Chapter 12: Rule Synthesis

# What is Rule Synthesis?

**Rule** **synthesis** is the process of determining which sources of law you will use to answer a legal question. Think back to when we discussed sources of law. We discussed that our legal system is founded on the idea that past decisions will guide us in predicting an outcome for the current situation. A legal rule can be a statute or a case holding that is directly on point for the legal question you are trying to answer. Often, however, you have to combine pieces from different places to formulate the rule. Successfully piecing together a rule is the backbone of performing legal analysis. Remember, the rule is the skeleton, devoid of meaty facts, that provides what courts should consider as they flesh out the answer to the current legal question with the specific facts before them. The rules we typically seek in this class are the core substantive rules about how to answer the substantive legal question; be aware there are also supporting rules that address how a rule should be applied or what the timing is for when a particular rule should be applied.

When you create a rule,

[the] rule should meet three criteria. **First**, it should be simply stated - concise enough for the reader to grasp easily. **Second**, it should be readily applied - unambiguous because the terms have defined, non-circular meanings, specific enough to give guidance for a new set of facts, but not too narrow to be useful. **Third**, it should be consistent with the cases and law in the jurisdiction - if applied to the existing cases, the rule would accurately predict the outcome of each.

Paul Figley, Teaching Rule Synthesis with Real Cases, 61 J. of Legal Educ. 245, 247 (2011).

Judicial opinions sometimes signal when they are about to state the rule being applied. Pay attention to phrases like “the holding is,” “we hold that,” “as a matter of common law,” “in this jurisdiction,” and “the present case is controlled by,” as opinions will use these to indicate the rule. Remember, however, that not all judicial opinions will make clear what rule is being used. Some opinions will not even make it clear there is a rule being applied at all. Not all judicial opinions, or legal writing of any genre, always follow best practices.

Legal rules can be mandatory, prohibitory, or discretionary. If a rule is mandatory, then it requires steps that must be followed and will usually use the words “must” or “shall.” If a rule is prohibitory, then it is forbidding certain types of actions and will usually use the words “must not” or “shall not.” If a rule is discretionary, then it is allowing choice of conduct and will usually use the word “may.”

In the outline below, I have described the most common types of rules you will encounter. Please note that these are not the only kinds of rules that exist, nor are these the only arrangements of these specific kinds of rules that exist. The formulations provided in the description are illustrative and not exhaustive.

# Types of Rules:

## Rule with Elements - Conjunctive

A conjunctive rule with elements is one when all components in the rule must be met for the outcome to occur. A conjunctive rule with elements can have one or more elements that must be met. This is one of the strictest kinds of rules.

### Examples

* An outcome is Z if A.
* An outcome is Z if A, B, and C are present.
* An answer to a complaint must be filed within 30 days.
* To establish burglary, the state must show all of the following:
  1. Breaking
  2. Entering
  3. Dwelling house
  4. Of another
  5. With the intent to commit therein
     1. A theft or
     2. felony

## Rule with Elements - Disjunctive

A disjunctive rule with elements is when at least one of multiple components in the rule must be met for the outcome to occur. A disjunctive rule with elements can have two or more elements that comprise the rule with at least one of those elements being required to be met.

### Examples

* An outcome is Z if A or B is present.
* An outcome is Z if A and B or C is present.
* A student violates the Honor Code if he/she:

1. Knowingly makes a materially false or deceptive statement to a person in authority in connection with an academic matter; or
2. Engages in conduct in connection with an academic matter either
   1. For the purpose of gaining an unfair advantage over another student, or
   2. Under circumstances such that a reasonable law student would know that the conduct was likely to result in an unfair advantage.

## Rule with Factors - Balancing

A balancing rule with factors is when there are factors to be considered, where some factors are in favor of reaching outcome Y and some factors are in favor of reaching outcome Z. With this rule, weigh the factors both in terms of quantity for each side and also in terms of the strength of each factor for its side. Not all factors must be present. This kind of rule can have either an exclusive list of factors (only these factors shall be considered) or an inclusive list of factors (things to be considered include but are not limited to).

### Examples

* General
  + A, B, and C favor outcome Y. D, E, and F favor outcome Z. A, B, and C are all present. B is particularly strong. Only E and F are present. F is particularly weak. Therefore, the outcome in the balancing test should be Y.
  + Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Delaware v. Prouse, 440 U.S. 648, 654 (1979).
  + A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995).
* Exclusive
  + Missouri utilizes a balancing test to determine the extent of the prejudice, if any, that the delay caused. There are four factors to this test which must be considered on a case-by-case basis: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of the right; and 4) the prejudice to the defendant. Id. Applying these factors to the facts before us, we find no prejudicial delay. State v. Smith, 849 S.W.2d 209, 213 (Mo. Ct. App. 1993) (citations omitted).
* Inclusive
  + Rather, we adopt the test expressed in A–S–P Associates that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose. State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982).

## Rule with Factors - Totality of the Circumstances

A totality of the circumstances rule with factors is when there are a number of factors to be considered and no certain number of factors must exist but instead the rule looks at “the whole picture.” This is one of the most expansive and “squishy” types of rules because it allows the factfinder to consider all kinds of things. This kind of rule can have either an exclusive list of factors (only these factors shall be considered) or an inclusive list of factors (things to be considered include but are not limited to).

### Examples

* General
  + A, B, C, D, H, K, and L are all considered and look like, weighed together, it makes sense to reach outcome Z.
  + The determination of whether a seizure has occurred is a fact-intensive analysis in which a reviewing court must consider the totality of the circumstances. In examining the totality of the circumstances, a court must look to numerous factors, including the time, place and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the officer's statements to others present during the encounter, the threatening presence of several officers, the potential display of a weapon by an officer, and the physical touching by the police of the citizen. State v. Alberti, 13-205, p.7-8 (La. App. 5 Cir. 10/9/13); 128 So. 3d 351, 356 (citations omitted).
* Exclusive
  + When assessing voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion. Commonwealth v. Nester, 709 A.2d 879, 882 (Pa. 1998) (citations omitted).
* Inclusive
  + After careful consideration, we adopt the ‘totality of the circumstances’ standard. While we agree ability to pay is a primary factor in determining whether ‘substantial abuse’ occurred, we believe other relevant or contributing factors, such as unique hardships, must also be examined before dismissing a Chapter 7 petition. Conversely, where an inability to pay exists, we believe other factors may nevertheless establish substantial abuse. We recognize the factors articulated by the other courts as instructive, but conclude they are not inclusive of all factors considered. A substantial-abuse analysis must be made on a case-by-case basis. In re Stewart, 175 F.3d 796, 809 (10th Cir. 1999).

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## Rule with Factors - Sliding Scale

A sliding scale rule with factors is when there are a number of factors to be considered, both in terms of presence and in terms of strength. Differs from balancing test, although the difference can feel nuanced. This kind of rule can have either an exclusive list of factors (only these factors shall be considered) or an inclusive list of factors (things to be considered include but are not limited to).

### Examples

* A+B definitely reaches outcome Z. A+b or a+B might reach outcome Z. a+b does not reach outcome Z.
  + Capital letters mean A LOT OF; lowercase letters means a little of.
  + So, if you have a lot of or strong evidence of both A and B, then you get to outcome B. However, depending on the amount or strength of (A+b) or (a+B), you *might* reach Z. If both do not have much (a+b), then you likely cannot reach Z.
* This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. Haas v. Four Seasons Campground, Inc., 2008 PA Super 136, ¶ 13, 952 A.2d 688, 694 (Pa. Super. Ct. 2008).
* Both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable. However, there is a sliding scale relationship between the two concepts: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause. Ellis v. McKinnon Broad. Co., 18 Cal. App. 4th 1796, 1804, 23 Cal. Rptr. 2d 80, 83 (Cal. App. Dep’t Super. Ct. 1993) (citations omitted).
* This process involves engaging in what we term the sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position. Ty, Inc. v. Jones Grp. Inc., 237 F.3d 891, 895 (7th Cir. 2001) (citations omitted).

## Rule with Exceptions

A rule with exceptions is when an outcome is met unless a certain condition exists, or when an outcome is not met unless a certain condition exists. Any of the above rules can have exceptions.

### Examples

* The privilege of an infant to avoid contracts which are injurious to him, and rescind those which are not, is not an exception to a general rule, but a general rule with exceptions. The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbitrary; that it is indispensably necessary that an infant should be at liberty to contract for necessaries; and that he may happen to make other contracts which will be beneficial to him. It does not therefore forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age–excepting from the operation of the privilege only contracts for necessaries, contracts which he may be compelled in equity to execute, and executed contracts where he has enjoyed the benefit of them and cannot restore the other party to his original position. Riley v. Mallory, 33 Conn. 201, 206 (1866).
* A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:

(a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:

(1) Requests emergency medical assistance for himself or herself or another person;

(2) Acts in concert with another person who requests emergency medical assistance; or

(3) Appears to be in need of emergency medical assistance and is the individual for whom the request was made

Ky. Rev. Stat. Ann. § 218A.133 (West 2020).

Something to keep in mind is that parts of legal writing, particularly piecing together rules and demonstrating how those rules work, are much like mathematics. Specifically,

lawyers and mathematicians both commonly use deductive reasoning, which is reasoning from the general to the specific. In legal writing and analysis, deductive reasoning is often used when applying rules to facts. The rule is general, while the facts of a case are specific. People in both fields also use inductive reasoning, which is reasoning from the specific to the general. In legal writing and analysis, inductive reasoning is often used to synthesize precedent cases and determine a general principle being followed in those cases.

Legal analysis and mathematical analysis are similar in other ways as well, beyond the types of reasoning used in each. They often have similar purposes, including thinking through a problem, convincing readers an analysis is correct, expanding knowledge in the field, and teaching those new to the field. Further, written legal analysis often follows a similar organizational scheme to that of a mathematical proof, which is the way mathematicians establish the truth of a mathematical proposition based on given information and previously known rules. Both types of written reasoning start by laying out the known information and where the writer intends to go, then apply previously established rules to the known information to reach a conclusion.

Maria Termini, Finding the Right Angle: Lessons from Mathematics for the Legal Writing Classroom, 26 Legal Writing 1, 2-4 (2022).

To see an example of how Rule Synthesis works with several cases, please see Appendix D (Rule Synthesis Example).

# Conclusion

The first step to good legal writing and correct legal analysis is to understand how to find the legal rule that needs to be applied. Become familiar with the different types of rule structures because it will make it easier for you to pull the rules from the sources of law you encounter.