Pa. Super. 356; 671 A.2d 740 (1996).

88. "The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 40 days after the filing of the notice of appeal." Pa. R. App. P. 1931(a).

89. *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 401 Pa. Super. 446, 460-461; 585 A.2d 1012, 1019 (1991) (emphasis added) (refusing to consider a praecipe not included in the certified record).

90. *Kenig v. Terminix Int'l*, No. 02893 PHL 94, slip op. at 4 (Pa. Super. 1995); 445 Pa. Super. 656; 665 A.2d 1306 (1995).

91. *Id.* at 4-5.

92. Notwithstanding appellate procedural variations among jurisdictions, the distinction between an appendix and the original record does not vary. An appendix is not a substitute for the original record. *Compare, e.g.*, 3d

Cir. R. 30.3 *with* Fed. R. App. P. 11(b). For a reproduced record to the Superior Court, appellant's attorney is to select and copy pages from the transcript. *Compare* Pa. R. App. P. 2151 *et seq. with* Pa. R. App. P. 1921.

93. 693 A.2d 208 (1997).

94. 448 Pa. Super. 356; 671 A.2d 740 (1996).

95. The reliance of the present analysis upon the Superior Court opinions is not without risk. The Pennsylvania Supreme Court does not habitually accord deference to rules announced by its junior appellate partner. The chastising of the Superior Court in *Commonwealth v. Dugger*, 506 Pa. 537; 486 A.2d 382 (1985), for example, is not unusual.

96. *Fiorentino,* 693 A.2d at 214-15, 219.

97. *Id.* at 214.

98. *Perkovic,* 448 Pa. Super. at 360; 671 A.2d at 743.

99. *Id*. at 358; 671 A.2d at 742.

100. I read the sentence, "Thereafter, appellee did not inform appellants of our reversal and remand and subsequently judgment was entered against appellants" in the context of the whole opinion To infer causation from that sentence alone would be to commit the logical fallacy of *post hoc ergo proptor hoc*.

101. *Kenig v. Terminix, Int'l,* No. 2893 PHL 94, slip op. at 4 (Pa. Super. 1995); 445 Pa. Super. 656; 665 A.2d 1306 (1995).

102. George G. Mahfood advises, "In deciding the order of presentation of legal theories, the strongest and simplest legal claim should be set forth first." George G. Mahfood, *Crafting Persuasive Complaints,* 28 Trial 39, 40 (Dec. 1992).

103. Fed. R. Civ. P. 10(c). The Pennsylvania Rules of Civil Procedure do not mention adoption by reference in the rules on complaints in actions at law. *See* Pa. R. Civ. P. 1017-1034. However, Rule 2328(a) on the contents of a petition to intervene provides, in part, that, "The petitioner . . . shall state in the petition that he *adopts by reference* in whole or in part certain named pleadings or parts of pleadings already filed in the action." Pa. R. Civ. P. 2328 (emphasis added.)

104. 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd mem.,* 114 F.3d 1172 (3d Cir. 1997).

105. *Gundlach v. Reinstein,* 924 F. Supp. 684, 688 (E.D. Pa. 1996), *aff'd mem.***,** 114 F.3d 1172 (3d Cir. 1997) (footnote and citations omitted) (holding that existence of a contract was not sufficiently alleged).

106. "[I]t has always been deemed essential to the sufficiency of a complaint that it set forth distinctly facts showing a legally sufficient consideration for the contract upon which the action is founded." *Porta v. American Bank & Trust Co.,* 48 Pa. D. & C. 516, 525 (Pa. Com. Pl. 1970) (no authorities cited). "The foundation of the claim was a contract, and to recover thereon it was necessary that all of its essentials should appear" in the complaint. *Franklin Sugar Refining Co. v. Eiseman,* 290 Pa. 486, 491; 139 A. 147, 149 (1927).

107. 547 Pa. 124; 688 A.2d 1179 (1996).

108. *See McMahon,* 547 Pa. at 127; 688 A.2d at 1180.

109. This sentence was in fact written by the client in a letter to the attorney in the case on which the second problem is based, *Kenig v. Casey*, 706 A.2d 1264 (Pa. Super., Dec. 18, 1997).

110. *See generally Gemini Equip. Co. v. Pennsy Supply, Inc*., 407 Pa. Super. 404, 412 n. 5; 595 A.2d 1211, 1215 n.5 (1991) (refusing to consider a deposition not included in the record certified and forwarded by the trial court). *See also Floyd v. Philadelphia Elec. Co.*, 429 Pa. Super. 460, 461; 632 A.2d 1314 (1993) (refusing to consider a transcript not included in the certified record). *Accord Frank v. Frank*, 402 Pa. Super. 458, 463 n.5; 587 A.2d 340, 342-343 n.5 (1991). *But see In re Matsock*, 416 Pa. Super. 520; 611 A.2d 737 (1992), where the Superior Court, on reviewing a termination of parental rights, held the county prothonotary responsible for transmitting a "woefully inadequate" record. *Id.* at 526 n.8; 611 A.2d at 740 n.8. A verdict in a negligence case, however, lacks the public import and severity of the termination of parental rights. Ordinarily, appellate counsel in Pennsylvania cannot shuck responsibility upon the clerks of Common Pleas.

111. *Kenig v. Terminix, Int'l*, No. 02893 PHL 94, slip op. at 4 (Pa. Super. 1995); 445 Pa. Super. 656; 665 A.2d 1306 (1995).

112. *Fiorentino,* 693 A.2d at 214.

113. *Id*. Reversing an order for compulsory nonsuit against a malpractice claim for breach of contract, *Fiorentino* held sufficient the client's testimony that he had instructed the attorney to draft an agreement of sale that would protect the client's right to payment. The *Fiorentino* opinion does not state, but we may infer, that the instruction must be within the scope of what a client may reasonably instruct the attorney to do. "Furthermore, Mr. Fiorentino testified that he specifically instructed the defendants that he wanted them to draft the agreement of sale 'to make sure that I got paid.'" *Id*. *N.B.*, It is not the purpose of this article to discuss whether to rely upon the client's account of what she or he orally instructed the attorney to do, where those instructions are not at least corroborated by paper.

114. 334 Pa. 353; 6 A.2d 285 (1939).

115. *Lichow,* 334 Pa. at 355; 6 A.2d at 286 (1939). In *Lichow*, where the complaint was designated as in trespass, the court nevertheless read it for elements of a breach of contract, stating, "Probably a suit in assumpsit would have been more appropriate, but the form of action is amendable at any stage of the proceedings . . . ." *Id*.

116. *Perkovic,* 448 Pa. Super. at 361; 671 A.2d at 743 (citation omitted).

117. *See, e.g., Fiore v. Oakwood Plaza Shopping Ctr., Inc*., 401 Pa. Super. 446, 460-461; 585 A.2d 1012, 1019 (1991) (refusing to consider a praecipe not included in the certified record). *See also Gemini Equip. Co. v. Pennsy Supply, Inc*., 407 Pa. Super. 404; 595 A.2d 1211 (1991) (refusing to consider a deposition not included in the record certified and forwarded by the trial court); *Floyd v. Philadelphia Electric Co.*, 429 Pa. Super. 460; 632 A.2d 1314 (1993) (refusing to consider a transcript not included in the certified record). *Accord Frank v. Frank,* 402 Pa. Super. 458, 463 n.5; 587 A.2d 340, 342-343 n.5 (1991).

118. *Gundlach,* 924 F. Supp. at 688.

119. 533 Pa. 237; 621 A.2d 108 (1993).

120. In the criminal correlate to the case-within-a-case rule, a criminal defendant suing for malpractice must in fact be "innocent of the crime or any lesser included offense." *Id.* at 247; 621 A.2d at 113.

121. *Id.* at 252; 621 A.2d at 115.

122. *Id.* at 251; 621 A.2d at 115.

123. Although Ms. Monaghan was thereby spared the expense of that transcript in bringing her appellate malpractice action, the transcript of the underlying case is not a transcript of the present case. It is an *exhibit* in the present case-an exhibit on which Ms. Monaghan will rely as evidence of Mr. Rockey's breach of contract.

124. *Rizzo*, 520 Pa. at 504; 555 A.2d at 68 (emphasis added) (quoting *Duke & Co. v. Anderson*, 275 Pa.Super. 65, 73-74, 418 A.2d 613, 617 (1980)).

125. Berthoff, *supra* note 79, at 4.

126. *Id*.

127. *Id.* at 19-20.

128. Roland Barthes, *S/Z* 4-5 (Richard Miller, trans. Hill & Wang 1985) (1970).

129. For a comprehensive discussion of rhetoric as a pluralistic discipline, *see* Mark Lawrence McPhail, Zen in the Art of Rhetoric (1996).

130. Even a judge who sought to explain the rule while enforcing it offered more anguish than advice, in *Vance v. American Society of Composers, Authors & Publishers*, 13 F.R.D. 109 ((S.D.N.Y. 1952) (Kaufman, J.): "The complaint here does violence to the purpose of the Rule not only because of extremely confused multiple sets of circumstances stated within many given paragraphs, but, even more significantly, because of the utter impossibility of isolating and defining the precise claims [that] plaintiff is alleging against particular defendants or combinations thereof." *Id.* at 112-13.

131. Tenn. R. Civ. P. 10.02.

132. Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 1322 at 731-32 (2d ed.1990). There is little commentary on Rule 10(b) and its analogues in law journals and treatises. The only law review article to elaborate on the rule of separate paragraphs does not explain how to write them. J. Patrick Browne, *Civil Rule 10(B) and the Three Basic Rules of Form Applicable to the Drafting of Documents Used in Civil Litigation*, 8 Capital Univ. L. Rev. 199, 204-05 (1978).

133. Wright & Miller, *supra* note 132, § 1322 at 732.

134. What lawyers call "instrumentality," non-lawyers simply call "instrument." In linguistics "instrument" is the term for the *means* by which action is declared to have been taken. In law, however, "instrument" refers to a document. Black's Law Dictionary (5th ed. 1979) defines "instrument" as "[a]nything reduced to a writing . . . ." *Id.* at 801.

135. Reasons for articulating the action of a sentence through its main verb have been argued by other professors of composition who have devised techniques based specifically on the requirements of legal discourse. *See supra* note 30.

136. Mich. Comp. Laws Ann. § 125.297a (West); Mich. Stat. Ann. § 5.2963(27a).

137. *English v. Augusta Township*, 204 Mich. App. 33, 37; 514 N.W.2d 172, 174 (1994).

138. In Stephen Toulmin's jurisprudentially based taxonomy of argument, a modifier or "qualifier" adds "some explicit reference to the degree of force which our data confer on our claim . . . ." Stephen E. Toulmin, The Uses of Argument 101 (1958). The most frequently used modifiers in American jurisprudence are burdens of proof. The facts in a criminal case need not support a finding of guilt absolutely but rather beyond a reasonable doubt. A search warrant may issue upon a finding of probable, not absolute, cause to believe that the contraband sought is on the premises to be searched. "It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; . . . ." *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1913). Similarly, the pleader's burden is lightened when a verb in an element may be modified.

139. *English*, 204 Mich. App. at 37; 514 N.W. 2d at 174.

140. *See supra* note 30 and accompanying text.

141. Alexander Bain, English Composition and Rhetoric: A Manual 4-5 (D. Appleton 1867). The 1867 edition included one chapter on each of the four modes. Frank D'Angelo, in his contribution to Teaching Composition: Ten Bibliographic Essays (Gary Tate ed.) (Texas Christian University Press 1976), cites the 1890 edition from New York publisher D. Appleton as the source for his analysis of Bain's four modes. *See id.* at 114-15. But when Bain revised and expanded his manual into two volumes, during the late 1880's, he eliminated the earlier edition's chapters on the modes. *See* English Composition and Rhetoric vi, vii (rev. ed. D. Appleton 1890).

142. *See* Bain, *supra* note 141, at 185-194.

143. *Id*. at 228.

144. *See id*. at 166.

145. *Id*. at 156.

146. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, n.1 (1994).

147. *Id.* at 37.

148. According to the reader response theory of discourse, a text is not completed upon writing or even publication. Rather, it becomes a text with each reading. For an introduction to reader response theory, see the essays in Reader-Response Criticism: From Formalism to Post-Structuralism Jane P. Tompkins ed. 1980)), and in Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980).

149. Restatement (Second) of Torts § 829A (1979) provides: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation." *Id.* Restatement (Second) of Torts, § 827 (1979) provides:

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) The extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

Id.

150. Barthes, *supra* note 128, at 8.

151. "The continuity that is provided by cohesion consists . . . in expressing at each stage in the discourse the points of contact with what has gone before." M.A.K. Halliday & Ruqaiya Hasan, Cohesion in English 299 (Longman 1976). Cohesion is the glue that holds a succession of words together as a text. *Id*., *passim*.

152. The study of Transformational Grammar presupposes that syntactic units are derived from underlying structures which, although not articulated, control the semantic value of an utterance. The best known example is the transformation of the active voice into the passive voice. "The crime was committed by the defendant" has an unarticulated, underlying, active-voice structure of "The defendant committed the crime." The grammatical subject of the clause "*Defendant's breach of contract* harmed the plaintiff" has an unarticulated, underlying, verb-based structure of "Defendant breached the contract." Gunther Kress & Robert Hodge, Language as Ideology (1979), criticize the premise of Transformational Grammar that the underlying structure is always recoverable. *See id*. at 31-35. Indeed, political discourse often depends on an underlying structure not being discoverable, as in President Reagan's famous concession, "Mistakes were made." (One prefers Nixon's "I am not a crook" for its syntactic and semantic, if not actual, honesty.) The narrative structure of a complaint, however, depends upon the underlying structure of an allegation being recoverable from preceding allegations.

153. By "discourse" I mean a use of language, whether that use consists of a single utterance or, as in this discussion, a system for using language. On discourse communities, *see generally* Fish, *supra* note 148.

154. The Oxford English Dictionary 443 (Clarendon Press, 2d ed. 1989).

155. James Boyd White, When Words Lose Their Meaning, (1984), *passim*, demonstrates that an argument justifies not only its explicit claims but also the very manner of its arguing.

156. Toulmin introduced his non-Aristotelian structure in what is now a classic of philosophy and rhetoric, The Uses of Argument. *See supra* note 138. He revised the terminology of that system in his textbook, Toulmin et al., An Introduction to Reasoning, (2d ed. 1984).

157. *See* Toulmin, The Uses of Argument 6.

158. *Id*. at 95.

159. *Id*. at 97-100.

160. *See id*. Lawyers may readily think of Toulmin's *warrant* as the verb used by lawyers in discussing whether the evidence against a suspect warrants his or her arrest-on the basis of which a magistrate will decide whether to issue the document called a "warrant."

161. *See* An Introduction to Reasoning, ch. 5.

162. *See* Berthoff, *supra* note 79, at 19.

163. *See Toulmin, supra* note 138, at 103-07; *see also Toulmin, supra* note 156, ch. 6.

164. Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 Brooklyn L. Rev. 889, 905 (1995).

165. *See* English v. Augusta Township, 204 Mich. App. 33, 35; 514 N.W.2d 172, 174 (1994).

166. *See* John H. Tucker, Jr., *Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs*, 13 La. L. Rev. 395 (1953). *See generally* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986).

167. *See* Henry McMahon, *The Case Against Fact Pleading in Louisiana*, 13 La. L. Rev. 369, 371, 373 (1953). Notice pleading is required by Fed. R. Civ. P. 8(a)(2); Ala. R. Civ. P. 8(a)(1); Alaska R. Civ. P. 8(a)(1); Ariz. R. Civ. P. 8(a)(2); Colo. R. Civ. P. 8(a)(2); Del. Super. Ct. R. Civ. P. 8(a)(1); Ga. Code Ann. § 81A-108; Haw. R. Civ. P. 8(a)(1); Idaho R. Civ. P. 8(a)(1); Burns Ind. Tr. R. 8(a)(1); Iowa R. Civ. P. 69(a)(1); Kan. Civ. Proc. Code Ann. § 60-208(a)(1); Ky. R. Civ. P. 8.01(1)(a); Me. R. Civ. P. 8(A)(1); Mass. R. Civ. P. 8(a)(1); Minn. R. Civ. P. 8.01; Miss. R. Civ. P. 8(a)(1); Mont. R. Civ. P. 8(a)(1); Nev. R. Civ. P. 8(a)(1); N.M. R. Civ. P. 1-008(A)(2); N.C. R. Civ. P. 8(a)(1); N.D. R. Civ. P. 8(a)(1); Ohio R. Civ. P. 8(A); 12 Okla. Stat. Ann. § 2008(A)(1); R.I. R. Civ. P. 8(a)(1); S.D. Cod. Laws § 15-6-80(a)(1); Tenn. Civ. P.R. 8.01(1); Utah R. Civ. P. 8(a)(1); Vt. R. Civ. P. 8(a)(1); Wash. Ct. R. 8(a)(1); W. Va. R. Civ. P. 8(a)(1); Wis. Stat. Ann. § 802.02(1)(A); Wyo. R. Civ. P. 8(a)(2).

168. *See, e.g., People ex rel. Scott v. College Hills Corp.*, 435 N.E.2d 463, 466-67 (1982) ("a civil complaint in Illinois is required to plead the ultimate facts which give rise to the cause of action"). *Id.*

169. Fla. R. Civ. P. 1.110(b)(2) ("a short and plain statement of the ultimate facts"), Or. R. Civ. P. 18(A) ("plain and concise statement of the ultimate facts"), and Or. R. Civ. P. 21A(8) (allowing a motion to remedy a "failure to state ultimate facts sufficient to constitute a claim").

170. Rideout & Ramsfield, *supra* note 146, at 37.