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## Outlining from Scratch: How to Make the Process Meaningful

By Edward (“Grumpy Ed”) Telfeyan

*Edward Telfeyan is Professor of Law at University of the Pacific, McGeorge School of Law in Sacramento, Calif.*

Over the course of my 10 years of teaching legal writing, I’ve had numerous occasions to get grumpy. Among those have been the times I have provided my students what I thought were perfectly clear instructions, only to find out that they did not understand them.

One of those instances occurred in my first few years when I would tell the students to “outline your memo before you write it.” In those early years, I thought I was being very clear when I explained to my students that outlining was the best way to organize their thoughts and develop a solid organization for the memo they were going to write.

I even went so far as to give them a sample outline. Here’s a typical one from those early years:

- I. First rule stated
  - A. Case establishing first rule
    1. Facts of case
    2. Holding of case
    3. Court’s rationale
  - B. Case following first rule
    1. Facts of case
    2. Holding of case
    3. Court’s rationale
- II. Second rule stated
  - A. Case establishing second rule
    1. Facts of case
    2. Holding of case
    3. Court’s rationale
  - B. Case following second rule

1. Facts of case
  2. Holding of case
  3. Court’s rationale
- III. First rule applied
    - A. Review of case establishing rule
    - B. Comparison of client’s case
    - C. Review of case following rule
    - D. Comparison of client’s case
  - IV. Second rule applied
    - A. Review of case establishing rule
    - B. Comparison of client’s case.
    - C. Review of case following rule
    - D. Comparison of client’s case
  - V. Conclusion

How, I wondered, could anything be more clear?

Of course, most of the memos I got in those early years rarely came anywhere close to what I thought I should be getting. I graded them accordingly and soon established a reputation (one of many I’m not proud of) as an arbitrary grader. That reputation then led to some dangerously nasty student evals, all of which made me grumpier and grumpier.

And then, finally, one day around the end of my third year, it occurred to me that I really wasn’t teaching my students anything about outlining, either as to how to do it or, more importantly, why to do it. All I was doing was giving them another reason to tune me out, giving them very little more in terms of substantive assistance than what they had learned about outlining back in the sixth grade.

That revelation led me to think about my own work as an attorney. How and why had I outlined (especially in the early days of my practice)? As I thought about my own use of the technique, I had an epiphany of sorts. Simply stated, I discovered why outlining had been so valuable

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to me in my practice. Its value is captured in this truism: The process generates the analysis.

Once I made that connection, everything opened up for me. I now understood what outlining could do for my students and, over time, I developed the approach to teaching it that I will now attempt to share in this article.

(I teach this approach in conjunction with the predictive memo assignments I give my students. Thus, as presented here, it conforms to a traditional CREAC paradigm. But it is equally useful, with slight modifications for a C-RAC paradigm for persuasive briefs.)

So we're talking about a process, a method, if you will, to get from the identification of an issue in a legal memo assignment to the completion of the writing of that memo. Let's consider the steps in that process and see where outlining can play a helpful role.

These are the steps and the concomitant role of outlines in each:

Step One: Conduct structured research—create research outline

Step Two: Apply law to client's facts—create application outline

Step Three: Explain law that is relevant to client's facts—create explanation outline

Step Four: Establish CREAC approach to the memo—combine explanation and application outlines (the writing template)

Step Five: Write the text of the memo—convert the writing template to legal prose

The first step, after the facts of the fact pattern have been digested and the issue to be analyzed has been identified, is to ascertain the relevant law. And to find that law, we teach our students the importance of legal research. Can outlining play a useful role in that step? Absolutely.

Legal research can be one of two distinctly different experiences. It can be a hunt for a needle in a haystack, with as much anxiety

and frustration as that metaphoric experience would likely entail. Or, it can be a treasure hunt, marked by the uncovering of a series of clues, each one bringing us closer to our goal.

For many students, legal research is that first experience repeated over and over again. If anything, the availability of LexisNexis® and Westlaw® has made it even more so. Just plug in a few magical words and see what comes up. Read a few lines in the headnotes and figure out if the case has any relevance. That, in essence, epitomizes the needle in a haystack approach to legal research, and the results often reflect that scattered and haphazard approach.

The treasure hunt, on the other hand, lends itself beautifully to outlining. The treasure hunt approach identifies rules that can resolve identified issues, and fleshes out those rules with cases, as in the following example.

Our fact pattern takes place in California and concerns an easement across Blackacre from Whiteacre to access a lakefront beach. It's a simple right-of-way that, by the express terms of the grant deed that created it, runs with the land. At the time of the grant, back in 1910, both lots contained single-family residences on large parcels of land. But now, 100 years later, the character of the surrounding land has changed. The new owner of Whiteacre wants to build a hotel on it and then allow his patrons to use the easement across Blackacre to get to the beach. The owner of Blackacre, still a single-family residence, obviously objects to the idea of possibly hundreds of hotel patrons traipsing across his property.

So we have a simple issue: Can the easement be terminated by changed circumstances (specifically defined by the facts of the case)?

At this point the needle-in-a-haystack students are off to the races, frantically looking for cases that seem to have similar facts or deal with a similar issue. They are the ones who usually come in for an office conference with a stack of cases they've printed from Westlaw or LexisNexis. They have some minimal understanding of the

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law from these cases, but they have no real sense of what they are going to do with them or how they should choose which ones to use in their memo. They’re hoping we (their friendly writing profs) will tell them during the conference.

The treasure hunt students, on the other hand, have an outline that represents the substantive expertise they’ve gained from their research. That outline would be developed step-by-step as the student’s research proceeded.

Let’s assume (in our example) that the treasure hunt student first finds a potentially relevant statute (California Civil Code section 811). It says, in part, that an easement will be deemed extinguished (the legal word for terminated) if it is either misused or excessively used.

Now we have a basic rule that we can put in outline form, something like this:

An easement will be extinguished if it is:

- Misused
- Excessively used

The treasure hunt has now begun, because with this very basic, preliminary outline of a seminal rule of law, we have a structure to work with.

Obviously, we now need to find out what circumstances might constitute misuse or excessive use sufficient to satisfy the requirements of the statute.

Case research soon reveals a veritable plethora of cases on both subjects. (For purposes of this example, I’ve reduced the “plethora” to four.) What do we do with them? We build them into our outline, so that it might end up looking something like this:

An easement will be extinguished if it is subjected to

Misuse

*Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished.)

*Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant

tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage.)

Rationale of *Reichardt* indicates extinguishment not appropriate when offending use can be curtailed through injunction.

Dicta in *Crimmins* makes same point.

Excessive use

*Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished.)

*Wall v. Rudolph*, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump.)

Note that in building the outline we accomplish two things. First, we begin to gain real substantive expertise through the systematized approach to our research. And, second, we start to understand the analysis we will be needing to make of our client’s issue.

Obviously, this example is overly simplified, but can you see that the approach (the process) we are using can easily be extended to all the research we will need to do on this issue? Thus we would want to conduct additional research that would lead to an additional part of the outline that will identify how an easement’s original purpose is identified/defined and whether subsequent changes in the surrounding environment will allow changes in its use. And we’ll want to conduct research to define the limits of injunctive relief that might be available if an extinguishment is not going to be recognized, with an added part of the outline resulting from that research.

For each part of the outline, the process will be the same. Essentially, we are outlining our substantive understanding (our expertise) of the law that will direct the analysis we develop for our client’s issue. We are outlining the law, if you will, much as we did when we studied for exams.

But in this instance, we aren't just learning the law by doing so; we are generating our analysis.

Thus, when we've completed our research, we will have a research outline that represents the body of authority we need to consider as we develop our analysis of our client's issue.

This leads to our next outline, which I call the application outline.

Again, remember the point of the outlining approach I'm recommending—the process generates the analysis.

So, now that we have a research outline, how can we use it to generate our analysis?

We are now ready to put the gained substantive expertise to work. Reminding the students of the value of a thorough understanding of the client's facts is very helpful at this point. (I constantly stress to my students the need to be completely conversant with the record before attempting any serious analysis.)

Assuming that preliminary step has been achieved, the application outline will represent the joining of substantive expertise with the facts of the record to resolve the issue presented by that record. Thus, we can now develop the outline of our analysis by considering, point by point, each of the items in our research outline.

So, to return to our example, here was the research outline we developed:

An easement will be extinguished if it is subjected to

Misuse

*Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished.)

*Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage.)

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Looking at each case in the outline we can now begin the task of analysis by asking: Do we have a basis for a finding of misuse?

First, from our outline, we consider the possible application of the *Crimmins* case, where a private right-of-way was extended to a public highway, thereby changing the use of the easement. Our case is less clear-cut, but we probably will find the better view to be a counter-analogy to that case, resulting in a finding of no misuse.

The *Reichardt* case doesn't appear relevant, at least on its facts, but we might want to provide an analysis of the rationale from that case as applied to our client's facts since the client is complaining that his enjoyment of his property is hindered by the defendant's current use of the easement.

Now let's develop an outline of these analyses.

I. Easement will not be extinguished by misuse

A. *Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished)

1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).
2. Change of dominant tenement from residence to hotel is not basis for misuse under *Crimmins*.

B. *Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).

1. Our case (no effort by dominant tenement to block servient's use of his property).

“Thus, when we've completed our research, we will have a research outline that represents the body of authority we need to consider. ...”

“And so we would have a completed application outline that would represent the second half of the discussion section of a predictive memo.”

2. Added traffic on servient’s property is not basis for injunction for misuse, because it is not offensive to intended use of easement as was the case in *Reichardt*.

What about the concept of excessive use?

Using our research outline, we review the cases under that theory for extinguishment. (Note that we are now indeed developing our analysis on this point.) The *Bartholomew* case appears analogous (at least at first blush). There the dominant tenement was changed from a farm to a nudist colony. As a result, traffic on the easement increased considerably. We do have a similar situation in our case, suggesting an extinguishment would be appropriate.

The *Wall* case also appears analogous. There, the dominant tenement was converted from a farm to an oil sump with much damage to the servient tenement resulting from the new kind of traffic that used the easement. The client’s property may also be seeing a new kind of traffic, but the difference may not be as dramatic as in *Wall*. Still we might argue that hundreds of hotel patrons traipsing across Blackacre will create far more damage (trash accumulation, loss of grass and plants) than would be expected from a single-family residence.

And so we can develop an outline of these analyses:  
II. The easement may be extinguished by excessive use or its current use enjoined.

A. *Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).

1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.
2. *Bartholomew* notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.
3. Thus, the easement would be extinguished by application of the rule from *Bartholomew* through an analogy to that case.

B. *Wall v. Rudolph*, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).
2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).
3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

And so we would have a completed application outline that would represent the second half of the discussion section of a predictive memo.

But what about the first part of the paradigm, the explanation section? Why have we essentially “worked backward” in this approach (since the explanation precedes the application in our CREAC paradigm)?

Developing an outline for this portion of the memo is relatively easy because it will simply mirror the substantive aspects of the application outline. In other words, once we have an outline of our application of the cases, we should be able to explain the law by laying out the relevant substance from those same cases.

Look again at the application outline we have developed in our example:

I. The easement will not be extinguished by misuse.

A. *Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished).

1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).
2. Change of dominant tenement from residence to hotel is not basis for misuse under *Crimmins*.

B. *Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).

1. Our case (no effort by dominant tenement to block servient's use of his property).
2. Added traffic on servient's property is not basis for injunction for misuse as in *Reichardt*.

II. The easement may be extinguished by excessive use (or its current use enjoined).

A. *Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).

1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.
2. *Bartholomew* notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.
3. Thus, the easement would be extinguished by application of the rule from *Bartholomew* through an analogy to that case.

B. *Wall v. Rudolph*, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).
2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).

3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

Our explanation outline will mirror it in terms of the substantive rules we provide, as is hopefully apparent in this example:

I. An easement can be extinguished if it is misused.

A. *Crimmins v. Gould*

1. Private right-of-way extended to public highway, with result of easement now used by public instead of being limited to private use.
2. Extinguishment ordered by court because public use changed intended use of easement, and the changed use could not be enjoined.

B. *Reichardt v. Hoffman*

1. Private right-of-way intended for co-use by dominant and servient tenements; dominant tenant blocked use to servient tenant.
2. This "misuse" insufficient in quality to justify extinguishment of easement.
3. Dominant tenant instead enjoined from blocking use by servient tenant.

II. An easement can be extinguished if it is used excessively

A. *Bartholomew v. Staheli*

1. Dominant tenement converted from farm to nudist colony with right-of-way easement experiencing dramatic increase in use as result.
2. Excessive use of easement, leading to increased damage to the servient tenement justified extinguishment by the court.

B. *Wall v. Rudolph*

1. Dominant tenement converted from farm to oil sump with greatly increased damage to servient estate resulting from dramatic increase in use (and in type of use) made of easement right-of-way.
2. Court enjoined the use for oil sump purposes rather than granting an extinguishment of the entire easement.

If you consider what we've done in this explanation outline, you'll see that we have

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“This point is also a valuable result of the outlining process since it stresses a cardinal rule ... that we never apply anything that we haven’t first explained and we only explain that which we will apply.”

essentially mirrored the application outline in terms of the references to the cases from that outline. Thus, we have limited our explanation of the four cases to those parts of the cases that we actually use in our application outline.

This point is also a valuable result of the outlining process since it stresses a cardinal rule with respect to the legal paradigm, which is that we never apply anything that we haven’t first explained and we only explain that which we will apply.

But notice the other result of the completion of the explanation and application outlines. We now have a complete template from which to write the discussion section of our memo. Here’s what that template looks like in our example:

I. An easement can be extinguished if it is misused.

A. *Crimmins v. Gould*

1. Private right-of-way extended to public highway, with result of easement now used by public instead of being limited to private use.
2. Extinguishment ordered by court because public use changed intended use of easement, and the changed use could not be enjoined.

B. *Reichardt v. Hoffman*

1. Private right-of-way intended for co-use by dominant and servient tenements; dominant tenant blocked use to servient tenant.
2. This “misuse” insufficient in quality to justify extinguishment of easement.
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1. Dominant tenement converted from farm to nudist colony with right-of-way easement experiencing dramatic increase in use as result.
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1. Dominant tenement converted from farm to oil sump with greatly increased damage to servient estate resulting from dramatic increase in use (and in type of use) made of easement right-of-way.
2. Court enjoined the use for oil sump purposes rather than granting an extinguishment of the entire easement.

III. The easement will not be extinguished by misuse.

A. *Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished).

1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).
2. Change of dominant tenement from residence to hotel is not basis for misuse under *Crimmins*.

B. *Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).

1. Our case (no effort by dominant tenement to block servient’s use of his property).
2. Added traffic on servient’s property is not basis for injunction for misuse as in *Reichardt*.

IV. The easement may be extinguished by excessive use (or its current use enjoined).

A. *Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).

1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.
2. *Bartholomew* notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.

3. Thus, the easement would be extinguished by application of the rule from *Bartholomew* through an analogy to that case.

B. *Wall v. Rudolph*, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).

2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).

3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

And what is now left to do? Nothing other than the mechanical task of writing out what we already have set forth in outline form.

In other words, we have used the first three steps in the process—research, rule application, rule explanation—to our benefit by systematizing each step in the creation of outlines. And, by focusing on the creation of each outline so that together they reflect the actual substantive work involved in creating an analysis, we have constructed a complete template from which we can now write the main part of our predictive memo.

And that formerly onerous task—writing the discussion section of the memo—is now nothing more than a mechanical exercise of converting the complete outline (the template) to legal prose.

In conclusion, we outline our research to gain meaningful substantive expertise; we outline our application of the relevant research to identify our analysis of the issue presented; and we outline our explanation of the relevant law/rules to provide the basis for the analysis that follows.

(Note, too, that by “working backward” in the construction of the application and explanation outlines, we adhere tightly to the basic requirement of the legal paradigm: that we never apply anything that we haven’t first explained and only explain that which we will apply.)

Outlining can be a great tool for our students if it is presented in a way that allows them to appreciate the value of a systematized approach to their assignment. And that value is best stated in the expression, “the process generates the analysis.”

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