wants to know the issues that your case presents, the rules that govern those issues, and how those rules should apply to your case. Of course, you will probably use cases to illustrate or explain the rules that you identify, but the *rules*, rather than the cases, should be the focus of your analysis.

When trying to identify the rules that you want to use to structure your argument, it may help you to think of possible categories of arguments. Since legal arguments are typically based on authority, you may try to develop your arguments based on the categories of authority, as noted in Chapter Three: case law, constitutions and statutes, regulations, or extra-legal authority. Since these different types of authority may interact within one argument, however, you may wish to think of categories from a different perspective. Wilson Huhn has identified five different types of arguments: text, precedent, intent, policy, and tradition.[1]

If the rules that govern your case are well established, and you must argue how those rules apply, you can structure your argument around those established rules.[2] If your case is not governed by well-established rules, or if you are struggling to discover or articulate[3] the relevant rules, you can use both research and brainstorming techniques to help you discover your structure. Furthermore, remember that some of your rules may be policy-based rules, and that those policy-based rules can help you to structure your argument. Once you have identified the issues, rules, and policies that are relevant to your argument, you can create a working outline.

4.1.1 USING EXISTING RULES AND THE "PHRASE-THAT-PAYS" TO STRUCTURE YOUR ARGUMENT

If your argument is based in whole or in part on well-established statutory or common law rules, you can structure your argument by looking for each rule's "key terms,"[4] or, as I call them, the "phrases-that-pay." I use this term to label the word or phrase that is the focus of controversy about whether or how a rule applies. You can use phrases-that-pay as an effective organizing principle: By focusing on one "phrase-that-pays" within each subsection of the document, you ensure that you are focusing on one issue or sub-issue at a time, and you make it easier for the court to

[1] Wilson Huhn, *The Five Types of Legal Argument* 13 (2d ed., Carolina Academic Press 2008). Huhn's text analyzes how to identify these arguments, how to create arguments, and how to attack arguments.

[2] *See, e.g.*, Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* chs. 2-6 (5th ed., Wolters Kluwer 2010); Richard K. Neumann, Jr. & Kristen Konrad Tiscione, *Legal Reasoning and Legal Writing* ch. 2 (7th ed., Wolters Kluwer 2013).

[3] See Chapter Five for guidance on using inductive reasoning to find rules.

[4] *See, e.g.*, Laurel Currie Oates & Anne M. Enquist, *The Legal Writing Handbook* §§22.3.2 (5th ed., Wolters Kluwer 2010).

understand your argument. Thus, if one or more of your legal issues is governed by well-established rules, you can begin to structure your argument by reviewing those rules and identifying the phrases-that-pay that are in controversy in your case.

You can often identify phrases-that-pay by turning your rule into an if-then statement.[5] An "if-then" rule says, in essence, "if a certain condition exists, then a certain legal status results." The phrase-that-pays is almost always the "condition" that you are trying to prove the existence (or nonexistence) of. Thus, look for the phrases-that-pay in the "if" clause; that clause usually contains the narrow point that the writer is trying to explain or prove. For example, the petitioner in *Minnesota v. Carter* might write a rule within its brief as follows:

> **While a person's home is, for most purposes, a place where he expects privacy, activities that are exposed "to the 'plain view' of outsiders are not protected" under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).**

The same rule stated as an if-then statement would read:

> **IF a person exposes activities to the plain view of outsiders, THEN those activities are not protected against observation by the Fourth Amendment's search and seizure limitations.**

This writer is arguing, at least in part, that the defendant's activities occurred within the plain view of police officers. Thus, "in plain view" is the phrase-that-pays.

Sometimes, one rule will have more than one phrase-that-pays in controversy. To determine if this is true for a particular rule, consider both how courts have interpreted the rule and how the rule relates to a particular set of facts. For instance, in the previous example, the respondents might argue that they did not "expose" their activities to "outsiders," even if the activities were technically within plain view. Some courts might conduct a separate analysis of what exactly it means to "expose" activities; they might also address who is considered an "outsider" for purposes of the plain-view doctrine. If the courts have conducted these separate analyses, it would be easy to divide the argument on this rule into three parts: (1) whether the activities were "exposed," (2) whether the activities were in "plain view," and (3) whether the activities were exposed to "outsiders." On the other hand, if the courts have not addressed these issues separately, but have presumed that all activities in plain view are exposed to

[5] Note that you should not necessarily articulate your rule as an if-then statement in the argument itself; this technique is merely a method for identifying the phrases-that-pay.

outsiders, it might not be worthwhile to address these issues separately.[6] The courts' analysis is usually a good starting point.

Whether your rule comes from a statute or the common law, you may find that you can discover the true phrases-that-pay only after further research. Sometimes a term in controversy has one or more layers of judicial gloss, so that the actual phrase-that-pays is one or two layers away from the phrase-that-pays in the rule itself. For example, 28 U.S.C. §1332 gives federal district courts "diversity jurisdiction" over certain lawsuits between "citizens of different states." If you did not conduct further research, you might presume that you had to focus your analysis on the meaning of the term *citizen* as it applies to your client and his or her opponent. If you did conduct further research, however, you would discover that the courts define *citizenship*—for purposes of §1332—as "domicile." Furthermore, the courts explain that establishing a domicile requires that "a person must be physically present in the state and must have either the intention to make his home there indefinitely or the absence of an intention to make his home elsewhere."[7] Upon looking at the cases addressing this rule, you see that courts analyze "physical presence," "intent" to make a home in a state, or both, when determining whether the standard is met.

An often-reliable test for the true phrase-that-pays is to identify the term that courts connect—or "apply"—to the facts of the case. In a diversity case, for example, the court might connect the concept of "citizenship" to "domicile," and "domicile" to "intent." If the court connects case facts to the terms "physical presence" and "intent" ("Mr. Guillen[8] was physically present in Illinois through much of the relevant time period, and stated at a press conference his intent to remain"), you can be pretty confident that for the rule determining diversity of citizenship, the phrases-that-pay are "physical presence" and "intent to make a home there indefinitely or the absence of an intent to make a home elsewhere."

When deciding what points to argue in your brief, however, you must do more than identify the phrases-that-pay that exist within a rule; you must decide which phrases-that-pay are at issue. For example, you may have a diversity situation where a party to a case is obviously "physically present," but where there is some controversy as to whether he or she has the requisite "intent" to make a home in the state. In that situation, you would acknowledge that there is no controversy as to physical presence and focus your argument on establishing intent. Chapter Five discusses how best to include uncontroversial issues within the argument.

Thus, you must look both to your case facts and to the courts' analyses to identify the phrases-that-pay that are relevant to your argument: (1) determine what words or phrases the courts focus on when they apply law to facts in their analysis of the relevant issue(s); (2) determine how those words or phrases relate to the rule or statute at issue (are the words part of the rule, part of the courts' definition of terms in the rule, or part of the courts' explanation of how the rule applies?); finally, (3) determine which phrases-that-pay are at issue in your client's case.

When writing, you must be sure to clarify how the phrases-that-pay relate to each other and to the relevant statutes or common law rules. Once you have analyzed all of the applicable rules, identified their phrases-that-pay, and determined which phrases-that-pay are in controversy in your case, you can begin to draft a working outline of your argument.

[6] Of course, you may decide that courts should be analyzing issues that they have not analyzed in the past. See Section 5.1.2(c), "Using Inductive Reasoning to Find and Articulate Legal Rules."

[7] *E.g.*, *Deasy v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 47 Fed. Appx. 726, 728 (6th Cir. 2002) (court-designated unpublished decision).

[8] The occasional use of names associated with the Chicago White Sox—the 2005 Major League Baseball World Champions—is purely honorific. The cases and fact scenarios are fictional, and the author does not mean to imply that these baseball stars are or should be involved in any sort of litigation.

4.1.2 Using Your Research to Help You Structure Your Argument

A second method of identifying argument structure is to use your research. Look at that stack of authorities. Each one of those authorities made it into the "chosen" pile because it appeared to support some aspect of your argument. Some authorities may support more than one, or even several, aspects of your argument. Ideally, you will have used an organized note-taking system as you reviewed each authority. For cases, for example, you may have recorded procedural information such as court and date, and substantive information such as issue(s), facts, holding, and reasoning. Now you can review those notes, and the authorities themselves, and look for organizing principles for your argument.

One way to identify organizing principles is to identify argument points you can get from each authority. To do this, look at each authority and write out the ways in which the authority relates to or supports your argument. These points may be rules or policies[9] that the court would need to consider in order to decide the case, or assertions that the court would have to agree with to decide the case in your favor.

This is a brainstorming technique, so don't worry about making the statements in perfect rule format, or even in formal language. Just use some method to list the holding(s) or other information from the authority that made you think the authority would be helpful to your argument, recording the source for each item. As you proceed through your authorities, you

[9] Section 4.1.3 will help you to identify policy-based rules.