

# Leading the Way:

Using Low Stakes Techniques from Legal Writing  
for Assessment Across the Curriculum

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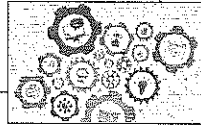
## Assessment Techniques: Selection Criteria ✓

- ✓ Low Stakes
- ✓ Easy to Prepare
- ✓ Tried & True
- ✓ Collaborative Learning
- ✓ Ease of Reporting
- ✓ Zero Grading (or Automated or Self Graded)

## Technology: Friend or Foe in Assessment?

- Automates tracking, reporting, grading
- BUT...

- Low Tech: scratch off cards, paper, both
- Higher Tech: clickers, polling



## A New Take on Quizzes

- Start of Class Quizzes
  - Cover Reading and/or Earlier Material
- TWEN Quizzes
  - Automated Grading & Reports
  - "Easy" Transfer from Year to Year



## Comments on Memos (or Exams)

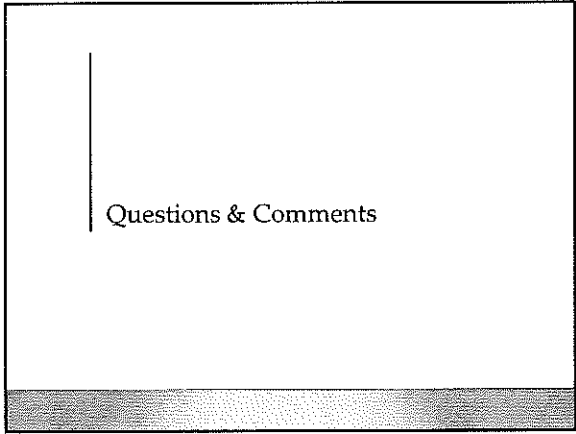
- True/False "Test" on Common Mistakes
- Low Stakes Multiple Choice Midterm
  - Common problems, core concepts, citation basics
- Timing: Before or After



## In Class Exercises

- Ungraded Rule Synthesis Exercise
  - In Legal Writing
  - In Casebook Classes
- Collaborative Multiple Choice Questions





2019 ALWD Conference—Leading the Way: Using Low Stakes Techniques from  
 Legal Writing for Assessment Across the Curriculum  
 Wanda M. Temm

RUBRIC FOR COMPONENTS OF CRITICAL READING  
 UMKC School of Law Fall 2015

Professor Wanda M. Temm

Course Lawyering Skills I

Enrollment 23

Number of exams assessed using this rubric 23

**FOLLOWING INSTRUCTIONS**

Instruction that was not followed:	Number of students who did not follow that instruction
Format instructions: double-spacing, typesize, font, page numbers, margins, etc.	3
Omitted required sections of memorandum	3
Name included instead of submitting anonymously	1

**USING TEXT TO SUPPORT ANALYSIS**

Critical fact or textual detail that students should be expected to use in their analysis (List one or two of these)	Answer draws inferences about the text item, using these inferences to support legal analysis.	Answer describes the text item as part of a cursory or conclusory legal analysis.	Answer notes the text item but does not use it in the analysis.	No mention is made of the text item in the answer.
Text Item #1 Client had actual knowledge of well's location and condition	5	10	8	0
Text Item #2 No prior accidents had occurred to give constructive notice.	4	2	3	14



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## Sample Reporting Instrument University Assessment Report

Student Learning Outcomes	Measures and Targets for Achievement/Success Criteria	When and where was data collected?	Summary Results (Findings) Was the target met?
SLO 2: Demonstrate mastery of objective legal analysis	M1: Lawyering Skills I course In-class Quiz T: 85% of first year students will demonstrate mastery of objective legal analysis: correctly identifying the precedential value of a case within a particular jurisdiction	M1: Administered during 1L Lawyering Skills classes in Fall 2018	Target met. 90% of each Lawyering Skills class scored a minimum of 90% on the in-class quiz exercise.  Was the target met? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No



Writing Bee – Day 6 Key  
Legal Analysis, Writing & Research 2  
Professor Julien  
Spring 2019

Student Name: \_\_\_\_\_

1. You are citing the statute below in a brief to be submitted to a Wisconsin state court. Assume that this citation is your first citation to the statute and that your citation appears in a citation sentence. The years on the spine of the relevant volume are 2017-18. This section does not appear in any pocket part or supplement.

**103.465 Restrictive covenants in employment contracts.** A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

History: 1995 a. 225; 1997 a. 253; 2015 a. 197 s. 51.

Citation:

Wis. Stat. § 103.465 (2017-18).

2. Assume that you are citing the Star Direct opinion for the first time in a citation sentence in your brief to a Wisconsin appellate court. The information you are citing appears in paragraph 19 of that opinion. Choose the best response from the list below.
- a. Star Direct, Inc. v. Dal Pra, 2009 WI 76, 287, 319 Wis. 2d 274, 287, 767 N.W.2d 898, 905.
  - b. Star Direct, Inc. v. Dal Pra, 2009 WI 76, ¶ 19, 319 Wis. 2d 274, 287, 767 N.W.2d 898, 905.
  - c. Star Direct, Inc. v. Dal Pra, 2009 WI 76, ¶ 19, 319 Wis. 2d 274, 767 N.W.2d 898.
  - d. Star Direct, Inc. v. Dal Pra, 2009 WI 76, ¶ 19, 319 Wis. 2d 274, ¶ 19, 767 N.W.2d 898, ¶ 19 (Wis. 2009).

3. Now assume that you are citing the Star Direct opinion for the second time and that you are again citing information that appears in paragraph 19 of the opinion. This time, assume that you cited the case earlier in the same general discussion, but the immediately preceding citation was to a different source. Choose the best response from the list below.

- a. Star Direct, Inc. v. Dal Pra, 2009 WI 76, ¶ 19.
- b. **Star Direct, Inc., 319 Wis. 2d 274, ¶ 19.**
- c. Star Direct, Inc., 2009 WI at ¶ 19, 319 Wis. 2d at 287, 767 N.W.2d at 905.
- d. Star Direct, Inc., 319 Wis. 2d at ¶ 19.

4. Assume that you are citing the Star Direct opinion for the third time. This time, assume that your immediately preceding citation was also to Star Direct and that you were citing information that appeared in paragraph 19 of the opinion. Now you are citing information that appears in paragraph 20. Choose the best response from the list below.

- a. Star Direct, Inc. v. Dal Pra, 2009 WI 76, ¶ 19, 319 Wis. 2d 274, 287, 767 N.W.2d 898, 905.
- b. Star Direct, Inc., 767 N.W.2d 898, ¶ 20.
- c. Id. at ¶ 20.
- d. **Id. ¶ 20.**



1. The discussion should be organized around CREAC exclusively, and should not take into account the rule structure.	T	<input type="checkbox"/>	<b>Commented [JA1]:</b> False. Within CREAC, the writer should organize around the rule structure – begin the explanation with the instrument part of the rule and follow it with the dangerousness part of the rule.
2. The case illustrations in the Explanation should include reasoning only if it's explicitly stated in the cases.	T	<input type="checkbox"/>	<b>Commented [JA2]:</b> False. If the reasoning is implicit, include it, but make clear that it's implicit.
3. Whole sentences of the rule should be repeated in the R, E, and A sections of the discussion.	T	<input type="checkbox"/>	<b>Commented [JA3]:</b> False. Key terms or "phrases that pay" should be repeated, but there is no need to repeat entire sentences or paragraphs of rule.
4. It's helpful to use the Application to check the content of the Rule and Explanation: every fact and all reasoning discussed in the Application should be made relevant by the Rule and Explanation.	<input type="checkbox"/>	F	<b>Commented [JA4]:</b> True. The E and A should "match." The relevance of the facts and reasoning in the A paragraphs should be apparent after having read the related E paragraphs.
5. This is an accurate and precise statement of the "dangerous rule" from <i>Travis</i> : The harm must be a reasonable inference, not a remote and unforeseeable consequence.	T	<input type="checkbox"/>	<b>Commented [JA5]:</b> False. Imprecise paraphrase. The harm need not be a reasonable inference. The instrument's <i>capability to readily cause harm</i> must be a reasonable inference from its use.
6. The "dangerous instrument" definition states that it applies to "assaults committed with knives, crowbars, etc., as well as those committed with	T	<input type="checkbox"/>	<b>Commented [JA6]:</b> False. This language is not in the statutory definition. It is part of the legislative history.

firearms, blackjacks, metal knuckles, etc.”			
7. It was relevant in <i>Travis</i> that the defendant threw the balls of wet toilet paper from a distance of 12 to 15 feet through a 2 ½ inch opening in a protective grate.	T	F	<b>Commented [JA7]:</b> True. The reasoning in <i>Travis</i> was about not only the nature of the instrument but also about how it was used.
8. The writer should include a citation after every sentence in a rule explanation paragraph.	T	F	<b>Commented [JA8]:</b> True. The facts, holding, reasoning, and hook are not the writer’s original idea. That information comes from the opinion (even if the writer is drawing an inference).
9. The writer should include a pincite only when quoting. Otherwise, a citation to the first page of the opinion is sufficient.	T	F	<b>Commented [JA9]:</b> False. Whenever a writer can cite a specific page, the write should include a pincite.
10. The <i>Carter</i> court held that rubber boots are instruments.	T	F	<b>Commented [JA10]:</b> False. The <i>Carter</i> court did not squarely address the instrument issue. That case was about the use-oriented approach (whether the boots were dangerous as used).
11. The prosecution must prove that an item is capable of causing harm to prove that the item is an instrument.	T	F	<b>Commented [JA11]:</b> False. The <i>Owusu</i> court clarified that capability of causing harm goes to whether the instrument was dangerous.
12. The following sentence compares specific, concrete facts from the precedent and from the client’s case: Like the boots in <i>Carter</i> and the plaster cast in <i>Davis</i> , the acrylic nails here were	T	F	<b>Commented [JA12]:</b> False. This sentence doesn’t include any specific facts about how any of the instruments were used.

used in a manner that made them dangerous.		
13. The following sentence makes a precise comparison: Like <i>Davis</i> , the acrylic nails are items attached to the defendant's body.	T	<input checked="" type="checkbox"/> F
14. The prosecution must prove that the instrument caused a serious physical injury to prove that the instrument was dangerous.	T	<input checked="" type="checkbox"/> F
15. Proving that the instrument caused a serious physical injury is relevant to proving that it was readily capable of doing so.	<input checked="" type="checkbox"/> T	F
16. This is an accurate and precise statement of the "instrument" rule from <i>Owusu, Carter &amp; Davis</i> : An instrument is a device or object attached to the body.	T	<input checked="" type="checkbox"/> F
17. The <i>Davis</i> court reasoned that because the plaster cast was attached to the defendant's body, it was an instrument.	T	<input checked="" type="checkbox"/> F

**Commented [JA13]:** False. You cannot compare the entire *Davis* case to the acrylic nails in *Vail's* case.

**Commented [JA14]:** False. The prosecution need prove only that the instrument was readily capable of causing that sort of injury.

**Commented [JA15]:** True. The reasoning in *Davis* supports this point: evidence about the brutal nature of the conduct & the fractures, laceration, and hospitalization support the inference that the cast was readily capable of causing serious injury. But this reasoning does not state that the prosecution *must* prove that a serious injury resulted.

**Commented [JA16]:** False. This sentence is imprecise because it suggests that only devices or objects attached to the body are instruments. Possible revisions: An instrument includes a device or object attached to the body. OR A device or instrument attached to the body is an instrument.

**Commented [JA17]:** False. There was no explicit reasoning in *Davis* about the instrument element.

18. A writer may include more than one case illustration in a single paragraph of rule explanation.

T  F

**Commented [JA18]:** True. If more than one case illustrates the hook, the writer may include more than one case illustration in the paragraph. If the paragraph gets too long, however, the writer can break the paragraph. If the writer breaks the paragraph, the first would begin with the hook setting out relevant language from the rule, and the second would likely begin with a transition and the holding from the case being illustrated.

Reasoning re: whether the injury would have resulted absent the object in *Davis* likely less relevant. The defense in that case argued that the defendant didn't use the cast, he used his fists. The evidence about whether the fists could have caused the injury was likely relevant to whether he hit her with the cast – whether he used a dangerous instrument to inflict harm.

Interrogatory Assignment – Samples  
Advanced Legal Writing  
Professor Julien  
Spring 2019

**Example 1**

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 10

WAUKESHA COUNTY

Brian, Anne & Melodie Hawkins  
435 Meridian Drive  
Oconomowoc, WI 53066

Plaintiffs

Case No. 19-CV-1234

v.

David Stroble  
6043 Crestview Drive  
Oconomowoc, WI 53066

Defendant

Commented [JA1]: No need to include addresses

Brian, Anne & Melodie Hawkins  
INTERROGATORIES TO  
David Stroble, DATED February 24, 2019

Commented [JA2]: Font should be the same throughout, remove the underlining, add "first set of Interrogatories"

**Example 2**

Smith & Smith LLC, by Rob Smith, submits the following interrogatories pursuant to Wis. Stat. § 804.08 and requests that they be answered under oath and within thirty (30) days of service.

Commented [JA3]: Remove legalese, write out name of statutory compilation and the word section, eliminate either "thirty" or (30)

**Example 3**

1) "You," "your," "your company" or "Defendant" refers, without limitation, to David Stroble, its subsidiaries, predecessors, successors, assigns, joint ventures, partners, parents, and affiliates; its present and former officers, directors, owners, employees, and managing agents; its counsel; and any consultants, experts, investigators, agents, representatives, and other persons acting on its behalf.

Commented [JA4]: Fix the pronouns, and make sure you include just the terms you need. Do you have reason to believe that he has subsidiaries or joint ventures or officers, directors, etc.? Is there any reason to believe he has a company? Any reference to "your company" in the interrogatories? Read the questions to see how you used "you." Do you really want information as to all of these people, or do you really just want information from the Defendant or Plaintiffs? Consider whether you even need to define "you."

## Example 4

### I. Instructions

1) These Interrogatories are continuing in character which require you to file supplementary answers if you obtain further or different information before trial.

2) Unless otherwise stated, these Interrogatories refer to the time, place, and circumstances of the auto accident and all personal injuries mentioned or complained of in the Plaintiff's Complaint.

3) Under Wis. Stat. § 804.08, Plaintiffs Brian, Anne, and Melodie Hawkins are required to respond to the following interrogatories. As used in these interrogatories:

### II. Definitions

1) "You," "your," or "plaintiff" refers to Brian, Anne, and Melodie Hawkins and, without limitation, any counsel, consultants, experts, investigators, special administrators, agents, or other persons acting on their behalf.

**Commented [JA5]:** Accurate? (5) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to all of the following:

1. The identity and location of persons having knowledge of discoverable matters.

2. The identity of each person expected to be called as an expert witness at trial.

(b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Wis. Stat. Ann. § 804.01 (West)

**Commented [JA6]:** What does this instruction mean do you need it? Are all of the questions referring to the place, and circumstances of the accident? If not, don't include this instruction. You might instead define terms like "car" or "accident." Defining terms might limit the scope of the questions more precisely than this instruction would.

**Commented [JA7]:** This language looks like the preamble to the definitions section. It doesn't belong in the instructions unless you rephrase.

**Commented [JA8]:** Needed? Potential privilege problems created?

## Example 5

5) "Document" is used in the broadest possible sense and refers to any form of communication of data storage however produced or reproduced, whether or not it now exists. Any document that contains any comment, notation, addition, signature, insertion, or marking of any kind, so that it is different from the original, is a separate document.

**Commented [JA9]:** This definition is better than the one in the form, but it may still be less precise than you'd like.

### Interrogatory 1

Please identify all persons who helped prepare this interrogatory.

**Commented [JA10]:** Precision. Does this mean all persons who helped prepare the responses to the entire set of interrogatories? Or does it mean the person who helped with just this question? The language suggests the latter.

**Interrogatory 2**

Please provide all documentation that supports the personal injuries obtained from the collision and complained of in the Plaintiffs Complaint.

**Commented [JA11]:** Provide all documents? The definition says document, not documentation.

**Commented [JA12]:** Consider whether the verbs "supports" and "obtained" are precise.

**Commented [JA13]:** If you use collision throughout, you might define it so that you don't always need to say "and complained of in the Plaintiffs' Complaint."

**Example 6**

- 3) "Identify" has the following meanings:
  - a. [omitted]
  - b. When used in reference to an *individual person*, it means to state
    - (1) The person's full name;
    - (2) The person's last-known residential address and telephone number; and
    - (3) The person's last-known employer, business address, and business telephone number.

**Interrogatory 8:**

Please state the names and provide the contact information of those individuals who witnessed the accident as provided by your knowledge or those individuals known by the insurance company.

**Commented [JA14]:** Use "identify" if you include the definition.

**Commented [JA15]:** Needed?

**Example 7**

- 3) "Identify" has the following meanings:
  - a. [omitted]
  - b. [omitted]
  - c. When used in reference to *any entity other than an individual person*, it means to state
    - (1) The entity's full name and its nature (e.g., a corporation);
    - (2) The entity's last-known address;
    - (3) The state in which the entity has its principal place of business;
    - (4) In the case of a corporation, the state of incorporation, or in the case of a limited liability company, the state of organization;
    - (5) In the case of a partnership, the name and address of each general partner, or in the case of a limited liability partnership, the state of organization and each managing partner; and
    - (6) In the case of any business entity other than a corporation, partnership, or limited liability company, the name and address of each owner.

**Interrogatory 6**

Identify the name of your insurance company and any coverage that might be provided for the

**Commented [JA16]:** Identify your insurance company - what if the party has more than one? Limit to auto insurance?

accident.

### Example 8

#### Interrogatory 4

Did you consume any alcoholic beverages or take any drugs or medications within 12 hours before the [time of the incident described in the complaint]? If so, state the type and amount of alcoholic beverages, drugs, or medication which were consumed, and when and where you consumed them.

**Commented [JA17]:** The next interrogatory refers to the accident; this one refers to the incident described in the complaint. Be consistent with references and consider if you need to define any of the terms.

#### Interrogatory 5

Describe in detail how the accident giving rise to this lawsuit occurred, including but not limited to the date, time, location, weather conditions, lighting conditions and traffic conditions of the area where the accident occurred.

### Example 9

Interrogatory No. 2: Please list the year, make, model, registration, and color of the motor vehicle you were operating at the time of the collision.

**Commented [JA18]:** Do you need to be more precise about what collision? Define it? Add some limiting language?

### Example 10

Interrogatory Number 3: Please state the type of injuries which you allegedly suffered because of this incident including but not limited to physical, emotional and mental injuries.

**Commented [JA19]:** Would type be physical, emotional? If you want specifics, you should rephrase. Ple describe the injuries.

### Example 11

[definitions section includes a definition of "accident"]

#### Interrogatory 5

Please give a brief statement of facts as to how you believe the car accident took place.

**Commented [JA20]:** Use accident, the term you defined.

#### Interrogatory 6

Please state whether you consumed any drugs, medicines, or alcoholic beverages within twenty-four hours prior to said occurrence, and if any, the amount thereof.

**Commented [JA21]:** Use accident

**Commented [JA22]:** legalese

### Example 12

#### Interrogatory 8

With respect to the intersection alleged in paragraph 8 of the complaint:

- a. State the date and time the plaintiff was present at the intersection;
- b. Describe in sufficient detail the type of traffic signals or signs that are located at the intersection;

**Commented [JA23]:** The intersection isn't alleged - precision

**Commented [JA24]:** Every date and time she was there? And just one plaintiff or all three?

**Commented [JA25]:** What amount of detail is sufficient? Needed?



**Example 13**

Interrogatory 7

Please ~~tell~~ whether you were under the care of a doctor at the time of the auto incident. If so, please ~~provide~~ ~~supply~~ the name and address of the doctor, ~~describe~~ the treatment for your illness or condition, and ~~list~~ any medication prescribed.

**Commented [JA26]:** Precise verb?

**Example 14**

Interrogatory 1

Please state whether defendant owns ~~insurance for his car~~ that was involved in the Accident? If so, please Identify the insurance company and defendant's insurance agent.

**Commented [JA27]:** Do we know if it was his car? If not, revise

**Example 15**

1. State the name, address, and occupation of each individual who participated in preparing ~~each answer~~ to these interrogatories.

**Commented [JA28]:** Looking for answers as to each interrogatory? In other words, is the party supposed to identify which people helped with which interrogatories?

**Example 16**

Interrogatory 2

List all civil lawsuits You have been a party to, ~~as~~ either plaintiff or defendant, ~~and include the style of the claim(s), the case number(s), and the court in which the suit(s) were filed.~~

**Commented [JA29]:** What does that mean? Perhaps describe the claims?

**Example 17**

Interrogatory 3

Was the vehicle being driven by Melodie Hawkins insured at the time of the Accident? If so, please state:

**Commented [JA30]:** The one she was driving during the accident? Which one?

- (a) The insurance carrier's name, address, and phone number.
- (b) The kind of coverage.
- (c) The policy number.
- (d) The limits of coverage for each type of coverage named in the policy.
- (e) The name address and phone number of the custodian of the policy.

**Example 18**

1. The terms "**Document**" and "**Documents**" are used in the broadest possible sense and refer, without limitation, to all written, printed, typed, photographed, recorded, or otherwise reproduced Communications, information or materials of every kind and description, whether comprised of letters, words, numbers, pictures, sounds, or symbols, electronic bits, or any combination thereof, whether prepared by hand or by mechanical, electronic, magnetic, photographic, or other means, as well as audio or video recordings of Communications, or statements, conversations, or events.

Any preliminary versions, drafts, or revisions of any of the foregoing, any Document which has or contains any attachment, enclosure, comment, notation, addition, insertion or marking of any kind which is not part of another Document, or any Document which does not contain a comment, notation, addition, insertion, or marking of any kind which is part of another Document, is to be considered a separate Document.

**REQUEST NO. 1:** Produce all Documents referred to in any response to the interrogatories herein, or on which You or Your Legal Guardians relied or referred to in answering any such interrogatories.

**REQUEST NO. 2:** Produce any and all statements taken by any person including You or Brian Hawkins or Anne Hawkins concerning the Accident, which You or Your Legal guardians have in possession, custody or control.

**Commented [JA31]:** Aren't these documents?

**REQUEST NO. 3:** Produce copies of all photographs, videos, slides, or digital recordings relating to the Accident. For any photographs, videos, slides, or digital recordings produced, please specify the following:

**Commented [JA32]:** Aren't these also documents?

- a) Who took the photographs, videos, slides, or digital recordings;
- b) When were the photographs, videos, slides, or digital recordings taken;
- c) Who has custody of said photographs, videos, slides, or digital recordings.



**Favorable Rules – Motion to Dismiss  
Legal Analysis, Writing & Research 2  
Professor Julien  
Spring 2017**

**A. Arizona Law – Motions to Dismiss**

***Luchanski v. Congrove*, 193 Ariz. 176, 179, 971 P.2d 636, 639 (Ct. App. 1998).**

Motions to dismiss for failure to state a claim are not favored in Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). “When a complaint is the target of a rule 12(b)(6) motion, the court must assume the truth of all of the complaint’s material allegations, accord the plaintiffs the benefit of all inferences which the complaint can reasonably support, and deny the motion unless certain that plaintiffs can prove no set of facts which will entitle them to relief upon their stated claims.” *Gatecliff*, 154 Ariz. at 508, 744 P.2d at 35.

***AMCOR Inv. Corp. v. Cox Ariz. Publ’ns, Inc.*, 158 Ariz. 566, 568, 764 P.2d 327, 329 (Ct. App. 1988).**

We recognize at the outset that motions to dismiss are not favored in our law and that trial courts should normally resist the temptation to abort cases at the pleading stage. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). The general rule is that a complaint is to be construed liberally in the plaintiff’s favor and should not be dismissed unless it appears beyond doubt that the plaintiff could prove no facts in support of its claim that would entitle it to relief. *Chirco Const. Co. v. Stewart Title and Trust*, 129 Ariz. 187, 188, 629 P.2d 1023, 1024 (App.1981).

***Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 586, 637 P.2d 1088, 1089 (Ct. App. 1981).**

In our review of a motion to dismiss, we must accept all material facts as alleged by the non-moving party as true. *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 419 P.2d 66 (1966). A court should not grant a motion to dismiss for failure to state a claim upon which relief can be granted unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated. *Folk v. City of Phoenix*, 27 Ariz.App. 146, 551 P.2d 595 (1976).

***Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, 115 P.3d 124, 128 (Ct. App. 2005).**

Dismissal for failure to state a claim is appropriate only if “as a matter of law ... plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof.” *Fidelity Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, ¶ 4, 954 P.2d 580, 582 (1998);

***Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).**

When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein. See, e.g., *Dressler v. Morrison*, 212 Ariz. 279, 281 ¶ 11, 130 P.3d 978, 980 (2006); *Long v. Ariz. Portland Cement Co.*, 89 Ariz. 366, 367-68, 362 P.2d 741, 742 (1961). Courts must also assume the truth

of the well-pled factual allegations and indulge all reasonable inferences therefrom. *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175 ¶ 2, 24 P.3d 1269, 1270 (2001); *Long*, 89 Ariz. at 367, 362 P.2d at 742.

**B. Synthesizing Favorable Rules**

**Rule favoring Plaintiff:**

**Rule favoring Defendant:**

Memo 2 "Quiz"

**Instructions:** Select True or False for each statement.

T F	1.	Always use the section symbol in both citations and in textual sentences.
T F	2.	Each IRAC should include more than one case.
T F	3.	An introduction goes before the question presented and brief answer.
T F	4.	Citation form in a sentence is different than citation form in a stand alone citation.
T F	5.	Using string cites will bolster my FHR when there are multiple cases that state a similar point.
T F	6.	Double IRAC is best suited to the second element – serious threat of physical violence.
T F	7.	The prediction (whether there is a duty or not) goes in both the thesis paragraph and the conclusion, so it is best to cut and paste the same prediction in both places.
T F	8.	The thesis paragraph is the only place that the memo needs to address the undisputed requirements that Tran is a therapist and Culberson is a patient under section 43.92.
T F	9.	Statutes (like 43.92) do not have a short citation form and must be cited in full, including the publisher and year.
T F	10.	<i>Tarasoff</i> needs its own FHR in this memo.
T F	11.	Including case details such as the therapist is the defendant or that the patient killed or harmed people, are unnecessary in the FHRs.

T F	12.	In writing the FHR, it can be appropriate to focus on the H and R of a case, and not the facts, when the facts are not analogous.
T F	13.	When developing the FHR of a case that is not a 43.92 case, it is best to expressly state something along the lines of, "Although, not a section 43.92 case" or "In interpreting Evidence Code section 1014"
T F	14.	FHR does not always need to tie in the ultimate result on whether the therapist owes a duty or not. For example, in <i>Ewing</i> the patient communication element is met but the therapist ultimately had no duty to warn.
T F	15.	Culberson's statements will qualify as patient communications, but this still needs to be briefly explained in the patient communication section of the memo.
T F	16.	While <i>Ewing</i> provides a basis for Schwartz's statements to be considered as patient communications, there is an equally valid position that his statements are not. Policy discussions in both <i>Grosslight</i> and <i>Marvoudis</i> help establish these counter points.
T F	17.	It is better to say <i>Ewing</i> and <i>Grosslight</i> did not decide – not that it is unclear -- whether non-family members would be included in patient communications.
T F	18.	Only murder threats are sufficient to constitute a serious threat of physical violence under section 43.92.
T F	19.	Using <i>Calderon</i> in element 3 to say that there is not an identifiable victim because there is no serious threat is bootstrapping and should be avoided.
T F	20.	Using the concurring opinion in <i>Barry</i> makes your FHR complete in the reasonably identifiable victim discussion.
T F	21.	Using <i>Calderon</i> and/or <i>Greenberg</i> as a small part of the FHR in the last element is appropriate, but <i>Barry</i> is the most essential if you are short on time.





Participation Quiz  
Class 1  
Fall 2018

Name: \_\_\_\_\_

Think about the cases that involved damages. Several were about horses. List two concepts, rules, or doctrines, you remember from the reading. Try to be as specific as you can, while keeping your answers concise.

1.

2.



Remedies

Name: \_\_\_\_\_

Class 9

Participation Quiz

The first essay assignment will be posted today. Write *one question* you have about essay writing in general, essay writing in this class, or essay writing on the bar exam.



Remedies

Bakhshian

Class 22

### Participation Quiz

You may do this quiz with one or two other classmates. Please turn in only one quiz with all of your names on it.

Courts use a variety of rules to determine whose money has been withdrawn from a commingled account. (They are summarized on page 212.) What are the *most significant* advantages or disadvantages of these various approaches? Explain.



**IMMEDIATE FEEDBACK ASSESSMENT TECHNIQUE (IF AT®)**

Name \_\_\_\_\_ Test # \_\_\_\_\_

Subject \_\_\_\_\_ Total \_\_\_\_\_

**SCRATCH OFF COVERING TO EXPOSE ANSWER**

	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>Score</b>
1.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
2.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
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10.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____

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## Remedies Class 6 Quiz

Use the facts from Problem 2 on page 54 in the textbook to answer these questions. You may also want to use your lecture notes from tonight and the introduction to contract damages on pages 42-46. Use the instructions on the slide to complete your quiz card.

1. If Seller (D) honestly and in good faith ran out of telescopes, does that change Buyer's (P's) damages for breach of contract?
  - A. Yes because Seller may reduce the damages owed to Buyer by justifying the breach
  - B. No because Buyer is entitled to be put in the position as if Seller performed
  - C. Yes because Seller did not defraud Buyer
  - D. No because Buyer's damages are reduced when Seller's breach is excused by the good faith mistake
2. What are the Buyer's (P's) benefit of the bargain damages?
  - A. 10,000
  - B. 29,000
  - C. 19,000
  - D. 50,000
3. If Buyer sues Seller for breach of contract, what are the total damages using the facts known now?
  - A. None
  - B. 10,000
  - C. 29,000
  - D. 19,000
4. If Seller intentionally breaches the contract without any justification, are punitive damages available to Buyer?
  - A. Yes because contract damages are designed to return the non breaching party to the pre-contract position
  - B. Yes because benefit of the bargain damages are good for society
  - C. Yes because contract damages are designed to unwind the bargain
  - D. No because contract damages are not designed to punish the breaching party
5. For this question only, use the modified facts in Problem 2.2. What are Buyer's (P's) breach of contract damages against Seller (D)?
  - A. 29,000
  - B. 14,000
  - C. Nothing
  - D. 19,000
6. Add this fact: Buyer has presented evidence (that the jury reasonably believes) to show Buyer has sustained emotional upset as a result of not receiving the telescope. May Buyer (P) recover for the emotional upset suffered as a result of Seller's (D's) breach of contract?
  - A. Yes because emotional harm is an incidental damage
  - B. Yes because emotional harm is a consequential damage
  - C. No because emotional harm is never available for breach of contract
  - D. No because the contract is for a telescope



## Remedies Class 24 Quiz

Start by reviewing all of the details in California Code of Civil Procedure section 1033.5 in the readings for Day.

1. Plaintiff incurred \$2,000 in deposition fees. Deposition fees typically range from \$1,000 to \$2,000 in this type of case. At the time of judgment against the Defendant, Plaintiff had not yet paid these fees. Are these fees properly included when Plaintiff seeks to recover costs?
  - A. No, because Plaintiff has not yet paid the deposition fees
  - B. Yes, because reasonable deposition fees are recoverable
  - C. Yes, because Defendant did not prevail
  - D. No, because \$2,000 is not reasonable
  
2. Defendant has taken the deposition of 100 former employees of Plaintiff. In this type of litigation, it is typical for the parties to depose 1 to 15 witnesses, including former employees. Defendant prevailed against Plaintiff. Are Defendant's deposition costs recoverable as costs?
  - A. No, because 100 depositions is excessive
  - B. No, because Plaintiff is not the prevailing party
  - C. Yes, because the depositions were Plaintiff's former employees
  - D. Yes, because the deposition costs were actually incurred by Defendant
  
3. Plaintiff is the prevailing party in litigation that required expert witnesses. Plaintiff has incurred \$5,000 in reasonable expert witness fees. Should the court award these fees as costs?
  - A. No, because the amount is not reasonable
  - B. Yes because the amount of the fees is reasonable
  - C. No, because Plaintiff's expert witness fees are not recoverable
  - D. Yes, because the litigation required expert witnesses



## Quiz 3 Restitution & Misc. rev spring 2018

Points Possible: 31

### Question 1.

1.0 Point

Todd defrauded Wilson and used the proceeds to pay off a mortgage on Todd's real estate. If Wilson sues Todd's for restitution, what remedy is available?

- 1. accounting
- 2. quiet title
- 3. ejectment
- 4. subrogation

### Question 2.

1.0 Point

The operative goal of restitution is to prevent unjust enrichment.

- 1. True
- 2. False

### Question 3.

1.0 Point

By it's nature, the focus in restitution cases is solely on the benefit received by the defendant.

- 1. True
- 2. False



**Question 4.****1.0 Point**

Defendant burglarizes Plaintiff's home and steals a diamond ring worth \$15,000.

Defendant sells the ring for \$2,000 at a yard sale to a unknown purchaser. Defendant spends the entire \$2,000 of proceeds on lottery tickets. Against all odds, Defendants wins the lottery in the amount of \$100,000. If Plaintiff sues Defendant for restitution, what is the likely recovery?

- 1. Nothing
- 2. 2,000 equitable lien
- 3. 15,000 equitable lien
- 4. 15,000 constructive trust
- 5. 100,000 constructive trust

**Question 5.****1.0 Point**

Defendant burglarizes Plaintiff's home and steals a diamond ring worth \$15,000.

Defendant sells the ring for \$2,000 at a yard sale to an unknown purchaser. Defendant spends the entire \$2,000 on lottery tickets. Against the odds, Defendant wins the lottery for \$100,000. If Plaintiff sues Defendant for damages what is Plaintiff's likely recovery?

- 1. Nothing
- 2. 2,000
- 3. 15,000
- 4. 100,000

**Question 6.****1.0 Point**

Accountant embezzled money from his Employer and invested the money in life insurance for his wife and child. Wife and child know nothing about the embezzlement. If Employer sues for restitution, what remedy is available?

- 1. none
- 2. a constructive trust
- 3. an accounting
- 4. subrogation





**Question 7.****1.0 Point**

Defendant adequately provides for his children, but Aunt decides that the children deserve to go to a five star restaurant. After taking them, Aunt sues Defendant for restitution on the theory that Defendant, as their father, is responsible for the children's health and welfare and Defendant should reimburse her for the children's meal. What is Aunt's likely recovery in restitution?

- 1. Nothing
- 2. Cost of a reasonably priced meal
- 3. Actual cost of the meal

**Question 8.****1.0 Point**

Equitable liens, constructive trusts, and subrogation remedies can be used to provide Plaintiffs with priority over other creditors.

- TRUE
- FALSE

**Question 9.****1.0 Point**

Defendant steals raw materials from Plaintiff's bakery. Defendant then uses the raw materials in Defendant's own bakery and sells the finished baked goods to the public who know nothing of the theft. If Plaintiff sues Defendant for restitution, what is the likely result?

- 1. Plaintiff cannot recover because of accession
- 2. Plaintiff cannot recover because Plaintiff can no longer trace the raw materials
- 3. Plaintiff cannot recover because Defendant's customers were unaware of the stolen raw materials
- 4. Plaintiff can recover the portion of Defendant's profits attributable to the raw materials stolen from Plaintiff



**Question 10.****1.0 Point**

Defendant steals Plaintiff's trade secret. Plaintiff developed the trade secret after many years of investment and research valued at \$50,000. Plaintiff never wanted to make a profit from the trade secret, but Defendant was able to earn \$100,000 using Plaintiff's trade secret. Shortly before Defendant stole Plaintiff's trade secret, a Third Party offered to buy the trade secret for \$60,000. If Plaintiff sues Defendant for conversion, what is Plaintiff's best theory of recovery and in what amount is Plaintiff likely to recover?

- 1. restitution for 50,000
- 2. restitution for 100,000
- 3. damages for 50,000
- 4. damages for 60,000

**Question 11.****1.0 Point**

The Supreme Court has ruled that evidence of a defendant's wealth cannot be admitted in trials where plaintiff seeks punitive damages.

- TRUE
- FALSE

**Question 12.****1.0 Point**

Lodestar is a formula for determining attorney's fees for any prevailing party.

- TRUE
- FALSE

**Question 13.****1.0 Point**

Alex is an agent of Company X. While reading the Los Angeles Times, Alex sees a story about an injunction granted against Company X. The article contained the text of the injunction which prohibited Company X from tearing down a fence in a border dispute. Alex was not told of this injunction by his supervisor or Company X's attorney. Alex avoided any contact with his supervisor and with Company X's attorney. Alex then tore down the fence. If Alex is charged with contempt, what is the likely result?

- 1. Alex cannot collaterally attack the order
- 2. Alex is in contempt
- 3. Alex is not in contempt



**Question 14.****1.0 Point**

How does collateral attack work in California?

- 1. California follows the majority rule and prohibits plaintiffs from raising constitutional challenges in collateral proceedings
- 2. California does not follow the majority rule, so plaintiffs may raise constitutional challenges in direct or collateral proceedings

**Question 15.****1.0 Point**

Judge issued an order with Defendant present in the courtroom. The order prohibited Defendant from interrupting the proceedings. Defendant disobeyed the order and continued to interrupt the proceedings. Judge immediately found Defendant in contempt and ordered a fine or 5 days in jail. If Defendant challenges Judge's contempt ruling, what is the likely result?

- 1. the contempt charge cannot stand because Defendant was not given notice and an opportunity to be heard
- 2. the contempt charge cannot stand because 5 days in jail is excessive
- 3. the contempt charge will stand because Judge witnessed the Defendant's conduct

**Question 16.****1.0 Point**

Buyer and Seller enter into a valid contract. Buyer agrees to pay Seller \$5 for a widget worth \$4. Buyer makes a deposit of \$2. If Seller breaches, what is Buyer's best remedy?

- 1. Injunction
- 2. Damages
- 3. Restitution

**Question 17.****1.0 Point**

Is the contract amount a cap on an attorney's recovery in quantum meruit in a contingency case when the attorney voluntarily quits and is not fired by the client?

- 1. No, the contract amount is only a cap when the attorney is fired by the client
- 2. No, the contract amount is not a cap, but it is evidence of the value of the attorney's services
- 3. The attorney cannot recover in quantum meruit when the attorney quits



**Question 18.****1.0 Point**

Plaintiff has a piece of art worth \$10,000. Defendant stole it and sold it to Art Collector, who knew the art's true value, for \$100. If Plaintiff sues Defendant and Art Collector for restitution, what is the likely recovery?

- 1. 100
- 2. 10,000
- 3. Return of the Art
- 4. 10,000 or Return of the Art (plaintiff may elect)

**Question 19.****1.0 Point**

D falsely represents to P that D's car gets 30 miles to the gallon, a fact which would make D's car worth \$3,000 if true. P and D enter into a valid contract for the car with a purchase price of \$2,000. The car actually gets 15 miles per gallon and is worth \$2,250. If P sues D for fraud and seeks restitution as P's remedy, P will recover:

- 1. Nothing
- 2. 250
- 3. 750
- 4. 1000

**Question 20.****1.0 Point**

P granted D an easement to use his road twice a year to haul his crops to market. D is now using the road everyday for access to his property and to haul his crops to market every month. The road is gravel and the condition is unchanged. What remedies should P seek to maximize P's recovery?

- 1. injunction and damages
- 2. damages and restitution
- 3. injunction and restitution
- 4. injunction, damages, and restitution





**Question 21.****1.0 Point**

D stole 500 from P. D put the money in the bank and then withdrew 200 which he lost gambling at a casino. If P sues for restitution what is P's remedy?

- 1. constructive trust for 500
- 2. constructive trust for 300
- 3. equitable lien for 500
- 4. equitable lien for 300
- 5. equitable lien for 200

**Question 22.****1.0 Point**

D embezzled 500,000 from P. D put P's money in a bank account that already had 500,000 of D's money. D then withdrew 500,000 to buy a house that appreciated to \$1 million. Under In Re Oatway (3rd Restatement) rule what is the P's measure of restitution?

- 1. House goes to D and P equally at 500,000 each
- 2. House goes to P in a constructive trust valued at \$1 million
- 3. P can elect an equitable lien \$500,000 in either the house or the bank account
- 4. P will get half of the house for \$500,000 and half of the account for \$250,000 for a total of \$750,000

**Question 23.****1.0 Point**

If a P sues for conversion and the property is gone at the time of trial, what remedy should P pursue for property that has appreciated in value?

- 1. conversion damages
- 2. specific restitution
- 3. substitutionary restitution

**Question 24.****1.0 Point**

Equitable replevin is a preferred remedy because it is superior to legal replevin.

- TRUE
- FALSE



**Question 25.****1.0 Point**

D trespasses on P's property. If P sues D for restitution what is the likely measure of P's recovery?

- 1. Nominal
- 2. Diminution in property value
- 3. Reasonable rental value

**Question 26.****1.0 Point**

In California, a prevailing party can recover costs subject to what limits?

- 1. reasonable costs are recoverable even if unpaid
- 2. costs that are actually paid and reasonable are recoverable
- 3. costs are only recoverable when an attorney's fee provision is present by code or contract

**Question 27.****1.0 Point**

Attorneys fees are available in California to either party under a valid contract even when the contract is written to provides fees to only one party.

- TRUE
- FALSE

**Question 28.****1.0 Point**

When a jury receives evidence that Defendant's conduct has harmed others besides the Plaintiff, what may the jury properly do with that evidence?

- 1. use the evidence to determine whether D's conduct was reprehensible
- 2. use the evidence to determine the amount of punitive damages
- 3. use the evidence to determine whether D's conduct was reprehensible but not the amount of punitive damages
- 4. use the evidence to determine both the amount of punitive damages and whether D's conduct was reprehensible



**Question 29.****1.0 Point**

How may a jury use the defendant's financial status in a punitive damage case?

- 1. to determine whether to award punitive damages
- 2. to determine the amount to award in punitive damages
- 3. to determine whether to award punitive damages and the amount to award in punitive damages
- 4. only judges can use the defendant's financial status for remittur of a punitive damages award

**Question 30.****1.0 Point**

P is a prevailing party in a civil litigation case in California. No statute or contract provides for attorney's fees or cost recovery. P has incurred \$700 in unpaid deposition costs and \$300 in court filing fees. What is P entitled to recover?

- 1. 300
- 2. 700
- 3. 1000
- 4. nothing

**Question 31.****1.0 Point**

Attorney and Client entire into a valid fee agreement. The fee agreement provides for attorney's fees of 25% of Client's recovery in the case. While the case is ongoing, Client hires a new attorney to represent Client and Attorney is replaced. Later, when the Client's case was settled, Attorney made a claim for attorney's fees.

Which of the following statements is true about Attorney's ability to collect attorney's fees?

- 1. Attorney is entitled to the 25% fees provided in the valid fee agreement if the Client fired Attorney without cause
- 2. Attorney is entitled to a reasonable fee under quantum meruit even if the Client fired Attorney
- 3. Attorney is entitled to a reasonable fee under quantum meruit only if the Attorney quit before being replaced
- 4. Attorney is not entitled to attorney's fees if Client fired Attorney for cause

