Mitchell Hamline Law Review

2019–2020 WRITE-ON COMPETITION HANDBOOK

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WELCOME

May 19, 2019

Dear Write-On Competition Participants:

The *Mitchell Hamline Law Review* Editorial Board welcomes you to the write-on competition. To facilitate your participation, we have prepared this handbook for you. The enclosed materials provide important information you will need during the competition.

The write-on competition consists of two tasks designed to evaluate your ability to think and write like a member of the *Law Review*. The *Bluebook* quiz contains forty consecutive endnote citations. You must correct each endnote according to the twentieth edition of *The Bluebook* and the sixteenth edition of *The Chicago Manual of Style*. The paper that you are required to write is called a case note. Your case note must have at least eight pages of text and eight pages of endnotes, and it must not exceed twenty pages. You have six days to complete the Bluebook quiz and two weeks to complete the case note. If you are worried about the time commitment, keep in mind that many successful candidates have taken summer classes, worked full-time, and studied abroad while participating in the write-on competition.

You may direct any questions you may have about the write-on competition to this year's Notes & Comments Editor, Elizabeth Slama, at Elizabeth.slama@mitchellhamline.edu. Elizabeth can provide general guidance on competition procedural issues, but will not answer substantive questions. You may not submit written portions of your case note to Elizabeth.

The write-on process is competitive. Case notes are evaluated in relation to the other submissions from the same category. Participants who receive the highest combined score for their case note and *Bluebook* quiz are invited to join the *Mitchell Hamline Law Review*.

Participants are evaluated on the quality of their write-on material alone. To ensure that submissions are evaluated consistently, we have established an anonymous grading system with uniform criteria. Please see the case note rubric below.

There are many benefits associated with *Law Review* membership. As an Associate, you will develop excellent legal research, writing, and editing skills. You will also write an article that will fulfill the long paper requirement and, if written during the fall semester, will be considered for publication in the *Mitchell Hamline Law Review*. Moreover, you will earn academic credit for your contributions to the journal. Finally, many employers consider law review experience to be an important, if not requisite, qualification in hiring.

Thank you for your interest in the *Mitchell Hamline Law Review*. We have a great year ahead, and we hope that you will join us.

Sincerely,

Editorial Board of Volume 46 of the *Mitchell Hamline Law Review*

COMPETITION TIMELINE

Sunday, May 19 at 9:00 a.m.	**Competition Begins** Download competition materials from the *Law Review* website. Receive your anonymous write-on ID via email from Elizabeth Slama. During this period, participants may e-mail procedural questions to Notes & Comments Editor Elizabeth. Substantive questions will NOT be answered. The Notes & Comments Editor will respond to questions within 48 hours. The Notes & Comments Editor is not required to respond to questions sent after Sunday, June 9.
Sunday, May 19 – at 9:00 a.m. Friday, May 24 at 7:00 p.m.	***Bluebook* Competition Period** *Bluebook* quizzes are due by 7:00 p.m. on May 24. A *Bluebook* quiz turned in at 7:01 p.m. or later will NOT be accepted. NO EXCEPTIONS. Electronic Submission Write-on participants must submit: 1. an electronic copy of their completed *Bluebook* quiz (using track changes) by email to elizabeth.slama@mitchellhamline.edu. AGAIN, LATE SUBMISSIONS WILL NOT BE ACCEPTED. EARLY SUBMISSIONS ARE WELCOME.
Saturday, May 25 – at 9:00 a.m. Sunday, June 9 at 7:00 p.m.	**Case Note Competition Period** Case notes are due by 7:00 p.m. on June 9. A case note turned in at 7:01 p.m. or later will NOT be accepted. NO EXCEPTIONS. Electronic Submissions Write-on participants must submit: 1. an electronic copy of their completed case note in endnote format; 2. an electronic copy of their completed case note in footnote format; and 3. a signed copy of the Honor Pledge (see next page for template) by email to elizabeth.slama@mitchellhamline.edu. AGAIN, LATE SUBMISSIONS WILL NOT BE ACCEPTED. EARLY SUBMISSIONS ARE WELCOME.
Mid-July	Announcement of those selected as associates for the *Mitchell Hamline Law Review*. Mandatory orientation will follow shortly after. *Note: Student Services and the Registrar cannot answer any questions about submissions, the* Law Review*, or the write-on process.*

HONOR PLEDGE

I pledge that I have complied with the rules stated in the Write-On Competition Handbook.

I pledge that I have complied with Mitchell Hamline Student Code of Conduct (as indicated in the Write-On Handbook's HONOR CODE AND ELIGIBILITY section) which prohibits conduct that tends to give an unfair advantage to any student in an academic affair, and that I have not violated the rules of the *Mitchell Hamline Law Review* Write-On Competition so as to give myself or anyone else an unfair advantage.

I pledge that the work I have submitted is my own and that I have not wrongfully copied or paraphrased another's expressions or ideas without proper attribution.

Signed:_____ Date:_____

PRINT Name:_____

Address:_____

City, State, Zip:_____

Telephone:_____

PLEASE ALSO INDICATE:

Case Note Topic: _____

Write-on ID: _____

Year in school: _____

(NOTE: This will not be viewed by those scoring your case note)

**** PRINT, SIGN, SCAN, AND THEN ATTACH THIS DOCUMENT TO YOUR SUBMISSION EMAIL. ***

HONOR CODE AND ELIGIBILITY

ELIGIBILITY

Students who have completed two semesters of law school and have at least two semesters remaining at Mitchell Hamline School of Law are eligible for the 2019–2020 *Mitchell Hamline Law Review* write-on competition. Applicants who have been sanctioned by any law school for plagiarism are not eligible to participate in the write-on competition.

HONOR CODES

Write-on participants must comply with Mitchell Hamline School of Law's Student Code of Conduct throughout the competition. All submissions must be the exclusive work of the write-on participant. Write-on participants shall not receive outside writing or editorial assistance. Write-on participants may refer to legal texts, treatises, or style guides provided that the material does not give the participant an unfair advantage. Write-on participants cannot seek assistance, discuss their topic, or show their work to anyone, excepted as permitted by the Write-On Competition Handbook. Any write-on participant who violates the Code of Conduct or the Write-On Competition Handbook rules will be disqualified from the competition and reported to administration. **Plagiarism will not be tolerated.**

- The Mitchell Hamline Student Code of Conduct is found in Chapter 2 of the Mitchell Hamline Student Handbook and is available at http://mitchellhamline.edu/students/student-handbook/

COMPETITION CHECKLIST

I have carefully reviewed the deadlines.	
I have reviewed the Write-On Competition Handbook.	
I have communicated any questions to the Notes & Comments Editor.	
I have typed my write-on ID on each page of my *Bluebook* quiz.	
I have emailed an electronic copy of my *Bluebook* quiz with tracked changes on to elizabeth.slama@mitchellhamline.edu by Friday, May 24 at 7:00 p.m.	
I have reviewed my case note for compliance with the guidelines specified in this packet.	
I have an electronic copy of my case note to submit with citations appearing as footnotes.	
I have an electronic copy of my case note to submit with citations appearing as endnotes.	
I have typed my write-on ID on each page of my case note (both electronic copies).	
I have signed the Honor Pledge and scanned an electronic version to my computer.	
I have emailed an electronic copy of my case note with endnotes, and my case note with footnotes, each as a separate Word document, and my signed honor pledge scanned as a PDF, to Elizabeth.slama@mitchellhamline.edu by Sunday, June 9 at 7:00 p.m.	

BLUEBOOK QUIZ

The *Bluebook* quiz comprises 40 endnotes that must be corrected according to the relevant rules in the 20th edition of the *Bluebook*. Simply correct each endnote **using the "track changes" feature**. **Remember to turn on track changes before you make any changes to the document.** For instructions on how to turn on track changes in Microsoft Word visit: https://support.office.com/en-us/article/track-changes-in-word-197ba630-0f5f-4a8e-9a77-3712475e806a

If you have trouble please reach out to Notes and Comments Editor, Elizabeth Slama at elizabeth.slama@mitchellhamline.edu.

Some endnotes may have no errors; others may contain several. It is your job to determine what errors exist, and how they should best be corrected.

There are some ambiguities in the *Bluebook*. You must work around these ambiguities based on your understanding of the relevant rule(s) and the *Bluebook* as a whole.

While the *Bluebook* quiz must be submitted electronically, you may find it helpful to print the document and make corrections on the printed copy. After making all corrections in the digital copy, you will submit this document to elizabeth.slama@mitchellhamline.edu no later than 7:00 p.m. on Friday, May 24, 2019. NO EXCEPTIONS.

SELECTED BLUEBOOK RULES

The following list is provided as a reminder of some important elements of a citation. However, this list is not exhaustive. *Always consult the rule in the* Bluebook.

The *Mitchell Hamline Law Review* has adopted some special citation rules in addition to those in the *Bluebook*. Rules that override the *Bluebook* are in boxes.

1. TYPEFACE

- Typeface conventions are the same as those in the *Bluebook*, Rule 2.1. Thus, anything that the *Bluebook* requires in italics must be *italicized*; anything that the *Bluebook* requires in small capitals must be in SMALL CAPS.
- How do I make small capitals in MS Word?
    - To turn plain text into small capitals, use the shortcut CTRL+SHIFT+K (Mac: COMMAND+SHIFT+K) before you begin typing the text you want small-capped. Then, type the text you want small-capped. Use the shortcut again to go back to plain text. Alternatively, you can select the text you want small-capped, and then use the shortcut CTRL+SHIFT+K (Mac: COMMAND+SHIFT+K) to change it to small caps.

2. USE OF ID.

- *Id.* is used to cite to the preceding authority, either within the same endnote/footnote or the immediately preceding endnote/footnote. *Id.* may only be used to cite to a previous endnote/footnote if that endnote/footnote contains only one authority. See Rule 4.1.

3. SIGNALS

- Rule 1.2 covers signals. Become familiar with the specific usage for each signal.
- All signals should be italicized unless they are used as verbs in ordinary textual sentences. See Rule 1.2(e).
- When using more than one signal in a single endnote/footnote, the order of signals is covered by Rule 1.3. Note that Rule 1.2 identifies four types of signals: supportive, comparative, contradictory, or background. Signals of the same basic type must be strung together within a single citation sentence and must be separated by semicolons. If an endnote contains signals of different types, then they must be placed in separate citation sentences.
- If you use *see also*, *cf.*, or *see generally*, then a parenthetical is strongly recommended. Rule 1.5 covers this type of parenthetical.

4. CASE NAMES

a. Typeface

- If a case name is cited in full in an endnote/footnote, then the case name should *not* be italicized. Case names appearing in a textual sentence, whether in the body of the text or in an endnote, should be italicized. See Rules 2.1(a) and 2.2.
- In a short cite, the case name should be italicized.
- Procedural phrases such as *In re* and *ex rel.* should be italicized, regardless of whether the entire case name is italicized.

b. Party Names

- Verify the spelling of all case names.
- Use abbreviations where appropriate. See Rule 10.2.2 and Table 6. If a case name appears in a textual sentence, do not use abbreviations unless permitted by Rule 10.2.1(c).

5. CASE CITATION

- Rule 10 generally covers case citations.
- Jurisdiction-specific citation is further covered in Table 1. Note that if a state is included in the reporter name, then the court of decision is not included with the date.

  For example: 123 Cal. Rptr. 23 (1998), *not* 123 Cal. Rptr. 23 (Cal. 1998)
- If a U.S. Supreme Court decision is published and available in U.S. Reports, then the case should cite to the U.S. Reporter, and not to the Supreme Court Reporter.

PARALLEL CITATION

Contrary to Rule 10.3.1(b), parallel cites are required for Minnesota cases that appear in both the North Western Reporter and Minnesota Reports. This rule applies to Minnesota cases published before 1978. The use of these parallel cites is a courtesy to Minnesota practitioners.

For example: *Vikings v. Packers*, 123 Minn. 456, 460, 987 N.W.2d 654, 660 (1971).

PUBLIC DOMAIN CITATION FORMAT

Contrary to Table 1 and Wisconsin Supreme Court Rule 80.02, subdiv. 2, citations to Wisconsin cases shall include public domain, Wisconsin Reports, and North Western Reporter information each time a full citation is appropriate. When a short form citation is appropriate, provide only public domain information, followed by "at ¶ [#]."

Full citation with pincite: State v. Pepper, 2001 WI 19, ¶ 4, 568 Wis. 2d 234, 234 N.W.2d 543.

Short form citations: *Pepper*, 2001 WI 19 at ¶ 3.
Id. at ¶ 6.

The *Bluebook* and Wisconsin Supreme Court Rule 80 do not provide guidance for formatting prior/subsequent history of Wisconsin cases decided after December 31, 1999. When such information is appropriate, use public domain information for prior/subsequent history.

Subsequent history with pincite:

State v. Pepper, 2000 WI App 10, ¶ 21, 283 Wis. 2d 123, 143 N.W.2d 321, *aff'd*, 2001 WI 19.

6. SHORT FORMS FOR CASES

- Rule 10.9(a): In law review footnotes, a short form for a case may be used if it clearly identifies a case that (1) is already cited in the *same footnote* or (2) is cited (in either full or short form, including "*id.*") in *one of the preceding five footnotes*. This applies to statutes as well.
- *Supra* and [hereinafter] should not be used to cite cases, except in extraordinary circumstances. See Rule 4.2.

7. PRIOR AND SUBSEQUENT HISTORY OF CASES

- Rule 10.7 governs what procedural information should be included with case citations. Generally, if a case is cited in full, include all subsequent history except for denials of rehearing, history on remand, and certain denials of certiorari.

8. STATUTES

- When citing statutes, see Rule 12 and Table 1.
- When citing Minnesota statutes, be sure to cite to Minnesota Statutes, not Minnesota Statutes Annotated. Similarly, when citing federal laws, cite to United States Code; do not cite to U.S.C.S. or U.S.C.A. unless absolutely necessary.

FEDERAL AND MINNESOTA STATUTES
Always cite to the print reporter for Federal and Minnesota statutes. When citing a state statute for a state other than Minnesota, cite to the statute on Westlaw. For example: MINN. STAT. § 123.06 (2012). WIS. STAT. ANN § 19.43 (West, Westlaw through 1995 Act 26).

- The date for a statutory volume should be the date of the main volume. Do not include the date of the supplement unless the statute is found or amended therein.

  For example:

  (1994) The statute is found in the main volume.

  (1994 & Supp. 2000) The statute is found in the main volume and amended in the supplement.

  (Supp. 2000) The statute is only found in the supplement.

- *Supra* and [hereinafter] should not be used to cite statutes or constitutions, except in extraordinary circumstances. See Rule 4.2.

9. PINPOINT CITES (PINCITES)

- Pincites are required when citing to a proposition in the text of the source.
- For cases, a pincite should refer to the text of the case, not to the headnotes or syllabus. In the *Bluebook*, the rule for how to create a pincite for a particular source is usually included in the general discussion of that source.
- A pincite is required even if the authority is on the first page of the source.

  For example: 11 HARV. L. REV. 123, 123 (1901).

10. PARENTHETICALS

- Use parentheticals to explain the proposition in the main text. For some introductory signals, use of a parenthetical is strongly recommended. See Rule 1.2.
- Most parentheticals should start with a present participle (a verb ending in "ing" such as "holding" or "discussing"). However, if a parenthetical quotes one or more full sentences, or if a full participial phrase is unnecessary, then no present participle is required. See Rule 1.5.

11. ORDER OF AUTHORITIES

- In a single citation sentence, authorities are ordered according to Rule 1.4.
- For primary authority, constitutions and statutes come first, followed by case law. Higher jurisdictions are generally cited before lower jurisdictions. Within courts of the same jurisdiction, cases are cited in reverse chronological order.
- Secondary authority follows primary authority. Note that some forms of secondary authority, especially law review articles, are in alphabetical order rather than reverse chronological order. Also note that student-written law review articles are ordered separately from other law review articles.

  For example:

  > Freida Young, *Fun with Law Review*, 4 L. REV. 100 (1986); Henry Zzyzzx, *Tweety & Me*, 18 L. REV. 100 (2000); Patricia Aardman, Note, *Courtroom Hijinks*, 16 L. REV. 100 (1998).

12. QUOTATIONS

- For quotations of fifty or more words, see Rule 5.1(a). The quotation must be blocked, with margins set in on both the left and the right, and it should be single-spaced. Quotation marks are not placed at the beginning or end of the quotation. Any quotation marks within the quotation should appear as they do in the original.
- For quotations of fewer than fifty words, see Rule 5.1(b). The quotation should be placed in quotation marks. Quotation marks within the quotation are replaced by single quotation marks.
- See Rule 5.2 for the use of brackets and "[sic]" when altering the original text.
- See Rule 5.3 for the use of ellipses when omitting words.

13. BOOKS, PAMPHLETS, AND OTHER NONPERIODIC MATERIALS

- Refer generally to Rule 15.
- When citing to a publication with two authors, separate the authors' names with an ampersand in the order listed on the publication. When citing to a publication with more than two authors, cite the first author's name followed by "ET AL." unless including all the authors would be particularly relevant. See Rule 15.1.
- Always give the full name of an editor and/or translator followed by "ed." or "trans." in a parenthetical. Rules 15.1 and 15.4.

  For example:

  > JOE BLUEBOOK & MARY CITE, CITE RIGHT 30–49 (Pat Page trans., Lou Turner ed., 2000).

- For special citation forms (including frequently cited works), refer to Rule 15.8.

14. PERIODICAL MATERIALS

- When citing periodical materials use LARGE AND SMALL CAPS for the name of the publication only. The author's name must be in ordinary Roman type and the title of the article must be in *italics*. Refer generally to Rule 16 for a breakdown of periodical citations and examples. Note the slight differences in consecutively and non-consecutively paginated journals.
- Refer to Rule 16.6 for additions to the general rules when citing to sections and page numbers of newspapers.

15. COMMERCIAL DATABASES AND THE INTERNET

- Cite to the traditional print source if it is available. If the traditional print source is hard to locate or citing to an electronic source would improve access to the information, cite to the traditional print source first, and also provide a parallel citation to the electronic source.
- Parallel Citations:
    - Use "*available at"* when a traditional source is available but the content of the Internet source is identical to the print source and the Internet citation will substantially improve access to the source.

      For example: Peggy Sue Review, *Fables and Follies of Blue Booking,* 78 LAW MONTHLY 65, 68 (2001), *available at* http://www.peggysue.com/articles/archives/lm78winter2001p.65.htm.

- Cite directly to the electronic source if it does not exist in print or if the print version is so obscure that it is practically unavailable.

  J.P. Tort, *Negligent and Unintentional Blue Booking,* BIG LAW BLOG, http://www.tortsonline.edu/redbull/v6il/jingleheimerschmidt.htm.

- Date of Internet Citation:
    - See Rule 18.2.2(c).
    - If a citation includes both a traditional source and a parallel Internet source, provide the date for the traditional source according to the applicable rule.
    - If a citation is only to an Internet source, a date must be provided. The date provided should be one of the following, in order of preference:
        - the date of the case, statute, article, or other material as specified in the information itself;
        - the date the Internet site was last visited to confirm the presence and location of the information.

      For example:

      TENN. COMP. R. & REGS. ch. 1200-1-2 (1999), *available at* http://www.state.tn.us/sos/rules/1200/1200-01/1200-01-02.pdf.

Randall R. Smith, *Jones on the Internet: Confusion and Confabulation,* Citation Debate Forum, *at* http://www.citations.org (last visited Jan. 20, 2000).

- Preservation of Information:
    - An accurate URL does not guarantee that the user can readily access the information. For this reason, downloading, printing, or otherwise preserving the information, as it exists at the time of access, is encouraged.

16. NUMBERS AND SIGNS

- See Rule 6.2
- Text:
    - Spell out the numbers zero to ninety-nine in text, footnotes, and endnotes. For larger numbers, use numerals.
    - See exceptions in Rule 6.2.
- Section Symbol - §
    - Endnotes - Use of § permitted.
        - Do not use "§" at the beginning of a sentence. Spell out the word "Section."
        - When the symbol is used, there should be a space between the symbol and the numeral.
    - Text - Use of § not permitted.
        - Always spell out the word "section." Only capitalize if at the beginning of a sentence.
        - Exception: when referring to a section of the U.S. Code or a federal regulation, use the § symbol.

17. CAPITALIZATION OF COURT NAMES

- See Rule 8.
- State Court
    - A state court name should only be capitalized if it appears with a state name.
    - Examples:
        - the Minnesota Supreme Court
        - the Minnesota Court of Appeals
    - Always capitalize the United States Supreme Court. When reference is made to the United States Supreme Court, always capitalize "Supreme" and "Court."

18. INTERNAL CROSS REFERENCES

- Rule 3.5 covers internal cross-reference.
    - Use "*supra*" to refer back to material that has already appeared within the piece when *id*. is not appropriate.
    - Use "*infra*" to refer to material that appears later in the piece.
    - Note that "*supra*" is also used in short form citations for certain types of sources (see Rule 4.2).
    - For example:
        - *See supra* text accompanying notes 23–24.
            - (referring the above the line text)
        - *See supra* note 15 and accompanying text.
            - (referring to the below the line text found in the footnote)
        - *See infra* Part II.
            - (referring to an entire section that is later in the article)
- Rule 4.2 covers "*supra*" and "hereinafter."
    - Note that "*supra*" and "hereinafter" should not be used to refer to cases, statutes, constitutions, legislative materials (other than hearings), restatements, model codes, or regulations, except when the name of the authority is extremely long.

WHAT IS A CASE NOTE?

The three forms of legal articles traditionally found in law reviews are: (1) the Comment; (2) the Note; and (3) the Case Note. Participants in the *Mitchell Hamline Law Review* Write-On Competition must write a case note; each participant will be assigned a specific case.

The case note is a piece of writing that focuses on the significance of a single case. It is an in-depth analysis of the issues raised in the opinion. The writer should:

- dissect the case, the court's reasoning, and policy justifications;
- fit the case into the fabric of principles of law and precedent;
- consider how the court's analysis will raise issues for future cases; and
- critique the court's analysis or offer an alternative analysis.

The author's case note analysis may agree or disagree with the court's approach and/or holding. In this sense, writing a case note is an opportunity to speak your point of view about a very specific area of law relative to the case about which you are writing. Portions of the case note will reflect on implications of the case in a larger sense. However, the case note should generally remain focused on the particular case. The case note follows a fairly standard format:

1. Table of contents (not included in page count)
2. Introduction (included in the page count, and it should start on a new page)
3. History of the relevant law
4. Facts of the case
5. Statement of the court's analysis and holding
6. Analysis
7. Conclusion

The purpose of a case note is to highlight recent developments in the law. Thus, significant, controversial, and interesting cases are particularly excellent candidates for a case note analysis.

Two sample case notes are included in this packet. These particular case notes were successful in the write-on competition, and the authors were also selected for publication. While these case notes are excellent examples, please note that the endnotes have not been corrected for any citation errors—they are in their original submission form. Additionally, note that these submissions required two spaces after a period. The 2019–2020 Write-On Competition requires only one space. Always go to the *Bluebook* for citation!

To review other examples, see published case notes in previous issues of the *Law Review* (http://mitchellhamline.edu/law-review/). Note, however, that these examples are much longer than the case note required for the write-on competition. The write-on competition requires at least eight pages of text and eight pages of endnotes, with no more than twenty pages altogether.

THE METHOD OF LAW REVIEW WRITING

I. GENERAL COMMENTS

The technique of law review writing is unique. Each sentence should be carefully written, with attention paid to draftsmanship, research, and accuracy of expression. This is particularly true concerning statements of law, analysis, and opinion.

Statements not reflecting the author's original idea or opinion must be cited. This is necessary both to avoid plagiarism and to increase the author's credibility. Often a statement will require several footnotes within a particular sentence. Legal writing does not involve merely collecting and discussing cases or gathering quotations. It is important for the writer to set out in the text of the article the relationship between the authorities. Examination of the authorities requires that they be compared, reconciled, and analyzed.

Clarity and organization are of primary importance. Each sentence and paragraph should naturally follow the preceding sentence. Statements of fact should be brief and concise but should not leave out any significant fact. The writer should write with enough clarity that a beginning law student could understand the article, but also in an interesting and learned manner so that the most noted legal scholar would respect the work and appreciate the significance of what is said.

Text that is a close paraphrase of another source should be changed to an exact quote and properly cited. That being said, writers should avoid the common tendency to overuse quotations. The desired point can usually be stated more succinctly through your own careful choice of words. When a quotation is used, it is more commonly confined to footnotes. Occasionally, however, quotations are placed in the text of an article to illustrate the court's point of view.

Quotations in the text may also be used if the court has summed up by way of dictum the author's conclusions on a point of view. That is, you may prefer to use the words of the court rather than your own, but whenever the language of the court is set out as an accurate statement of the law, it should be supported by independent authorities.

For example, consider this sentence: "The rule was well stated in the case of *X v. Y* in which the court said '- - - - - - - - -.'" This requires a footnote setting out the page(s) in *X v. Y* at which the dictum appears. This requirement is obvious, but preferably such a statement should also be accompanied by a footnote containing an independent citation of authority supporting the statement that this is an accurate recitation of the law. That is necessary because the dictum has been set out to represent the status of the law rather than merely to represent the attitude of a particular court in a particular case.

When stating your own opinions, criticisms, or conclusions without support of direct authority, ensure the statement reads as such and is not misleading. It is important to distinguish personal opinions, based on the author's study of legal materials, from attempts to collect and objectively put together cases. Statements of opinion should be accompanied by a "see" footnote, showing cases on which the author's opinion is based and possibly giving an explanation of this opinion.

The "History of the relevant law" section should be a complete story of the issue that is the subject of the note. There is a tendency to write this section like the statement of the rule in an office memo. Instead, this section should read as if a historian wrote it. It should begin at the first recorded statement by a court or legislature, chronicle the law's evolution, and conclude with the present rule of law. Try to think of this section as a moving picture of this area of the law, organized in chronological order, rather than a snapshot of the law as it is today (or the day before your case was decided, if you are writing a case note). For a good example of this, see Mary Maloney-Huss, Case Note, *Eighth Circuit Extends McCarran-Ferguson to Shield Alleged Monopolization of the Health Insurance Industry from Antitrust Scrutiny*, 15 WM. MITCHELL L. REV. 713, 714–16 (1989) (discussing evolution from the fourteenth century to the twentieth century and containing no apology for its long title).

Also, the "History of the relevant law" section should move from the general to the specific. For example, if you are writing on the standard of judicial review for administrative agencies' fact-finding in formal adjudication, you might start with the general purpose of the Administrative Procedure Act, then focus on judicial review, and finish with judicial review as it specifically applies to formal adjudication. Sometimes an article concerns the intersection of two different areas of the law. In that case, you must trace the path of both laws separately and then combine them at the end of the section.

II. PROPER USE OF AUTHORITY

An important aspect of writing the first draft is the correct use of supporting authority. This is accomplished by utilizing citations. Care must be taken, however, to be sure the authority cited does in fact support the textual statement. More specifically, before using a case as authority, a writer must distinguish a court's holding from its dictum; the writer must distinguish what a court does from what it says, and sometimes, from what it says it is doing. The holding is generally considered an appellate court's disposition of issues presented in appealing the conduct or procedure of the lower court. It includes essential reasons supporting the ruling on each issue. A gratuitous or preliminary statement of law in a case would merely be dictum. Often there will be difficult problems in deciding which label is appropriate, but the following illustrations may be helpful:

A. The trial court makes rulings A, B, and C. The appellate court states that A, B, and C are all correct and affirms. The case may be cited as finding for A, B, and C.

B. The trial court makes ruling A. The appellate court states that A was erroneous and that the ruling should have been B instead. The case may be cited as holding that A is erroneous, and as holding that B is correct, so far as B is clearly contrary to A. If, however, B goes beyond this and covers areas not included in A as well, then it is best to cite it as dictum. This calls for the use of individual judgment.

C. The court states that A is the general rule, but that it is not applicable to the facts before it. The case may be cited as dictum for general rule A.

D. The court modifies a judgment and affirms the judgment as modified. The case may be cited as holding for both the portion of the judgment that is affirmed and the portion that is modified.

E. The attorneys arguing the case assign errors or raise points that the court neither considers nor acts upon. Do not cite the case as either holding or dictum. Instead, merely explain what happened. For example, "In *Jones v. Smith*, counsel contended that . . . , but the court apparently . . . ."

F. The dissenting opinion raises a point that the majority did not express, but which it must have necessarily rejected in order to reach its conclusion. Do not cite the case as either holding or dictum, but merely explain what happened. For example, "In *Jones v. Smith*, the dissent contended . . . , but the majority apparently . . . ."

G. Another extremely important aspect of the correct use of supporting authority is the assurance that the authority is still good authority. To this end, every decision and statute cited must be carefully Shepardized through Westlaw, Lexis, or the latest paper supplement before being used as authority. Be certain that no case has been reversed, overruled, or so distinguished as to substantially destroy its value as an authority. Subsequent history of a case such as *cert. denied*, etc., must be included as part of the citation. See *Bluebook* Rule 10.7 for detailed rules on citing subsequent history.

III. AMOUNT OF AUTHORITY

The question always arises as to the amount of authority that is necessary to support a proposition in the text of an article. This question is not easily answered. The decision basically involves the discretion of the writer and will depend to a great extent on the quality of the authorities cited. For example, if you can cite a recent United States Supreme Court decision that is clearly controlling as to a point of law cited in the text, this decision alone can probably support the statement and represents a satisfactory citation of authority. On the other hand, it may be equally desirable not only to set out authority necessary to support a statement made in the text, but also to provide a number of additional primary and secondary authorities as an aid to research for readers who may be interested in following up the proposition stated.

Where the authorities cited in support of a proposition are of a lesser quality, there will generally be a need, if possible, to cite several cases in support of the statement. Where there is abundant authority that casts some doubt on the proposition, it is advisable to cite sufficient authority so that both sides of the issue can be thoroughly examined. Some articles place specific emphasis on consideration of the law in Minnesota. Even where this is not the object of the author's treatment of the subject, it is generally considered preferable to include among the authorities some Minnesota cases or discussions of Minnesota law so that the Minnesota position is at least indicated by implication. In some situations, a separate paragraph in a footnote may be devoted to discussion of the Minnesota position in regard to a matter taken up in the text or for which the footnote provides authority.

The writer should be careful not to overlook the use of secondary authorities, particularly where only a limited amount of space is devoted to discussion of a preliminary or related point in the article. This provides an opportunity for the reader to obtain a more detailed discussion and a more extensive collection of authorities, even though it would not be practical to thoroughly treat the matter in the article itself. Secondary authority is generally not sufficiently precise and does not purport to present an accurate treatment of the law. Annotations, such as A.L.R.s, may be

used as collateral citations, along with the state and regional report citations, if the entire case has been reported and annotated.

IV. USE OF FOOTNOTES/ENDNOTES

Endnotes/footnotes serve several purposes. An endnote/footnote may contain any or all of the following:

A. Citation and discussion of authorities supporting the statement in the text. This will always come first in a footnote containing both citation of authority and discussion of collateral matters.

B. Explanation of the rationale of a statement of law contained in the text. Often this reasoning will be placed in the text, but the writer may find it more appropriate to place it in an endnote/footnote instead.

C. Historical review or background of a point of law, a statement contained in the text, or other matters of law or analysis which may be useful in explaining the text material.

D. Various analyses of or questions regarding the authorities, rules of law, or reasoning of the court with regard to the rule set out in the text.

E. Collateral matters may be discussed or alluded to with citation to sources containing a lengthy treatment of the subject. It may be desirable to present a brief discussion of these matters and then provide further citations so that someone interested in the matter can follow it.

F. Remember that endnotes/footnotes are not just places to catch all extra items of information the writer may have collected. They should be useful to the article but essential to the text.

V. PARENTHETICALS

Parentheticals are valuable in certain situations but are often overused. The *Bluebook* contains some valuable instructions on this issue at Rule 1.5, with which everyone should be familiar. In sum, it implies that parentheticals are not required, or even recommended, where the relevance of the cited authority is clear from the text. Thus, writing parentheticals that restate the proposition of the text is senseless

Parentheticals are useful in just a few situations. One example would be when the case is cited for a proposition that is not central to the holding of the case. Thus, if you were discussing appellate standards of review, and you stated that a particular court used a de novo standard, it might be useful to show what the substantive issue was, e.g., "(holding that bonuses for non-strikers constituted unfair labor practice)." For another example, parentheticals are useful when you have a string cite with many cases, each of which varies from the text's proposition in its own way. Thus, a rule of law regarding the law of medical malpractice might list several cases with parentheticals such as "knee injury," "shoulder injury," etc. Yet another example is when you want to quote a short (preferably, less than one sentence), useful phrase.

Parentheticals are not intended to take the place of extended textual footnotes. The form of a parenthetical is very limiting. It is difficult to transmit a well-reasoned description of a case, or syntheses of several cases, when you limit yourself to a single present participle proceeded by one of a short list of signals. The purpose of a law review article is to explain the subject to the reader in a way that is logical and understandable. An author who merely lists cases with parenthetical descriptions does not accomplish this purpose.

Perhaps the best way to understand how parentheticals should be used is to read back issues of our publication or any high-quality law review, taking note of the conventions used by published authors.

VI. PROPER CITATION--*BLUEBOOK*

Citations, if initially done correctly, save time—time that can be better spent researching, analyzing, and writing. All citations in the *Mitchell Hamline Law Review* conform to the twentieth edition of *The Bluebook: A Uniform System of Citation*, as published by the Columbia Law Review Association, Inc., et al, as well as all local rules in the *Mitchell Hamline Law Review* style guide contained in this handbook. There are several systems of citation in use in the United States; therefore, many legal periodicals are not in *Bluebook* form. It is essential to get familiar with the *Bluebook* and its index. There is a specific *Bluebook* rule for almost everything.

VII. DRAFT PREPARATION

Plagiarism is not tolerated in law review writing. If discovered, it will result in immediate expulsion from the *Law Review*. The *Law Review*, all of the articles that it contains, and other periodicals are copyrighted.

All drafts submitted to the editorial board must conform to the following specifications:

A. Text and footnotes/endnotes must be double-spaced.

B. Follow *Bluebook* rules. For example, all words that are italicized in the *Bluebook* should, likewise, be italicized in your paper.

C. Follow *The Chicago Manual of Style* (17th ed.) for grammar, punctuation, etc.

D. Lateness due to computer problems, printer problems, power failures, traffic, etc. will not be excused.

E. Keep a copy of your draft.

Finally, a word about the editorial process. Students are allowed to direct a reasonable amount of questions to the Notes & Comments Editor. Substantive questions about their write-on submission will not be answered. Ultimately, a student should remember that it is his or her name alone that will be on the paper, and *Law Review* Editors have the authority only to provide guidance and general advice.

TECHNICAL REQUIREMENTS FOR THE CASE NOTE

A. REQUIREMENTS

1. Comply with the requirements in the Case Note Parameters (located at §2.6).
2. *Anonymous ID*: *Place your write-on ID on the top right-hand corner of each page of each of your final drafts*. This must be inserted in the header. This ID is a random, anonymous name that will be assigned to you when the write-on competition begins.
3. Footnote Copy: Applicants must turn in one electronic copy with footnotes. All text in the footnote copy must be identical to the submitted endnote copy.
4. Endnote Copy: Applicants must turn in one electronic copy with endnotes. Page count will be determined using this copy. The case note must have at least 8 pages of text and 8 pages of endnotes, all double-spaced. All text in the endnote copy must be identical to the submitted footnote copy.
5. Naming: Scoring of final case notes is anonymous. Only when the scoring is complete will we match names to case notes. DO NOT INCLUDE A COVER SHEET OR PUT YOUR NAME ANYWHERE ON THE FINAL DRAFT.

B. SUBMISSION

1. Time: Both the footnote and endnote copies of case note submissions are due on Sunday, June 9 at 7:00 p.m. Because of the editing and evaluation schedule, and for reasons of fairness, **we will not accept late submissions, regardless of any excuse**. We strongly suggest not waiting until the last minute to hand in your materials. **You should save often.**

   Electronic submissions: You must electronically submit one copy of the case note in endnote format and one copy of the case note in footnote format. Each must be submitted in separate Word documents. These two documents (as well as your Bluebook quiz and Honor Pledge) must be submitted in one email, and must be received by elizabeth.slama@mitchellhamline.edu by 7:00 p.m.

C. HONOR PLEDGE

1. You must fill out and submit an electronic version of a signed honor pledge (see § 1.3 of this handbook) along with your *Bluebook* quiz and case note (in both endnote and footnote format). Signing the pledge indicates that you have observed the rules according the HONOR CODE section of this Handbook. Please print off the honor pledge, sign it, and then scan it into your computer in PDF format.
2. The case note and *Bluebook* quiz are to be completed 100% on your own. ANY DIVERGENCE FROM THESE RULES WILL LEAD TO AUTOMATIC DISQUALIFICATION.
3. After you have been assigned a topic, you may disclose your topic to other participants. Once the competition begins, you may not at any time discuss the case, its legal issues, legal research, or legal citation with anyone at all, including but not limited to participants, non-participants, professors, judges, practitioners, Westlaw or Lexis

representatives, law school graduates, other law students, friends, family members, or complete strangers. You may ask librarians or library staff specific questions about how to complete a research step you have already identified, such as where to find a book or how to use a specific database features, but you may not ask questions that require a judgment on how best to research your topic.

4. You may not conduct interviews or otherwise contact any other person for commentary on a case, brief, article, or any other source connected to your research or your assigned case. This prohibition includes authors of works you come across through research, attorneys, law students, and any persons related to the case.
5. At no time may you show written work to anyone, not even the Notes & Comments Editor.
6. You must be respectful of other participants' interests in using the same library sources. You may not leave a source in a place where other participants cannot find it.
7. You are expected to adhere to the highest ethical standards. Your signed honor pledge is your contract with the *Law Review* that you have complied with the MHSL Student Code of Conduct during the competition. Accordingly, you also have a duty to report any known violations of the write-on competition rules by any other participant. Any reports of violations will be taken seriously and false allegations will not be tolerated.

CASE NOTE PARAMETERS

Cover Sheet:	Final Draft: Do not include a cover sheet. Submit one electronic copy of your case note in endnote format and one electronic copy of your case note in footnote format.
Paper:	8 1/2 by 11 inches.
Margins:	One-inch margins on both sides. One-inch margins top and bottom (except for page numbering and ID).
Type:	The case note must be typed. Use twelve-point, Times New Roman font.
Body:	Both text and endnotes must be double-spaced. Indent the first line of each paragraph. Use one space between sentences. Place your write-on ID on the top right-hand corner of each page of each of your final drafts.
Length:	Length will be determined based on your endnote-formatted submission. Text must be at least eight pages. The table of contents is ***not*** included in your page count. Endnotes must be at least eight pages. Total length may not exceed twenty pages. Page length may vary for your footnote-formatted submission.
Title:	Your title must be in bold and it must be aligned on the left side of the first page. Write your case note topic in all caps, followed by a colon, followed by your title in regular caps, followed by an em dash, followed by the case citation. See the sample below. **CONTRACTS: This Case Was Great—*Doe v. Doe*, 555 N.W.2d 555 (Minn. 2014)**
Page Numbers:	Page numbers must be centered in the bottom margin.
Anonymous ID	Your anonymous ID must be in the top right hand corner of each page.
Citation:	Citations must conform to the twentieth edition of *The Bluebook: A Uniform System of Citation*.
Honor Pledge:	The Honor Pledge must be signed and scanned into your computer so that you can submit it in electronic version via email with the rest of your submission materials to elizabeth.slama@mitchellhamline.edu.

PAPERS NOT MEETING THESE REQUIREMENTS WILL BE PENALIZED.

CASE NOTE SCORING RUBRIC

		4	3	2	1	Points
Research	*Thoroughness*	The case note uses *all* significant primary and secondary authority. *Many* sources are unique and diverse.	The case note uses *most* significant primary and secondary authority. *Some* sources are unique and diverse.	The case note uses *some* significant primary and secondary authority. *A few* sources are unique and diverse.	The case note uses *minimal* significant primary and secondary authority. Sources are *neither* unique *nor* diverse.	
	Application of Authority	A*ll* statements are supported by appropriate authority. *Almost all* sentences include a footnote.	*Most* statements are supported by appropriate authority, but authority is *occasionally lacking*. *Most* sentences include a footnote.	S*ome* statements are supported with appropriate authority, but authority is *often inadequate*. *Many* sentences include a footnote.	Authority is *minimal* and *usually inadequate*. *Many* sentences lack a footnote.	
Writing Ability	*Organization*	The case note *follows the outline* provided in the guidelines or modifies the structure in an *appropriate* way. Paragraphs are structured *thoughtfully*.	The case note makes *minor, inappropriate deviations* from the suggested structure. There are *a few minor issues* with paragraph structure.	The case note makes *several minor, inappropriate deviations or one major deviation* from the suggested structure. There are *several minor issues* with paragraph structure.	The case note bears *little or no resemblance* to the outline provided in the guidelines and *lacks any coherent structure*.	
	Clarity	The case note is *very reader-friendly*. *Each* sentence is free from ambiguity or vagueness. *Each* sentence is written in plain, formal language and is free from legalese.	The case note is *reader-friendly*. *Most* sentences are free from ambiguity or vagueness. *Most* sentences are written in plain language, but some are informal or include unnecessary legalese.	The case note is *somewhat* reader-friendly. *Some* sentences are ambiguous or vague. *Several* sentences include informal language or include unnecessary legalese.	The case note is *not* reader-friendly. *Many* sentences are ambiguous or vague. *Many* sentences include informal langugae or include unnecessary legalese.	
	Footnote/ Endnote Quality	Endnotes *always* relate to the text and are *always* informative. The endnotes go beyond mere citation of sources and include *ample* explanatory text.	Endnotes *usually* relate to the text and are *often* informative. The endnotes include *some* explanatory text.	Endnotes *usually* relate to the text and are *sometimes* informative. The endnotes include *minimal* explanatory text.	Endnotes *sometimes* relate to the text and are *rarely* informative. The endnotes include *no* explanatory text.	

		4	3	2	1	Points
Analysis and Persuasion	*Overall Thesis*	The overall thesis is *thorough, sound, and unique* (i.e., novel and innovative). The analysis of the case is *persuasive and compelling*.	The overall thesis is *thorough and sound* but *lacks uniqueness*. The analysis of the case is *generally* persuasive but *some secondary arguments* are not convincing.	The overall thesis is *sound* but *lacks thoroughness and uniqueness*. The analysis of the case is *somewhat* persuasive but *some primary arguments* are not convincing.	The case note *lacks any original thought or overall thesis*. The case note is *merely a synopsis* of the case and relevant law.	
	Support of Thesis	The overall thesis is *well supported* throughout the case note. Each section and paragraph *complements* the author's overall thesis.	The overall thesis is *usually well-supported. Most* sections or paragraphs complement the overall thesis, but the writing is *occasionally* tangental or superfluous.	The overall thesis is *sometimes* well-supported. *Some* sections or paragraphs complement the author's overall thesis, but *several sections* are tangental or superfluous.	The overall thesis is *frequently unsupported. Many* sections and/or paragraphs have little to do with the author's overall thesis, and *much* of the writing is tangental or superfluous.	
Technical Aspects	*Grammar and Proofreading*	The case note has 0–4 grammar and spelling errors according to the *Chicago Manual of Style* (*CMOS*).	The case note has 5–10 grammar and spelling errors according to *CMOS*.	The case note has 11–16 grammar and spelling errors according to *CMOS*.	The case note has 17 or more grammar and spelling errors according to *CMOS*.	
	Citation Accuracy (*Bluebook*)	0–4 Errors = 12 pts 5–8 Errors = 11 pts 9–12 Errors = 10 pts	13–16 Errors = 9 pts 17–20 Errors = 8 pts 21–24 Errors = 7 pts	25–28 Errors = 6 pts 29–32 Errors = 5 pts 33–36 Errors = 4 pts	37–40 Errors = 3 pts 41–44 Errors = 2 pts 45–48 Errors = 1 pt	

TOTAL POINTS (from both pages):	

Mandatory 2 point deduction: □ absence of a title □ incorrect font □ page length violation □ incorrect margins □ not double spaced	**Mandatory 1 point deduction** for any other deviations from the *Case Note Checklist*	**DEDUCTIONS:**	
		GRAND TOTAL:	

CASE NOTE STRATEGIES

1. Always keep in mind the general principles that are laid out in "What Is a Case Note?"
2. Prepare the case note:
    A. Read the court's opinion and any concurring or dissenting opinions very carefully.
        1) Identify the important issue or issues. Determine their significance.
        2) Remember—you do not need to address every issue raised by the court.
        3) Keep a narrow focus.
            a. Does the case address a novel issue?
            b. Does the court develop a novel theory or approach?
            c. Does the court misapply law or apply it correctly?
            d. Are policy rationales persuasive or unpersuasive?
            e. Is there procedural error?
            f. What is the history of the issues?
    B. Develop a theme for your analysis. Adopt a critical or positive approach.
    C. Research the issues raised by your theme.
        1) Research both primary and secondary authority.
        2) Include relevant national and local law.
        3) Find historical and current law.
        4) Use a diverse variety of sources.
    D. Begin writing. Text must be at least eight pages long.
        1) Title. The title should be single-spaced. It should state the general subject area, then describe the main point of your article, and then list the name of the case. A creative title is a plus.
        Example:
            CRIMINAL CONSTITUTIONAL LAW: Expanding the Reasonable Suspicion Standard for Investigatory Stops—*State v. Johnson*, 444 N.W.2d 824 (Minn. 1989).
        2) Introduction. The introduction should include:
            a. A brief statement of the relevant procedure and the holding;
            b. A brief description of the issues raised; and
            c. A brief statement of the analysis to follow.
        3) History of the relevant law. Set up this section so that it relates to your analysis to follow.
            a. Identify the issue or issues you will analyze historically.
            b. Examine the development of the law regarding these issues.
            c. Specifically address Minnesota law, but you may address the law of other jurisdictions if it is applicable.
            d. Discuss the historical events leading up to the main case, but do not yet discuss the main case itself.
            e. Include elements of the law, governing rules, standards, statutes, or regulations, as well as any specific exceptions to the law.
        4) Facts of the case.
            a. Present the major facts in the body.
            b. Present the secondary facts in the endnotes.

c. State the facts succinctly, but do not omit significant facts.

5) Statement of the court's analysis and holding.
   a. State the court's holding.
   b. State the court's reasoning.
   c. Tie your case to the law as described in your history section.
6) Analysis.
   a. State your opinion here, and only here. Criticize or support the holding and analysis. If criticizing, offer an alternative approach and an explanation.
   b. Explain whether the decision fits with prior law or whether it departs.
   c. Discuss policy ramifications.
7) Conclusion.
   a. Summarize the significance of the case.
   b. Reiterate your theme.
8) Endnotes. The endnotes are perhaps the most important part of the case note. Well-written endnotes exemplify mastery of the case note.
   a. Endnotes must be at least eight pages long.
   b. Use the twentieth edition of the *Bluebook*.
   c. Follow the "law review" format from the *Bluebook's* white pages.
   d. Follow the *Mitchell Hamline Law Review* style guide as set out in this packet. This may modify the *Bluebook*. THE *MITCHELL HAMLINE LAW REVIEW* STYLE GUIDE TAKES PRECEDENT OVER THE BLUEBOOK.
   e. Demonstrate proper use of introductory signals.
   f. Use pincites where appropriate.
   g. Do not use footnotes—use endnotes.
   h. Nearly every sentence should have a citation.
   i. Avoid overusing direct quotations. Paraphrase where appropriate.
   j. Include the following in endnotes:
      - Citations
      - Textual support for the text and the citation
      - Historical or background explanation
      - Secondary information
      - Discussions of collateral matters

E. Continue to research after you start writing. You will almost certainly find new issues you need to research.
F. Read case notes available on the Mitchell Hamline Law Review website for guidance and ideas.
G. Comply with general writing principles. Use proper spelling, punctuation, grammar, sentence structure, diction, transitions, etc. according to the *Chicago Manual of Style* (17th ed.).

Hand in your case note and go celebrate a job well done!

PUNCTUATION AND STYLE

This is a short summary of some of the more important rules that need to be observed when writing, quoting, and editing. Many of these are taken verbatim from *The Chicago Manual of Style* (17th ed.). This list is not complete; it contains only those rules that are frequently violated. If you have any questions not answered in this handout, consult *The Chicago Manual of Style*.

Applicants may access the *Chicago Manual of Style* in print at the Warren E. Burger Library. Applicants may also access the *Chicago Manual of Style* online through the Warren E. Burger Library Subscription Databases.

A. Periods

Periods are almost always placed within quotation marks, even within single quotation marks that set off special terms at the end of a sentence.

> Mark Twain said, "Let us endeavor so to live that when we come to die even the undertaker will be sorry."
>
> "A person's own death becomes real to him after the death of both parents. Until then, there was someone else who was 'supposed to' die before him; now that no one stands between him and death, it becomes his 'turn.'" Robert Novick, *The Examined Life*.

B. Colons

Colons should always be placed outside quotation marks.

> Kego has three objections to "Filmore's Summer": it was contrived; the characters were flat; the dialogue was unrealistic.

When a colon is used to introduce a statement, quotation, list, related clause, etc., there is only one space between the colon and the work or punctuation following the colon.

> "What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not." St. Augustine, *Confessions*.

C. Brackets

Brackets have two frequent uses in law review writing (particularly in use with quotations). Brackets are used to enclose editorial interpolations, corrections, explanations, or comments in quoted materials.

> "[A Conservative] is enamored of existing evils, as distinguished from a Liberal, who wishes to replace them with others." Ambrose Bierce, *The Devil's Dictionary*.
>
> Gore Vidal said, "[Ronald Reagan is a] triumph of the embalmer's art."

> Brackets are also used to indicate a change in capitalization or other alteration. Jeremy Bentham said, "[E]very law is an infraction of liberty."
>
> George Orwell believed that England is "the most class-ridden country under the sun" and that "[i]t is a land of snobbery and privilege, ruled largely by the old and silly."

D. Quotation Marks

Quoted words, phrases, and sentences that run into the text are enclosed in double quotation marks. Single quotation marks, however, enclose quotations within a quotation.

> "'Journalese' is a quilt of instant words patched together out of other parts of speech. Adjectives are used as nouns ('greats,' 'notables'). Nouns are extended into adjectives ('insightful'). Nouns are used as verbs ('to host'), or they are chopped off to form verbs ('enthuse,' 'emote'), or they are padded to form verbs ('beef up,' 'put teeth into')." William Zinsser, *On Writing Well*.

E. Block Quotations

Material set off from the text as a block quotation should not be enclosed in quotation marks. Any quoted matter within a block quotation should be enclosed in double quotation marks, even if the source quoted uses single marks.

Therefore, when a quotation that runs into the text in the original is converted into a block quotation, the initial and final quotation marks must be deleted and the internal marks changed to double quotation marks. Similarly, if a quotation set off from the text in the original is run into the text, initial and final quotation marks must be added and any internal quotation marks changed accordingly.

F. Run-In Quotations

Run-in quotations (as opposed to block quotations) are in the same type size as the text and are enclosed in double quotation marks. When a quotation is used as a syntactical part of a sentence, it begins with a lowercase letter, even though the original is a complete sentence beginning with a capital. Remember, whenever the original is changed in any way, the change or addition must be enclosed in brackets.

> Jeremy Bentham once said that "[l]awyers are the only persons in whom ignorance of the law is not punished."
>
> Clarence Darrow believed that people insist on the death penalty because "human beings enjoy the suffering of others." Clarence Darrow, *The Story of My Life*.

Note: The initial letter of a block quotation may be lowercase if the syntax demands it, but a colon is usually used to introduce a long, formal quotation.

When a quotation is not syntactically dependent on the rest of the sentence, the initial letter is capitalized.

> Jeremy Bentham said, "Lawyers are the only persons in whom ignorance of the law is not punished."
>
> Clarence Darrow believed he knew why many people in the world still insist upon the death penalty. As Darrow explained, "Different people would give different reasons for this, but the real reason is that human beings enjoy the sufferings of others."

G. Ellipses

Any omission of a word or phrase (including citations), line, or paragraph, from within a quoted passage must be indicated by ellipsis points (three dots). The *Law Review* distinguishes between the use of ellipsis points for an omission within a sentence and between sentences.

Three dots indicate an omission within a sentence. Thus an omission in the sentence by Leonard Levy:

> "Jefferson, like the others, believed that there could be no toleration for serious differences of opinion on the issue of independence."

As shortened:

> "Jefferson . . . believed that there could be no toleration for serious differences of opinion on the issue of independence."

Four spaced dots indicate the omission of (1) the last part of the quoted sentence, (2) the first part of the next sentence, (3) a whole sentence or more, or (4) a whole paragraph or more. When a sentence ends with a question mark or an exclamation point in the original, this mark is retained, and three dots are used for the ellipsis.

When four dots indicate the omission of the end of a sentence, the last dot is the period. A grammatically complete sentence, either as it is quoted or in combination with the text preceding it, should precede an ellipsis indicated by four dots. Similarly, a full sentence should also follow a four-dot ellipsis. In other words, every succession of words preceding or following four ellipsis points should be a functional sentence. The following is by Emerson:

> The spirit of our American radicalism is destructive and aimless: it is not loving, it has no ulterior and divine ends; but is destructive only out of hatred and selfishness. On the other side, the conservative party, composed of the most moderate, able, and cultivated part of the population, is timid, and merely defensive of property. It vindicates no right, it aspires to no real good, it brands no crime, it proposes no generous policy, it does not build, nor write nor cherish the arts, nor foster religion, nor establish schools, nor encourage science, nor emancipate the slave, nor befriend the poor, or the Indian, or the immigrant. From neither party, when in power, has the world any benefit to expect in science, art, or humanity, at all commensurate with the resources of the nation.

The passage might be shortened as follows:

> The spirit of our American radicalism is destructive and aimless. . . . [T]he conservative party . . . is timid, and merely defensive of property. It vindicates no right, it aspires to no real good. . . . From neither party . . . has the world any benefit to expect in science, art, or humanity, at all commensurate with the resources of the nation.

Three dots without a period are used at the end of a quoted sentence that is deliberately and grammatically incomplete:

> Everyone knows that the Declaration of Independence begins with the sentence "When, in the course of human events . . ." But how many people can recite more than the first few lines of the document?

In general, no ellipsis points should be used (1) before or after an obviously incomplete sentence, (2) before or after a run-in quotation of a complete sentence, (3) before a block quotation beginning with a complete sentence or an incomplete sentence that completes a sentence in the text, or (4) after a block quotation ending with a complete sentence.

H. *Sic*

Sic may be inserted in brackets following a word misspelled or somehow incorrect in the original. (Note that *sic* is a complete word, not an abbreviation, and, therefore, takes no period.) Overuse of this device, however, is to be discouraged. In most articles it is unnecessary to call attention to every variant spelling or every oddity of expression in quoted material.

I. Hyphen (-)

Do not flank a hyphen with spaces. The hyphen is used *only* in compound words and names. Hyphenate compound numbers from twenty-one to ninety-nine. Do not hyphenate adverbs ending in "ly."

- E.g., "five-year-old child," or "third-largest town"
- NOT "highly-paid," "utterly-useless," "frankly-discussed-subject," or "newly-discovered fact"

J. En-Dash (–)

The en-dash is used primarily to connect ranges of numbers. The en-dash is also used in limited cases of compound adjectives involving open compounds.

- E.g., "1998–2002" or "§§ 1–4"
- E.g., "post–World War II," or "quasi-public–quasi-judicial body"

K. Em-Dash (—)

Do not flank the em-dash with spaces. The em-dash is the most commonly used of the dashes, but two uses are the most common:

- It can be used to amplify or explain.
    - E.g., "It was a revival of the most potent image in modern democracy—the revolutionary idea."
- It can also be used to set off a phrase.
    - E.g., "Because the data had not been fully analyzed—the reason for this will be discussed later—the publication of the report was delayed."

L. Miscellaneous Notes

- Use active verbs.
- Omit needless words.
- Avoid legalese.
- Use plain, familiar, concrete language.
- Proofread.
- Use one space between sentences, not two. Note: This requirement follows the advice of the *Chicago Manual of Style* (17th ed.) and *The Bluebook* (20th ed.).
    - An easy way to visually check spaces between sentences is to click the ¶ button in Microsoft Word under "Paragraph" on the "Home" tab (this button is located above the tabs on Word for Mac).
- Distinguish between hyphens, en-dashes, and em-dashes.

MICROSOFT WORD SHORTCUTS

These tips are optional and for the writer's convenience only. Shortcuts may work differently on different versions of MS Word. [NOTE: Mac shortcuts are in parenthesis]

Generally

FORMATTING SHORTCUTS

Small Caps: CTRL+SHIFT+K (COMMAND+SHIFT+K)
Italics: CTRL+I (COMMAND+I)
Underline: CTRL+U (COMMAND+U)
Bold: CTRL+B (COMMAND+B)

ENDNOTE/FOOTNOTE SHORTCUTS

Endnote: ALT+CTRL+D (COMMAND+OPTION+E)
Footnote: ALT+CTRL+F (COMMAND+OPTION+F)

VIEWING FORMATTING CHARACTERS

Make Invisible Characters Visible: CTRL+8 (COMMAND+8)

CUTTING/COPYING/PASTING

Cut: CTRL+X (COMMAND+X)
Copy: CTRL+C (COMMAND+C)
Paste: CTRL+P (COMMAND+V)

FILE SHORTCUTS

Save: CTRL+S (COMMAND+S)
Close: CTRL+W (COMMAND+W)
Print: CTRL+P (COMMAND+P)

BREAKS

Page Break: CTRL+ENTER (Fn+SHIFT+RETURN)

Write-on Competition Tips

ENDNOTE TIPS (PC)

A. Using the shortcut, "ALT+CTRL+D" instead of mouse-clicking "Insert > Footnote > Endnote" will save you a great deal of time.
B. For the write-on competition, endnotes will need to be in Arabic numerals (i.e., "1, 2, 3 …" though the default Word format is small Roman numerals (i.e., "i, ii, iii …")
   To change the format from Roman to Arabic numerals, do the following.
   1. Click on the "Insert" section of the ribbon
   2. Click on the "dialog box launcher" in the Footnotes section (the dialog box launcher is the small arrow in the bottom right corner or the Footnotes section)
   3. Select the radio button next to "Endnotes"
   4. Under "Number format," select "1, 2, 3 . . ." from the drop-down menu
   5. Click "Apply"

   From this point forward, your notes will be in Arabic format.

ENDNOTE TIPS (MAC)

A. Using the shortcut, "COMMAND+OPTION+E" instead of mouse-clicking "Insert > Footnote > Endnote > Insert" will save you a great deal of time.
B. For the write-on competition, endnotes will need to be in Arabic numerals (i.e., "1, 2, 3 …" though the default Word format is small Roman numerals (i.e., "i, ii, iii …")
   To change the format from Roman to Arabic numerals, do the following.
   1. Click Insert > Footnote
   2. Select the radio button next to "Endnote"
   3. Under "Format" select "1, 2, 3, …" from the drop-down menu
   4. Make sure the "Numbering" drop-down menu is set to "Continuous" and the changes apply to the whole document.
   5. Click "Apply"

   From this point forward, your notes will be in Arabic format.

SET SHORTCUTS FOR VARIOUS SYMBOLS (SUCH AS "EM-DASHES" (—), "EN-DASHES" (–), AND "SECTION" (§)) (PC)

1. Click on the "Insert" section of the ribbon
2. Click on "Symbol" and then click on "More Symbols"
3. Choose the symbol you want to modify (such as "em dash") and click on it so it is highlighted
   a. The en dash and em dash symbols are towards the end of the list of symbols
4. Click "Shortcut Key"
5. Choose whatever shortcut you will remember (ex: ALT+M)
6. Click "Assign"
7. Click "Close"
8. Click "Close"
9. Repeat with other symbols

SET SHORTCUTS FOR VARIOUS SYMBOLS (SUCH AS "EM-DASHES" (—), "EN-DASHES" (–), AND "SECTION" (§)) (MAC)

1. Click Insert > Symbol > Advanced Symbol
2. Click on "Special Characters"
3. Choose the symbol you want to modify (such as "em dash") and click on it so it is highlighted
4. Click "Keyboard Shortcut"
5. Click in the box next to "Press New Keyboard Shortcut"
6. Choose whatever shortcut you will remember (ex: CONTROL+M)
7. Click "Assign"
8. Click "OK"
9. Repeat with other symbols

   Note: The default shortcuts for these three symbols is "SHIFT+OPTION+-" (—), ("OPTION+-) (–), (OPTION+6) (§)

CONVERTING ENDNOTES TO FOOTNOTES

In order to convert your endnotes to footnotes (and vice versa), see https://support.office.com/en-us/article/Convert-footnotes-to-endnotes-ccfd96a0-e26a-4edc-b5ec-7e1a1acd739e?ui=en-US&rs=en-US&ad=US.

TABLE OF CONTENTS PAGINATION

Your table of contents is not included in you page count. In order to correctly paginate your article, see https://support.office.com/en-in/article/Number-pages-differently-in-different-sections-1ba9047e-4534-460f-8003-12a81bb527f3.

ACCESSING THE CHICAGO MANUAL OF STYLE (CMOS)

The CMOS is not free, so you will need to access it through the school's subscription using the instructions below. We suggest using Google Chrome as your browser.

If you run into trouble, CMOS offers a 30-day free trial and does not ask for financial information in order to sign up (i.e., it's not like some subscription services that charge you if you forget to cancel, so there is no risk involved).

1. Use this link: https://library.mitchellhamline.edu/record=b366912
2. Click "view resource online"
3. If prompted, log in with your Mitchell Hamline credentials
4. Click the tab at the top titled "CMOS 17 CONTENTS"
5. Everything you need will be under Part II Style and Usage

SAMPLE CASE NOTE 1

(**Disclaimer**: While this case note is an excellent example, please note that its formatting does not follow all of the *Law Review*'s requirements, and its endnotes have not been corrected for any citation errors. Always go to the *Bluebook* for citation! Additionally, this case note does not include a table of contents, which is required for your submission.)

TORTS: No Statutory Interpretation Required—*Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015).

I. Introduction

In *Guzick v. Kimball*,[1] a legal malpractice case, the Minnesota Supreme Court held that a plaintiff's case should be dismissed with prejudice because the plaintiff's first attempt to provide expert opinion on an element of legal malpractice was deficient.[2] *Guzick* upheld the court's jurisprudence on accounting malpractice—when expert opinion is severely deficient on an element of malpractice that requires expert support, courts can dismiss cases before trial and without granting the plaintiff any time to remedy the deficiency.[3]

This case note begins with a history of legal malpractice and the statutory framework underlying *Guzick*. The facts and procedural history of *Guzick* follow. The analysis of this note argues that *Guzick*'s unforgiving approach to defective expert opinions is at odds with a plain reading of the underlying statute.[4] Furthermore, to make the law more predictable and open to potentially meritorious claims, the court should adopt a plain reading of the statute and overrule *Guzick*'s interpretation.[5]

II. History

The Minnesota Supreme Court has long held that if an attorney's negligence causes damages to a client, the attorney is responsible for the damages.[6] The court recognized early that it is not always clear when an attorney-client relationship exists.[7] But when there is an attorney-client relationship, the court has articulated that the scope of a lawyer's duty to her client is to act "in good faith to the best of [her] skill and knowledge."[8] An attorney abiding by this standard does not breach her duty because of a simple error or mistake.[9]

Putting much of this common law into a modern framework, the court adopted four elements that are required for a prima facie legal malpractice claim: (1) an attorney-client relationship, (2) a negligent act, (3) proximate causation, and (4) but-for causation.[10]

In addition, procedural limitations require that expert opinion help establish a legal malpractice claim.[11] As the discussion below explores, medical malpractice law influenced the development of these procedural limitations.[12]

A. *Minnesota's Tort Reform Act and Section 145.682*

Section 145.682 was drafted partly to reduce frivolous medical malpractice lawsuits and was part of Minnesota's Tort Reform Act of 1986.[13] The statute requires two affidavits of expert opinion in support of the malpractice claim.[14] The first affidavit—the affidavit of expert review—is usually filed with the plaintiff's

complaint[15] and must only disclose that an expert read the facts and concluded that the defendant breached a duty, and this breach caused damages.[16] Second, an affidavit of expert disclosure must be served within 180 days of the commencement of discovery.[17] This second affidavit must identify the expert and provide the substance and grounds of the opinion.[18] In place of a formal affidavit of expert disclosure, answering an interrogatory can also satisfy the statute.[19] If a plaintiff does not meet these requirements, the defendant can submit a motion to dismiss the case.[20]

In *Sorenson v. St. Paul Ramsey Medical Center,*[21] the court interpreted that experts must explain their conclusions in a manner that is consistent with the legislature's purpose of avoiding frivolous lawsuits.[22] In particular, the second affidavit must contain more than general facts from the hospital record followed by conclusory statements of fault.[23] Rather, the affidavit must show adequate causation for a meritorious malpractice suit.[24]

In 2001, section 145.682 was amended because meritorious lawsuits had been dismissed over minor technical errors.[25] The statute now contains a safe harbor provision that provides plaintiffs at least forty-five days to correct errors upon service of a motion to dismiss.[26]

B. *The Enactment of Section 544.42*

In 1997, the legislature enacted section 544.42 to expand the scope of

section 145.682 to non-medical professionals.[27] Not surprisingly, the language, content, and timing requirements of section 544.42 closely track section 145.682.[28] The two-affidavit requirement is virtually identical.[29] First, the affidavit of expert review, which is typically served with the complaint, only needs to verify that an expert reviewed the facts of the case and found probable negligence.[30] Then, the affidavit of expert disclosure, which outlines the expert's reasoning, must be served within 180 days of discovery commencing.[31] An answer to an interrogatory can serve as an affidavit of expert disclosure.[32] If a plaintiff fails to meet these requirements, the defendant can move to dismiss the case.[33]

Section 544.42 was enacted with a safe harbor provision, which can provide the plaintiff sixty days to remedy any deficiencies upon service of a motion to dismiss.[34] Unlike section 145.682, the safe harbor period is not automatic—the court triggers safe harbor by providing the plaintiff notice of the affidavit's deficiencies.[35]

Analogously to *Sorenson*'s interpretation that conclusory statements do not satisfy the second affidavit under section 145.682, *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*[36] held that an attorney's conclusory allegations did not meet the affidavit's minimum standards under section 544.42.[37] As interpreted by *Brown-Wilbert*, the minimum standards are that the second affidavit must contain (1) the expert's identity and (2) the expert's opinion supporting the

elements of a prima facie malpractice case.[38] The court applies this standard to determine whether to grant a party sixty days of safe harbor or grant pretrial dismissal of the case.[39] The court reasoned that allowing conclusory affidavits to pass safe harbor would render the 180-day requirement meaningless presumably because nearly anything would qualify as an affidavit.[40]

After *Brown-Wilbert*, it was clear that an expert did not always need to support each element of a prima facie malpractice case—support of one or two elements could be enough.[41] However, because *Brown-Wilbert* was an accounting malpractice case, it was not entirely clear how it applied in a legal malpractice context.[42] *Guzick*, however, took up this very question in 2015.[43]

III. The *Guzick* Decision

A. *Facts and Procedural History*

Colleen Bennett ("Bennett") was the legal assistant of attorney Larry Kimball ("Kimball") at Kimball Law Office.[44] In 2008, Louis Nyberg ("Tony") asked Bennett to draft a power of attorney form that would allow Tony to act as attorney-in-fact of behalf of his uncle, George Nyberg ("George").[45]

Per office procedure, Bennett printed a standard form and filled in George's information.[46] The form contained a pre-checked box that would allow Tony full access to all of George's property.[47] Bennett gave the form to Tony, who obtained George's signature.[48] However, neither Bennett nor Kimball determined whether

George read and understood the form.[49] In fact, Kimball did not even see the form.[50]

In early 2009, Tony used the power of attorney form at a Wells Fargo branch to add his name to two of George's bank accounts as a joint owner with a right of survivorship.[51] A few days later, George died.[52] Around this time—before and after George's death—Tony transferred $226,524 to bank accounts he shared with his wife.[53]

Representing George's estate, Timothy Guzick sued Kimball for legal malpractice and alleged that Kimball had a duty to supervise Bennett and also had an independent duty to meet with George to discuss the legal consequences of the power of attorney.[54] Kimball moved for summary judgment against Guzick's claims on the basis that Guzick did not provide a satisfactory affidavit of expert disclosure within the required 180-day timeframe.[55] Although Guzick referenced the affidavit of expert review in answering Kimball's interrogatories, Kimball argued that this was inadequate because the expert's opinion was conclusory and did not establish any of the four elements of legal malpractice.[56]

The district court agreed with Kimball and granted the motion for summary judgment.[57] It held that Guzick's answers to Kimball's interrogatories were "grossly deficient in meeting the statutory requirements."[58] The court also held that

all four elements of legal malpractice should have been supported by expert opinion and that Guzick supported none of them.[59]

Guzick appealed the decision, and the court of appeals reversed. First, the court held that expert opinion was only required to fulfill two elements of legal malpractice—a negligent act and proximate causation.[60] Second, the court held that Guzick's affidavit was sufficient to satisfy these two elements.[61]

B. *The Minnesota Supreme Court's Decision*

Kimball appealed the court of appeal's decision, and the Minnesota Supreme Court reversed on the basis that Guzick's second affidavit was conclusory and failed the *Brown-Wilbert* standards.[62] First, the court noted that Guzick procedurally met the 180-day limit on the second affidavit by answering Kimball's interrogatories.[63] As such, he potentially qualified for safe harbor, which would have given him notice of deficiencies in the affidavit and sixty days to remedy those deficiencies.[64] As a result, *Brown-Wilbert* applied, and the court considered whether Guzick satisfied the minimum standards.[65] Guzick plainly satisfied the first *Brown-Wilbert* element—disclosure of the expert to be called upon.[66] Consequently, the case hinged on which elements of legal malpractice required expert opinion and whether Guzick's affidavit was satisfactory for each of these elements under *Brown-Wilbert*.[67]

Generally, the court noted that whether an expert is required for each element of legal malpractice is determined on a "case-by-case" basis.[68] The court found that Guzick needed an expert to establish a negligent act and proximate cause.[69] This is because the parties did not dispute that an expert was required to establish these elements.[70] The parties disputed whether an expert must establish but-for causation and the existence of an attorney-client relationship,[71] but the court determined an expert was not needed to establish but-for causation[72] and deemed it unnecessary to discuss the requirements for an attorney-client relationship.[73]

The court addressed two elements in its analysis: but-for causation and proximate cause.[74] First, in determining that but-for causation did not require an expert, the court considered whether the facts relating to but-for causation were "within an area of common knowledge and lay comprehension such that they can be adequately evaluated by a jury in the absence of an expert."[75] The court ruled that a lay juror could make causal inferences about whether Kimball's negligent acts were a but-for cause of the overbroad power of attorney form and whether this form was a but-for cause of the vulnerability of George's funds.[76]

Second, the court considered proximate cause, and this is what decided the case. Since Guzick did not dispute the necessity of expert opinion for proximate cause, *Brown-Wilbert* applied, and the court ruled that Guzick's second affidavit

was plainly conclusory because it only stated that Kimball's negligence "caused damages."[77] Consequently, this defect in the affidavit precluded Guzick from safe harbor under *Brown-Wilbert*.[78]

IV. Analysis

A. *Guzick Should Have Overruled Brown-Wilbert Because Brown-Wilbert Unjustifiably Abandons Plain Statutory Language*

In 2011, the Minnesota Supreme Court declined to extend *Brown-Wilbert* to medical malpractice in *Wesely v. Flor*.[79] The court reasoned that, under the plain language of section 145.682, the triggering of the forty-five day safe harbor period is entirely procedural and automatic.[80] Thus, there is no place for a substantive *Brown-Wilbert* analysis of an affidavit's content.[81] In contrast, under section 544.42, the court triggers the safe harbor period and issues specific deficiencies in the affidavit.[82] *Brown-Wilbert*, therefore, fits into the statutory framework of section 544.42.[83]

Wesely is persuasive regarding the differences in the statutes. Under section 544.42, the court identifies the deficiencies and grants the plaintiff sixty days of safe harbor.[84] Under section 145.682, the defendant identifies the deficiencies and the plaintiff has at least forty-five days to remedy the affidavit upon service of the motion.[85] In sum, the court is involved in the safe-harbor process in 544.42, but all references to the court are absent from the plain statutory language of 145.682.[86]

However, the differences in the two statutes are not enough for *Guzick* to uphold *Brown-Wilbert*. Section 544.42 does not state that the court plays a substantive role in granting safe harbor.[87] Subdivision 6(c) states that "an initial motion to dismiss an action . . . shall not be granted, unless after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4."[88] This language suggests that the court's role is limited to granting notice that the sixty days have started.[89] And, while the court must issue deficiencies in the affidavit, these deficiencies do not require remedy until after the sixty days have expired.[90]

Brown-Wilbert reasoned its interpretation of the statute was necessary because allowing affidavits with little or no content would render the 180-day requirement meaningless.[91] After all, a plaintiff could submit a "placeholder" affidavit to delay submitting a proper affidavit.[92] However, *Wesely* convincingly explained that this is unlikely because the first affidavit requires that the plaintiff already "[be] in contact with an expert."[93] Therefore, the plaintiff would usually have little reason to use such a tactic.[94] Moreover, even if a plaintiff uses this tactic, it is risky because it only leaves sixty days to submit an affidavit, and a failure to submit an affidavit in good faith could shift the defendant's attorney fees and other costs to the plaintiff.[95] Thus, *Brown-Wilbert* does not provide a compelling argument to deviate from the plain statutory language, and *Guzick*

missed an opportunity to return the court to the plain statutory language of section 544.42.

B. *Moving to the Statute's Plain Language Will Make Minnesota Law More Predicable and Open to Meritorious Lawsuits*

Guzick noted that the court should determine whether but-for causation requires expert support by considering whether the facts relating to but-for causation fall within an area of common understanding for a lay juror.[96] Presumably, the court would apply this standard to the legal malpractice elements of attorney-client relationship and proximate cause as well.[97]

When this inexact standard is combined with the power to dismiss a case early under *Brown-Wilbert*, its immediate application may unjustifiably dismiss the cases of unsuspecting plaintiffs.[98] *Brown-Wilbert* and *Guzick* do not require the court to specify its expectations for expert opinion before deciding a motion to dismiss. However, plaintiffs need to know the expectations of the presiding court and must have adequate notice to abide by these expectations.[99] After all, what falls within the common understanding for a lay juror might change over time and different courts might have different interpretations. Indeed, as the procedural history of *Guzick* demonstrates, the district court and the court of appeals disagreed about what elements of a prima facie legal malpractice case require expert testimony.[100]

Considering that the current case law might lead to unpredictable and unjust results, it may make sense to consider adopting the plain statutory language of section 544.42.[101] If the plain statutory language applied, plaintiffs would have sixty days to remedy any defects.[102] The plain language of section 544.42 is more forgiving and less likely to dismiss meritorious lawsuits.[103]

V. Conclusion

Guzick considered which elements of legal malpractice require expert support and how to evaluate the adequacy of expert opinion for these elements.[104] Following *Brown-Wilbert*, *Guzick* determined that a plaintiff provided an inadequate expert opinion and, as a result, dismissed the plaintiff's case without granting any time to remedy the inadequacies.[105] This is a harsh outcome that might lead to the dismissal of meritorious cases.[106] Consequently, the court might consider the lead of *Wesely* in the medical malpractice context and adopt the plain language of the underlying statute,[107] which is more forgiving and less likely to preclude meritorious cases.[108]

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[1] 869 N.W.2d 42 (Minn. 2015).

[2] *Id.* at 51.

[3] Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., 732 N.W.2d 209, 217–18 (Minn. 2007).

[4] *Guzick*, 869 N.W.2d at 52–56 (Lillehaug, J., concurring).

[5] *See id.*

[6] *See, e.g.*, Schoregge v. Bishop, 29 Minn. 367, 371, 13 N.W. 194, 196 (1882) ("The attorney is answerable to his clients in damages for any abuse of his trust, or the consequences of his ignorance, negligence, or indiscretion.").

[7] *See* Ryan v. Long, 35 Minn. 394, 29 N.W. 51, 51 (1886) (holding that an attorney-client relationship existed when an attorney provided solicited legal advice); *see also* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 692 (Minn. 1980) (recognizing *Ryan* as the first Minnesota case to question whether an attorney-client relationship existed).

[8] Sjobeck v. Leach, 213 Minn. 360, 365, 6 N.W.2d 819, 822 (1942) (quoting 5 AM. JUR. *Attorneys at Law* § 125 (1936)).

[9] *Id.*

[10] *Togstad*, 291 N.W.2d at 692 (citing Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970)).

[11] *See* MINN. STAT. § 544.42 (2015).

[12] *See House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000) (stating that the Minnesota legislature used a medical malpractice statute "as a blueprint" for a statute relating to legal malpractice).

[13] *See* Parker v. O'Phelan, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff'd*, 428 N.W.2d 361 (Minn. 1988) (stating that the primary purpose of the statute was to reduce "nuisance malpractice suits"); *see generally* E. Curtis Roeder, Note, *Introduction to Minnesota's Tort Reform Act*, 13 WM. MITCHELL L. REV. 277, 303–06 (1987), available at http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=2484&context=wmlr.

[14] MINN. STAT. § 145.682, subdiv. 2 (2015).

[15] *Id.* § 145.682, subdiv. 2(1).

[16] *Id.* § 145.682, subdiv. 3(a).

[17] *Id.* § 145.682, subdiv. 2(2).

[18] *Id.* § 145.682, subdiv. 4(a).

[19] *Id.*

[20] *Id.* § 145.682, subdiv. 6(a).

[21] 457 N.W.2d 188 (Minn. 1990).

[22] *Id.* at 193 (explaining that "empty conclusions . . . can mask a frivolous claim").

[23] *Id.* at 192; *see also* Stroud v. Hennepin Cty. Med. Ctr., 556 N.W.2d 552, 556 (Minn. 1996) (holding that the second affidavit—the affidavit of expert disclosure—was insufficient because it only provided "broad, conclusory statements as to causation").

[24] *Sorenson*, 457 N.W.2d at 192.

[25] *Brown-Wilbert*, 732 N.W.2d at 217 (citing *Sen. Debate on S.F. 0936*, 82d Minn. Leg., May 16, 2001 (audio tape) (statement of Sen. Neuville, author of the bill)). Before the enactment of the safe harbor provision, it was well established that section 145.682 could have harsh outcomes. *See generally* Jason Leo, Comment, *Torts—Medical Malpractice: The Legislature's Attempt to Prevent Cases without Merit Denies Valid Claims,* 27 WM. MITCHELL L. REV. 1399, 1419–22 (2000), available at http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1767&context=wmlr.

[26] MINN. STAT. § 145.682 (6)(c)(2) (2015). ("[T]he time for the hearing of the motion is at least 45 days from the date of service of the motion."). The Minnesota Supreme Court interprets this statute as giving the forty-five days automatically before the court even considers if the second affidavit contains a deficiency. Wesely v. Flor, 806 N.W.2d 36, 41 (Minn. 2011).

[27] *House*, 105 F. Supp. 2d at 1051; *see also* MINN. STAT. § 544.42 (2015) (defining "professionals" as attorneys, architects, accountants, engineers, land surveyors, and landscape architects).

[28] Meyer v. Dygert, 156 F. Supp. 2d 1081, 1090 (D. Minn. 2001) ("[T]he statutory language for both statutes is, in major substance, the same."); *House*, 105 F. Supp. 2d at 1051 (discussing that the two statutes have "nearly identical" content).

[29] *Compare* MINN. STAT. § 145.682, subdiv. 2 (2015), *with* MINN. STAT. § 544.42, subdiv. 2 (2015).

[30] MINN. STAT. § 544.42, subdiv. 3(a)(1) (2015).

[31] *Id.* § 544.42, subdiv. 4(a).

[32] *Id.*

[33] *Id.* § 544.42, subdiv. 6(a).

[34] *Id.* § 544.42, subdiv. 6(c).

[35] *Wesely*, 806 N.W.2d at 41; *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[36] 732 N.W.2d 209 (Minn. 2007).

[37] *See id.* at 219.

[38] *Brown-Wilbert*, 732 N.W.2d at 219. These standards are considered objectively—subjective intent to submit an affidavit in good faith is irrelevant. *Id.*

at 216. *But see House*, 105 F. Supp. 2d at 1053 (stating that courts can take alternative action to dismissal when an affidavit is "submitted in good faith").

[39] *Brown-Wilbert*, 732 N.W.2d at 218–19.

[40] *Id.* at 217–18; *see also House*, 105 F. Supp. 2d at 1051 (noting that having no minimum requirement would grant a plaintiff 240 days to file). *But see Wesely*, 806 N.W.2d at 42 (arguing that a plaintiff would not be inclined to use a "placeholder affidavit" with no information to cheat the 180-day affidavit requirement).

[41] *Brown-Wilbert*, 732 N.W.2d at 219; *see also* Hill v. Okay Const. Co., 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977) ("[E]xpert testimony is not necessary when the matters to be proven are within the area of common knowledge and lay comprehension."). Before *Guzick*, the only element of legal malpractice that generally required expert testimony was the establishment of a negligent act, which consists of a duty and breach. *Guzick*, 869 N.W.2d at 166 (citing *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992)).

[42] *See Guzick*, 869 N.W.2d at 44 (stating that the court had only discussed the necessity for expert testimony in a legal malpractice context on "a few occasions").

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* Before suing Kimball, Guzick sued Tony and Tony's wife for conversion. *Id.* They filed for bankruptcy, and Guzick won a sum in bankruptcy court. *Id.* Guzick also sued Wells Fargo. *Id.* Wells Fargo settled the case. Brief of Appellants Larry Alan Kimball, Kimball Law Office, and Kimball and Undem at 4, *Guzick*, 869 N.W.2d 42 (No. A14-0429), 2015 WL 1070344, at *4. One of Kimball's defenses was that these previous lawsuits showed the damages were the result of third parties, and so Kimball could not be liable. *Id.* at *8.

[55] *Guzick*, 869 N.W.2d at 45; *see also* MINN. STAT. § 544.42 (2015).

[56] *Guzick*, 869 N.W.2d at 45–46.

[57] Guzick v. Kimball, No. 11-CV-13-689, 2014 WL 9963420, at *2 (Minn. Dist. Ct. 2014), *rev'd*, No. A14-0429, 2014 WL 4957973 (Minn. Ct. App. 2014), *rev'd*, 869 N.W.2d 42 (Minn. 2015).

[58] *Id.*

[59] *Id.*

[60] Guzick v. Kimball, No. A14-0429, 2014 WL 4957973, at *6 (Minn. Ct. App. 2014), *rev'd*, 869 N.W.2d 42 (Minn. 2015).

[61] *Id.* at *11.

[62] *Guzick*, 869 N.W.2d at 51.

[63] *Id.* at 51.

[64] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[65] *Guzick*, 869 N.W.2d at 48.

[66] *Id.*

[67] *See Guzick*, 869 N.W.2d at 49–50 (stating the main issue as whether or not the affidavit was satisfactory for the elements requiring expert opinion).

[68] *Id.* at 48–49.

[69] *Guzick*, 869 N.W.2d at 48.

[70] *Id.*

[71] *Id.* at 49–50.

[72] *Id.* at 50–51.

[73] *Id.* at 48 n.5.

[74] *Id.* at 50–51

[75] *Id.* at 50 (citing *Hill* 252 N.W.2d at 116).

[76] *Id.* at 50.

[77] *Id.* at 51. The court also noted that Guzick should not be allowed safe harbor because he had been pursing other lawsuits, which were based on the same facts, for multiple years. *Id.*

[78] *Id.* at 51–52; *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[79] *Wesely*, 806 N.W.2d at 42.

[80] *Id.* at 41.

[81] *Id.* at 42.

[82] *Id.*

[83] *See id.*

[84] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[85] MINN. STAT. § 145.682, subdiv. 6(c)(2) (2015).

[86] *See Wesely*, 806 N.W.2d at 41.

[87] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring); *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[88] MINN. STAT. § 544.42, subdiv. 6(c) (2015); *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing MINN. STAT. § 544.42, subdiv. 6(c) (2015)).

[89] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring). In *Guzick*'s only concurring opinion, Justice Lillehaug noted that *Brown-Wilbert* singlehandedly invented the court's authority to substantively decide an affidavit's merits before granting sixty days of safe harbor. *Id.* at 53–54. Provided that the language of section 544.42 unambiguously provides sixty days of safe harbor before a motion can be dismissed, this "judicial concoction" is unwarranted. *Id.* Thus, while he reluctantly concurred with the majority's application of *Brown-Wilbert*, Justice Lillehaug argued that the court should eventually return to the plain language of the statute. *Id.* at 55–56.

[90] MINN. STAT. § 544.42, subdiv. 6(c) (2015); *see also Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring).

[91] *Brown-Wilbert*, 732 N.W.2d at 217–18.

[92] *Wesely*, 806 N.W.2d at 42. *Brown-Wilbert* does not explicitly express the worry that a plaintiff might submit a "placeholder" affidavit, but it is implied. *See Brown-Wilbert*, 732 N.W.2d at 217–18.

[93] *Wesely*, 806 N.W.2d at 42.

[94] *Id.*

[95] *Id.*; *see also* MINN. STAT. § 544.42, subdiv. 7 (2015). One of *Brown-Wilbert*'s holdings was that the standard of good faith does not apply to the affidavit of expert disclosure under section 544.42. *Brown-Wilbert*, 732 N.W.2d at 216. Rather, *Brown-Wilbert* judges the affidavit's requirements objectively. *Id.* However, in the medical malpractice context, *Wesely* noted that the good faith standard applies to both affidavits. *Wesely*, 806 N.W.2d at 42. This discrepancy makes little sense. *See Brown-Wilbert*, 732 N.W.2d at 227 (Anderson, J., concurring in part and dissenting in part). Subdivision 7 of sections 145.682 and 544.42 contain essentially the same language, and both allow sanctions if the plaintiff or the plaintiff's attorney certifies the "affidavit or answers to interrogatories" in good faith. *Compare* MINN. STAT. § 544.42, subdiv. 7 (2015), *with* MINN. STAT. § 145.682, subdiv. 7 (2015). The fact that subdivision 7 includes answers to interrogatories, which can only serve as an affidavit of expert disclosure under subdivision 4, suggests that *Wesely*'s interpretation is right—the good faith standard should apply to both affidavits. *Wesely*, 806 N.W.2d at 42.

[96] *Guzick*, 869 N.W.2d at 50 (citing *Hill*, 252 N.W.2d at 116).

[97] *Guzick* only indicated that expert testimony is generally required to establish a negligent act. *Id.* at 49. *Guzick* distinguishes this from the other elements of legal malpractice by stating that the court has "never required expert testimony on the

other elements of a prima facie case of legal malpractice." *Id.* Expert testimony is generally required to establish a negligent act in many jurisdictions outside Minnesota. *See* George L. Blum, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney—Conduct Related to Procedural Issues*, 59 A.L.R. 6th 1 (2010).

[98]*See Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part) ("[C]ourts are to consider and utilize less drastic alternatives than dismissal when a plaintiff has identified experts and given some meaningful disclosure of the expert's testimony.")

[99]Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."). Notably, Arizona's courts have recognized the need to provide adequate notice to plaintiffs—Arizona's analogous statute on legal malpractice requires courts to give "fair notice to a plaintiff and an opportunity to cure . . . an expert deficiency." Kaufman v. Jesser, 884 F. Supp. 2d 943, 955 (D. Ariz. 2012); *see also* Warner v. Sw. Desert Images, LLC, 180 P.3d 986, 994 (Ariz. Ct. App. 2008) ("Section 12–2602(E) provides that when a trial court determines an affidavit is required, it must 'set a date and terms for compliance.'" (quoting

ARIZ. REV. STAT. ANN. § 12-2602, subdiv. E (West, Westlaw through 2016 legislation))).

[100] *See Guzick*, 869 N.W.2d at 45–46.

[101] *See id.* at 53 (Lillehaug, J., concurring).

[102] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[103] *See Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely*, 806 N.W.2d at 41); *see also Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

[104] *Guzick*, 869 N.W.2d at 44.

[105] *Id.* at 51.

[106] *See Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

[107] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely*, 806 N.W.2d at 41).

[108] *See id.*; *see also Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

SAMPLE CASE NOTE 2

(**Disclaimer**: While this case note is an excellent example, please note that its formatting does not follow all of the *Law Review*'s requirements, and its endnotes have not been corrected for any citation errors. Always go to the *Bluebook* for citation! Additionally, this case note does not include a table of contents, which is required for your submission.)

CRIMINAL LAW: Behind Closed Doors: Expanding the Triviality Doctrine to Intentional Closures--*State v. Brown*

I. Introduction

The Minnesota Supreme Court recently held in *State v. Brown*[1] that the intentional locking of a courtroom during jury instructions does not implicate a defendant's right to a public trial.[2] The majority found that the trial court's actions were too trivial to affect any of the defendant's public trial rights.[3] Because the court adopted the triviality doctrine, it did not apply the traditional test for alleged Sixth Amendment violations.[4]

This case note begins by exploring the history of the right to a public trial in America.[5] Then it discusses the facts of *Brown* and the court's rationale for its decision.[6] Next, it argues that the court expanded the triviality doctrine's scope beyond its proper application.[7] Finally, this note concludes that *Brown* will lead to many unwarranted courtroom closures.[8]

II. History of the Right to a Public Trial in the United States

A. Origins of the Right to a Public Trial

The guarantee to a speedy and public trial is generally seen as a common law privilege originating in England.[9] English judges consistently applied the guarantee throughout the late seventeenth and eighteenth centuries.[10] At the time, the right was not seen as a benefit for the accused[11] but rather a way to reinforce the legitimacy of convictions.[12]

B. The Public Trial Guarantee in the United States

The founding fathers recognized that the public trial guarantee provided important safeguards to freedom and chose to adopt it into the Bill of Rights.[13] The Sixth Amendment of the U.S. and Minnesota Constitutions state that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[14] A public trial is defined as a "trial that anyone may attend or observe."[15] The guarantee is seen as a benefit for the accused.[16] The guarantee is not absolute[17] and at times it must yield to important government interests.[18] Though courts took up the issue prior to the twentieth century,[19] *Davis v. United States* provided the initial framework for modern jurisprudence.[20] The court in *Davis* held that alleged public trial violations were not harmless errors.[21] Therefore, the defendant need not show actual harm in order to prevail.

C. The Waller Test

In 1984, the Supreme Court ruled unconstitutional the broad courtroom closure of a seven-day suppression hearing during a criminal trial.[22] Writing for the

majority, Justice Powell outlined the current test for alleged Sixth Amendment violations.[23] He held that the party seeking to close the courtroom must: "[1] advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure."[24] The Court held that a violation of the public trial guarantee does not necessarily require a new trial.[25] Rather, the "remedy should be appropriate to the violation."[26] The Supreme Court recently reaffirmed this rule and applied it to every stage of a trial.[27]

D. The Public Trial Guarantee in Minnesota

Minnesota has generally followed the *Waller* test[28] though recent jurisprudence has allowed more opportunities for courtroom closure.[29] Specifically, Minnesota now recognizes that some closures are too trivial to amount to a violation of the Sixth Amendment.[30]

III. The *Brown* Decision

A. Facts and Procedural Posture

On August 29, 2008, Darius Miller was shot and killed outside Whispers Gentlemen's Club in Minneapolis.[31] The State charged Brown with first-degree premeditated murder, first-degree premeditated murder committed for the benefit

of a gang, second-degree intentional murder, and second-degree intentional murder committed for the benefit of a gang.[32]

The State presented evidence that just prior to the murder, three of Brown's acquaintances attacked Miller.[33] During the fight, someone yelled, "You better go get a gun."[34] Immediately preceding the gunshots, an eyewitness reported seeing an individual wearing a white undershirt, a large necklace, and his hair in a ponytail come up the club stairs.[35] The State introduced jail security camera footage that showed Brown leaving jail twelve hours before Miller's murder, with his hair in a ponytail and wearing a large necklace, white tank top, and dark pants.[36] Additionally, the State presented evidence showing that a car seen near the murder was registered to the sister of one of Brown's acquaintances.[37] The State had an expert testify that a bullet casing recovered from a shooting that Brown pled guilty to in 2008 matched that of a casing found near Miller's body.[38]

Following closing arguments, the trial court ordered the courtroom door be locked for the duration of the jury instructions.[39] In explaining the situation, the judge stated on the record:

> For the benefit of those in the back, I am going to begin giving jury instructions. While that is going on the courtroom is going to be locked and people are not going to be allowed to go in or out. So, if anybody has to leave, now would be the time. You are welcome to [s]tay. But I just want to make sure that everybody knows that the courtroom is going to be locked. We are all good? Deputy?[40]

For the duration of the jury instructions, no spectators were let in or allowed out.[41] The jury found Brown guilty on all four counts of murder.[42] The trial court sentenced him to life imprisonment for first-degree murder plus an additional year of imprisonment based on the murder being committed for the benefit of a gang.[43] *B. The Supreme Court's Decision*

Before the Minnesota Supreme Court, Brown argued that he was entitled to a new trial for five reasons.[44] This note focuses on the court's reasoning in regards to the public trial issue. The court also addressed the admissibility of evidence, jury instructions, testimony, and impeaching evidence.[45] The court ruled in favor of the State on all five issues.[46]

The court noted that denials of the public trial guarantee constitute structural error and are not subject to harmless error review.[47] The court then addressed the purpose of the public trail guarantee, citing the *Waller* standard.[48] The court explained that not all courtroom restrictions implicate a defendant's right to a public trial.[49] The court focused on two recent Minnesota decisions which found that certain closures can be "too trivial to amount to a violation of the [Sixth] Amendment."[50] The court cited several factors for determining that the trial court's actions were trivial, including that the courtroom was never cleared of all spectators and that the trial remained open to the general public and press.[51] Thus, the Minnesota Supreme Court found that locking the courtroom doors did not

implicate Brown's right to a public trial.[52] The majority concluded by noting that in future cases, the trial court should expressly state on the record why it locked courtroom doors.[53]

IV. Analysis

A. The Triviality Doctrine

The majority erred by applying the triviality doctrine to a case where the judge intentionally closed the courtroom to additional spectators.[54] The majority should have found that the closure implicated the defendant's Sixth Amendment rights and remanded the case for further proceedings to determine whether the closure satisfied the *Waller* test.[55]

The triviality standard used in *Brown* was developed from the often-cited *Peterson v. Williams*.[56] In that case, a courtroom was closed during the testimony of an undercover agent.[57] The judge inadvertently forgot to reopen the courtroom prior to the next testimony.[58] Thus, for fifteen to twenty minutes, the defendant testified in a closed courtroom.[59]

The *Peterson* court did not articulate a specific test for determining triviality, but held that because the closure was extremely short, followed by a helpful summation, and entirely inadvertent, the defendant's Sixth Amendment rights were not infringed upon.[60] The court found that a defendant's Sixth Amendment rights

are only implicated when a closure affects the values served by that right.[61] Thus, trivial closures are not subject to the *Waller* test.[62]

B. Scope of the Triviality Doctrine

Courts are reluctant to make a specific test for determining whether a closure is trivial.[63] Instead, the determination is a fact intensive issue for each case.[64] Jurisdictions across the country have addressed the issue differently.[65] Some courts are extremely hesitant to broaden the scope [66] or even recognize[67] the doctrine. The doctrine is most often cited in cases involving unintentional closures for short periods of time.[68]

The majority in *Brown* relied heavily on the analysis of past Minnesota cases.[69] The *Brown* case presented unique facts that distinguished it from controlling precedent.[70] Therefore, the court erred by not delving further into the purpose and scope of the triviality doctrine.[71]

C. Intentional Closures

The triviality doctrine allows closures which do not undermine the "values served by the Sixth Amendment."[72] The values protected by the guarantee are to "1) ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury."[73] The second value is an effective restraint on possible abuse of judicial power.[74] As Justice Meyers correctly stated

in her dissent, an intentional courtroom closure goes against the values protected by the Sixth Amendment.[75]

Courts do not agree about the implication of judicial intent for courtroom closures. [76] Some courts have questioned the applicability of *Peterson* to intentional courtroom closures.[77] A recent case in Florida held that intentionally locking courtroom doors amounted to a partial closure, [78] subject to the less stringent substantial reason test. [79] A partial closure occurs when access to the courtroom is retained by some spectators but denied to others. [80] Though many jurisdictions do recognize the distinction between partial and total closures, [81] Minnesota does not. [82] Locking a courtroom's doors contravenes the presumption of openness in criminal proceedings.[83] Therefore, regardless of the partial and total closure distinction, "if a court intends to exclude the public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific enough findings with regards to those factors."[84]

The U.S. Supreme Court has been firm in its protection of the public trial guarantee.[85] Any closure by a trial court judge must satisfy the four requirements of the *Waller* test.[86] The Minnesota Supreme Court's ruling allows trial courts to ignore the *Waller* test, so long as the closure is small.[87] The better precedent would be to apply the *Waller* test to any intentional courtroom closure.[88] It would provide

appellate courts a better opportunity to review the case and promote public confidence in the judiciary.[89]

D. Brown's Impact on Future Decisions

At the end of the public trial section in the *Brown* opinion, the court appears to acknowledge that its new precedent could create the appearance that "Minnesota's courtrooms are closed or inaccessible to the public."[90] Thus, the court draws on the *Waller* test and requires future closures to have express reasons stated on the record.[91] But the *Brown* court affirmed the trial court's decision, which lacked any articulated reason for the closure.[92] Therefore, the *Brown* decision sets a low threshold for courtroom closures and leaves questions about how future decisions will be addressed.[93] There is a strong potential that "creeping courtroom closures" may become commonplace in Minnesota courts.[94] In fact, a recent Minnesota Supreme Court decision relied on *Brown* to uphold a locked courtroom only for the stated reason that "[g]oing in and out [during a proceeding] obviously creates some disruptions and distractions."[95]

The better course of action in *Brown* would have been to acknowledge the implication of the public trial guarantee and to remand the case for an evidentiary hearing to further address the issue.[96] A remand does not necessarily mean that the closure was unconstitutional, as courts have found maintaining order during jury instructions is an important interest.[97] Rather, a remand sets the precedent that

judges are not allowed overbroad discretion to close the courtroom without being subject to the *Waller* test.[98]

V. Conclusion

The court was presented with the difficult question of determining whether the intentional locking of a courtroom during closing arguments violated the defendant's Sixth Amendment rights.[99] The court determined that this was too trivial to be considered a closure and therefore the defendant's rights were not implicated.[100] The majority failed to analyze the reasons behind the triviality doctrine when it applied it to intentional closures. Though the decision put in checks for future cases, *Brown* sets a very low standard that could lead to many unwarranted courtroom closures in the future.[101]

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[1] 815 N.W.2d 609 (Minn. 2012).

[2] *Id.* at 617-18.

[3] *Id.*

[4] *Id.*

[5] *See infra* Part II.

[6] *See infra* Part III.

[7] *See infra* Part IV.

[8] *See infra* Part V.

[9] Max Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381, 381 (1932). *See generally* JOSEPH JACONELLI, OPEN JUSTICE: A CRITIQUE OF THE PUBLIC TRIAL 5 (2002) (tracing public trials from common law England to colonial America).

[10] Radin, *supra* note 9, at 389 ("But any feature of the common law was sure to be noted as a merit, especially in the seventeenth century. . . . [I]n the eighteenth century . . . the "open and public trial" of the common law [was given] something of an order of sanctity.").

[11] *Id.* at 384.

[12] Daniel Levitas, Note, *Scaling Waller: How Courts have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493, 501 (2009).

[13] Kleinbart v. United States, 388 A.2d 878, 881 ("The guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of prosecution."); Radin, *supra* note 9, at 386 ("The [Sixth Amendment right to a public trial] is one of the important safeguards that [was] soon deemed necessary to round out the Constitution . . . ." (quoting Davis v. United States, 247 F. 394, 394 (8th Cir. 1917))); Fair Trial Guarantees, 32 C.F.R. § 151.7(p) (2012) (citing public trials as important safeguards to fair trials).

[14] U.S. CONST. amend. VI; *accord* MINN. CONST. art. I, § 6.

[15] BLACK'S LAW DICTIONARY 1644 (9th ed. 2009).

[16] Waller v. Georgia, 467 U.S. 39, 46 (1984) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)). *See generally* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, at xviii (2006) (discussing the purpose of the Sixth Amendment); 23 C.J.S. *Criminal Law* § 1542 (noting that the requirement that criminal trials be public is for the benefit of the accused).

[17] *E.g.*, *Waller*, 467 U.S. at 39; People v. Colon, 71 N.Y.2d 410, 416 (N.Y. 1988).

[18] *Waller*, 467 U.S. at 46. *See generally* Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 1-3 (1961) (discussing the need to balance defendant's rights to a public trial and the government's need to maintain secrecy in certain situations).

[19] *See* Davis v. United States, 247 F. 394, 396-98 (8th Cir. 1917) (discussing eleven lower court public trial decisions).

[20] *Id.* at 398-99 ("A violation of the constitutional right [to a public trial] necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury.").

[21] *Id.*

[22] *Waller*, 467 U.S. at 50.

[23] *Id.* at 48.

[24] *Id.*

[25] *Id.* at 49-50.

[26] *Id.* at 50. *See generally* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 113 (1988) (discussing the appropriate remedy for Sixth Amendment violations).

[27] *See* Presley v. Georgia, 558 U.S. 209, 215 (2010) (holding that a trial court's closure during *voir dire* violated the defendant's Sixth Amendment rights because the court did not take into account alternatives and did not articulate a specific enough finding).

[28] *See, e.g.*, State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (holding that the trial court failed to provide adequate findings for the closure as required by *Waller*); State v. Fageroos, 531 N.W.2d 199, 203 (Minn. 1995) (remanding the case in order for the prosecutor to have the opportunity to establish, if he could, that closure was necessary under *Waller*); State v. McRae, 494 N.W.2d 252, 260 (Minn. 1992) (holding that the trial court did not comply with the requirements of *Waller*).

[29] *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 390 (Minn. 2011) (holding that the values sought to be protected by a public trial are not implicated when some

spectators are excluded from the courtroom); State v. Lindsey, 632 N.W.2d 652, 660-61 (Minn. 2001) (holding that the closure in question was so trivial that it did not implicate the right to a public trial).

[30] *See, e.g.*, State v. Brown, 815 N.W.2d 609, 618 (Minn. 2012) (quoting Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996)); *Caldwell*, 803 N.W.2d at 390; *Lindsey*, 632 N.W.2d at 660-61.

[31] Appellant's Brief at 10, *Brown*, 815 N.W.2d 609 (No. A10-0992), 2012 WL 8479012 [hereinafter Appellant's Brief].

[32] *Id.*

[33] *See Brown*, 815 N.W.2d at 614.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Brown*, 815 N.W.2d at 614.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 614-15.

[42] Appellant's Brief, *supra* note 34, at 8.

[43] *Brown*, 815 N.W.2d at 615.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 616 (citing State v. Bobo, 770 N.W.2d 129, 139 (Minn. 2009)).

[48] *Id.* at 616-17.

[49] *Id.* at 617.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 617-18 ("[T]he courtroom was never cleared of all spectators . . . . The trial remained open to the public and press already in the courtroom . . . . [T]he jury instructions did not compromise a proportionately large portion of the trial proceedings.").

[53] *Id.* at 618.

[54] *Id.* at 614.

[55] *See id.* at 627 (Meyer, J., dissenting).

[56] Peterson v. Williams, 85 F.3d 29 (2d Cir. 1996).

[57] *Id.* at 42 (protecting the identity of the undercover agent is a valid reason for courtroom closure).

[58] *Id.* (failure to re-open was an oversight).

[59] *Id.* at 41.

[60] *Id.* at 44.

[61] *Id.*

[62] *See id.*

[63] *See, e.g.*, United States v. Gupta, 699 F.3d 682, 689 (2d Cir. 2011) ("Whatever the outer boundaries of our "triviality standard" may be . . . we see no reason to define these boundaries . . . ."); *Peterson*, 85 F.3d at 44. *See generally* Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 403-04 (1997) (discussing the different factors that can be used for determining triviality).

[64] *See Peterson*, 85 F.3d at 44.

[65] *See generally* H.D. Warren, Annotation, *Exclusion of Public During Criminal Trial*, 156 A.L.R. 265 (1945) (discussing triviality cases from different jurisdictions).

[66] *Gupta*, 699 F.3d at 688 ("We have repeatedly emphasized, however, the [triviality] doctrine's narrow application.").

[67] *See* State v. Easterling, 157 Wash. 2d 167, 180 (Wash. 2006) (noting that the a majority of the State's court has never found a public trial right to be de minimis).

[68] Case Comment, *Criminal Law--Sixth Amendment--Second Circuit Affirms Conviction Despite Closure to the Public of a Voir Dire*--U.S. v. Gupta, 125 HARV. L. REV. 1072, 1076 (2012) (finding that in eighteen cases in which a *voir dire* proceeding was closed to the public but found too trivial to implicate the defendant's public trial rights, most involved inadvertent closure (citing *Gupta*, 650 F.3d at 874 (Parker, J., dissenting))).

[69] *See* State v. Brown, 815 N.W.2d 609, 617 (Minn. 2012).

[70] *Compare id.* (intentionally locking courtroom doors to public not in the courtroom at that time), *with* State v. Caldwell, 803 N.W.2d 373, 391 (Minn. 2011) (removing the defendant's mother who had been disruptive throughout the court proceedings), *and* State v. Lindsey, 632 N.W.2d 652, 657 (removing two minors during criminal trial pursuant to Minnesota law).

[71] *See Brown*, 815 N.W.2d at 626 (Meyer, J., dissenting) (arguing that the majority's reasoning was flawed and the actions of the *Lindsey* court were distinguishable).

[72] Peterson v. Williams, 85 F.3d 29, 43 (2d Cir. 1996).

[73] *Id.* (citing Waller v. Georgia, 467 U.S. 39, 46-47 (1984)).

[74] *Waller*, 467 U.S. at 46 f.4 (citing *In re Oliver*, 333 U.S. 257, 270 (1948)).

[75] *Brown*, 815 N.W.2d at 626 (Meyer, J., dissenting) ("[T]he values of the public trial guarantee are sufficiently implicated by the facts of this case such that the *Waller* analysis is required.").

[76] *See, e.g.*, Gonzalez v. Quinones, 211 F.3d 735, 737 (2d Cir. 2000) ("In *Peterson*, the problematic closure occurred as the result of the accidental failure to reopen after a properly ordered closure, where as here the door was intentionally locked by court personnel. . . . [I]n view of these differences, we do not believe the closure can be considered trivial . . . ."); Kelly v. State, 6 A.3d 396, 407 f.10 (Md. 2010) ("Some courts do consider whether the closure was inadvertent. Other courts find this irrelevant to the analysis."); State v. Torres, 844 A.2d 155, 162 (R.I. 2004) ("[The closure] was neither brief nor inadvertent, but was an intentional restriction . . . . Under these circumstances, the appropriate relief is the granting of a new trial."). *But see* Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004) ("Whether the closure was intentional or inadvertent is constitutionally irrelevant."); State v. Vanness, 738 N.W.2d 154, 158 (Wis. Ct. App. 2007) (holding that the State's intent is irrelevant, so when the courthouse was locked for three hours without the judge's knowledge, it was still a closure).

[77] *See* Brown v. Kuhlmann, 142 F.3d 529, 541 (2d Cir. 1998) ("It is unclear from the analysis in *Peterson* whether [the intentional closing] would alter the

conclusion that no Sixth Amendment violation occurred."); *Peterson*, 85 F.3d at 44 f.8 (questioning whether an intentional closure may threaten a defendant's public trial right, even if the closure is brief).

[78] *See* United States v. Flanders, 845 F.Supp. 2d 1298, 1302 (S.D. Fla. 2012) (holding that locking courtroom during closing arguments was a partial closure).

[79] United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) ("[T]he impact of the partial closure did not reach the level of a total closure, and therefore "only a 'substantial' rather than a 'compelling' reason for the closure was necessary." (quoting Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984))).

[80] Judd v. Haley, 250 F.3d 1308, 1314 (11th Cir. 2001).

[81] *See, e.g.*, United States v. Smith, 426 F.3d 567, 571 (2d Cir. 2005); Nieto v. Sullivan, 87 F.2d 743, 754 (10th Cir. 1989); Com v. Cohen, 921 N.E.2d 906, 921 (Mass. 2010).

[82] State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007).

[83] Richmond Newspapers, Inc. v. Virginia 448 U.S. 555, 573 (1980).

[84] United States v. Gupta, 699 F.3d 682, 687 (2d Cir. 2011).

[85] Presley v. Georgia, 558 U.S. 209, 214-15 (2010) (explicitly holding that "trial courts are required to consider alternatives" and "make every reasonable measure to accommodate the public.").

[86] *Gupta*, 699 F.3d at 684-85 ("Because the lower court here did not analyze the *Waller* factors prior to closing the courtroom, the closure was unjustified.").

[87] *See* State v. Brown, 815 N.W.2d 609, 618-19 (discussing the factors which made the closure too trivial too implicate the defendant's rights).

[88] *Gupta*, 699 F.3d at 687 ("If a trial court fails to adhere to [the *Waller* test], any intentional closure is unjustified . . . .").

[89] *Compare Brown*, 815 N.W.2d at 618 (aiming to maintain confidence in the judiciary and facilitate appellate review), *with Gupta*, 699 F.3d at 689 (knowledge that anyone is free to attend a trial inspires confidence), *and* Levitas, *supra* note 12, at 510-11 (noting that the elements of *Waller* create a "suitable record for appellate review.").

[90] *Brown*, 815 N.W.2d at 618.

[91] *Compare id.* ("To facilitate appellate review in future cases, we conclude the better practice is for the trial court to expressly state on the record why the court is locking the courtroom doors."), *with* Waller v. Georgia, 467 U.S. 39, 45 (1984) ("The interest [for the courtroom closure] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.").

[92] *Brown*, 815 N.W.2d at 618 (stating on the record that it was "for the benefit of those in the back").

[93] *See* Benjamin E. Rosenberg, *Appellate Review of Structural Errors in Criminal Trials*, 242 NEW YORK LAW JOURNAL 20 (2009) (discussing the tensions between the triviality doctrine and automatic reversal for structural errors).

[94] State v. Silvernail, No. A12-0021, 2013 WL 2364094, at *13 (Minn. May 31, 2013) (Anderson, J., dissenting).

[95] *Id.* at *12.

[96] *See Brown*, 815 N.W.2d at 627 (Meyer, J., dissenting) (arguing that the appropriate disposition was remand for an evidentiary hearing).

[97] *Cf.* United States v. Flanders, 845 F.Supp. 2d 1298, 1302 (2012) (preventing the distraction of members of the jury by the public coming in and out of the courtroom is an important government interest).

[98] 23 Minn. Prac., Trial Handbook for Minn. Lawyers § 2.14 (2012 ed.) ("The appropriate initial remedy for an inadequate record to justify closing a trial is remand for an evidentiary hearing." (citing State v. Fageroos, 531 N.W.2d 199 (Minn. 2005))).

[99] *Brown*, 815 N.W.2d at 615.

[100] *Id.* at 618.

[101] *Silvernail*, 2013 WL 2364094, at *13 f.1 ("[D]uring the 2011-2012 term, [the Minnesota Supreme Court] denied five petitions for review that challenged the district court's decision to close or lock the door during final jury instructions.").