UTILIZING FACTS RATHER THAN REASONING LANGUAGE IN THE QUESTION PRESENTED

When drafting the Question Presented portion of your Memorandum using the under-does-when format, be sure to include your case's legally significant facts in the "when" section. A common mistake students make is using rule/reasoning language in place of facts for the "when" section. This is problematic, as this practice removes the question entirely.

In stating the issue for the Memorandum, you are providing the reader with the legal question that will be addressed and answered in the document. You note the relevant area of law for the "under" and the precise legal issue for the "does" (or "is" or "can"), and you provide the client's legally significant facts for the "when." These facts are critical to the question, because you are essentially asking whether a certain legal component is satisfied when X occurs. If X contains rule language, the question becomes circular. It is only proper to describe the facts in this section, and you must resist the urge to jump the gun and provide conclusory rule language when providing these facts.

Below is an example of a correctly written "when" portion and a faulty one that utilizes rule language. The relevant rule is first provided for context. In the "incorrect" Question Presented given below, highlight or underline the rule language you see repeated from the rule given.

Rule: An employee's injury occurs within "the course of employment" under the bunkhouse rule if he is injured in housing provided by the employer as an employment incentive, or if the employee's work necessitates that he live in the dwelling where he is injured.

CORRECT This Question Presented utilizes facts:

Under the California workers' compensation statute, does an employee's off-duty injury occur within "the course of employment" when the employee is injured in employer-owned housing, is on call nearly all the time and was at the time of injury, lives in the housing pursuant to a compensation agreement with the employer, and utilizes a portion of the housing as a home office?

INCORRECT This Question Presented utilizes reasoning language instead of facts:

Under the California workers' compensation statute, does an employee's off-duty injury occur within "the course of employment" when the employee is injured in housing provided by the employer as an employment incentive, and her work necessitates that she live there?

Memorandum: Short Answer
(Question Presented Also Provided for Context)

Ideal Sample

This ideal sample showcases a properly written Short Answer section. After providing a rule, the author applies it using syllogism, and it is easy to understand because the author's application tracks the rule in the same order given.

QUESTION PRESENTED

Under the California Labor Code involving workers' compensation, is off-duty swimming considered a "reasonable expectancy of employment" when it is done voluntarily at a private facility, and the employer does not require fitness testing but merely tells the employee to stay fit?

SHORT ANSWER

Probably not. Participation in an off-duty recreational activity is a reasonable expectancy of employment if the employer expressly or impliedly pressures the employee to engage in the specific activity. *Kidwell v. Workers' Comp. Appeals Bd.*, 33 Cal. App. 4th 1130, 1136 (1995); *City of Stockton v. Workers' Comp. Appeals Bd.*, 135 Cal. App. 4th 1513, 1520 (2006). However, an employer's general expectation that its employees stay physically fit does not suffice. *Stockton*, 135 Cal. App. 4th at 1524. In the present case, Anthony Bennett ("Mr. Bennett") was injured while practicing swimming techniques that he believed helped him remain in top cardiovascular shape. He practiced swimming regularly even though his employer, the Los Angeles Fire Department (LAFD), did not schedule the activity or subject its employees to physical fitness testing. Accordingly, there is no indication that the LAFD expressly or impliedly pressured Mr. Bennett to participate in the specific activity of swimming. Rather, the LAFD's employees are merely told to stay physically fit, which Mr. Bennett did by frequently visiting a

private health club instead of the on-site gym at the fire department. Therefore, a court will likely conclude that the activity was not a reasonable expectancy of employment, and Mr. Bennett will not receive workers' compensation benefits.

Flawed Sample

This flawed sample is identical to the ideal sample in all respects except the application portion of the Short Answer. Unlike in the ideal sample, this sample does not use syllogism. The author fails to tie in key language from the rule, but instead simply provides case facts and a conclusion. Students should recognize the weakness in this sample with the rule language missing from the application.

QUESTION PRESENTED

Under the California Labor Code involving workers' compensation, is off-duty swimming considered a "reasonable expectancy of employment" when it is done voluntarily at a private facility, and the employer does not require fitness testing but merely tells the employee to stay fit?

SHORT ANSWER

Probably not. Participation in an off-duty recreational activity is a reasonable expectancy of employment if the employer expressly or impliedly pressures the employee to engage in the specific activity. *Kidwell v. Workers' Comp. Appeals Bd.*, 33 Cal. App. 4th 1130, 1136 (1995); *City of Stockton v. Workers' Comp. Appeals Bd.*, 135 Cal. App. 4th 1513, 1520 (2006). However, an employer's general expectation that its employees stay physically fit does not suffice. *Stockton*, 135 Cal. App. 4th at 1524. In the present case, Anthony Bennett ("Mr. Bennett") was injured while practicing swimming techniques that he believed helped him remain in top cardiovascular shape. He practiced swimming regularly even though his employer, the Los Angeles Fire Department (LAFD), did not schedule the activity or subject its employees to

physical fitness testing. Rather, the LAFD's employees are merely told to exercise and stay in shape, which Mr. Bennett did by frequently visiting a private health club instead of the on-site gym at the fire department. Therefore, a court will likely conclude that the activity was not a reasonable expectancy of employment, and Mr. Bennett will not receive workers' compensation benefits.

Memorandum: Case Explanation – Consistent Names

Flawed Sample

This flawed sample contains an excerpt from a Memorandum case discussion, and it provides only a thesis sentence and the facts of a precedent case. It is meant to showcase the importance of referring to the parties in a consistent manner to avoid reader confusion. Students often want to vary the phrasing for stylistic reasons, but this can cause confusion to the reader about the identity of the individual.

For example, water tubing is a sport because it involves physical skill and challenges that pose a significant risk of injury to participants. *Record v. Reason*, 73 Cal. App. 4th 472 (1999). In the *Record* case, Michael Record ("Mr. Record") was injured when he fell off an inner tube as it was towed behind a boat that the defendant was driving. The plaintiff then brought an action against the driver of the boat, Brian Reason ("Mr. Reason"). *Id.* at 475. The inner tube was pulled around a lake at high speeds and accompanied by rapid turns that were "whipping" Mr. Record across the water. *Id.* While on the inner tube, the plaintiff experienced centrifugal force from the turns that required him to hold on tightly to the inner-tube with a "white-knuckled grip." *Id.* at 482. It was this force that caused Mr. Record to fly off the tube and suffer extensive injuries. He later sued the defendant, alleging negligence, and Mr. Reason asserted an assumption of the risk defense. *Id.* at 475-76.

Memorandum: Case Explanation in the Discussion Section

Ideal Sample

This ideal sample includes a thorough and well-written case explanation. It properly begins with a thesis sentence and then includes case facts, the legal issue holding, and the court's reasoning. The reasoning is thorough, containing both explanatory and application reasoning.

An off-duty recreational activity is not a "reasonable expectancy of employment" when the employer merely expects its employees to remain physically fit without any requirement that they engage in specific physical training activities. *City of Stockton v. Workers' Comp. Appeals Bd.*, 135 Cal. App. 4th 1513, 1520 (2006). In the *Stockton* case, Sean Jenneiahn ("Mr. Jenneiahn"), a police officer for the City of Stockton, was injured while playing an off-duty, pickup basketball game. *Id.* at 1517. The police department required that its officers remain physically fit; however, the department did not require employees to undergo any physical fitness tests after being hired, and employees were never told how to train to remain fit. *Id.* Mr. Jenneiahn also did not know of any officer who was ever disciplined for a lack of physical fitness. *Id.* To remain in shape for the job, Mr. Jenneiahn engaged in various physical activities outside of work, including running and jogging, and occasionally including playing basketball and softball. *Id.* Although the police department had an on-site workout facility, Mr. Jenneiahn was playing at a private facility when he sustained his injury. *Id.* at 1517. Further, the police department did not schedule the basketball game or otherwise know it was taking place. *Id.*

Mr. Jenneiahn sought and was denied workers' compensation benefits, but the Workers' Compensation Appeals Board ruled that Mr. Jenneiahn was entitled to benefits because his participation in "cardiovascular activities," which included basketball, were required by his employer. *Id.* at 1527. The police department appealed that decision, and the appellate court reversed, concluding that the Board erred in its findings. *Id.* at 1516. The appellate court held

that playing in the off-duty, pickup game of basketball was not a reasonable expectancy of Mr. Jenneiah's employment, and he was not legally entitled to benefits. *Id.*

In making its determination, the court examined the relevant workers' compensation statute under the California Labor Code, noting that injuries arising "'out of voluntary participation in any off-duty recreational, social, or athletic activity"' are not compensable unless "'these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment.'" *Id.* at 1520 (quoting Cal. Labor Code § 3600 (West 2012)). To determine if the activity was a "reasonable expectancy of employment," the court considered whether the employee's belief that the specific activity at issue was expected by his employer was "objectively reasonable." *Id.* at 1524. The court explained that "general assertions that it would benefit the employer for, or even that the employer expects, an employee to stay in good physical condition" are not enough to satisfy a compensation claim in situations involving a voluntary activity. *Id.* It further noted that the decisions granting workers' compensation benefits pursuant to the relevant statute "have generally found the employer expected the employee to participate in the specific activity in which the employee was engaged at the time of injury." *Id.*

In holding that participation in the basketball game was not a reasonable expectancy of Mr. Jenneiahn's employment, the court noted that even though training officers suggested that Mr. Jenneiahn stay in shape, he knew that he would not have to take a fitness test to prove his fitness level. *Id.* at 1525. The court also pointed out that basketball was not included in his training regimen and that he only played on occasion. *Id.* at 1526. Furthermore, the court reasoned that Mr. Jenneiahn was injured while playing a game that had nothing to do with his employer; the activity took place at a private facility, and the employer did not schedule it, nor did the employer sponsor it. *Id.* From the above reasoning, the court concluded that Mr.

Jenneiahn's belief that playing basketball was necessary to remain physically fit was not "objectively reasonable" and, therefore, the activity did not satisfy the required "reasonable expectancy of employer" standard. *Id.*

Flawed Sample

This flawed sample is identical to the ideal sample given above, but it does not contain explanatory reasoning. After providing the case facts and the legal issue holding, the author skips over any discussion of the required standard for the "reasonable expectancy of employment" requirement, jumping right into a note of why the court held the way it did under the plaintiff's facts. If a case opinion provides explanatory reasoning (most do, but some do not), students should include this to assist the reader in understanding the law the court used to support its legal issue conclusion in the case. In other words, it's not enough to show which case facts supported the decision – the author should also discuss the basis for the conclusion by providing the rule language the court relied on in making its determination.

An off-duty recreational activity is not a "reasonable expectancy of employment" when the employer merely expects its employees to remain physically fit without any requirement that they engage in specific physical training activities. *City of Stockton v. Workers' Comp. Appeals Bd.*, 135 Cal. App. 4th 1513, 1520 (2006). In the *Stockton* case, Sean Jenneiahn ("Mr. Jenneiahn"), a police officer for the City of Stockton, was injured while playing an off-duty, pickup basketball game. *Id.* at 1517. The police department required that its officers remain physically fit; however, the department did not require employees to undergo any physical fitness tests after being hired, and employees were never told how to train to remain fit. *Id.* Mr. Jenneiahn also did not know of any officer who was ever disciplined for a lack of physical fitness. *Id.* To remain in shape for the job, Mr. Jenneiahn engaged in various physical activities outside of work, including running and jogging, and occasionally including playing basketball and softball. *Id.* Although the police department had an on-site workout facility, Mr. Jenneiahn was playing at a private facility when he sustained his injury. *Id.* at 1517. Further, the police department did not schedule the basketball game or otherwise know it was taking place. *Id.*

Mr. Jenneiahn sought and was denied workers' compensation benefits, but the Workers' Compensation Appeals Board ruled that Mr. Jenneiahn was entitled to benefits because his participation in "cardiovascular activities," which included basketball, were required by his employer. *Id.* at 1527. The police department appealed that decision, and the appellate court reversed, concluding that the Board erred in its findings. *Id.* at 1516. The appellate court held that playing in the off-duty, pickup game of basketball was not a reasonable expectancy of Mr. Jenneiah's employment, and he was not legally entitled to benefits. *Id.*

In holding that participation in the basketball game was not a reasonable expectancy of Mr. Jenneiahn's employment, the court noted that even though training officers suggested that Mr. Jenneiahn stay in shape, he knew that he would not have to take a fitness test to prove his fitness level. *Id.* at 1525. The court also pointed out that basketball was not included in his training regimen and that he only played on occasion. *Id.* at 1526. Furthermore, the court reasoned that Mr. Jenneiahn was injured while playing a game that had nothing to do with his employer; the activity took place at a private facility, and the employer did not schedule it, nor did the employer sponsor it. *Id.* From the above reasoning, the court concluded that Mr. Jenneiahn's belief that playing basketball was necessary to remain physically fit was not "objectively reasonable" and, therefore, the activity did not satisfy the required "reasonable expectancy of employer" standard. *Id.*

Avoiding Repetition in Factual Case Comparisons

When comparing facts within an application section, you may have the same fact for more than one case. In that situation, there is no need to repeat that fact. Instead, group the facts together as displayed below.

Give the factual comparison like this:

In both *Holley* and *Ferguson*, the defendants were located in the back cargo area of their vehicles. 185 P.3d at 232; 928 P.3d at 821. However, Mr. Davis was slouched across the driver's seat of his vehicle with his feet by the pedals and his body partly in the passenger seat.

Do not give the factual comparison like this, as it would be repetitive:

In the *Holley* case, the defendant was located in the back cargo area of his vehicle, 185 P.3d at 232, and in the *Ferguson* case, the defendant was located in the back cargo area of his vehicle. 928 P.3d at 821. However, Mr. Davis was slouched across the driver's seat of his vehicle with his feet by the pedals and his body partly in the passenger seat.

Syllogism

As discussed in the *Legal Analysis*[1] book, rule-based (deductive) reasoning relies on syllogism as a basic tool to deduce a conclusion when applying a rule to set of facts. Syllogism **requires** that the author **repeat** rule language in the application to arrive at the conclusion. This repetition is critical because it creates a relationship between the rule and the facts in the application, and it showcases this relationship to the reader.

For example, consider the following deductive argument:

Major Premise (Rule): For purposes of civil battery, a contact is "harmful" if it results in physical impairment or pain to the plaintiff.

Minor Premise (Application): The defendant kicked the plaintiff in the leg, which caused discomfort.

Conclusion: The plaintiff suffered a harmful contact.

Now consider this modified version:

Major Premise (Rule): For purposes of civil battery, a contact is "harmful" if it results in physical impairment or pain to the plaintiff.

Minor Premise (Application): The defendant kicked the plaintiff in the leg, which caused the plaintiff to experience physical pain.

Conclusion: The plaintiff suffered a harmful contact.

You can see how the modified version is stronger. In repeating the standard rule language from the major premise in the application, the author showcases how the rule relates to the client facts in the application, making the transition to the conclusion seamless. In the original argument, without that connection with repetition, the reader must infer a connection, which weakens the analysis.

[1] David S. Romantz & Kathleen Elliott Vinson, *Legal Analysis* 55-58 (3d ed. 2020).

Trial Brief: Introduction

Ideal Sample

This ideal sample contains the Introduction section of a sample involving the crime of robbery. It is well-written and thorough, and it is understandable on the first read. The author properly explains law before applying it, using syllogism in the applications.

INTRODUCTION

The Commonwealth of Virginia ("Commonwealth") seeks the Defendant, Christopher Davis's, conviction for violating the common law crime of robbery. In December of 2017, the Defendant snatched the victim, Sandra Snider's ("Ms. Snider" or the "Victim"), purse while she and her young son were shopping in an Alexandria grocery store. As this brief will prove, this criminal act was not a simple purse-snatching. Ms. Snider's purse was violently pulled from her body following a struggle. Accordingly, Defendant committed a robbery and not simply a larceny.

In Virginia, an individual commits robbery when he takes the personal property of another by violence or intimidation. *Chappelle v. Commonwealth*, 504 S.E.2d 378, 379 (Va. Ct. App. 1998). Virginia courts have held that the personal property of value element is satisfied if the defendant takes property belonging to another, and the actual value of the property is irrelevant to the inquiry. *Brown v. Commonwealth*, 482 S.E.2d 75, 77 (Va. Ct. App. 1997). Thus, when Defendant snatched Ms. Snider's purse, which was later found to be relatively empty, he took personal property of value because the purse belonged to another.

Further, violence is the primary feature which distinguishes robbery from larceny, and an act which would otherwise constitute larceny may develop into a robbery if the element of violence is introduced. *Ali v. Commonwealth*, 701 S.E.2d 64, 66 (Va. 2010). The degree of

violence separating the two (2) offenses need only be slight. *Id.* Indeed, it is sufficiently proven if a thief accomplishes the taking by directing *any* amount of force at the victim's person. *Id.*

Consequently, when Defendant approached Ms. Snider and grabbed her purse, he initially committed the crime of larceny because his force was only directed at Ms. Snider's property. However, Ms. Snider physically attempted to retain possession of her purse by holding onto it. At this point, Defendant accomplished his taking by directing force at Ms. Snider's person as he tugged the purse from her grasp, and thus he took her property "by violence."

As a result, this Court should find Defendant guilty of robbery.

Flawed Sample

This sample covers the same issues as the ideal sample, but it is substantively confusing and incomplete. You will notice that the author fails to provide rules before she applies them, and she provides conclusions based on facts without first giving the necessary facts for proper context. With these errors, it is difficult to understand and much less persuasive than the ideal sample given above.

INTRODUCTION

The Commonwealth of Virginia has filed a robbery charge against the Defendant, Christopher Davis, based upon an arrest made at Grocery Mart. The Commonwealth seeks a conviction under these charges. A defendant is guilty of the crime of robbery if he wrongfully takes the personal property of the victim's away from her by use of force or threat. While the personal property, the purse, was empty and the force was only slight, the elements under common law have been met.

Due to the violent nature of the Defendant's actions in taking the purse, the Defendant committed the crime of robbery, which consists of the following elements: (1) wrongful, (2) taking, (3) carrying away, (4) personal property (of value), (5) by use of force or threat. *Jones v.*

Commonwealth, 496 S.E.2d 668, 669 (Va. Ct. App. 1998). Although the purse had nothing of significant monetary value within, it was still personal property of Ms. Snider that did not belong to the Defendant. Thus, the purse meets the personal property (of value) element requirement. Additionally, when Defendant took Ms. Snider's purse, she turned toward him and took notice. She resisted his attempt to take it, holding onto her purse until he finally overpowered her and yanked it from her. Through the Defendant's actions, confronting Ms. Snider and struggling with the purse, he intimidated her as showed by her call for help rather than taking action further. This satisfies the violence/force element.

Trial Brief: Explanation and Application Sections for One Legal Issue within the Discussion

Ideal Sample

This ideal sample contains the explanation and explanation portion for one legal issue within a robbery trial brief. It considers whether property taken satisfies the "personal property of value" element of robbery. It is well organized and thorough. The explanation section properly explains the law from general to specific, providing a specific case example. The application utilizes the relevant case facts and properly ties in reasoning language from the explanation section in a fluid, easy to read manner.

a. Ms. Snider's purse was personal property of value because it belonged to Ms. Snider, and the actual value of the taken property is not an element of robbery.

Ms. Snider's purse was personal property of value within the meaning of the crime because it belonged Ms. Snider rather than Defendant. In Virginia, one takes personal property of value if he removes an item from the custody of another whose right of possession is superior to that of the thief. *Beard v. Commonwealth*, 451 S.E.2d 698, 700 (Va. Ct. App. 1994). This element, therefore, focuses simply on whether the item belonged to the defendant or whether it belonged to another. *Id.* If it belonged to another, the element is satisfied. *Id.*

Further, binding case law demonstrates that the taking of property that may appear "valueless" satisfies this element because the actual value of the property is not an element of the offense. *Brown v. Commonwealth*, 482 S.E.2d 75, 77 (Va. Ct. App. 1997). In *Brown*, the defendant approached the victim with a gun in hand and asked for his wallet. *Id.* at 76-77. Although the victim told the defendant that the wallet contained no money, the defendant continued his demand. *Id.* at 77. The victim complied, and the defendant immediately realized that the wallet contained no money or anything of significance. He then threw it to the ground and fled the scene. *Id.* He was later apprehended and convicted of robbery.

On appeal, the Virginia Court of Appeals affirmed the conviction, specifically finding that the element of "personal property of value" was satisfied even though the stolen wallet contained no money. *Id.* at 76. The court spent little time on the wallet's value, merely restating the well-established rule that "[p]ersonal property is anything of value, but the value of the stolen object is not an element of the offense" before moving onto more substantive legal issues. *Id.* at 77. It is clear from the court's opinion that the value of property taken is not the relevant inquiry. Instead, to satisfy this element, the Commonwealth need only show that the item taken was property belonging to someone other than the defendant. *See id.*

Under the rules established in *Brown*, the "personal property of value" element is easily met in this case. When Defendant fled the Grocery Mart on December 13, 2017, he was not carrying a purse belonging to him. The purse clearly belonged to Ms. Snider, and thus he took personal property belonging to someone "other than the defendant," establishing element (3) of the crime. *See id.* Although Ms. Snider's purse contained nothing of significant monetary value, that is irrelevant under *Brown*'s holding. *Id.* at 76. The *Brown* court easily found the personal property of value element satisfied with the taking of an empty wallet. *Id.* Thus, Ms. Snider's nearly empty purse satisfies the element in the same way. Accordingly, this Court should find that Defendant took personal property of value without even considering the purse's actual worth, just as the court in *Brown* did not require proof of the wallet's value.

<u>*Flawed Sample*</u>

This flawed sample covers the same legal issue discussed within the ideal sample, but it is incomplete and confusing. In the explanation section, the author went right into a case discussion without first providing any introductory law or even a thesis sentence for the case. Further, the case discussion is incomplete. It contains very few facts and scant reasoning language. Its lack of detail leaves the reader confused.

The application section includes factual comparisons between the instant case and the precedent case based on facts not given in the explanation above. It adds details to the precedent case while engaging in an application, requiring the reader to stop to understand the precedent case better, which then distracts the reader from the application taking place.

a. The element of personal property (of value) is satisfied because the stolen purse belonged to Ms. Snider and not the Defendant.

The element of personal property (of value) is satisfied because the stolen purse belonged to Ms. Snider and not the Defendant. In *Brown*, the court held that the contents within the stolen property are irrelevant. *Brown v. Commonwealth*, 24 Va. App. 292, 295, 482 S.E.2d 75, 77 (1997). Rather, the court held that because the wallet itself did not belong to the defendant, it satisfied the element of personal property. *Id*.

In the present case, the Defendant stole the personal property of the victim, a purse, only to find it was empty. This situation is similar to the facts of *Brown* where the defendant had taken the victim's wallet, only to discover that there was no money inside. *Id*. Because of this the defendant, like in the present case, dismissed the value of it due to its empty contents. In *Brown*, the court ruled that the property that mattered was the actual wallet, because it belonged to the victim, regardless of its monetary value. *Id*.

Therefore, the Court should rule based upon the clear precedent set out in *Brown*, that the value of the actual items within the purse are immaterial because the purse itself did not belong to the Defendant and so the purse itself satisfies the element of personal property.

Trial Brief: Application Section Within the Discussion

Ideal Sample

This ideal sample contains an explanation and application section of a trial brief for one legal issue. The author represents the defendant in the lawsuit, and her brief argues that the plaintiff is a limited purpose public figure for the purpose of a defamation action. This excerpt focuses on one prong (whether the controversy at issue is "public") of the public figure test. The application properly ties in reasoning language from the precedent case; such reasoning language is underlined to pinpoint its use.

EXPLANATION:

A controversy is considered "public" if there is more than a general concern or interest in it and people are actively discussing some particular question relating to it. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998). Specifically, in determining if the first *Trotter* prong is satisfied, Texas courts consider whether the media was covering the controversy in order for the public to formulate some judgment on the issue and whether others may be impacted by the newsworthy controversy. *Id*. In *WFAA-TV*, the plaintiff sued WFAA-TV, alleging that its news reports regarding his role as a reporter during a failed raid by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") damaged his reputation. *Id*. at 569. During the raid, the ATF descended upon a compound but was met with gunfire. The plaintiff was the only reporter at the scene of the raid, and WFFA-TV began broadcasting reports that the ATF blamed the local media present at the scene for the failure. *Id*. The Court held that because "numerous commentators, analysts, journalists, and public officials were discussing the raid" and "the press was actively covering the debate over why the ATF raid failed," the controversy surrounding the raid was public. Further, the Court noted that people other than the raid participants were likely to feel the impact of its failure. Because of these reasons, the first part of the *Trotter* test requiring a "public" controversy was satisfied. *Id*. at 572.

APPLICATION:

The facts of the present case clearly meet the first *Trotter* prong. The controversy surrounding Plaintiff's IVF practices and procedures was publicly discussed on numerous occasions. Not only were Plaintiff's patients speaking with others about his procedures, but the medical board also debated the ethics of Plaintiff's practice. In addition, Plaintiff spoke about his practices publicly at his many seminars, and the news media showed interest in the subsequent controversy after a News 6 representative attended a seminar and later wrote about Plaintiff's apparent inability to properly diagnose his patients' IVF failures. Thus, the publicity surrounding the controversy in the present case is analogous to that in *WFAA-TV*, as numerous patients, medical professionals, and the media were all discussing the controversy surrounding Plaintiff's IVF procedures, and the press, namely News 6 and *The Dallas Tribune*, was actively covering the legitimacy of Plaintiff's IVF procedures. Further, Plaintiff's former and current patients will undoubtedly be impacted by a resolution of whether Plaintiff's IVF procedures were legitimate and whether the Texas Medical Board suspends his medical license. Therefore, this Court should find that the controversy was public and hold that the first *Trotter* prong is satisfied.

Flawed Sample

This flawed sample includes the same substantive material as the ideal sample above, but the application portion is faulty, in that it contains a persuasive conclusion and relevant client facts, but it does not tie in reasoning language from the case explanation section.

EXPLANATION:

A controversy is considered "public" if there is more than a general concern or interest in it and people are actively discussing some particular question relating to it. *WFAA-TV, Inc. v.*

McLemore, 978 S.W.2d 568, 572 (Tex. 1998). Specifically, in determining if the first *Trotter* prong is satisfied, Texas courts consider whether the media was covering the controversy in order for the public to formulate some judgment on the issue and whether others may be impacted by the newsworthy controversy. *Id*. In *WFAA-TV*, the plaintiff sued WFAA-TV, alleging that its news reports regarding his role as a reporter during a failed raid by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") damaged his reputation. *Id*. at 569. During the raid, the ATF descended upon a compound but was met with gunfire. The plaintiff was the only reporter at the scene of the raid, and WFFA-TV began broadcasting reports that the ATF blamed the local media present at the scene for the failure. *Id*. The Court held that because "numerous commentators, analysts, journalists, and public officials were discussing the raid" and "the press was actively covering the debate over why the ATF raid failed," the controversy surrounding the raid was public. Further, the Court noted that people other than the raid participants were likely to feel the impact of its failure. Because of these reasons, the first part of the *Trotter* test requiring a "public" controversy was satisfied. *Id.* at 572.

APPLICATION:

The facts of the present case clearly meet the first *Trotter* prong. Plaintiff's patients were speaking with others about his procedures, and the medical board also debated the ethics of Plaintiff's practice. In addition, Plaintiff spoke about his IVF practices at his many seminars, and a News 6 representative attended a seminar and later wrote about Plaintiff's apparent inability to properly diagnose his patients' IVF failures. Further, if the Texas Medical Board suspends Plaintiff's medical license, he can no longer serve patients in the local area. Therefore, this Court should find that the controversy was public and hold that the first *Trotter* prong is satisfied.

POINT HEADINGS EXAMPLES – GOOD AND FLAWED

GOOD – Trial Brief Sample

I. DEFENDANT SHOULD BE CONVICTED OF ROBBERY BECAUSE THE TESTIMONY ESTABLISHES THE CONTESTED ELEMENTS OF THE CRIME.

a. Ms. Snider's purse was personal property of value because it belonged to Ms. Snider and the actual value of the taken property is not an element of the crime.

b. The "by violence" element of robbery is satisfied in the case at bar because Defendant directed force at Ms. Snider's person to overcome her resistance to the taking of her purse.

FLAWED – Trial Brief Sample

I. THE TESTIMONY IN THIS CASE ESTABLISHES THE CONTESTED ELEMENTS OF THE CRIME.

a. Ms. Snider's purse was personal property of value even though it was practically empty.

b. When Ms. Snider held onto her purse, Defendant's physical force overcame her resistance to the taking.

Commented [NG1]: This heading is missing the result sought.

Commented [NG2]: This heading is missing the rule language that supports the conclusion.

Commented [NG3]: This heading is missing the legal issue conclusion for this section of the brief.

GOOD – Limited Purpose Public Figure Sample

I. PLAINTIFF IS A LIMITED-PURPOSE PUBLIC FIGURE BECAUSE ALL THREE (3) PRONGS OF THE LIMITED-PURPOSE PUBLIC FIGURE TEST DEVELOPED BY THE FIFTH CIRCUIT ARE SATISFIED IN THIS CASE.

a. The first *Trotter* prong is satisfied because the controversy surrounding Plaintiff's IVF procedures is public, both in the sense that patients, doctors, and the media were discussing it, and Plaintiff's former and current patients are likely to feel the impact of its resolution.

b. The second *Trotter* prong is satisfied because Plaintiff had more than a trivial or tangential role in the controversy by holding public fertility seminars and speaking to the media about his medical practice.

c. The third *Trotter* prong is satisfied because the alleged defamation is germane to Plaintiff's participation in the controversy over whether Plaintiff performs adequate testing for his patients following failed IVF procedures.

II. DR. KELLER DID NOT ACT WITH ACTUAL MALICE BECAUSE HE REASONABLY BELIEVED HIS STATEMENTS REGARDING PLAINTIFF WERE TRUE, AND HE HAD A PLAUSIBLE BASIS FOR THIS BELIEF.

FLAWED – Limited Purpose Public Figure Sample

I. PLAINTIFF IS A LIMITED-PURPOSE PUBLIC FIGURE, AND I'M ABOUT TO SHOW YOU WHY.

a. The first *Trotter* prong is satisfied because the issue was public.

b. Plaintiff was heavily involved in the controversy at issue.

c. The third *Trotter* prong is satisfied because Dr. Keller's words involve Dr. Hunt's medical practice.

II. PLAINTIFF DID NOT ACT WITH ACTUAL MALICE BECAUSE HE DID NOT INTEND TO HARM DR. HUNT.

Commented [NG4]: This point heading is much too informal. The author should actually tell the reader why instead of stating that she will tell the reader why.

Commented [NG5]: This heading is missing the key facts that support the conclusion.

Commented [NG6]: This heading is missing the legal issue conclusion.

Commented [NG7]: This heading is missing the rule language that supports the conclusion.

Commented [NG8]: This heading is missing the rule language that supports the conclusion.

Trial Brief: Grammar, Punctuation, and Citation Issues

Flawed Sample

This flawed sample is similar to the other Trial Brief Introduction sample, but this one focuses on flaws with grammar, style, and citation rather than on substantive flaws. It is important avoid mixing substantive and mechanical flaws within a flawed sample to avoid cognitive overload when reading the sample.

INTRODUCTION

The Commonwealth of Virginia, has filed a robbery charge against the Defendant, Christopher Davis, based upon an arrest made at Grocery Mart. The Commonwealth is seeking conviction under these charges. A Defendant is guilty of the crime of robbery if they wrongfully took the personal property of the victim, Sandra Snider (Ms. Snider), away from her by use of force or threat. While the personal property, the purse, was empty and the force was only slight, the elements under common law have been met.

Due to the violent nature of the actions by the Defendant in order to take the purse, the Defendant committed the crime of robbery which consists of the following elements: (1) wrongful, (2) taking, (3) carrying away, (4) of personal property (of value), (5) by violence. Only elements (4) and (5) are at issue in this case and the evidence will prove that both are satisfied.

Element (4), which requires that the stolen property be "personal property (of value), is satisfied if that property belongs to someone other than the defendant, and Virginia courts have held that the actual value of the item is not relevant. *Brown v. Comm.*, 482 S.E.2d 75, 77 (Va. Ct. App. 1997). Although Sandra's purse had nothing of significant monetary value within, it was still personal property of Ms. Snider's that did not belong to the defendant. Thus, the purse meets the personal property (of value) element requirement.

Commented [NG1]: Unnecessary comma following "Virginia"

Commented [NG2]: Wordy – would be better to say "The Commonwealth seeks . . ."

Commented [NG3]: "Defendant" should not be capitalized

Commented [NG4]: Noun/pronoun agreement issue

Commented [NG5]: Use present tense for rule language

Commented [NG6]: Improperly joining general rule language with specific case facts

Commented [NG7]: "Ms. Snider" should be in quotes

Commented [NG8]: Prior context is needed for this sentence. The author has not yet told the reader about a purse-snatching or about the contents within the purse.

Commented [NG9]: Passive voice

Commented [NG10]: Missing comma before "which"

Commented [NG11]: Missing citation

Commented [NG12]: There should be a comma before the "and" conjunction.

Commented [NG13]: Missing the end quotation

Commented [NG14]: "Irrelevant" would be more concise

Commented [NG15]: "Commonwealth" should not be abbreviated.

Commented [NG16]: The author told the reader earlier that the victim would be called "Ms. Snider."

Commented [NG17]: "Defendant" should be capitalized.

Further, element (5) requires that the property is taken "by violence," and this element is satisfied if the defendant directs any force towards the victim to take her property. *Ali v. Commonwealth*, 701 S.E.2d 64, 66 (Va. 2010). In this case when the Defendant took the Ms. Snider's purse she turn toward him and took notice. She resisted his attempt to take it, holding onto her purse until he finally overpowered her and yanked it from her. Through the Defendants actions, confronting Ms. Snider and struggling with the purse, he used force to take her property, satisfying element (5).

Because each element of robbery is satisfied in this case, the Commonwealth asks the Court to find that the Defendant is guilty of robbery.

Commented [NG18]: Should be a comma after "case"

Commented [NG19]: Proof-reading mistake – remove "the"

Commented [NG20]: Should be a comma after "purse"

Commented [NG21]: Turn should be "turned"

Commented [NG22]: Missing apostrophe