

into sections, on some emergency projects, creating a template may help you to identify appropriate subsections. One way to identify sections and subsections is to consult your topic sentence list. As noted above, in a well-organized document, you should see several paragraphs about one issue, then several paragraphs about the next issue, and so on. When your topic sentences indicate that you have shifted to a new topic, it's time to insert a new heading.

10.2.3

PROVIDING CONTEXT WITH LEGAL BACKSTORY AND A ROADMAP

When one of my daughters was in the fourth grade, she wrote a paper on the Ottawa people. Her teacher told her she had to begin with an introduction, so she wrote, "Hello, here is my paper on the Ottawa people." The introductory material that you provide in a brief to a court is not as simple, but it should be almost as direct.

Professor Linda Edwards has used the term *umbrella paragraphs* to describe the combination of introductory material and roadmap paragraphs that appear—or should appear—at the beginning of most arguments.⁷ In introductory material, the writer generally includes any information that is needed to provide context, that is common to all of the subpoints, or that will connect the subpoints to the writer's thesis. Illustration 10.1 shows where the umbrella paragraphs should appear. Generally, any time you break a section down into further subsections, you should provide some sort of introduction and roadmap. Sometimes these items can be

combined in one paragraph, while at other times you may need two or three paragraphs. Note that it would be extremely unusual to need more than a page for your umbrella.

Many brief writers mistakenly believe—consciously or subconsciously—that they do not need to provide the court with an introduction within the argument. The court knows the law, they believe, and it can read the

Illustration 10.1

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| <p>I. First Major Point [legal backstory relevant to A, B, & C and roadmap foreshadowing A, B, & C]</p> <p>A. B. [legal backstory relevant to 1 & 2 and mini-roadmap foreshadowing 1 & 2]</p> <p>1. 2.</p> <p>C.</p> <p>II. Second Major Point [legal backstory relevant to A & B and roadmap foreshadowing A & B]</p> <p>A. B.</p> <p>III. Third Major Point</p> |
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⁷Linda Holdeman Edwards, *Legal Writing: Process, Analysis, and Organization* 69-74, 133-37, 160-61 (5th ed., Aspen 2010).

facts and then figure out how this case fits in the scheme of things. And on one level they are right; the court could figure it out, with enough time. But good legal writing doesn't make readers figure things out: It provides them with the information they need when they need it. And at the beginning of the argument, legal readers need two things: They need to know what's already happened, and they need to know what's coming. You must write the legal backstory to tell them what has already happened, and a roadmap to tell them what's coming.

a. What's Already Happened: The Legal Backstory

"What's already happened" is not just the facts and the procedure in the case (although certainly, readers do need this information, which you have no doubt supplied in the Fact Statement). I'm talking about what has already happened "in the law." Where did this issue come from? How has it been spending its time? If the law is a seamless web, what part of the web are we looking at right now? Perhaps, rather than thinking of the law as a seamless web, you should think of it as a complicated movie. Thus, the beginning of any argument can be thought of as the middle of the movie. And the court just came in late, sat down next to you, and whispered, "What's happened so far?"

To explain what has happened "so far," you need to provide the legal backstory, as succinctly as possible and with citations as appropriate. By doing so, you provide the reader with vital context for the rest of the argument. If you are saying that the defendant did not have a reasonable expectation of privacy, don't dive into the reasonable expectation of privacy analysis, presuming that the reader knows how it is relevant to the plaintiff's rights. Instead, set the argument in the context of the Fourth Amendment. Likewise, if you are arguing that the public policy exception to the employment-at-will doctrine does not apply, make sure that you tell the reader what the employment-at-will doctrine is. Furthermore, if there is a split in the circuits, don't make the court figure that out five pages later; tell that important detail right away.

Broadly stated, the reader should be able to glean four elements from the legal backstory:

1. **The question that this part of the document is answering.** If you are writing the backstory for the whole argument, you should address the question that the whole document is answering. If you are providing backstory for just one part of the argument, focus on that part alone. In almost every situation, you should state this question as an argumentative declaration, as in, "The plaintiff's complaint should be dismissed because supervisors cannot be held individually liable under Title VII."
2. **The legal rule or standard that is at the root of the issue being addressed in that part of the document.** Many legal arguments are

- about the meaning of a particular word or phrase within a constitutional provision, statute, or legal rule. Even when there is a thick layer of judicial gloss on the original rule—as there is, for example, on the First Amendment—you should still note (or quote) the pertinent part of the First Amendment before moving to the concept of, for example, the existence of a chilling effect in a particular case.
3. **How the legal issue in this case (or section of the argument) relates to the rule.** After stating the rule that is at the root of your controversy, move from that rule to the rule or sub-rule currently at issue. The concept of the "rule cluster," which was discussed in Chapter Five, may be appropriate here, as there may be a direct progression from one rule to the next. In contrast, the legal issue in your case may be a subpart of the main rule.
 4. **The current status of that issue in the relevant jurisdiction, if needed.** Although this piece of the umbrella is not always needed, for some cases its inclusion is crucial. Most umbrellas will make evident how the rule operates in general. Include more details about the rule's status if there are any controversies about this rule that are relevant to your argument. For example, perhaps you are arguing that the court should allow an exception to a particular rule when circumstance C exists. To identify the current status of the rule, you might point out that the court has previously created exceptions for circumstance A and circumstance B. In addition or in the alternative, there might be a split in the circuits as to the issue. If you are writing to a court other than the United States Supreme Court, it might be appropriate to point out that sister states or sister circuits have adopted a particular rule but that your particular jurisdiction has not yet done so.

Be honest in the legal backstory. For example, if there is a split in the circuits, it might be tempting to point out only that certain other courts have decided the case the same way you want the court to decide this one. Your credibility would suffer, however, when the court reads your opponent's brief and discovers the truth. In contrast, if you begin by laying out the complete backstory, you will do much to help the court and to burnish your own image as an honest dealer.

Note how this writer accurately identifies contrasting authorities in this legal backstory:

GOOD EXAMPLE

Gary Kirkby cannot be found individually liable as an employer under Title VII. ¹ Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. §2000e(b) (2001). ² Neither the Supreme Court nor the First Circuit has addressed the specific question of whether a supervisor is an "employer" for purposes of individual liability under Title VII. ³ *Morrison v. Carleton Woolen*

¹ This sentence tells the court the question that the document will ultimately answer.

² Here is the legal rule at the root of the issue.

³ This sentence tells how the legal issue in the case relates to the legal rule: the issue is about the meaning of the word "employer" as it relates to supervisors. The sentence also begins to tell the reader the current status of the issue in the relevant jurisdiction: the court has not decided it yet.