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### CREAC in the Real World

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# CREAC IN THE REAL WORLD

DIANE B. KRAFT\*

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## I. INTRODUCTION

When law students are asked to describe how legal arguments are organized, they are likely to say something like “IRAC” or “CREAC” or “CRuPAC” or “TREAT.”<sup>1</sup> Indeed, the organizational<sup>2</sup> paradigm is a feature of many legal writing textbooks, and is likely to be one of the first ideas a new law student will encounter in the legal writing classroom. While many legal writing professors find the use of such paradigms to be helpful to students, others find the paradigms simplistic and limiting.

This article will examine the extent to which common legal writing paradigms such as CREAC are used by attorneys in the “real world” of practice when writing on the kinds of issues law students may encounter in the first-year legal writing classroom. To that end, it will focus on the analysis of two factor-based criminal law issues: whether a defendant was in custody and whether a defendant had a reasonable expectation of privacy. In focusing on “first-year” issues, the article seeks not to examine whether organizational paradigms are used at all in legal analysis, but to discover whether and how they are used when analyzing the same kinds of issues first-year law students analyze. If experienced attorneys writing on these issues do indeed use organizational paradigms in the same way many legal writing professors teach first-year law students, it is strong support for the continued use of organizational paradigms in the classroom. If not, it is perhaps time to reexamine their use.

In section I, the article will briefly review the rhetorical basis for the paradigms. Section II will review the central place organizational paradigms hold in legal writing

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<sup>1</sup> IRAC stands for Issue-Rule-Application or Analysis-Conclusion; CREAC stands for Conclusion-Rule-Explanation-Application-Conclusion.

<sup>2</sup> Paradigms like IRAC and CREAC have also properly been called analytical rather than organizational schemes because they are “a kind of shorthand for the categorical syllogism.” Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 328 (2011); see *infra* Section I.

pedagogy, as well as the resistance to those paradigms. Section III will examine how the organizational paradigms are used in appellate briefs filed in actual cases involving issues that first-year law students at the University of Kentucky College of Law have written about in their spring appellate brief assignments involving two hypothetical cases. Specifically, the article will show that while practicing attorneys writing on these issues do follow the general pattern of organizational paradigms like CREAC, they deviate from the paradigms in ways that suggest an increased emphasis on narrative as an essential part of persuasion above and beyond the story told in the Statement of the Case section of a brief. In section IV, the article will suggest ways that the findings of section III might be incorporated into legal writing pedagogy.

## II. THE RHETORICAL BASIS FOR ORGANIZATIONAL PARADIGMS LIKE CREAC

Most legal writing professionals agree that deductive reasoning — reasoning that moves from the general to the specific<sup>3</sup> — is a crucial part of legal analysis.<sup>4</sup> Organizational paradigms are widely used in legal writing classrooms at least in part because, at their core, IRAC, CREAC, and the other paradigms are ways of understanding and using deductive reasoning, or syllogisms, in legal writing.<sup>5</sup> When using deductive reasoning, the writer will “set out [her] assertion and then the support for that assertion.”<sup>6</sup> In terms of a syllogism, the major premise is the “general,” that is, “a broad statement of general applicability.”<sup>7</sup> The syllogism’s minor premise is “a narrower statement of particular applicability that is related in some way to the major premise.”<sup>8</sup> The syllogism’s conclusion is “the logical consequence of the major and

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<sup>3</sup> E.g., Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 492 (2003).

<sup>4</sup> See, e.g., CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 80-82 (6th ed. 2011); VEDA CHARROW ET AL., *CLEAR AND EFFECTIVE LEGAL WRITING* 210-19 (5th ed. 2013); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 82-83 (6th ed. 2014); LAUREL CURRIE OATES ET AL., *JUST BRIEFS* 35-37 (3d ed. 2013); JAMES A. GARDNER, *LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY* 6-7 (1st ed. 1993); CATHY GLASER ET AL., *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 64-69 (2002); MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, *LEGAL WRITING AND ANALYSIS* 19 (2009); TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS* 18, 30-32 (2d ed. 2013); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNTZ, *SYNTHESIS: LEGAL READING, REASONING AND WRITING* 81-82 (3d ed. 2007); ROBIN WELLFORD SLOCUM, *LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS* 156-59 (3d ed. 2011).

<sup>5</sup> E.g., Robbins-Tiscione, *supra* note 2, at 328; Anita Schnee, *Logical Reasoning “Obviously”*, 3 J. LEGAL WRITING INST. 105, 106 (1997).

<sup>6</sup> OATES ET AL., *supra* note 4, at 35.

<sup>7</sup> GARDNER, *supra* note 4, at 722.

<sup>8</sup> *Id.* at 4; accord James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 722 (2006); Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies*, 9 LEGAL COMM. & RHETORIC: JALWD 351, 356 (2012).

minor premise.”<sup>9</sup> So, in the most well-known example of the syllogism, “All humans are mortal” is the broad statement of general applicability, “Socrates is a human” is the narrower statement of particular applicability, and “Therefore, Socrates is mortal” is the logical consequence. In terms of CREAC, “All humans are mortal” is the R (rule); “Socrates is a human” is the A (application of rule to facts); and “Therefore, Socrates is mortal” is the C (conclusion).<sup>10</sup> Reasoning by syllogism is widely regarded as a highly effective way to win an argument because if the judge agrees with the major premise and the minor premise, the conclusion is inevitable.<sup>11</sup> One scholar argues that “all legal argument should be in the form of syllogisms.”<sup>12</sup> Several first-year legal writing textbooks even include an explanation of the syllogism upon which organizational paradigms are based.<sup>13</sup> In short, paradigms like CREAC are “designed . . . to teach students to reason as syllogistically as possible.”<sup>14</sup>

Although the number of versions of these paradigms has expanded far beyond the original IRAC, because they are based on the syllogism, like the syllogism they are all

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<sup>9</sup> GARDNER, *supra* note 4, at 4; accord Boland, *supra* note 8, at 722; Turner, *supra* note 8, at 356.

<sup>10</sup> Schnee, *supra* note 5, at 107; accord Boland, *supra* note 8, at 722; Turner, *supra* note 8, at 356.

<sup>11</sup> E.g., Boland, *supra* note 8, at 717-27; GARDNER, *supra* note 4, at 3-13 (stating that “all legal argument should be in the form of syllogisms.”); Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report’s Challenge to Make Legal Analysis Explicit – Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192, 208 (2009) (“Deductive reasoning is closely associated with logic, comprehension, common sense, and order. Judges and lawyers use it because it is generally recognized as the most common, sound, and indispensable of the forms of reasoning.”); Robbins, *supra* note 3, at 493 (“What makes the syllogistic argument so appealing is its seemingly ironclad quality.”); Robbins-Tiscione, *supra* note 2, at 329; Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1558-59 (observing that a good lawyer “will engage in a style of argument and proof that is highly rational and that is made in the spirit, and where possible the form, of deductive, syllogistic logic.”).

<sup>12</sup> GARDNER, *supra* note 4, at 3.

<sup>13</sup> E.g., CALLEROS, *supra* note 4, at 80-82; CHARROW ET AL., *supra* note 4, at 210-19; DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING: ANALYSIS, PROCESS AND DOCUMENTS 12-13 (2011); GLASER ET AL., *supra* note 4, at 64-69; RAMBO & PFLAUM, *supra* note 4, at 18-21, 31-35; SCHMEDEMANN & KUNTZ, *supra* note 4, at 81-87; SLOCUM, *supra* note 4, at 156-59.

<sup>14</sup> Robbins-Tiscione, *supra* note 2, at 329. Some argue that the more accurate word for syllogisms used in legal reasoning is “enthymemes.” E.g., Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 848-49 (2002) (citing James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line – Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 839 (1995)). For an explanation of the difference between a syllogism and an enthymeme, see KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS 118-19 (2009); see also Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 50 (2010) (“Because an enthymeme contains a conclusion and only one premise, the other premise being implied and both premises being only presumably true, the enthymeme cannot lead to certainty, but only to a tentative conclusion from probable premises.”).

rule-based.<sup>15</sup> Significantly, in all paradigms the rule is stated before it is applied to the facts.<sup>16</sup> Rule explanation also comes before rule application because rule explanation provides the basis for the reader to accept the writer's application of the rule to the facts.<sup>17</sup> No paradigm recognizes a place for inclusion of facts within the analysis — other than the limited facts that may be part of the initial conclusion — before the rule is stated and explained, much like no effective syllogism puts the minor premise before the major premise.<sup>18</sup> Moreover, no paradigm allows for a mixing of the individual parts, for example interspersing rule explanation within rule application.<sup>19</sup> A few paradigms include a specific place for counter-analysis and policy arguments, but most do not.<sup>20</sup>

### III. ORGANIZATIONAL PARADIGMS AND LEGAL WRITING PEDAGOGY

Legal writing professors have been using such organizational paradigms like CREAC for at least the past twenty years because they reflect deductive reasoning: reasoning that goes from general (the rule) to specific (application of the rule to the facts).<sup>21</sup> One scholar found that the majority of textbooks reviewed (fourteen out of

<sup>15</sup> See Turner, *supra* note 8, at 356-59. As Turner correctly notes, the paradigms “may be more detailed than IRAC, but they are not inconsistent with IRAC.” *Id.* at 359.

<sup>16</sup> See *id.* at 357-58.

<sup>17</sup> See *id.*; RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 175 (7th ed. 2013). One item in a list of questions for students to ask themselves after completing the first draft is, “Have you completed the rule proof and explanation before starting the rule application? If you let the material get out of control, the result may be a little rule proof, followed by a little rule application, followed by a little more rule proof, followed by a little more rule application . . . Finish proving the rule before you start applying it. If you start to apply a rule before you have finished proving it, the reader will refuse to agree with what you're doing.” *Id.*; see also Michael D. Murray, *Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT*, 8 *LEGAL COMM. & RHETORIC: JALWD* 217, 230-31 (2011) (suggesting that the full explanation section should follow the rule).

<sup>18</sup> See Turner, *supra* note 8, at 357-58.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* Specifically, CRARC stands for Conclusion, Rule, Application, Rebuttal and refutation, Conclusion, while CRAAAP stands for Conclusion, Rule, Authority, Application, Alternative Analysis, Policy. As Turner notes, one exception to the use of organizational paradigms is the textbooks by Laurel Currie Oates et al. In particular, *The Legal Writing Handbook* includes examples of organization that is essentially CREAC, but also examples that allow for inclusion of facts before stating the rule. LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 439-41 (6th ed. 2014); see also RUTH ANNE ROBBINS ET AL., *YOUR CLIENT'S STORY* 206 (2012) (including CPRA (Conclusion – Prime – Rule – Application) as a variation on CREAC that allows for facts before the rule. As Robbins explains it, “[i]n this variation, the writer follows the Conclusion with a paragraph designed to prime the reader, emotively. This might be a story about our client or an explanation of public policy. The goal is to motivate the judge so that she wants to find a reason to rule in your client's favor on that particular issue.”).

<sup>21</sup> “The Value of IRAC” was the topic of Volume 10, No. 1 of *The Second Draft*, which appeared in November 1995. As is clear from the content of that issue, the debate over the usefulness of organizational paradigms like IRAC was happening even then. See also Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of*

twenty-five) used an organizational paradigm as a way to teach students to state and discuss rules before applying the rules to the facts.<sup>22</sup> For example, in one legal writing textbook, students are encouraged to use CRAC to organize a deductive argument.<sup>23</sup> In another, CREAC is introduced as “A Formula for Organizing Analysis.”<sup>24</sup> Another textbook uses BaRAC, which is called “the ultimate formula for logical thinking and writing.”<sup>25</sup> While the paradigms may vary superficially, they all stand for the same premise: Legal analysis should be fronted with the rule, and the rule must be applied to the facts of the case at hand.<sup>26</sup> The benefits of using organizational paradigms to teach this fundamental premise are also touted in articles about legal writing pedagogy<sup>27</sup> as well as in pieces for practicing attorneys.<sup>28</sup> Even legal writing professors

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*Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 152, 169 (2010) (recognizing the difficulty of determining when IRAC and its progeny were first recommended in legal writing pedagogy).

<sup>22</sup> Turner, *supra* note 8, at 359.

<sup>23</sup> CALLEROS, *supra* note 4, at 355. CRAC stands for Conclusion-Rule-Application-Conclusion. Acknowledging the potential limits of any organizational paradigm, Professor Calleros also urges students to “exercise the flexibility and creativity to adopt any method of internal organization and advocacy that will present your client’s argument most effectively,” but suggests that students use a deductive organization such as CRAC unless they have good reason to organize their arguments in a different way. *Id.*

<sup>24</sup> RICHARD K. NEUMANN, JR. & SHEILA SIMON, *LEGAL WRITING* 118 (2d ed. 2011).

<sup>25</sup> RAMBO & PFLAUM, *supra* note 4, at 21. BaRAC stands for Bold Assertion-Rule-Application-Conclusion.

<sup>26</sup> See, e.g., DONAHOE, *supra* note 13, at 42-45.

<sup>27</sup> E.g., Meredith Aden, *CREAC Scramble: An Active Self-Assessment Exercise*, SECOND DRAFT, Fall 2010, at 5-16; Lurene Contento, *Demystifying IRAC and Its Kin: Giving Students the Basics to Write “Like a Lawyer,”* SECOND DRAFT, Dec. 2006, at 8, 9 (asserting “[l]awyers use IRAC, judges use IRAC. From the new associate writing his first memo, to the appellate judge writing her last opinion, everyone (well, almost everyone) uses IRAC (or its kin) to get organized.”); Ann Cronin-Oizumi, *Beethoven’s Fifth & IREAC*, SECOND DRAFT, Aug. 2005, at 12; Jacquelyn E. Gentry, *Creating a Rock-Solid Foundation for IRAC*, SECOND DRAFT, Aug. 2005, at 8, 9; Angela Caputo Griswold, *Teaching IRAAC: The Power of Self-Discovery*, SECOND DRAFT, Aug. 2005, at 11 (arguing that “[l]egal paradigms work.”); Jill Koch Hayford, *Empowering Students to Build a Better CREAC*, SECOND DRAFT, Fall 2009, at 6; Christine Hurt, *Teaching Legal Analysis Using IRAC*, SECOND DRAFT, May 2000, at 11, 12; M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, J. ASS’N LEGAL WRITING DIRECTORS, Fall 2004, at 67-68 (suggesting CRAFTAD as an advanced organizer); Ken Swift, *[Not Just] For New Teachers: My Dinner with IRAC*, SECOND DRAFT, Dec. 2005, at 13; Hollee S. Temple, *Using Formulas to Help Students Master the “R” and “A” of IRAC*, 14 PERSPS.: TEACHING LEGAL RES. & WRITING 129 (2006) (arguing that “[o]ur students, most fresh from undergraduate writing experiences that prized both length and obfuscation, need a template to help them transition into the legal setting, where supervisors and judges expect practitioners to adhere to the IRAC . . . format.”); Stephanie A. Vaughn, *Persuasion is an Art . . . But It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 662 (2009) (advocating use of IRAC as a way to present complex legal arguments in a way that is simple to follow).

<sup>28</sup> E.g., Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, N.Y. ST. B.A. J., July/Aug. 2010, at 64 (stating that “[a]ll legal writers will improve their writing skills and their submitted product by using IRAC or one

who are merely lukewarm adherents of organizational paradigms recognize the usefulness of such paradigms to teach the rudiments of legal analysis to novice legal writers.<sup>29</sup> In short, organizational paradigms are an integral part of most first-year legal writing pedagogy because many believe they “capture the essence of what is involved in legal analysis: applying legal principles to facts (the R and the A parts).”<sup>30</sup>

Not all legal writing professionals are fans of organizational paradigms, however.<sup>31</sup> One professor argues that organizational paradigms like CREAC<sup>32</sup> fail to help students learn to write competent legal analyses because the paradigms’ “simplistic nature masks the series of complex, interrelated steps that students need to learn to analyze and write about legal problems in a sophisticated manner.”<sup>33</sup> Another professor criticizes CREAC for “its failure to place the emphasis on the factual setting, as

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of its many variations.”); DiAnn Lindquist, *Effective Legal Argument – Appellant’s Opening Brief*, in COLO. PRACTICE 2012, § 19.13 (telling readers to “[f]ormat your arguments in IRAC, just as you learned in law school.”); Sarah E. Ricks & Jane L. Istvan, *Effective Brief Writing Despite High Volume Practice: Ten Misconceptions that Result in Bad Briefs*, 38 U. TOL. L. REV. 1113, 1115 (2007) (“Tip: Use CRAC as a Default Analytical Structure for Each Legal Conclusion”).

<sup>29</sup> E.g., Boland, *supra* note 8, at 721 (arguing that “[w]hile IRAC can be useful in organizing legal briefs, it does not adequately convey the core of what lawyers do, i.e., make legal arguments.”); Jo Anne Durako, *Evolution of IRAC: A Useful First Step*, SECOND DRAFT, Nov. 1995, at 6 (arguing that “students benefit from having some organizing principle to help decode legal problems and to help them begin the complex process of learning legal analysis”); Chris Iijima & Beth Cohen, *Reflections of IRAC*, SECOND DRAFT, Nov. 1995, at 9 (stating that “IRAC provide[s] a good starting point to explain the components of legal analysis”); Jeffrey Metzler, *The Importance of IRAC and Legal Writing*, 80 U. DET. MERCY L. REV. 501, 501 (2003) (stating that IRAC has “some value . . . as merely an organizational tool”).

<sup>30</sup> Joseph Kimble, *In Defense of IRAC (As Far As It Goes)*, SECOND DRAFT, Nov. 1995, at 10; *see also* Kedia, *supra* note 21, at 150 (observing that “[t]hrough the distinctiveness of the IRAC method itself has come into question in recent years, its utility is not generally in doubt.”).

<sup>31</sup> E.g., Marion W. Benfield, Jr., *IRAC – An Undesirable Formula*, SECOND DRAFT, Nov. 1995, at 16-17 (1995); Toni M. Fine, *Comments on IRAC*, SECOND DRAFT, Nov. 1995, at 7 (arguing that “[t]here are times when the structure represented by IRAC is completely unworkable . . . [and] other situations in which, while an analysis organized around IRAC concepts would be feasible, it would not be the best approach.”); Kedia, *supra* note 21, at 150 (criticizing the rule-centric nature of IRAC and arguing for an alternative pedagogy); Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 624 (2006) (stating “CREAC tends to encourage formalism, rather than creative thinking”).

<sup>32</sup> The November 1995 issue of *The Second Draft* was devoted to the pros and cons of using IRAC to teach legal analysis. For the sake of consistency within this article, and because CREAC is the more recent iteration of IRAC for legal writing purposes, I am using CREAC where the authors in that issue of *The Second Draft* used IRAC.

<sup>33</sup> Jane Kent Gionfriddo, *Dangerous! Our Focus Should be on Analysis, Not Formulas Like IRAC*, SECOND DRAFT, Nov. 1995, at 2; *see also* Jane Kent Gionfriddo et al., *A Methodology for Mentoring Writing in Law Practice: Using Textual Clues to Provide Effective and Efficient Feedback*, 27 QUINNPIAC L. REV. 171, 188 n.71 (2009) (noting that the authors do not teach IRAC or its variants because “too often this formula causes students to fail to fully develop an abstract analysis of the law separately from applying that law to their client’s situation”).

opposed to the legal setting, of the matter in controversy.”<sup>34</sup> Still another argues that the paradigms “are both necessary and dangerous, both supporting and defeating.”<sup>35</sup> Some practicing attorneys and judges who write on effective legal writing in practice appear to agree, or at least do not view an organizational paradigm like CREAC to be essential to good brief writing. In an article on writing effective briefs, one attorney included IRAC as only one of several ways to organize a brief.<sup>36</sup> In another piece on brief-writing, no mention at all is made of organizational paradigms.<sup>37</sup> Similarly, a state supreme court justice advised brief writers to “[l]et the facts do the talking” and “meld the facts and the law” in the argument, but is silent on using organizational paradigms.<sup>38</sup>

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<sup>34</sup> Manning Warren, *IRAC Response*, SECOND DRAFT, Nov. 1995, at 19; see also Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 262 (2009) (stating that “[t]he problem with the recitation of the law under one of these structural paradigms is that there is no action, no movement, and consequently, no plotline”).

<sup>35</sup> George G. Gopen, Keynote Address at the Capital Area Legal Writing Conference, Feb. 26, 2011, in *IRAC, REA, Where We Are Now, and Where We Should Be Going in the Teaching of Legal Writing*, 17 J. LEGAL WRITING INST. xvii, xviii (2011); see also Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 135 (1998) (arguing that “formulas” like IRAC “shut off the use of analytical styles other than rule-based reasoning”).

<sup>36</sup> Todd Winegar, *The Best Brief Wins: On Writing Well*, ALI-ABA Professional Skills Program, June 28, 2011 (available on Westlaw at SS625 ALI-ABA 1). But see Karin Ciano, *A Briefreader’s Guide to Briefwriting*, FED. LAW., Jan.-Feb. 2012, at 43 (implying that IRAC is the basic organizational structure of legal arguments in briefs). However, Ciano also urges brief writers to use narrative to make their arguments more persuasive. *Id.* at 44-45.

<sup>37</sup> Beate Bloch, *Brief-Writing Skills*, 2 PERSPS.: TEACHING LEGAL RES. & WRITING 4, 4 (1993) (noting, “[i]t is a truism that most cases are decided on their facts”); see also Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. REV. 581, 587 (1999) (using an organizational paradigm not included in list of factors that most effective brief writers did).

<sup>38</sup> Jim Regnier, *Appellate Briefing: A Judicial Perspective*, 11 PERSPS.: TEACHING LEGAL RES. & WRITING 72, 73 (2003); see also Michael J. Newman, *The Importance of Storytelling as a Tool in the Practice of Law*, THE LEGAL INTELLIGENCER (Apr. 19, 2013) (stating that “stories are far more effective than argument and facts at changing people’s minds”); Raymond P. Ward, *How to Write an Appellate Brief* (2006), <http://raymondward.typepad.com/newlegalwriter/files/HowToWriteAnAppellateBrief.pdf>; Jacques L. Wiener, Jr., *Ruminations From the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 194 (1995) (stating only that “written argument . . . must be grounded in logic, legally supported, and ‘readable’”). For two articles about what judges and practitioners think of attorneys’ brief-writing skills but that do not mention organizational paradigms like CREAC, see Susan Hanley Kosse & David T. ButleRichie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80 (2003), and Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257 (2002); see also Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141, 141 (2002) (describing a survey on judges’ preferences in appellate advocacy in which the use of organizational paradigms is not mentioned). Also, neither the Federal Rules of Appellate Procedure nor the Kentucky rules governing appellate practice direct attorneys to use



While deductive reasoning has long been the star of legal analysis, more and more frequently legal writing professionals are calling for increased attention to the role of other types of legal reasoning that are not rule-based. Wilson Huhn, for example, advocates teaching students to argue persuasively by introducing them to a “pluralistic model” that includes five types of legal argument: textual analysis, intent, precedent, tradition, and policy.<sup>39</sup> Others emphasize the importance of narrative in legal analysis, reminding us that “[l]aw lives on narrative”<sup>40</sup> and “lawyers persuade by telling stories.”<sup>41</sup> Linda Edwards stresses that five commonly used forms of reasoning — rule-based, analogical, policy-based, consensual normative, and narrative — all have narrational roots, and that “seldom does a particular form of reasoning operate alone.”<sup>42</sup> In other words, while logic is still crucial to legal analysis, “multiple legitimate forms of legal arguments exist.”<sup>43</sup> The problem these scholars have with legal writing’s focus on CREAC is not that legal analysis should never use deductive reasoning, but that effective legal analysis must often go beyond deductive reasoning.<sup>44</sup> As one scholar argues:

[H]aving an organizational paradigm like IRAC that focuses solely on the organization of the analysis of one specific legal question misinforms students by putting undue emphasis on deductive analysis, without introducing the complexity of its dependence on fact, issue framing, and

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any particular organizational paradigm. FED. R. APP. P. 28; KY. R. CIV. P. 76.12(4)(c)(v). *But see* Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 435 (1986) (stating, “[t]he mark of a well-organized brief is the skill with which it applies legal argument to the facts of the case”).

<sup>39</sup> Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 440, 481-82 (2000-2001). For an in-depth presentation of Huhn’s theories, see generally WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* (3d ed. 2014).

<sup>40</sup> ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000).

<sup>41</sup> Christopher J. Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 54 (2008); *see also* Sheppard, *supra* note 34, at 255-68 (urging lawyers to “be more conscious of narrative during the structuring and drafting of the argument section of [briefs and memoranda]”).

<sup>42</sup> Linda Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 9-11, 13 (1996).

<sup>43</sup> Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, *supra* note 39, at 437.

<sup>44</sup> *See, e.g.*, Eichhorn, *supra* note 35, at 136 (stating that “rule-based reasoning alone cannot explain the complexity of the law”); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 272 (2008) (stating that “[t]he first element of persuasion, such as appealing to ‘reason,’ is covered by IRAC — the formula provides a rational method for the reader to come to a conclusion. But IRAC is not structured to appeal to the reader’s innate ‘understanding’ — the second element of persuasion”). For more on rhetoric in legal analysis, see Berger, *supra* note 14; Donald H. J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467 (1985); *see also* Robbins-Tiscione, *supra* note 2; Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566 (1994); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL’Y 195 (Winter 1993). For an excellent discussion of narrative persuasion, see Rideout, *supra* note 41.

context. The IRAC paradigm does not teach students to be flexible in their approach to the law and to be creative in their analysis.<sup>45</sup>

Another scholar goes a bit further, finding IRAC's usefulness to be "limited to the logical strand of the argument" and advocating that narrative be used for the large-scale organization of legal analysis, lest IRAC "lead to formulaic writing devoid of the personal stories that form the conflict being presented to the court."<sup>46</sup> Despite the lack of agreement about the benefits and pitfalls of using organizational paradigms like CREAC, however, their use remains a centerpiece of first-year legal writing pedagogy. The question is, should it?

#### IV. DO ATTORNEYS USE CREAC IN THE REAL WORLD?

Even when legal writing professionals criticize organizational paradigms like CREAC for truncating students' views of what legal analysis can encompass, they may find it appropriate for the kinds of issues many legal writing professors use in first-year legal writing assignments, *i.e.*, issues involving straightforward statutory elements or factors.<sup>47</sup> One could argue that if organizational paradigms like CREAC

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<sup>45</sup> Kedia, *supra* note 21, at 170.

<sup>46</sup> Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 132, 162 (2008). In a 2010 study, Chestek found that judges were more persuaded by briefs that emphasized the story behind the dispute than by briefs that relied primarily on logic alone. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 2 (2010).

<sup>47</sup> See, e.g., OATES & ENQUIST, THE LEGAL WRITING HANDBOOK, *supra* note 20, at 439-40 (giving the following examples of acceptable ways, although not the only ways, to organize an elements analysis:

1. Argumentative heading for first element

- Assertion
- Statement of the rule
- Descriptions of analogous cases
- Your argument, including your response to your opponent's arguments
- Conclusion

...

1. Argumentative heading for first element

- Statement of the rule
- Descriptions of analogous cases
- Your argument, including your response to your opponent's arguments
- Conclusion

...); see also ROBBINS ET AL., *supra* note 20, at 204 (noting that "a full-CREAC brief is likely only when you are working with an elements test"). Robbins believes writers "might find that the CREAC structure is too limiting" when analyzing a factors test, for example when the factors are interrelated. *Id.* at 204, 209.

are so widely used to teach first-year law students how to organize legal analysis of at least certain kinds of issues, it must be at least in part because practicing attorneys also organize legal analysis according to a similar paradigm. The question, in other words, is whether by teaching our students to use organizational paradigms we are helping them to be “practice ready” by giving them a tool that practicing attorneys actually use.

In the spring semesters of 2012 and 2013, the first-year students in the legal writing program at the University of Kentucky College of Law wrote appellate briefs involving two different factor-based issues. In 2012, the issue was whether a defendant had been in custody for *Miranda* purposes when two police officers came to her workplace to speak to her about the murder of her ex-husband.<sup>48</sup> Specifically, students had to analyze whether the defendant’s freedom of movement had been restrained to a degree associated with formal arrest.<sup>49</sup> In making this determination, courts weigh factors in deciding whether, under the totality of the circumstances, a reasonable person would have felt free to terminate the questioning and leave.<sup>50</sup> We chose this problem in part because the multiple factors courts use to analyze the issue suggest a clear organizational structure, similar to elements in a statute.<sup>51</sup> Specifically, we expected students to divide the argument section into subsections mirroring the factors that were relevant to the case: for example, whether the encounter took place in public, whether the police told the defendant he was not under arrest, and whether the defendant had unrestrained freedom of movement.<sup>52</sup> Further, we expected students to use CREAC in organizing the analysis because that is the organizational paradigm

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<sup>48</sup> The brief also involved a question of whether the Defendant had been interrogated, but because the custody question was the one we expected would require a more in-depth analysis given the fact scenario, I am limiting my discussion to that issue.

<sup>49</sup> A person is in custody when there is (i) formal arrest or (ii) a restraint on one’s freedom of movement to a degree that is associated with formal arrest. *E.g.*, *Smith v. Commonwealth*, 312 S.W.3d 353, 358-59 (Ky. 2010).

<sup>50</sup> *Id.* The factors include the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; the use of tone of voice or language that would indicate that compliance with the officer’s request would be compelled; the purpose of the questioning; whether the place of the questioning was hostile or coercive; the length of the questioning; whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions. *Id.*

<sup>51</sup> See, e.g., Lorraine Bannai et al., *Sailing Through Designing Memo Assignments*, 5 J. LEGAL WRITING INST. 193, 193 (1999); Gail Anne Kintzer, Maureen Straub Kordesh & C. Anne Sheehan, *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 143, 151 (1997); Helene S. Shapo & Mary S. Lawrence, *Designing the First Writing Assignment*, 5 PERSP.: TEACHING LEGAL RES. & WRITING 94, 95 (Spring 1997).

<sup>52</sup> Our expectation is supported by the suggested organization of an issue involving a rule with multiple elements in *Just Briefs*. OATES ET AL., *JUST BRIEFS*, *supra* note 4, at 170-71; see also Miller & Charles, *supra* note 11, at 208 (stating that the analysis of factors is an example of deductive reasoning, with the factors as the major premise and the facts as the minor premise).

used in their legal writing textbook and the one we teach in the classroom.<sup>53</sup> So a typical argument section for the custody issue might be organized as follows:<sup>54</sup>

Subsection 1:

C: Conclusion

R: Rule (Factor 1: whether the encounter was in a public place)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 2:

C: Conclusion

R: Rule (Factor 2: whether the police informed the individual that he was not under arrest and was free to leave)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 3:

C: Conclusion

R: Rule (Factor 3: whether the police displayed weapons or used physical force)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 4:

C: Conclusion

R: Rule (Factor 4: whether individual had unrestrained freedom of movement during the encounter)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

In 2013, the issue in the first-year appellate brief assignment was whether a defendant had a reasonable expectation of privacy for Fourth Amendment search and seizure purposes regarding a stolen gun she had hidden in the dormitory suite where she was visiting.<sup>55</sup> This determination involves a two-part test: (1) whether a person had a subjective expectation of privacy, and (2) whether that expectation was

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<sup>53</sup> At the University of Kentucky College of Law we use RICHARD K. NEUMANN & SHEILA SIMON, *LEGAL WRITING* (2d ed. 2011), which teaches CREAC as an organizing/analytical paradigm for legal memos and briefs.

<sup>54</sup> Many students combined similar factors under one subheading to avoid repeating facts, so they had fewer but slightly broader subsections that still adhered to CREAC within each subsection.

<sup>55</sup> The brief also involved the issue of whether the identity of a confidential informant should be revealed, but because that issue did not require the same depth of analysis, I am limiting my discussion to the expectation of privacy issue.

objectively reasonable.<sup>56</sup> Courts analyze the second part of the test by looking at factors such as whether the defendant was legitimately on the premises, whether the defendant had a proprietary interest in the place to be searched or the item to be seized, whether the defendant had the right to exclude others from the place searched, and whether the defendant had taken normal precautions to maintain her privacy.<sup>57</sup> We expected that a typical argument section for the expectation of privacy issue might be organized as follows:<sup>58</sup>

Test part 1: Whether the defendant had a subjective expectation of privacy

C: Conclusion

R: Rule

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Test part 2: Whether the expectation was objectively reasonable

Subsection 1:

C: Conclusion

R: Rule (Factor: whether the defendant was legitimately on the premises)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 2:

C: Conclusion

R: Rule (Factor: whether the defendant had a proprietary interest in the place to be searched or the item to be seized)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 3:

C: Conclusion

R: Rule (Factor: whether the defendant had the right to exclude others from the place searched)

E: Explanation of rule

A: Application of rule to facts of our case

C: Conclusion

Subsection 4:

C: Conclusion

R: Rule (Factor: whether the defendant had taken normal precautions to maintain her privacy)

E: Explanation of rule

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<sup>56</sup> *Katz v. United States*, 389 U.S. 347, 362 (1967).

<sup>57</sup> *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006).

<sup>58</sup> Here, too, many students combined similar factors under one subheading, so they had fewer but slightly broader subsections while still adhering to CREAC within each subsection.

- A: Application of rule to facts of our case  
C: Conclusion

To answer the question of whether practicing attorneys use CREAC, I reviewed sections of thirty-seven appellate briefs that analyzed the same issues our students wrote about in their briefs: whether a defendant had been in custody for *Miranda* purposes and whether a person had had a reasonable expectation of privacy for Fourth Amendment search and seizure purposes. I reviewed briefs filed by appellants and appellees in the U.S. Supreme Court, U.S. Circuit Courts of Appeal, and the Kentucky Supreme Court between 1989 and 2013.<sup>59</sup> I found that most briefs included the elements of CREAC: conclusion, rule, rule explanation,<sup>60</sup> rule application, and conclusion. What was surprising, however, was the extent to which attorneys deviated from the strict R-E-A that is common to all the organizational paradigms. So rather than CREAC, for example, I found CARE, RAREA, REA, CREAE, CARAEA, AREAEC, ARARAREAEA, and numerous other CREAC alternatives. Moreover, it appeared that these deviations frequently involved including the facts of the case in a place other than, or in addition to, a separate rule-application section. This was true of briefs written on both the custody issue and the expectation of privacy issues. Three trends in particular emerged: (1) including facts before rule or rule explanation; (2) including the rule in a separate section, and starting subsequent sections with a discussion of facts; and (3) interspersing rule explanation and rule application. An examination of each trend follows.

#### *1. Including facts<sup>61</sup> before rule or rule explanation.*

Many textbooks that encourage students to use organizational paradigms suggest that a separate paradigm be used for each section of analysis.<sup>62</sup> In other words, as illustrated above, for an issue like custody where the rule is comprised of a series of factors, one or two factors would be discussed in a separate subsection under a separate heading, and each section would follow an organizational paradigm such as CREAC. For example, the section on the first factor would state the rule and rule explanation that were relevant to that factor, followed by application of the rule to the facts of the case assigned to the students. The section on the second factor would again state the

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<sup>59</sup> See Appendix A for a list of the briefs reviewed for this article. Because I wanted to review briefs that would be considered “good” by experienced attorneys, I relied heavily where possible on briefs written by U.S. attorneys and assistant U.S. attorneys, who would be likely to have written many briefs. To ensure that I had a good cross section of briefs, I also reviewed briefs written by public defenders and other local practitioners.

<sup>60</sup> Use of rule explanation varied more than any other part of CREAC.

<sup>61</sup> By this I mean more than a cursory reference to the facts in a case before stating the relevant rule.

<sup>62</sup> See, e.g., EDWARDS, *supra* note 4, at 290-93 (Edwards takes a flexible approach to organizing a multi-element issue, however, advising students that “[o]ccasionally, later drafts can vary the normal multi-issue paradigm by combining the rule explanation section for each element into one comprehensive explanation of the rule and then combining the rule application section for each element into a comprehensive rule application.”); NEUMANN & TISCIONE, *supra* note 17, at 164; OATES ET AL., JUST BRIEFS, *supra* note 4, at 170-72; SCHMEDEMANN & KUNTZ, *supra* note 4, at 107-08.

rule and rule explanation relevant to that second factor, followed by application of the rule to the facts.

In practice, some appellate brief writers adhered to this organization. For example, in the appellant's brief in *United States v. Romaszko*, each subsection analyzing a particular factor in the custody analysis begins with a rule and, usually, a rule explanation relevant to that factor, which is followed by application of the rule to the facts of that case.<sup>63</sup> However, other briefs I reviewed did not consistently follow that paradigm. One fairly common deviation was a variation on CREAC that few legal writing textbooks allow for: including a discussion of facts — often the facts brought out during a suppression hearing — very early in the analysis, before the rule explanation and rule application sections, and sometimes even before a complete rule statement.<sup>64</sup> This may be because the custody issue and expectation of privacy issue are both fact-intensive inquiries. In the appellant's brief for *United States v. Panak*, for example, the analysis of the custody question begins with the standard of review and a short statement of the relevant rule, followed by an enumeration of the relevant facts (in bold):

2. THE DISTRICT COURT ERRED IN RULING UNDER A TOTALITY OF THE CIRCUMSTANCES THAT PANAK WAS SUBJECT TO CUSTODIAL INTERROGATION, SO THAT MIRANDA WARNINGS WERE REQUIRED, WHEN INVESTIGATORS QUESTIONED HER IN HER OWN LIVING ROOM ABOUT HER EMPLOYER'S DRUG TRAFFICKING CRIMES.

Again, the standard of review of a suppression order is that factual findings are reviewed for clear error, whereas conclusions of law are reviewed *de novo*. The standard of review of a finding that a defendant was 'in custody' is also *de novo*.

The 'custody' determination turns on whether an individual was subjected to a 'restraint on freedom of movement of the degree associated with formal arrest.' **In this case, Panak testified that (1) she did not remember 'inviting' the investigators into her home; (2) she initially declined to answer one of their questions and was told it would be to her benefit to cooperate; (3) she perceived at the time that she was being investigated for something her boss had done; (4) she did not feel free to leave the house because she was unwilling to allow the investigators to remain in her home by themselves; (5) she did not feel 'threatened' by the investigators; (6) the investigators told her that**

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<sup>63</sup> Brief for Appellant at 27-36, *United States v. Romaszko*, 253 F.3d 757 (2d Cir. 2001) (No. 00-1580).

<sup>64</sup> As noted elsewhere, a few do allow for fact-focused variations on CREAC. The textbooks by Oates et al. — *Just Briefs* and *The Legal Writing Handbook* — provide an example of an element's analysis that includes a "Statement of the Facts" between the heading for that element and the rule. OATES ET AL., *JUST BRIEFS*, *supra* note 4, at 171-72; OATES & ENQUIST, *THE LEGAL WRITING HANDBOOK*, *supra* note 20, at 441. Similarly, *Your Client's Story* includes CPRA as a variation that motivates the judge by emphasizing the client's story. ROBBINS ET AL., *supra* note 20, at 206. In *Experiential Legal Writing*, Donahoe advises, "[Y]ou might want to present your client's facts before you provide the rule, especially if the facts are compelling and the law is not very beneficial." DONAHOE, *supra* note 13, at 45.

**Chionchio was going to jail; and (7) she believed the investigators' statement that her name would be cleared if she cooperated. Even if every word of that testimony is accepted as true, it falls well short of the court's conclusion that Panak was subjected to restraints on her freedom comparable to those associated with formal arrest.<sup>65</sup>**

This is followed by a statement of the rule regarding the factors courts apply to custody determinations, explanation of the rule, and application of the rule to the facts.<sup>66</sup>

Similarly, both the appellant's and appellee's briefs in *Fugett v. Commonwealth* include a lengthy discussion of the facts before the rule, rule explanation and rule application sections.<sup>67</sup> The appellant's brief goes so far as to include a lengthy discussion of the facts in a separate subsection headed "Background" immediately before a subsection headed "Argument," all within the larger Argument section of the brief.<sup>68</sup>

Finally, the appellant's brief in *United States v. Brooks* states the overall rule for custody in a roadmap paragraph, and begins each subsection (*i.e.*, analysis of each factor) with the relevant facts. For example, the subsection on the "place of questioning" factor begins:

In this case, Ms. Brooks was questioned at the ECC, her place of employment, almost immediately after reporting to work. She knew nothing about the agents wanting to interview her prior to arriving at the ECC. Agent Collins testified that he spoke with Ms. Brooks' supervisor, Barbara Guerrero, prior to Ms. Brooks arriving for work, to get someone to cover Ms. Brooks' shift while he and Camper questioned her.<sup>69</sup>

The rule and rule explanation for this factor follow this opening paragraph.<sup>70</sup>

I found the same pre-rule discussion of facts in briefs that analyzed the expectation of privacy issue. For example, in a brief filed in the well-known case of *Minnesota v. Olson*, a subsection on whether the defendant had a reasonable expectation of privacy began as follows (facts are in bold):

B. Respondent Did not Overcome his Burden of Demonstrating a Legitimate Expectation of Privacy in the Duplex in Which He was Arrested.

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<sup>65</sup> Brief for Plaintiff-Appellant at 13-14, *United States v. Panak*, 552 F.3d 462 (6th Cir. 2009) (No. 07-4476) (citations omitted). Although it could be argued that this paragraph is essentially an umbrella paragraph that uses the facts of the case to set forth the factors in a custody analysis, the next paragraph restates those factors. Therefore, the main purpose of this paragraph seems to be to put the facts before the reader as early as possible.

<sup>66</sup> *Id.* at 14-17.

<sup>67</sup> See Brief for Appellant at 35-37 and Brief for Appellee at 32-35, *Fugett v. Kentucky*, 250 S.W.3d 604 (Ky. 2008) (No. 2006-SC-000051-MR).

<sup>68</sup> Brief for Appellant at 35-37, *Fugett*, 250 S.W.3d 604. In other words, the pre-rule discussion of the facts is in addition to the Statement of the Case earlier in the brief.

<sup>69</sup> Brief for Defendant-Appellant at 20, *United States v. Brooks*, 379 Fed. App'x 465 (6th Cir. 2010) (No. 08-5875/08-5948) (citation omitted).

<sup>70</sup> *Id.* at 21-22.



1. Respondent has no legitimate expectation of privacy under prior decisions of this court.

**The record establishes that Respondent did not own or rent the duplex. He was not related to its owners. He did not possess a key. He did not receive mail or visitors there. He had never used the premises before. He kept no possessions there other than a change of clothes. He was never left alone in the duplex. His authority to admit or refuse visitors was never discussed or tested. Any right to privacy that Respondent could possess in the duplex could be derived only from his sleeping on the floor there one night with permission of the owners.** Although some lower courts hold, at least implicitly, that a defendant's status as an overnight guest is alone sufficient to demonstrate a privacy interest in a third person's home, prior decisions by this Court compel a different result.<sup>71</sup>

The brief then goes on to explain the rule in *Jones v. United States* and to apply that rule to the facts.<sup>72</sup>

The appellant's brief in *Mendoza v. United States* begins the expectation of privacy subsection with the facts (in bold):

A. There Was No Reasonable Expectation of Privacy in the Common Area.

**The record is clear that the residence is a duplex with a main door opening into a common vestibule. The main entrance opens into a common vestibule which reveals a short hall with the lower apartment door to the left of the common vestibule area and a stairway leading to a [sic] upper unit. The officers who executed the search warrant indicated that the front door opening into the common vestibule area had a latch, but the evidence is clear that the door was not locked or otherwise barred against the entry of people attempting to visit the upper or lower apartments and the police did not break down the door.**<sup>73</sup>

This is followed by rule, rule explanation and rule application.<sup>74</sup>

Similarly, in *United States v. Maestas*, the appellee's analysis of whether the defendant had a reasonable expectation of privacy begins with conclusion and facts (in bold), which are followed by the rule and rule explanation:

2. Defendant Had no Reasonable Expectation of Privacy in the Common Garbage Area.

Even if this Court determines that Maestas had a reasonable expectation of privacy inside the Mountain Road apartment, that expectation of privacy did not extend to the garbage area in which the drugs and gun were found.

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<sup>71</sup> Brief for Appellant at 16, *Minnesota v. Olson*, 110 S. Ct. 2558 (1989) (No. 88-1916).

<sup>72</sup> *Id.* at 17-19.

<sup>73</sup> Brief for Appellant at 7-8, *Mendoza v. United States*, 281 F.3d 712 (8th Cir. 2002) (No. 00-3631MNST) (citations omitted).

<sup>74</sup> *Id.* at 8-12.

**Arguing that he maintained a reasonable expectation of privacy in the garbage area, Maestas relies on the assumption that the area constitutes ‘curtilage’ of the apartment and is therefore entitled to the same Fourth Amendment status as the interior of the apartment itself. Maestas notes that the garbage area is ‘attached to the duplex, hidden from public access, and walled off by tall coyote fences,’ and that to access the area one would have to ‘either unlatch the gate or scale the coyote fence.’ Maestas concludes that because ‘the public could not readily access the garbage cans,’ he maintained a reasonable expectation of privacy in that area.<sup>75</sup>**

The Appellees’ briefs in *Blades v. Commonwealth* and *United States v. King* both include a full paragraph of facts early in the analyses of the expectation of privacy issue.<sup>76</sup> In the argument section of *Blades*, only the conclusion and the standard of review precede a long quote about the facts of the case (in bold):

#### ARGUMENT

##### I. THE TRIAL COURT PROPERLY DENIED BLADES’ MOTION TO SUPPRESS THE EVIDENCE FOUND AS A RESULT OF THE WARRANTLESS SEARCH OF HIS HOTEL ROOM

Blades argues that the trial court erred when it denied his motion to suppress all evidence found through a warrantless search of his hotel room. ‘An appellate court’s standard of review of the trial court’s decision on a motion to suppress requires that [the appellate court] first determine whether the trial court’s findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, [an appellate court] must then conduct a de novo review of the trial court’s application of the law to those facts to determine whether its decision is correct as a matter of law.’

**There is no dispute as to the facts between Blades and the Commonwealth. Officer Vallelunga testified to the following at the suppression hearing held the morning of the first day of trial:**

**He found a key to a Comfort Inn or Comfort Suites in the glove compartment of Tonya Brokaw’s car after Deputy Crabtree had gained permission to search the vehicle. He located the hotel and spoke to the management. The hotel had a guest named ‘Tonya’ but with a different last name. The management determined that they had rented a room to a woman and man who fit the description of Brokaw and Blades. Blades and Brokaw had paid for the room with cash, and it was after their check-out time. Deputy Vallelunga stated he was there after lunch-time, and check-out was between 9:00 and 10:00 AM. Because it was past check-out time, the hotel management decided that they could**

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<sup>75</sup> Brief for Appellee at 9, *United States v. Maestas*, 639 F.3d 1032 (10th Cir. 2011) (No. 10-2226) (citation omitted).

<sup>76</sup> Brief for Appellee at 4-5, *Blades v. Commonwealth*, 339 S.W.3d 450 (Ky. 2001) (No. 2010-CS-000187); Brief for Appellee at 19-20, *United States v. King*, 227 F.3d 732 (6th Cir. 2000) (No. 98-4046).

**open the hotel room for Deputy Vallelunga and let him search the room. Deputy Vallelunga stated that he did not secure a search warrant because the items in the room were abandoned property, and he knew that Blades and Brokaw had been arrested and were not coming back 'to pay cash for the room.'**<sup>77</sup>

These facts are followed by the rule, rule explanation, and rule application.<sup>78</sup> In *King*, the rule statement regarding expectation of privacy immediately follows the standard of review.<sup>79</sup> However, the rule statement and rule explanation are separated by facts (in bold):

III. THE DISTRICT COURT PROPERLY FOUND THAT THE DEFENDANT LACKED STANDING TO CHALLENGE THE SEARCH OF THE BASEMENT BASED ON THE DETERMINATION THAT KING HAD NO LEGITIMATE EXPECTATION OF PRIVACY IN THE BASEMENT.

On appeal, a district court's findings of fact will be reversed only upon a finding of clear error whereas its conclusions of law are reviewed de novo.

In order for an individual to challenge a search and seizure of a premises, that person must have a legitimate expectation of privacy in the area or items seized. In addition, not only must the individual establish a subjective expectation of privacy in the area searched, the privacy interest must be of a type that society is willing to recognize as legitimate.

**During the April 21, 1998, suppression hearing, the defendant called his mother, Carolyn King, to the stand to establish standing. Ms. King testified that at the time of the search, she had lived at the 1439 East 116<sup>th</sup> Street location for approximately three years. Ms. King described the residence as a two-family dwelling. She also stated that she lived on the second floor with her four-year old, five-year old, and nine-year old children. Living on the third floor was her fifteen-year old son. Kenny and Kewin King lived on the first floor. Ms. King stated she rented the second and third floor as a unit, paying \$375 per month to the landlord. In addition, she paid \$300 per month for the first floor unit which was paid to her by her sons Kenny and Kewin King. Ms. King also stated that the hallway connecting the basement, first, second and third floors was open to the entire house and that everyone in the house lived there as one family. The house was used as a single living unit for the entire King family with each family member in joint possession of the premises. Access to the basement was open to every member of the household with each family member having complete freedom to travel between the basement, first, second and third floors.**<sup>80</sup>

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<sup>77</sup> Brief for Appellee at 4-5, *Blades*, 339 S.W.3d 450 (citations omitted).

<sup>78</sup> *Id.* at 5-7.

<sup>79</sup> Brief for Appellee at 19-20, *King*, 227 F.3d 732.

<sup>80</sup> *Id.* at 20-21 (citations omitted).

Rule explanation follows these facts.<sup>81</sup>

Finally, the Appellee in *Nourse v. Commonwealth* begins the argument on the expectation of privacy issue with more than five pages of facts before turning to the rule, rule explanation, and rule application parts of the argument.<sup>82</sup> What is clear from these examples is the central place of facts in the arguments these attorneys made on fact-intensive issues, a centrality that most organizational paradigms fail to convey.

2. *Including the rule in a separate section, and starting subsequent sections with a discussion of facts.*

Another way brief writers put the facts front and center in their arguments is to set forth the rule and rule explanation in subsections separate from rule application. For example, the argument in the appellant's brief in *Stansbury v. California* has five main sections: The first and third sections state and explain the relevant rules regarding custody, including a discussion of the factors, and the second and fourth apply those rules to the facts of the case.<sup>83</sup>

I. THE TEST OF CUSTODY FOR MIRANDA PURPOSES IS AN OBJECTIVE ONE THAT EVALUATES THE TOTALITY OF THE CIRCUMSTANCES FROM THE PERSPECTIVE OF A REASONABLE PERSON IN THE DEFENDANT'S POSITION.

[This section states and explains rules.]

...

II. IN DETERMINING THAT PETITIONER WAS NOT IN CUSTODY, THE COURTS BELOW INCORRECTLY FOCUSED ON THE INTERROGATING OFFICERS' UNDISCLOSED INTENT AND SUBJECTIVE SUSPICIONS.

[This section applies those rules.]

...

III. THE PROPER FACTORS TO BE CONSIDERED IN DETERMINING WHETHER INTERROGATION IS CUSTODIAL.

[This section states and explains rules.]

...

IV. APPLYING PROPER FACTORS TO THE IN-CUSTODY DETERMINATION, PETITIONER'S INTERROGATION WAS CUSTODIAL.

[This section applies those rules.]

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<sup>81</sup> *Id.* at 21-22.

<sup>82</sup> Brief for Appellee at 22-31, *Nourse v. Commonwealth*, 177 S.W.3d 691 (Ky. 2004) (Nos. 2003-SC-00220, 2003-SC-00021). For additional examples of discussion of facts before rule or rule explanation, see Brief for Appellant at 15-16, *United States v. Acosta*, 965 F.2d 1248 (3d Cir. 1992) (Nos. 91-2071, 91-2072, 91-2073); Brief for Appellees at 13-18, *Acosta*, 965 F.2d 1248; Brief for Appellee at 9, *United States v. Miravalles*, 280 F.3d 1328 (11th Cir. 2002) (No. 01-13027-AA); Brief for Appellant at 14, *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002) (No. CA 01-30166).

<sup>83</sup> Brief for Petitioner at 13-31, *Stansbury v. California*, 511 U.S. 318 (1994) (No. 93-5770). The fifth section is a policy argument.

Section IV is further divided into four subsections, one for each factor, and each subsection begins with facts.<sup>84</sup> For example, the second subsection, which is about whether the atmosphere was police-dominated, begins not with the relevant rule and rule explanation, but with facts:

Although we submit the petitioner was in custody for *Miranda* purposes from the moment he was confronted by four armed police officers, the restraints on his freedom of action only increased thereafter. He was driven with two police officers not to the public section of the police station but to the jail proper. Petitioner was escorted by four officers through locked steel doors, and deposited in a small “locked interview room in the secure area of the jail.” This room was normally used for questioning suspects and persons “who were already in custody” or “were going to be” placed in custody.<sup>85</sup>

Similarly, the appellant’s brief in another U.S. Supreme Court case, *Thompson v. Keohane*, states the rule regarding custody as part of a related but separate issue;<sup>86</sup> the analysis of whether the petitioner was in custody for *Miranda* purposes is set forth in a different section and begins and ends with facts, with references to the rules interspersed in the facts.<sup>87</sup>

One reason for this focus on facts rather than on the rule may be that the questions at issue both for the custody and expectation of privacy issues are fact-intensive inquiries. Thus, it is not surprising that much of the analysis of this question would be a discussion of the facts of the case, even to the extent that discussion of the facts both precede and follow the statement of the rule. Beyond that, however, it may be that the attorneys who began sections with facts rather than rules did so because the rules did not favor their clients. It may also be that the attorneys were responding to judges’ advice to “[l]et the facts do the talking. Make your presentation people-oriented.”<sup>88</sup> By reminding the reader first about the facts, the writer is reminding the reader why she is reading the brief in the first place — to resolve a dispute involving real people.

### 3. *Interspersing rule explanation and rule application.*

A third common deviation from an organizational paradigm like CREAC was the interspersing of sections of rule explanation and rule application. One of the requirements of most, if not all, organizational paradigms is that the rule and rule explanation should be stated before the rule is applied to the facts because rule explanation provides the basis for the reader to accept the writer’s application of the

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<sup>84</sup> *Id.* at 20-27.

<sup>85</sup> *Id.* at 23-24 (citations omitted).

<sup>86</sup> The rule regarding whether a person is in custody is stated in the analysis of the first issue, which argues that “whether a suspect is in ‘custody’ for purposes of *Miranda* is a mixed question of law and fact not subject to section 2254(d)’s presumption of correctness.” Brief for Petitioner at 8-16, *Thompson v. Keohane*, 516 U.S. 99 (1995) (No. 94-6615).

<sup>87</sup> *Id.* at 37-42. This section is not divided into subsections.

<sup>88</sup> Regnier, *supra* note 38, at 73.

rule to the facts.<sup>89</sup> One popular textbook defines rule explanation as “a demonstration that the main rule on which you rely really is the law in the jurisdiction involved.”<sup>90</sup> This demonstration includes proof “that the rule is law in the jurisdiction where the dispute would be or is being litigated”; proof “that you have stated the rule accurately”; explanation of “how the rule operates,” which can include relevant “information about how courts have interpreted the rule;” and explanation of “the policy behind the rule.”<sup>91</sup> Another popular textbook describes rule explanation as “explaining the source of the rule and what it means,” which includes:

(1) [D]escribing what the court said about the rule, (2) describing how the court applied the rule, (3) pointing out any relevant information about how the court did *not* apply the rule, (4) pointing out any relevant facts the courts emphasized, and (5) describing the policy considerations that support the rule.<sup>92</sup>

The legal writer then uses authority from the rule explanation in the rule application, for example to support the rule application with analogical reasoning.<sup>93</sup> In adherence to all commonly used organizational paradigms, however, any authority that appears in rule application should first have appeared in rule explanation.<sup>94</sup>

In practice, however, attorneys analyzing the issue of custodial interrogation frequently mixed rule explanation and rule application. In the appellant’s brief for *United States v. Kim*, the initial rule explanation of the custody issue comes before rule application, but the application is followed by additional rule explanation.<sup>95</sup> Specifically, the writer explains the rule by discussing the relevant facts of six cases.<sup>96</sup> The writer then shifts to rule application by stating, “Here, defendant was not

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<sup>89</sup> NEUMANN & TISCIONE, *supra* note 17, at 175. One item in a list of questions for students to ask themselves after completing the first draft is, “Have you completed the rule proof and explanation before starting the rule application? If you let the material get out of control, the result may be a little rule proof, followed by a little rule application, followed by a little more rule proof, followed by a little more rule application . . . . Finish proving the rule before you start applying it. If you start to apply a rule before you have finished proving it, the reader will refuse to agree with what you’re doing.” *Id.*; see also Murray, *supra* note 17, at 230-31 (suggesting that the full explanation section should follow the rule).

<sup>90</sup> NEUMANN & TISCIONE, *supra* note 17, at 146.

<sup>91</sup> NEUMANN & SIMON, *supra* note 24, at 121-22.

<sup>92</sup> EDWARDS, *supra* note 4, at 86-87 (emphasis in original).

<sup>93</sup> NEUMANN & TISCIONE, *supra* note 17, at 146.

<sup>94</sup> See *id.*; EDWARDS, *supra* note 4, at 110 (urging readers to “[b]e sure to complete the rule application section by matching its coverage and approach to the explanation section.”).

<sup>95</sup> Brief for Appellant at 13-22, *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002) (No. CA 01-30166). The initial rule and rule explanation sets forth the rule from *Stansbury* and explains the relevant factors regarding whether a person is in custody for *Miranda* purposes.

<sup>96</sup> *Id.* at 14-17. The six cases in the initial rule explanation are *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *People of the Territory of Guam v. Palomo*, 35 F.3d 368 (9th Cir. 1994); *United States v. Gregory*, 891 F.2d 732 (9th Cir. 1989); *United States v. Hudgens*, 798 F.2d 1234 (9th Cir. 1986); and *United States v. Levya*, 659 F.2d 118 (9th Cir. 1981).

summoned, the physical surroundings were familiar to her, she was not confronted with evidence of her guilt, the police did not apply any pressure to detain her, and the interview lasted approximately an hour and a half.”<sup>97</sup> This is immediately followed by discussion of two cases that were not included in the initial rule explanation.<sup>98</sup> The writer then returns to rule application, which is followed a page and a half later by discussion of six more cases that were not included in earlier rule explanation.<sup>99</sup> This is followed by more application, and the conclusion.<sup>100</sup>

The appellant’s brief in *United States v. Bassignani* similarly intersperses facts and rule explanation.<sup>101</sup> The overall rule for custody, including the factors, is included in a separate section with the heading “The Legal Standard for Custody.”<sup>102</sup> The individual factors are not explained in this separate section.<sup>103</sup> Instead, each factor is analyzed in a subsection headed, “The District Court Erred in Concluding Defendant Was in Custody by Neglecting to Consider Numerous Relevant Facts, Placing Undue Weight on the *Kim* Factors, and Failing to Adequately Consider the Totality of the Circumstances.”<sup>104</sup> The analysis of each factor is dominated by the facts, interspersed with rule explanation. For example, the discussion of one factor begins (rule explanation is underlined; facts/rule application is marked in bold):

The district court held the second factor — the extent to which the defendant is confronted with evidence of guilt — also weighed in favor of a finding of custody. **It is certainly true that Detective Williams questioned Bassignani about his connection with the big\_perm2469@yahoo.com email account and about child pornography associated with the account, among other matters. But the district court looked only to the subject matter of the questions, rather than to the coercive nature of the questioning — the proper focus of the inquiry. As the Supreme Court has explained, the purpose of *Miranda* is “to ensure that the police do not coerce or trick captive suspects into confessing.” *Berkemer*, 468 U.S. at 433. The point of this factor is not, as the district court seemed to believe, that once the conversation turns to relevant matters, it becomes custodial. In almost all interviews of suspects, the officers confront the suspect with evidence of his guilt. After all, if the**

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<sup>97</sup> Brief for Appellant at 17, *Kim*, 292 F.3d 969.

<sup>98</sup> *Id.* at 17-18. The two new cases are *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969) and *United States v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987).

<sup>99</sup> Brief for Appellant at 18-21, *Kim*, 292 F.3d 969. The six new cases are *Michigan v. Summers*, 452 U.S. 692 (1981); *United States v. Saadeh*, 61 F.3d 510 (7th Cir. 1995); *United States v. Crawford*, 52 F.3d 1303 (5th Cir. 1995); *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994); *United States v. Ritchie*, 35 F.3d 1477 (10th Cir. 1994); and *United States v. Richmann*, 860 F.2d 837 (8th Cir. 1988).

<sup>100</sup> Brief for Appellant at 21-22, *Kim*, 292 F.3d 969.

<sup>101</sup> Brief for Plaintiff-Appellant at 13-30, *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009) (No. 07-10453).

<sup>102</sup> *Id.* at 13-14.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 15-30.

questions were not reasonably likely to elicit incriminating answers they would not constitute interrogation, and would not require *Miranda* warnings even if asked in a custodial setting. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

A review of the recorded demonstrates no coercion or trickery. Other than to ask defendant whether the “big perm” account was his and whether others had access to it, Detective Williams did not begin to talk to defendant about his suspected criminal conduct until approximately 45 minutes into the interview. The tone of the interview remained calm and cooperative even after the officer began to ask defendant about his email accounts and his view of child pornography. Once Detective Williams began to ask defendant about his conduct, Bassignani told him, “I’m more than happy to go with you through this process.” He later made clear the reason why he was willing to participate in the interview, stating: “I’m trying to save my own ass here. I mean let’s be honest. I’m trying to get as minimal impact of this as possible.”<sup>105</sup>

This is followed by two pages of rule explanation: a discussion of Ninth Circuit precedent and the facts and reasoning from a Third Circuit case.<sup>106</sup>

Similarly, a brief filed in the Kentucky Supreme Court includes a short definition of custodial interrogation before turning to rule application. That application is interspersed with rule explanation that includes brief discussions of five cases that were not part of earlier rule explanation.<sup>107</sup>

The appellant’s brief for *United States v. Wallace* also mixes rule explanation and application, but in a different way. Here, the rule on custody is stated first, followed by rule explanation that includes citations to numerous cases, including *United States v. Axsom*.<sup>108</sup> This discussion of *Axsom* is interspersed with rule application. In other words, rather than set forth the complete rule explanation first, followed by application that includes analogies to the already-stated facts in *Axsom*, the writer includes the analogies in the initial discussion of the *Axsom* facts, as in the following example (rule explanation is underlined; rule application is in bold):

The Eighth Circuit Court, however, found in *Axsom* that the agents employed no strong arm tactics, did not adopt a threatening posture, did not display their weapons, or make any show of force during questioning. Likewise no such factors existed in the present case. Also, in *Axsom*, the Eighth Circuit noted that no deceptive stratagems were employed, and that the agents asked straightforward questions and got straightforward answers, as did the questioning agent in this case.

Further, although the district court in *Axsom* found a police dominated atmosphere, the Eighth Circuit noted that while nine agents participated in

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<sup>105</sup> *Id.* at 18-20 (citations to record omitted).

<sup>106</sup> *Id.* at 20-22.

<sup>107</sup> Brief for Appellant at 39-43, *Fugett v. Kentucky*, 250 S.W.3d 604 (Ky. 2008) (No. 2006-SC-000051-MR).

<sup>108</sup> Brief for Appellant at 9-13, *United States v. Wallace*, 323 F.3d 1109 (8th Cir. 2003) (No. 02-3613).



the search, only two agents conducted the interview. Here, the defendant interviewed was interviewed by a single agent. Further, the Eighth Circuit in *Axson* noted that photographs taken at or near the time of questioning reflect a more casual scene than a police dominated, coercive atmosphere. In the present case, the court was given photographs which depict extremely casual and non-threatening scenes at the Defendants' headquarters.<sup>109</sup>

Similar examples can be found in appellee's briefs on the custody issue. In the appellee's brief for *United States v. Littledale*, the writer begins the section on custody with a statement of the rule, citing but not discussing four cases.<sup>110</sup> Immediately after stating the rule, the writer turns to application, and essentially includes the rule explanation within the rule application, as in the following example (rule explanation is underlined; rule application is in bold):

**The Court also specifically credited the agents [sic] testimony that he was told that he was not under arrest. The district court found that defendant was told at the outset of the interview that he was not under arrest and that he wasn't in any trouble [sic] which weighs heavily in finding no custodial interrogation. *Yarborough*, 541 U.S. at 662. . . (if police tell a reasonable person he is not under arrest, that person will likely not feel his freedom of movement is restrained to "the degree associated with a formal arrest.")** **Although agents did not advise defendant that he was free to leave, they also did not tell him that he could not leave, and defendant did not ask to leave or attempt to leave. The Court correctly concluded that those facts weighed in favor of a determination that defendant was not in custody. *United States v. Salyers*, 160, F.3d 1152, 1159-60 (7th Cir. 1998) (the fact that the defendant was not told he could not leave, did not ask if he cold [sic] leave, and never attempted to leave supports a finding that the defendant was not in custody).**<sup>111</sup>

In two more briefs, the rule is followed by a lengthy discussion of the facts of the case, with explication of the rule (in the form of discussion of relevant cases) interspersed in the latter part of the application section. In the appellee's brief for *United States v. Brooks*, the section on custody begins with a statement of the rule, followed immediately by facts.<sup>112</sup> This discussion of the facts continues for a little over two pages, and is then interspersed with rule explanation that includes discussion of several cases not previously cited, as in this paragraph (rule explanation is underlined; facts are in bold):

**Brooks continues to argue that the place of the questioning, the length of the questioning, and "other indicia of custody" support her position that *Miranda* warnings were required. Regarding the place of**

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<sup>109</sup> Brief for Appellant at 12, *Wallace*, 323 F.3d 1109 (citations omitted).

<sup>110</sup> Brief for Appellee at 17-18, *United States v. Littledale*, 652 F.3d 698 (7th Cir. 2011) (No. 10-3063).

<sup>111</sup> *Id.* at 19 (citations to record omitted).

<sup>112</sup> Brief for Appellee at 30-31, *United States v. Brooks*, 379 F. App'x 465 (6th Cir. 2010) (No. 08-5875/08-5948).

questioning, Brooks says she was “seated in a small room at the ECC across from Special Agents Camper and Collins, next to the door, which remained closed during the interview.” Although there is no testimony that Brooks felt constrained or intimidated by the room, Brooks now says that Agent Collins’s testimony “indicated it was a small rooms which was capable of constraining or intimidating.” Regardless, it is undisputed that Brooks was at her work place, was unrestrained, and sitting closest to the door that had a window. The agents did nothing to constrain or intimidate Brooks. *See, e.g., United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999); *United States v. Sivils*, 960 F.2d 587, 598 (6th Cir. 1992) (person not in custody when free to move about and neither told that he was under arrest nor threatened with arrest). ***Mahan* is especially similar to Brooks’s case.** There, FBI agents interviewed the employee in a conference room, never told the employee that he could not leave, the employee never asked to leave, the doors to the interview rooms were unlocked, and the employee sat in the chair closest to the door. This Court found that the employee was not subject to custodial interrogation.<sup>113</sup>

Similarly, in the appellee’s brief for *United States v. Street* the application section includes discussion of cases either not previously cited or cited earlier in the brief in support of other points.<sup>114</sup> For example (rule explanation is underlined; rule application is in bold):

**After defendant signed his written confession, the agents left the room so that he could tell his parents in privacy. Similarly, when defendant was eventually handcuffed, the agents did it out of his parents’ sight. These facts support the district court’s finding that there were virtually no restrictions place on defendant’s movement until Agent Fitzgeralds verbally advised him of his rights, much less any restrictions that equated to formal arrest.** *See McDowell*, 250 F.3d at 1362-63 (suspect was not in custody during a four-hour roadside stop when he was not handcuffed, no guns were drawn, the agents’ questions were not accusatory, suspect did not ask to leave and was not told that he could not leave); *United States v. Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996) (suspect was not in custody when questioned without *Miranda* warnings, as the officers did not physically move or restrain him, they did not draw their weapons, he was not charged or told he was under arrest, and he did not ask to leave); *United States v. Phillips*, 812 F.2d 135, 1262 (11th Cir. 1987) (reversing the suppression of defendants’ inculpatory, pre-*Miranda* statements because the defendants were neither arrested nor

<sup>113</sup> Brief for Appellee at 33-34, *Brooks*, 379 F. App’x 465 (citations to record omitted).

<sup>114</sup> Brief for Appellee at 47-48, *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006) (No. 05-16299-DD). *United States v. McDowell* was cited earlier in the brief in the Standard of Review section and in support of the point that when a defendant lengthens a roadside stop “by giving inconsistent stories and refusing to provide the interviewing agents with a valid telephone number to verify his story,” the stop does not become a custodial interrogation. *Id.* at 25, 35.

restrained, and none of the questioning agents used physical or psychological force to overwhelm their will to resist).<sup>115</sup>

Attorneys also mixed rule explanation and rule application in briefs on the expectation of privacy issue. In the appellant's brief in *United States v. Correa* the rule application includes an almost two-page discussion of a case not included in the lengthy initial rule explanation.<sup>116</sup> The appellee's brief in the same case also interspersed rule explanation throughout rule application.<sup>117</sup>

The examples described above strongly suggest, then, that while practicing attorneys certainly include the parts of CREAC when crafting their arguments — they state the rule, explain the rule, and apply the rule — they do so in a much more flexible way than most first-year legal writing textbooks teach, even when analyzing factor-based issues very similar to issues assigned to first-year legal writing students. This may be true for many reasons, and the reasons may vary for each attorney. One likely reason is that the attorneys deemed it more persuasive to deviate from a pure R-E-A paradigm. Perhaps when citing to cases in the rule application that were not used in the rule explanation, the attorneys were emphasizing the number of cases that supported their argument — too many to include in a single rule explanation section. Perhaps attorneys used EAEAEA rather than EA in a single subsection so they could discuss the facts sooner in the section than they could if all the rule application were done after the rule explanation. Perhaps they were trying to avoid the repetition that comes with stating the relevant facts of a case in the rule explanation and repeating the key facts in the rule application. When the deviations involved including extensive facts where pure CREAC does not allow for them, perhaps the attorneys were trying to do what many judges encourage legal writers to do: emphasize the facts. Alternatively, perhaps the attorneys just did what seemed to flow best as they were writing. As long as the briefs were persuasive as a result of these organizational decisions,<sup>118</sup> however, the attorneys were not incorrect to deviate from strict adherence to an organizational paradigm like CREAC. If the briefs were more persuasive because they deviated from pure CREAC, then the attorneys made good choices about organization.

## V. TEACHING A FLEXIBLE CREAC

Given the examples above, it seems safe to say that when writing about factor-based issues, attorneys use variations of paradigms like CREAC in organizing their arguments: They state rules first, which are usually followed by rule explanation and rule application. They provide proof for their conclusions of law, just as first-year law students are taught to do via organizational paradigms. When they deviate from strict

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<sup>115</sup> Brief for Appellee at 47-48, *Street*, 472 F.3d 1298 (citations to record omitted).

<sup>116</sup> Brief for Appellant at 14-16, *United States v. Correa*, 653 F.3d 187 (3d Cir. 2011) (No. 05-16299-DD). The case not included in rule explanation is *McDonald v. United States*, 335 U.S. 451 (1948).

<sup>117</sup> Brief for Appellee at 11-12, 23-30, *Correa*, 653 F.3d 187. For additional examples of interspersing rule explanation with rule application, see Brief for Appellee at 24-33, *Minnesota v. Carter*, 525 U.S. 83 (1998) (No. 97-1147).

<sup>118</sup> It is certainly conceivable that a judge who expects pure CREAC would be distracted by deviations from that paradigm, which could detract from the brief's persuasiveness. However, given judges' views on what makes a brief effective, this seems unlikely. See *supra* note 38.

adherence to CREAC, it is often to include facts in places other than rule application — often before the rule or between the rule and rule explanation — and to intersperse rule explanation with rule application.

What, then, should we teach first-year law students about organizing legal analysis? Because the attorneys writing about factor-based issues in the examples above used the parts of CREAC in more or less the order C-R-E-A-C, it makes sense to continue to use such paradigms to help beginning law students learn this new, deductive type of organization. However, teaching an organizational paradigm should be done in a way that moves from basic, straightforward use of the paradigm to a more flexible use of the paradigm in appropriate circumstances.<sup>119</sup> I liken CREAC to a basic white sauce.<sup>120</sup> All white sauces contain fat (usually butter), flour, and a liquid such as milk, just as all legal analysis that involves questions of fact contains rules and rule application.<sup>121</sup> As beginning cooks need to master the basic white sauce — or any basic recipe — before moving on to its variations, beginning legal writers need to master CREAC before moving on to its variations. After learning to make the basic white sauce, a more advanced cook learns she can add lemon to the sauce when serving it with fish, or horseradish and dry mustard when serving it with corned beef.<sup>122</sup> Similarly, once a legal writer has mastered CREAC, she should learn when variations like those in the examples above are appropriate. If she is working with compelling facts, for example, she should learn that she can add those facts to the beginning of a section, for example after the rule but before the rule explanation.<sup>123</sup>

In short, while an organizational paradigm can be tremendously helpful to beginning legal writers, it also makes sense to expose these writers to at least some of the alternatives early on, as do the examples provided in the textbooks by Oates *et al.*<sup>124</sup> Students whose progress is slower may stick with basic CREAC, while other students may begin to experiment with the variations of basic CREAC, such as including facts before the rule, or alternating between rule explanation and rule application within a section. Students should be taught that such variations are fine, and can be very effective, as long as the students have a reason for using them.

Of course, the main limitation on teaching the variations of organizational paradigms to our students is time: Given everything the students must learn in first-year legal writing, many legal writing professors will despair at finding time to teach anything but a basic organizational paradigm to the first-year students.<sup>125</sup> Therefore,

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<sup>119</sup> Or at least to raising students' awareness that it is sometimes appropriate to deviate from the paradigm, even if not expecting first-year students to master advanced use of paradigms.

<sup>120</sup> For more analogies between legal analysis and cooking, see Kristen Robbins-Tiscione, *Aristotle's Tried & True Recipe for Argument Casserole*, 16 PERSPS.: TEACHING LEGAL RES. & WRITING 45, 47 (Fall 2006).

<sup>121</sup> IRMA S. ROMBAUER & MARION ROMBAUER BECKER, *JOY OF COOKING* 341-42 (1975 ed.).

<sup>122</sup> *Id.* at 341-43.

<sup>123</sup> Other examples of teaching advanced students to add new "ingredients" to basic legal analysis include making policy arguments and arguments on questions of law.

<sup>124</sup> OATES & ENQUIST, *THE LEGAL WRITING HANDBOOK*, *supra* note 20, at 439-442; OATES ET AL., *JUST BRIEFS*, *supra* note 4, at 169-173.

<sup>125</sup> See, e.g., Linda H. Edwards, *A Chance to Teach Analytical Skills Intentionally and Systematically*, SECOND DRAFT, May 2002, at 1 ("The breadth of coverage demanded of a required Legal Writing course sequence is already massive, and we don't have time to do all

using a third semester of legal writing to teach advanced techniques such as CREAC variations is ideal.<sup>126</sup> One focus of such an advanced class could be the importance of using facts in legal analysis, as illustrated in the examples above.<sup>127</sup> As legal writing scholars recognize, many judges want and expect legal analysis to go beyond the parameters of formalist analysis, for example to include more emphasis on facts and

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we're already asked to do.”); Kate O’Neill, *Formalism and Syllogisms: A Pragmatic Critique of Writing in Law School*, 20 LEGAL STUD. F. 51, 56 (1996) (noting that “the typical credit-loading of legal writing courses,[sic] makes it very unlikely that the course, no matter how well planned, can accomplish the multiple goals assigned, which can include remediation in reading, reasoning and writing skills, training in the conventions of professional legal writing, and research instruction, and also provide serious instruction in legal reasoning. The ‘time-crunch’ is especially severe because first-year students are understandably inefficient researchers and writers.”). While many law schools have increased the number of credit hours assigned to legal research and writing classes since these articles appeared, required LRW classes at many other law schools are still limited to two semesters and as few as one credit hour per semester. Survey Comm., Ass’n of Legal Writing Dirs. & Legal Writing Inst., 2002 Survey Results (2002); Survey Comm., Ass’n of Legal Writing Dirs. & Legal Writing Inst., Report of the Annual Legal Writing Survey 7 (2013).

<sup>126</sup> E.g., Randall Abate, *The Third Time is the Charm: The Structure and Benefits of a Three-Semester Legal Writing Program*, SECOND DRAFT, May 2002, at 7 (explaining that the third semester of legal writing at his school “is designed to deepen and expand the range of skills addressed in the first two semesters. It introduces appellate advocacy and addresses even more sophisticated techniques of analysis, organization, research, and persuasive writing than those addressed in the second semester.”); Edwards, *supra* note 125, at 10 (arguing that “[a] three-semester [legal writing] program can give us the chance to take our students to a significantly deeper mastery of analytical Legal Writing. We could both teach our current syllabus content more thoroughly and add express, intentional, and systematic coverage of the most important analytical skills . . . [including] . . . framing a narrative theme[,] . . . organizing the analysis of multiple issues[,] . . . [and] explaining and applying a factors test or a balancing test . . . .”); Constance Hood, *Using a Third Semester to “Pull it All Together,”* SECOND DRAFT, May 2002, at 8 (arguing that “[h]aving three semesters [of legal writing] makes it possible to build skills slowly and spend more time developing them.”); Nancy Soonpa, *A Retrospective on Three Teaching Experiences*, SECOND DRAFT, May 2002, at 4 (describing one advantage of a three-semester legal writing class as “the ability to examine and teach everything in depth” and noting many students thought a third semester of legal writing “should be required.”). Some legal writing scholars call for as many as six semesters of required legal writing classes. E.g., Kristen Konrad-Tiscione, *A Writing Revolution: Using Legal Writing’s “Hobble” to Solve Legal Education’s Problem*, 42 CAP. U. L. REV. 143, 144-45 (2014).

<sup>127</sup> See, e.g., Berger, *supra* note 14, at 7, 40-43 (describing an upper level elective course, Law & Rhetoric, that teaches “classical and contemporary rhetorical theories[,]” including narrative, “that seem particularly appropriate for interpreting and composing legal arguments.”); Rideout, *supra* note 41, at 55 (noting that a main focus of the discussion on theories of persuasion in his advanced legal writing seminar is the question of why narratives are persuasive in legal analysis); Tracy Turner, *Adapting IRAC to Meet the Challenges of Practice* 26 (July 5, 2013) (unpublished manuscript) (on file with author) (noting, “[w]ith adequate instruction, upper-level students who have already taken a legal writing course can likely absorb the organizational choices as extensions of the IRAC paradigm.”). This is not to say that the importance of facts cannot be taught in the first and second semesters of legal writing—certainly it can. However, learning how to use facts in the argument section of the brief to persuade a judge is a skill that takes more than one year of beginning legal writing to even begin to master.

telling a story.<sup>128</sup> Our students should know that, and know how to write in a way that responds to judges' expectations. In doing so, they will be more effective advocates for their clients.

The question of whether and how to use organizational paradigms to teach legal writing is almost as old as the legal writing profession itself. We serve our students well when we give them the tools they need to do the jobs they will be expected to do as practicing attorneys. An organizational paradigm is one such tool, especially when students are taught when and how to vary the parts of the paradigm. As George Gopen has correctly said, "there is not and cannot be a single structure that is the right answer to the question of how argumentative thought is best conveyed from the mind of a writer to the mind of a reader."<sup>129</sup> Mastery of a more flexible CREAC can be a potent weapon for the attorney writing a brief, so we should be sure it is in each of our student's arsenals.

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<sup>128</sup> E.g., Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS 1, 15 (2010) (recognizing a renewed "emphasis on the importance of narrative and creative storytelling . . . in legal writing scholarship"); Berger, *supra* note 14, at 40-43; Megan E. Boyd & Adam Lamparello, *Legal Writing for the "Real World," A Practical Guide to Success*, J. MARSHALL L. REV. 487, 497 (2013) ("Most cases are won or lost on the facts."); Kenneth D. Chestek, *The Life of the Law Has Not Been Logic: It Has Been Story*, 1 SAVANNAH L. REV. 21, 25, 29 (2014) ("[T]he law, almost unconsciously, incorporates storytelling . . . . [N]arrative reasoning is not only a *necessary* feature of law-making, but also a *desirable* feature."); Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 126 ("[A] rule that requires a close examination of the facts of the case (for example, to determine whether specified factors are present or not, or how those factors should be weighed) may require the advocate to tell a compelling story."); Edwards, *supra* note 42, at 28 ("Lawyers are storytellers."); PHILIP N. MEYER, STORYTELLING FOR LAWYERS 2 (2014) ("Make no mistake about it – lawyers are storytellers . . . . As professional storytellers we can do our jobs better the more consciously we deploy the tools of the storyteller's craft."); Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 J. LEGAL WRITING INST. 229, 229-30 (2006) ("Legal arguments are, perhaps, best understood as disguised and translated stories . . . . [P]erhaps more often than we care to admit, it is narrative that truly does the persuasive work in legal advocacy."); Rappaport, *supra* note 44, at 268 ("[L]awyers must write and tell stories."); Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 DUQ. L. REV. 3, 36 (2013). Judges are not the only legal writing experts to recognize the importance of facts and storytelling in persuasion; legal writing professors and scholars have long encouraged attorneys and law students to see storytelling as an essential part of persuasion. Rideout, *supra* note 41, at 54 ("Lawyers persuade by telling stories."); ROBBINS ET AL., *supra* note 20, at 24 ("We use pathos effectively when we choose strategies that allow our audience to empathize with our client. We do that through story."); Ruth Anne Robbins, *An Introduction to This Volume and to Applied Legal Storytelling*, 14 J. LEGAL WRITING INST. 1, 4 (2008) ("[S]tories or narratives . . . are cognitive instruments and also means of argumentation in and of themselves. Lawyers need to realize the importance of story towards accomplishing the goals of legal communication and legal persuasion."); Robbins-Tiscione, *supra* note 2, at 332-35; Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 239 (2012) ("One of the principal techniques of persuasion comes through understanding the art of storytelling. Storytelling is primal."); Vaughn, *supra* note 27, at 656 ("An advocate should analyze the facts of the case, and weave facts and theme with the law . . . ."); Wetlaufer, *supra* note 11, at 1559 ("The lawyer will tell a story, weave a narrative . . . . It will be his purpose, in generating this narrative, to enhance the intelligibility and the persuasiveness of his argument.").

<sup>129</sup> Gopen, *supra* note 35, at xviii.

## **Appendix**

### **Briefs reviewed for article (\*brief cited in article)**

#### **I. Custody Issue**

- \*Brief for Petitioner, *Thompson v. Keohane*, 516 U.S. 99 (1995) (No. 94-6615).
- Brief for Respondents, *Thompson v. Keohane*, 516 U.S. 99 (1995) (No. 94-6615).
- \*Brief for Petitioner, *Stansbury v. California*, 511 U.S. 318 (1994) (No. 93-5770).
- Brief for Respondent, *Stansbury v. California*, 511 U.S. 318 (1994) (No. 93-5770).
- Brief for Appellant, *U.S. v. Littledale*, 652 F.3d 698 (7th Cir. 2011) (No. 10-3063).
- \*Brief for Appellee, *U.S. v. Littledale*, 652 F.3d 698 (7th Cir. 2011) (No. 10-3063).
- \*Brief for Appellant, *U.S. v. Brooks*, 379 Fed. App'x 465 (6th Cir. 2010) (No. 08-5875/08-5948).
- Brief for Appellee, *U.S. v. Brooks*, 379 Fed. App'x 465 (6th Cir. 2010) (No. 08-5875/08-5948).
- \*Brief for Appellee, *U.S. v. Panak*, 552 F.3d 462 (6th Cir. 2009) (No. 07-4476).
- \*Brief for Appellant, *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009) (No. 07-10453).
- Brief for Appellee, *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009) (No. 07-10453).
- Brief for Appellee, *U.S. v. Willaman*, 437 F.3d 354 (3d Cir. 2006) (No. 05-1336).
- \*Brief for Appellee, *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006) (No. 05-16299-DD).
- \*Brief for Appellant, *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002) (No. CA 01-30166).
- \*Brief for Appellant, *U.S. v. Romaszko*, 253 F.3d 757 (2nd Cir. 2001) (No. 00-1580).
- Brief for Appellee, *U.S. v. Romaszko*, 253 F.3d 757 (2nd Cir. 2001) (No. 00-1580).
- Brief for Appellee, *Smith v. Commonwealth*, 312 S.W.3d 353 (Ky. 2010) (No. 2008-SC-000060-DG).
- Brief for Appellant, *Alkabala-Sanchez v. Commonwealth*, 255 S.W.3d 916 (Ky. 2008) (No. 2006-SC-000196-MR).
- \*Brief for Appellant, *Fugett v. Kentucky*, 250 S.W.3d 604 (Ky. 2008) (No. 2006-SC-000051-MR).
- \*Brief for Appellee, *Fugett v. Kentucky*, 250 S.W.3d 604 (Ky. 2008) (No. 2006-SC-000051-MR).
- Brief for Appellant, *Emerson v. Commonwealth*, 230 S.W.3d 563 (Ky. 2007) (No. 2005-SC-205-MR).

## II. Expectation of Privacy Issue

- \*Brief for Appellee, *United States v. Maestas*, 639 F.3d 1032 (10th Cir. 2011) (No. 10-2226).
- \*Brief for Appellee, *U.S. v. Miravalles*, 280 F.3d 1328 (11th Cir. 2002) (No. 01-13027-AA).
- \*Brief for Appellee, *Minnesota v. Carter*, 525 U.S. 83 (1998) (No. 97-1147).
- \*Brief for Appellant, *Minnesota v. Olson*, 110 S. Ct. 2558 (1989) (No. 88-1916).
- Brief for Appellee, *Minnesota v. Olson*, 110 S. Ct. 2558 (1989) (No. 88-1916).
- Brief for Respondent, *California v. Greenwood*, 486 U.S. 35 (1988) (No.86-684).
- \*Brief for Appellant, *U.S. v. Correa*, 653 F.3d 187 (3d Cir. 2011) (No. 05-16299-DD).
- \*Brief for Appellee, *U.S. v. Correa*, 653 F.3d 187 (3d Cir. 2011) (No. 05-16299-DD).
- Brief for Appellant, *U.S. v. Kimber*, 395 Fed. App'x 237 (6<sup>th</sup> Cir. 2010) (No. 07-4060).
- \*Brief for Appellant, *Mendoza v. United States*, 281 F.3d 712 (8th Cir. 2002) (No. 00-3631MNST).
- Brief for Appellants, *U.S. v. Heath*, 259F.3d 522 (6th Cir. 2001) (Nos. 99-6549; 99-6550).
- Brief for Appellee, *U.S. v. King*, 227 F.3d 732 (6<sup>th</sup> Cir. 2000) (No. 98-4060).
- \*Brief for Appellant, *U.S. v. Acosta*, 965 F.2d 1248 (3d Cir. 1992) (Nos. 91-2071, 91-2072, 91-2073).
- \*Brief for Appellees, *U.S. v. Acosta*, 965 F.2d 1248 (3d Cir. 1992) (Nos. 91-2071, 91-2072, 91-2073).
- \*Brief for Appellee, *Blades v. Commonwealth*, 339 S.W.3d 450 (Ky. 2001) (No. 2010-CS-000187).
- Brief for Appellee, *Nourse v. Commonwealth*, 177 S.W.3d 691 (Ky. 2004) (Nos. 2003-SC-00220, 2003-SC-00021).