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WELCOME

Apr. 29, 2010

Dear Write-On Competition Participants:

Welcome to the *William Mitchell Law Review* Volume 37 Write-On Competition. The *Law Review* Editorial Board is excited that you are interested in the Competition. To facilitate your participation, we have prepared this Write-On Competition packet for you. The enclosed materials provide important information you will need during the process.

As previously mentioned, the *William Mitchell Law Review* is a student-run organization that addresses contemporary legal issues. The *Law Review* is composed of an editorial board consisting of one Editor-in-Chief, four Executive Editors, and eight Editors. There are also several Assistant Editors. This year we hope to invite approximately forty-five Write-On Competition participants to join the *Law Review* as staff members. However, there is no set number of staff members that we will accept.

The write-on process is competitive by nature. Each submission will be evaluated in relation to the other submissions in that category. Those who submit the best case notes will become Volume 37 staff members. Please note that submission quality varies from year to year. Therefore, your editor will not be able to guarantee the success of your submission.

To ensure that submissions are evaluated on the basis on quality, we have established an anonymous evaluation process. All submissions will be anonymously evaluated by three scorers. Moreover, to ensure anonymity, your previously assigned editor will not be evaluating your paper.

There are many benefits associated with *Law Review* membership. As a staff member, you will develop excellent legal research, writing, and editing skills. You will also write an article that fulfills William Mitchell's long paper requirement. Moreover, you will earn two academic credits, and your long paper will be given strong consideration for publication. Finally, many employers consider the *Law Review* experience an important qualification because it demonstrates achievement, commitment, and writing ability. In the fall, some employers even host special events solely for the *Law Review* staff.

The paper you are required to write for the Write-On Competition is called a "case note." The case note consists of at least eight pages each of text and endnotes, with a maximum of twenty pages. You will have three weeks to research and write your case note. You may choose to have editorial assistance while writing it. If you are worried about the time commitment, keep in mind that many successful candidates have taken summer classes, worked full-time, and/or studied abroad while participating in the competition.

Thank you for your interest in the *William Mitchell Law Review*. We are planning a great year and hope you will join us.

Sincerely,

Volume 37 Editorial Board

TIMELINE

Tuesday, May 18 at 6:30 p.m.	Meet in the auditorium for Prof. Knapp's presentation, "How to Write a Case Note." (Also available on reserve DVD in the Library) *Time/room subject to change*
Tuesday, May 18 at 7:30 p.m.	Download the competition materials.
May 22–June 4	During this period, participants may e-mail up to two drafts of their work to their assigned editors. The editors will review the drafts and provide feedback. Arrangements are made individually with each editor.
Tuesday, June 8 at 5:00 p.m.	Write-on Competition papers are due in Student Services NO LATER than 5:00 p.m. NO LATE PAPERS WILL BE ACCEPTED. NO EXCEPTIONS. <i>Note: Student Services cannot answer any questions about submissions, the Law Review, or the write-on process.</i>
Week of June 20	Write-on Competition winners announced.
Approximately July 15	Announcement of grade-on winners

NOTES ABOUT DISCUSSING TOPICS: *You may not at any time discuss the case or its legal issues with non-participants, including professors, judges, practitioners, law school graduates, or other law students. You may disclose your topic to other participants, but once the Competition begins you may not discuss your topic in-depth with anyone. You may not interview anyone as part of your research, including authors of any written work you cite or attorneys involved in the case.*

NOTE ABOUT DEADLINES: *The deadlines are firm and non-negotiable. No exceptions. Plan your schedules accordingly to hand in your papers by the dates and times listed. You may hand in your paper early. You may not hand in your paper late.*

OTHER RELEVANT DATES *(note these dates are tentative)*

Mid-July: Full staff picnic!

First weekend of school: Orientation.

HONOR PLEDGE

I pledge that I have complied with the rules stated in the Write-on Manual.

I pledge that I have complied with § 1.a.3 of the William Mitchell Student Conduct Code, 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 *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 the sentences or phrases, or paraphrased the expression or ideas, of any other author without proper attribution.

Signed: _____ Date: _____

Please Print: Name: _____

Address: _____

City, State & Zip: _____

Telephone: _____

PLEASE ALSO INDICATE:

Year in school: _____

If you have just completed the first year of a three-year program, please put 2L.

If you have just completed the first year of a four-year program, please put 1L.

If you have just completed the second year of a three-year program, please put 3L.

If you have just completed the third year of the four-year program, please put 4L.

(NOTE: this will not play a role in determining who makes the *Law Review*.)

Name of Editor you were assigned: _____

****PLEASE MAKE **THREE** COPIES OF THIS AND ATTACH IT TO EACH OF THE **THREE FINAL COPIES** OF YOUR PAPER.****

TECHNICAL REQUIREMENTS FOR THE CASE NOTE

- A. **Number of Copies:** (always keep a copy for yourself)
1. First Draft: **1**
 2. Final Draft: **3**
- B. **Length:**
1. First Draft: You may submit to your editor any number of pages but no more than what is allowed on the final draft. You are encouraged, however, to submit a full first draft to get the greatest benefit from your editor conference.
 2. Final Draft:
 - a. Text: Minimum of 8 double-spaced pages with margins of no less than one inch on each side.
 - b. Endnotes: Minimum of 8 double-spaced pages with margins of no less than one inch on each side. Endnotes should be double-spaced, with no extra spaces between separate endnotes. **Remember:** Use endnotes and NOT footnotes.
 - c. Total length must not exceed 20 pages.
 3. Please number your pages.
- C. **Cover Sheet:**
1. First Draft: Please include a cover sheet with:
 - a. Your name
 - b. Telephone number
 - c. Case Name
 - d. Name of Editor
 2. Final Draft: **Do not** include a cover sheet. **Do not** put your name on the final draft. Instead, turn in your Honor Pledge with you final draft. We will code your Honor Pledge to your final draft, so that scoring of final case notes is anonymous. Only when the scoring is complete will we match names (from your Honor Pledges) to case notes. Therefore, **do not forget to bring your Honor Pledge with you when you turn in your final draft.** Do include the title of your case note as specified in “Case Note Guidelines” at page 8.
- D. **Submission:**
1. Timeliness: Because of the editing and evaluation schedule, and for reasons of fairness, **WE CANNOT ACCEPT LATE SUBMISSIONS.** Computer problems are not a valid excuse. Plan to be done in plenty of time to have three copies of you final draft to hand in. **YOU SHOULD SAVE AND PRINT OFTEN.**
 2. Place:
 - a. You should coordinate with your Write-On Editor as to where you will pick up and drop off your draft copies.

- b. If you want to submit your case note early, you may do so. All final papers are due in Student Services. Student Services cannot answer questions about the submissions, the *Law Review*, or the competition.
- E. **Honor Pledge:** You must fill out and submit a signed honor pledge with your final draft. Attach the honor pledge to the three copies of your final draft with a rubber band, binder clip, or any other secure method. Signing the pledge indicates that you have observed the following rules:
1. After the assignment is given, you may disclose your topic to other participants, but once the Competition begins you may not discuss your topic or its legal issues in-depth with anyone. In particular, no participant shall discuss these things with fellow participants.
 2. Participants may not at any time discuss the case or its legal issues with non-participants, including professors, judges, practitioners, law school graduates, or law students. (Please note: Professors have been advised of which cases the *Law Review* has selected for the write-on competition this year and have been instructed to inform us of any student violating this policy.)
 3. 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 in research, attorneys, law students, and any persons related to the case.
 4. At no time may a participant show his or her written work to anyone except a member of the Editorial Board.
 5. All participants will be respectful of other participants' interests in using the same library sources. No participant should leave a source in a place where other participants cannot be expected to find it.
 6. Write-On participants are expected to adhere to the highest ethical standards. Your signed Honor Pledge that you will hand in with your final draft is your contract with the *Law Review* that you have complied with the Honor Code during the competition.

*****NOTE ABOUT RESEARCH*****

The Topic Packet, which contains your case, is only a starting point for your research. To be successful, you must do a significant amount of additional primary and secondary research. Successful candidates demonstrate appropriate use of a variety of sources.

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 William Mitchell Law Review Write-On Competition must write a Case Note.

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. Introduction
2. History of the relevant law
3. Facts of the case
4. Statement of the court's analysis and holding
5. Analysis
6. 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. The *Law Review* Editorial Board has worked hard to find such cases for the write-on competition.

A Case Note is included in this packet. This particular Case Note was successful in the write-on competition, and the author was also selected for publication. While this Case Note is an excellent example, please note that its endnotes have not been corrected for any citation errors. Always go to the Bluebook for citation!

To review other examples, see published Case Notes in previous issues of the *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 8 pages in text and 8 pages of endnotes, with no more than 20 pages altogether.

CASE NOTE GUIDELINES

1. Remember General Goals: As you write the Case Note, 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. Remember—you do not need to address every issue raised by the court. 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. Continue to research after you start writing. You will almost certainly find new issues you need to research.
 - E. Begin writing. Text must be at least 8 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 the lead case into the state of the law as described in the 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. Endnotes must be at least 8 pages long.
 - a. Use the eighteenth edition of the Bluebook. Please note: The 19th edition of the Bluebook will be released during the course of this competition. While we will be using the 19th version next year, please apply the 18th edition for purposes of this competition.
 - b. Follow the "law review" format set out in the Bluebook.
 - c. Follow the *William Mitchell Law Review* style guide as set out in this packet. This will modify the Bluebook.
 - d. Demonstrate proper use of introductory signals.
 - e. Use jump cites where appropriate.
 - f. Do not use footnotes—use endnotes.
 - g. Nearly every sentence should have a citation.
 - h. Avoid overusing direct quotations. Paraphrase where appropriate.
 - i. Include the following in endnotes:
 - Citations
 - Textual support for the text
 - Textual support for the citation
 - Historical or background explanation
 - Secondary information
 - Discussions of collateral matters
- F. Read other Case Notes for guidance and ideas.
- G. Comply with general writing principles. Use proper spelling, punctuation, grammar, sentence structure, diction, transitions, etc.

- H. Edit your Case Note.
- I. Show it to your editor for review.
- J. Hand in your Case Note.

SCORING CRITERIA & EVALUATION FORM

Case Note # _____

Editor # _____

RESEARCH

1. **THOROUGHNESS OF RESEARCH (5 points)** _____
Has the author used all significant authority, enough primary authority, significant secondary authority or unique sources?
2. **APPROPRIATE APPLICATION OF AUTHORITY (5 points)** _____
Has the author used authority that is appropriate and supported statements that need to be supported?

WRITING ABILITY

3. **ORGANIZATION (5 points)** _____
Has the author followed the prescribed outline or added to it in a helpful way? Has the author structured paragraphs and sentences properly?
4. **CLEAR AND CONCISE STYLE (5 points)** _____
Has the author written a reader-friendly case note? Is the meaning of each sentence free from ambiguity or vagueness?
5. **GRAMMAR AND PROOFREADING (5 points)** _____
Has the author followed the rules of grammar and punctuation?
6. **ANALYSIS (5 points)** _____
Has the author presented a thorough, sound, and unique point of view (regardless of the editor's personal views)?

TECHNICAL ASPECTS

7. **ENDNOTE QUALITY (5 points)** _____
Has the author written well-developed textual endnotes? Do the endnotes relate to the text?
8. **BLUEBOOK ACCURACY (10 points)** _____
Has the author followed the Bluebook (18th edition)?

TOTAL _____

SCORING

For Criteria 1–7: Excellent = 5; Good = 4; Average = 3; Below Average = 2; Poor = 1

For Criterion 8: Excellent = 10; Good = 8; Average = 6; Below Average = 4; Poor = 2

LAW REVIEW WRITE-ON STYLE SHEET

Cover Sheet:	<p><u>First Draft:</u> Include your name, your editor's name, your e-mail address, your telephone number, and the name of the case.</p> <p><u>Final Draft:</u> No cover sheet is required. Turn in three copies of your casenote with your signed Honor Pledge.</p>
Paper:	8 1/2 by 11 inches. White bond, not onion skin
Margins:	One-inch margins on both sides One-inch margins top and bottom (except for page numbering)
Type:	The case note must be typed, not in longhand. Use no more than ten characters per inch (i.e., twelve point or larger), in a non-proportional font such as Courier or Courier New. A few, neat, hand-printed corrections in black ink are acceptable.
Body:	Both text and endnotes must be double-spaced, with no more than 27 lines per page. Indent the first line of each paragraph. <i>If your printer or typewriter cannot conform to these type and body requirements, you must make arrangements with your editor, prior to deadline, to adjust your page ranges accordingly.</i>
Length:	The text must be at least eight pages. Endnotes must be at least eight pages. Total length may not exceed twenty pages.
Citation:	Citations must conform to the guidelines of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 18th ed. 2005).
Binding:	<i>Staple</i> each draft in the upper left-hand corner. Do not use cardboard or plastic covers or binders. Do not use paperclips or binder clips.
Pagination:	A cover sheet is not included in pagination.

PAPERS NOT MEETING THESE REQUIREMENTS MAY BE PENALIZED.

These formatting requirements are NOT the same as those used in WRAP.

Note: Good professional practices dictate that attorneys using word processing should always back up their data and print drafts frequently. You should do the same. A good attorney always keeps a copy of each document submitted to the court, a client, or a colleague. You should do the same. Write-On candidates will be "estopped" from complaining about a loss that could have been prevented by either practice.

BLUEBOOK CHECKLIST: A HANDY GUIDE TO THE BLUEBOOK

The following list is provided as a reminder of some important elements of citation. However, this list is neither authoritative nor exhaustive. *Always consult the rule in the Bluebook.*

William Mitchell Law Review has adopted some special citation rules in addition to those in the Bluebook. The special rules are noted in this list. If the William Mitchell rules conflict with the Bluebook, use the William Mitchell rules.

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 SMALLCAPPED.

How do I make small capitals in MS Word?

There are three ways that you can turn ordinary text into small capitals:

Easiest Way: You can use **CTRL+SHIFT+K** before you begin typing the text that you want small capped. Then, type the text that you would like to be small capped. Click **CTRL+SHIFT+K** again to go back to normal text.

Easier Way: Select the text that you want small capped. Use **CTRL+SHIFT+K** to change it to small caps.

Easy Way: Select the text that you want small capped. Go to the “**Format**” menu (or right-click your mouse) and select “**Font**.” In the “**Font**” window under “**Effects**,” select “**Small caps**.”

The Hard Way:

1. As you’re writing your paper, use **bold** instead of SMALL CAPS.
2. When you’re finished, go to the “Edit” menu and select “Replace.”
3. In the “Find and Replace” window, click the “More” button.
4. With the cursor in the “Find what” field, click on the “Format” button and select “Font.” In the Font window, under “Font style,” select “bold.” Then click “OK.”
5. With the cursor in the “Replace with” field, click on the “Format” button and select “Font.” In the Font window, under “Font style,” select “Not bold”; and under “Effects,” check “Small caps.” Again, click “OK.”
6. Back in the “Find and Replace” window, click “Replace All.”

Voila! The hard way is a lot of steps, but some of you may prefer not stopping to alter fonts while typing.

2. USE OF ID.

- *Id.* is used to cite to the preceding authority, either within the same endnote or to the immediately preceding endnote. *Id.* may only be used to cite to a previous endnote if that endnote 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, 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 sentences.
- If you use *see also*, *cf.*, or *see generally*, then a parenthetical is strongly recommended. This type of parenthetical is covered by rule 1.5.

4. CASE NAMES

a. Typeface

- If a case name is cited in full in an endnote, 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

- Case citation is generally covered by Rule 10.1.
- 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 U.S. Supreme Court decisions are published and available in U.S. Reports, then the case should be cited to the U.S. Reporter, not to 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 will generally apply to Minnesota cases published before 1978. The use of these parallel cites is a courtesy to Minnesota practitioners.

6. SHORT FORMS FOR CASES

- See Rule 10.9 for guidance in short form citation.
- *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 which 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 generally Rule 2.1 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.
- 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 (JUMP) CITES

Pinpoint cites are required when citing to a proposition in the text of the source.

- For cases, a pinpoint cite should refer to the text of the case, not to the headnotes or syllabus. In the Bluebook, the rule for how to pinpoint cite a particular source is usually included in the general discussion of that source.
- A pinpoint cite is required even if the authority is on the first page of the source.

For example:

11 WM. MITCHELL 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.
- From primary authority, constitutions and statutes are first, followed by case law. Higher jurisdictions are generally placed 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 in

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. 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 5.3 for the use of ellipses when omitting words.
- See Rule 5.2 for the use of brackets and “[sic]” when altering the original text.

13. BOOKS, PAMPHLETS, AND OTHER NONPERIODIC MATERIALS

- Refer generally to rule 15.
- Cite by volume when citing to more than one book, pamphlet, or other nonperiodic material. Rule 3.2(a)
- 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. 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; 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 15.7.

14. PERIODICAL MATERIALS

- When citing periodical materials use LARGE AND SMALL CAPS for the name of the publication only; the author's name is in ordinary Roman type; the title of the article is 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.
- Law Review articles require a parenthetical describing the content of cited pages.
- Refer to Rule 16.5 for additions to the general rules when citing to sections and page numbers of newspapers.

15. COMMERCIAL DATABASES AND THE INTERNET

- Rule 18 is intended to clearly indicate which source the author actually used.
- Cite traditional sources if available. If (1) the traditional source is hard to locate or (2) citing to an electronic source will improve access to the information, cite to the traditional source, to the extent possible, and the electronic source as a parallel citation.
- 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.

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>.

- Use no explanatory phrase when the source is unavailable in traditional printed format, or when the print format exists but is so obscure as to be 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 18.2.3(e)
 - 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.
- Examples:
 - 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 information can be readily accessed by the user. 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 section of 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. MISCELLANEOUS NOTES

- Use active verbs.
- Omit needless words.
- Avoid legalese.
- Use plain, familiar, concrete language.
- Proofread.

THE TECHNIQUE 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 footnoted. This is necessary both to avoid plagiarism and to increase the author's credibility. Often a statement will require several footnotes within the 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 be aware of a tendency to assume that the prospective reader knows as much about the subject as the writer. The writer should write with enough clarity that a beginning law student could understand the article. The writer should also strive to write 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 footnoted.

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 also should 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, be sure 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 "Background" or "History of the 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're 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 14th century to the 20th century; containing no apology for its long title).

Also, the "Background" 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, then 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 "Background" 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 citing in a text. 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” 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. Any subsequent history of a case such as *cert. denied*, etc., must be included as part of the citation.

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 which 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 aide 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 Endnotes.

Endnotes serve several purposes. An endnote 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 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.
Remember that endnotes 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 a 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 verb preceded 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 *William Mitchell Law Review* conform to the Eighteenth Edition of *A Uniform System of Citation* (The Bluebook), as published by the Harvard Law Review Association. 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 endnotes should 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. Print often. Lateness due to computer problems, printer problems, power failures, etc. will not be excused.
- D. Keep a copy of your draft.
- E. Finally, a word about the editorial process. Students are allowed to share up to two drafts with their write-on editor. Ultimately, a student should remember that it is his or her name alone that will be on the paper.

VIII. Punctuation and Style Basics.

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* (15th 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*.

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. Colon.

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 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 us 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 ellipses points (three dots). The Law Review distinguishes between the use of ellipses 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 dots (a period followed by the three 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 used for the ellipses.

When four dots indicate the omission of the end of a sentence, the first dot is the period; thus, there is no space between it and the preceding word. 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, of the Indian, or the immigrant. From neither party, when in power, has the works 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, (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. Conclusion.

If you have questions, feel free to consult an editor after you have consulted the Bluebook and/or *The Chicago Manual of Style*. One of the editors' duties is to help staff candidates learn how all of this is done.

Given appropriate attention, you will find it is not as difficult as it may at first appear.

SHORTCUTS FOR USING MICROSOFT WORD

Disclaimer: Using these tips is optional and for the writer's convenience only. Some of the following tips may work differently on different versions of MS Word. Using, or declining to use, these tips in your case note will in no way increase or decrease your chances of being selected to the *William Mitchell Law Review*.

GENERALLY

FORMATTING SHORTCUTS

Small Caps: CTRL+SHIFT+K

Italics: CTRL+I

Underline: CTRL+U

Bold: CTRL+B

ENDNOTE/FOOTNOTE SHORTCUTS

Endnote: ALT+CTRL+D

Footnote: ALT+CTRL+F

VIEWING FORMATTING CHARACTERS

See Invisible Characters: CTRL+SHIFT+* (asterisk)

CUTTING/COPYING/PASTING

Cut: CTRL+X

Copy: CTRL+C

Paste: CTRL+P

FILE SHORTCUTS

Save: CTRL+S

Close: CTRL+W

Print: CTRL+P

BREAKS

Page Break: CTRL+ENTER

WRITE-ON COMPETITION TIPS

ENDNOTE TIPS

- A. Using the shortcut, "ALT+CTRL+D" instead of mouse-clicking "Insert > Footnote > Booknote" 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. then click **Endnote** and
3. then click **Options** at the bottom of the dialog box
4. Under "Number format", select "1, 2, 3 ..." from the drop-down menu
5. Click **OK**
6. Click **Close**

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

COMPETITION CHECKLIST

By Tuesday, June 8, 2010

- _____ I have carefully reviewed the deadlines
- _____ I have reviewed the competition manual
- _____ I have communicated any questions to my Editor
- _____ I have had my Editor review up to two drafts of my paper
- _____ I have reviewed my paper for compliance with the guidelines specified in this packet
- _____ I have made the appropriate cover sheet for my submission
- _____ I have signed my honor pledge and have it ready to turn in
- _____ I have three copies of my paper to turn in
- _____ I have printed two copies of my bluebook quiz
- _____ I have printed and signed my bluebook honor pledge and have it ready to turn in
- _____ I am turning in my paper to student services by Tuesday, June 8 at 5:00 p.m. NO EXCEPTIONS. I understand that if I am out of town, three copies of my paper must be received by mail at Student Services by this same time.

You do not need to turn this sheet in.

SAMPLE CASE NOTE

CONTRACTS: Beating Them at Their Own Game: The Business Risk Doctrine and the Broadening of Commercial General Liability Insurance--*Thommes v. Milwaukee Insurance Co.*, 641 N.W.2d 877 (Minn. 2002).

Insurance. An ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table.¹

I. Introduction

In some ways, Ambrose Bierce's infamous definition of insurance falls short of the mark; players in today's insurance do not even have a "comfortable conviction" of an insurer welcoming its contractual duty to defend.² The Minnesota Supreme Court recently revisited the question of insurance coverage in *Thommes v. Milwaukee Insurance Co.*,³ which involved a commercial general liability (CGL) policy.⁴ CGL insurance is a form of insurance "that covers damages that the insured becomes legally obligated to pay to a third party because of bodily injury or property damage."⁵

The framework that courts have adopted to resolve questions of coverage for CGL policies is the business risk doctrine.⁶ The idea behind the business risk doctrine is that an insured "should not look to its CGL insurer to cover business risks that are within its own control."⁷ As one commentator has elaborated:

The risk of replacing and repairing defective materials or poor workmanship has generally been

considered a commercial risk which is not passed on to the liability insurer. Rather liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work.⁸

As a result, courts hold CGL policies to provide coverage for tort claims from third parties, not for contract liability arising from the contracting owner's property.⁹

Yet questions remain about coverage even within the category of tort liability from third parties. In particular, there is the question of timing of the work that caused damages. As originally formulated, the business risk doctrine would only operate to cover tort liability for completed work that causes damages.¹⁰ However, *Thommes* suggests that the supreme court has developed a new policy that the risk intended to be insured is for tort liability, no matter at what point the tort arises.

This note first examines the theory behind the business risk doctrine in determining commercial general liability insurance (CGL).¹¹ It then details the supreme court's holding in *Thommes*,¹² followed by an analysis of that decision.¹³ Finally, the note concludes that the supreme court's removing timing as a consideration from coverage for tort liability is a sound approach that favors the insured.¹⁴

II. History

In 1971, Roger C. Henderson produced an article that is credited with first articulating the business risk doctrine.¹⁵

In this seminal work, Henderson wrote that "[t]he risk intended to be insured is the possibility that the . . . work of the insured, *once relinquished or completed*, will cause . . . damage to property other than to the . . . completed work itself, and for which the insured may be found liable."¹⁶ From this, courts began to rely on the business risk doctrine to resolve questions of CGL coverage based on whether the liability arose from tort, rather than contract.¹⁷

In 1982, the Minnesota Supreme Court adopted the business risk doctrine in *Bor-Son Building Corp. v. Employers Commercial Union Insurance Co. of America*.¹⁸ *Bor-Son* involved a building owner bringing suit against the general contractor who had constructed it for faulty workmanship and materials.¹⁹ Though the contractor had a CGL policy, the supreme court ruled that the insurer had no duty to defend because the damages arose out of the contractor's breach of contract.²⁰ The building owner had not received the product "for which it had bargained."²¹ In setting out the business risk doctrine, the court quoted Henderson's formulation word for word rather than restating it.²²

By the time of *Knutson Construction Co. v. St. Paul Fire & Marine Insurance Co.* in 1986,²³ the supreme court proved more expansive. Like *Bor-Son*, *Knutson* arose from a claim by a property owner against a general contractor for faulty workmanship and defective materials.²⁴ The court affirmed its

earlier ruling in *Bor-Son*, holding that the contractor had no CGL coverage because the claims derived from breach of contract.²⁵ Yet even though *Knutson* quoted the same passage from Henderson as *Bor-Son*,²⁶ the reasoning within *Knutson* did deviate from the mantra of "once completed or relinquished." Specifically, in an aside, the *Knutson* court stated that a CGL policy could shift the risk to the insurer for tort liability for that period "during the course of the work."²⁷ Whether the supreme court realized the full implications of this statement had to wait for *Thommes*, a case that involved tort liability to a third party.

III. The *Thommes* Decision

Thommes & Thomas Land Clearing (Thommes) is a partnership that clears and grubs land for construction projects.²⁸ In September 1996, *Thommes* subcontracted to clear and grub land for a commercial development owned by Dean Morlock, Charles Vig, and HHA Development.²⁹ However, a property adjoined the land to be cleared, owned by Morlock's sister and her husband, Donna and John Krajewski.³⁰ Before *Thommes* started work, Morlock instructed *Thommes* on what land needed clearing by pointing to a tree that allegedly marked the dividing line between properties.³¹ When specifically asked whether certain trees were on the adjacent property, "Morlock told [*Thommes*] not to worry because his sister owned the property."³² Only after *Thommes*

cleared the property, did its workers find out that they had destroyed trees on the Krajewski property.³³

The Krajewskis then brought an action against Thommes for damage to their property.³⁴ Thommes tendered defense of this lawsuit to its CGL insurance carrier, Milwaukee Insurance Company (Milwaukee).³⁵ Milwaukee, however, declined to either defend or indemnify Thommes based on two exclusions³⁶ in the policy, 2j(5) and 2j(6).³⁷ 2j(5) stated that coverage does not apply to "'[p]roperty damage' to . . . [t]hat particular part of real property on which you . . . are performing operations, if the 'property damage' arises out those operations."³⁸ 2j(6) stated that neither was there coverage for "'property damage' to . . . [t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it."³⁹

In *Thommes*, the supreme court recognized there to be two types of risk that a contractor faces.⁴⁰ The first type was that an insured may be liable through contract for defective work, in which case the business risk doctrine would operate to exclude coverage.⁴¹ The second type included the risk that a contractor's work will cause "property damage to other property."⁴² The court continued, "it was this type of risk, which may give rise to tort liability to third parties," that CGL policies are intended to insure against.⁴³ As a result, when

considering the first exclusion at issue, section 2j(5), the court reasoned that the "underlying purpose of CGL insurance" rendered the exclusion ambiguous.⁴⁴ Once the court found the exclusion ambiguous, it only needed to recite that "contract exclusions are to be construed strictly against the insurer" to hold that there was coverage.⁴⁵

When it came to the other provision at issue, 2j(6), the court produced a slightly different analysis. Instead of the business risk doctrine alone being sufficient to render the provision ambiguous, the court found multiple meanings on the face of the policy's actual language.⁴⁶ The court reasoned that the word "incorrect" could mean not only the manner in which work was conducted, but the place where it was conducted.⁴⁷ From this, the court came to the same conclusion that the exclusion was ambiguous and had to be construed against the insurer to order coverage.⁴⁸ Yet even though the court found 2j(6) ambiguous on its face, the court would have applied the same analysis as it had for 2j(5) if it had been necessary. Thus, the majority's holding that the mere "purpose" of CGL insurance makes a contract clause fatally ambiguous inhabits the whole case.⁴⁹ In effect, *Thommes* ruled that if an insured's work may give rise to tort liability to third parties, then a CGL policy provides coverage.

IV. Analysis of the *Thommes* Decision

By removing any timing qualification, the Minnesota Supreme Court's formulation of the business risk doctrine in *Thommes* is broader than the Henderson article from which the doctrine originated. In his work, Henderson asserted that the risk intended to be insured is to cover the possibility that the insured's work will cause tort liability to a third party "once relinquished or completed."⁵⁰ By contrast, *Thommes* simply states that CGL policies are intended to insure against the type of risk that "may give rise to tort liability to third parties," dropping any mention of coverage being contingent on work being completed.⁵¹

Strangely, nowhere does the majority comment on its departure from Henderson, which had been quoted verbatim in earlier decisions.⁵² And the dissent did not remark upon it either, which would have been a valid criticism.⁵³ As a result, it is unclear whether the supreme court moved this way deliberately.⁵⁴ But either way, the holding in *Thommes*--ordering coverage for *Thommes*, the insured, for damage to the Krajewskis' property that occurred *while* *Thommes* was carrying out its contracted for work--demonstrates the operation of the rule that timing is not a factor. Though there is an absence of notice, this declaration still stands.⁵⁵

Perhaps this is the way it should have been all along. In a sense, Henderson's original rule creates a false distinction

between torts: those that arise while working and those that arise from work after it is completed.⁵⁶ The rationale appears to be that a contractor has less control over the work once the work is finished.⁵⁷ Yet, after all, a tort is a tort is a tort-- a wrong or breach of duty whenever it happens.⁵⁸ One is not found liable for reasonable behavior. Thus, given the intent behind CGL to cover the risks of tort liability to third parties, *Thommes* was only fair to broaden coverage to live up to that intent.

V. Conclusion

By the time *Thommes* reached the supreme court, *Thommes* had independently reached a settlement with the Krajewskis, rather than risk the high cost of litigation.⁵⁹ Yet with the Minnesota Supreme Court's removal of the artificiality of the timing consideration, insureds should no longer have to weigh whether an insurer will actually honor its duty to defend against a third party claim for tort liability. Insurance companies originally propagated the business risk doctrine before the courts as a way to narrow coverage.⁶⁰ And, indeed, this is what happened in such landmark Minnesota cases as *Bor-Son*⁶¹ and *Knutson*,⁶² because of the business risk doctrine. However, the intent behind the business risk doctrine has allowed an insured like *Thommes* to beat the insurers at their own game.

¹ AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* (Oxford University Press 1999)(1911).

² BLACK'S LAW DICTIONARY 523 (7th ed. 1999) (defining the duty to defend clause in a liability insurance contract as that which obligates the insurer to "take over the defense of any lawsuit brought by a third party against the insured on a claim that falls within the policy's coverage."). As commentators have noted, the duty to defend forms a crucial component of CGL coverage because "[w]hether a contractor lacking the resources necessary for protracted litigation can shift the cost of defending a counterclaim to the insurer may color or even determine the outcome" of a litigation. F. Malcolm Cunningham & Amy L. Fischer, *Insurance Coverage in Construction--The Unanswered Question*, 33 TORT & INS. L.J. 1063, 1081 (1998).

³ 641 N.W.2d 877 (Minn. 2002).

⁴ See generally 9 LEE R. RUSS ET AL., *COUCH ON INSURANCE* § 129:11 (3d ed. 1999). As one commentator recounts, CGL used to stand for "comprehensive" but changed to "commercial" in 1986; this is considered to be emblematic of the narrowing of coverage over the years. Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 106 (2001) [hereinafter Abraham, *Rise and Fall*].

⁵ BLACK'S, *supra* note 2, at 809.

⁶ 27 DUNNELL MINN. DIGEST *Insurance* § 19.01(b) (4th ed. 1995). "A contractors' general liability policy provides coverage for insurance risks, not business risks. Where the insured's defective work causes property damage or personal injury to a third party, however, the third-party claim is covered by the policy and is not barred by the business risk doctrine." *Id.*

⁷ James Duffy O'Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 CONSTR. L. 15, 15 (2001) [hereinafter O'Connor, *Lawyer Should Know*].

⁸ Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims under Commercial General Liability Policies*, 30 TORT AND INS. L.J. 785, 787 (1994).

⁹ Keith A. Dotseth et al., *Evolution or Revolution: Thommes' Role in the Development of the Business Risk Doctrine*, 29 WM. MITCHELL L. REV. 597, 601 (2002) [hereinafter Dotseth, *Evolution or Revolution*]. One commentator has argued that the distinction between tort (covered) and contract (not covered) claims has no logical basis in fact because both arise from negligent or somehow defective work. Clifford J. Shapiro, *Further Reflections--Inadvertent Construction Defects Are an "Occurrence" under Commercial General Liability Policies*, 686 PLI/Lit 73, 98. See also O'Connor, *Lawyer Should Know*, *supra* note 7, at 18: "So what that the insured was negligent? Isn't

that exactly why consumers buy insurance? . . . It is precisely to cover the risk that each of these insureds will fail to act in a reasonably prudent manner on occasion that each buys general liability insurance." *Id.* Nevertheless, it is possible for a "contractual liability coverage" provision to be added to a CGL policy. See 7 LEE R. RUSS ET AL., COUCH ON INSURANCE § 103:19 (3d ed. 1999).

¹⁰ Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971) [hereinafter Henderson, *Insurance Protection*].

¹¹ See *infra*, Part II.

¹² See *infra*, Part III.

¹³ See *infra*, Part IV.

¹⁴ See *infra*, Part V.

¹⁵ Henderson, *Insurance Protection*, *supra* note 10, at 441.

¹⁶ *Id.* (emphasis added). Henderson reasoned, "[T]he risks of . . . property damage arising from the planning stage of business are a business risk of the insured, that is, a responsibility which he must undertake just as he does for other business decisions. There is, however, a difference between insuring against economic risks arising from the market place which subject the businessman to ruin for faulty planning or judgment

and risks to others for . . . property damage arising from faulty planning or judgment." *Id.* at 440.

¹⁷ Dotseth, *Evolution or Revolution*, *supra* note 9, at 598. See generally Abraham, *Rise and Fall*, *supra* note 4, discussing the history and development of commercial general liability insurance since its origins in the nineteenth century.

¹⁸ 323 N.W.2d 58 (Minn. 1982). One of the first jurisdictions in the country to endorse the business risk doctrine was New Jersey in the 1979 decision *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). See Annotation, *Scope of Clause Excluding from Contractor's or Similar Liability*, 8 A.L.R.4th 563 (1981) (discussing insurance exclusions from contractor's coverage in different jurisdictions).

¹⁹ *Bor-Son*, 323 N.W.2d at 59-60.

²⁰ *Id.* at 63.

²¹ *Id.*

²² *Id.*

²³ 396 N.W.2d 229 (Minn. 1986).

²⁴ *Id.* at 231.

²⁵ *Id.* at 235.

²⁶ *Id.* at 232.

²⁷ *Id.* at 234.

²⁸ 641 N.W.2d at 879.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 877 (Minn. 2002).

³² *Id.*

³³ *Id.*

³⁴ *Thommes*, 641 N.W.2d at 879.

³⁵ *Id.*

³⁶ The *Thommes* court also noted that "[i]nsurance contract exclusions are construed strictly against the insurer." 641 N.W.2d at 880 (citing *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001)). See Abraham, *Rise and Fall*, *supra* note 4, at 104-05. "[T]he current trend . . . is toward ever more narrow CGL coverage. The original "comprehensive" general liability insurance policy contained only five exclusions. Over time the exclusions have proliferated. Today there are a minimum of fifteen exclusions in the standard-form CGL policy, occupying nearly four pages of fine print." *Id.*

³⁷ *Thommes*, 641 N.W.2d at 879. See generally 9 LEE R. RUSS ET AL., COUCH ON INSURANCE § 129:12 (3d ed. 1999) (discussing exclusions 2j(5) and 2j(6)). Along with a group of other exclusions in a CGL policy, exclusion j is generally known as a "business risk" exclusion. Gregory G. Schultz, *Commercial General Liability*

Coverage of Faulty Construction Claims, 33 TORT & INS. L.J. 257, 266 (1997).

³⁸ *Thommes*, 641 N.W.2d at 882.

³⁹ *Id.* at 883.

⁴⁰ *Id.* at 881. The interpretation of an insurance policy is a question of law reviewed *de novo*. *Walser*, 628 N.W.2d at 609. The question of whether an insurer has a duty to defend or indemnify is also a question of law reviewed *de novo*. *Metro. Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999).

⁴¹ *Thommes*, 641 N.W.2d at 881.

⁴² *Id.*

⁴³ *Id.* However, the court does admit the possibility that an insurer and insured could contract otherwise for different coverage. *Id.* at 882 (citing *Am. Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983)).

⁴⁴ *Id.* at 883. The majority makes this ruling despite earlier protestations that "[n]otably absent from *Bor-Son* and *Knutson* [two cases upon which the majority relies] is any indication that these [business risk] principles serve as the foundation for a separate 'business risk doctrine' that operates to override the express language of policy exclusions." *Id.* at 880.

⁴⁵ *Id.* (relying on such precedent as *Walser*, 628 N.W.2d at 613, that exclusions in insurance contracts are construed strictly against the insured). See also *Nathe Bros. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000)). "Because most insurance policies are presented as preprinted forms, which a potential insured must usually accept or reject as a whole, ambiguities in a policy are generally resolved in favor of the insured." *Nathe*, 615 N.W.2d at 344. Nevertheless, when an insurance contract uses unambiguous language, the contract is given its plain and ordinary meaning. *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 884.

⁴⁹ It is for this reason that, when speaking of the whole case, the *Thommes* dissent states that "[t]he ambiguity found by the majority regarding whether the exclusion applies to property owned by third parties comes not from the language of the exclusion, but rather from the majority's conception of the underlying purpose of CGL insurance." 641 N.W.2d at 884 (Stringer, J., dissenting).

⁵⁰ Henderson, *Insurance Coverage*, *supra* note 10, at 441.

⁵¹ *Thommes*, 641 N.W.2d at 881.

⁵² See *Bor-Son*, 323 N.W.2d at 65; *Knutson*, 396 N.W.2d at 232.

There is at least one decision from the court of appeals that preceded the supreme court's position in *Thommes*, *W. World Ins. Co. v. H.D. Eng'g Design & Erection Co.*, 419 N.W.2d 630 (Minn. Ct. App. 1988). *H.D.* involved employees of a subcontractor negligently placing materials on top of a partially completed building, causing it to collapse. *Id.* at 631. The court of appeals also found the effect of the business risk doctrine distinguishable from *Bor-Son* and *Knutson* for the situation at hand. *Id.* at 635. The court ultimately found that the subcontractor's insurer had a duty to defend and indemnify because the damages arose from tort liability to a third party. *Id.* The court made this decision despite the fact that the actions giving rise to the liability occurred while the work was still in progress. *Id.* at 631.

⁵³ The dissent instead focuses its criticisms of the majority to contract interpretation. In particular, the dissent faults the majority for finding the exclusions at issue ambiguous; the dissent would have restricted itself to the plain meaning of each exclusion to deny coverage. *Thommes*, 641 N.W.2d at 884-85 (Stringer, J., dissenting).

⁵⁴ The Minnesota Court of Appeals decision did not mention the issue either. 622 N.W.2d 155 (Minn. Ct. App. 2001). Upon

examining the case, the court of appeals made its ruling specifically based on a finding of tort liability that arose "in the course of clearing" the land. *Id.* at 160. By the time the case came to the supreme court, however, the supreme court must have been aware of the issue; the briefs from both sides address it. See Appellant's Brief at 25-28, *Thommes* (No. C9-00-1393); Respondent's Brief at 22-23, *Thommes* (No. C9-00-1393).

⁵⁵ There is also support for the Minnesota Supreme Court's position in at least one other jurisdiction, *Glen Falls Ins. Co. v. Donmac Golf Shaping Co.*, 417 S.E.2d 197 (Ga. Ct. App. 1992). In *Glen Falls*, a contractor had accidentally built part of golf course on wetlands without necessary permits, violating federal law. *Id.* at 198. The fact pattern is thus strikingly similar to that in *Thommes*, what with tort liability to third parties arising in the course of the insured's work. As the supreme court would decide in *Thommes*, the Georgia Court of Appeals ruled simply that the situation involved a tort claim and thus business risk exclusions did not apply. *Id.* at 201.

⁵⁶ The artificiality of this distinction is similar to the criticism commentators have made of the business risk doctrine for considering tort claims covered by CGL policies, but not contract claims (given that both can arise from negligent behavior). See *infra*, note 9.

⁵⁷ See Appellant's Brief at 27, *Thommes* (No. C9-00-1393).

⁵⁸ BLACK'S, *supra* note 2, at 1496. It is worth noting that by the time *Thommes* came up on appeal, even though a settlement had already been reached between Thommes and the Krajewskis, both sides still disputed whether Thommes had been negligent. See Appellant's Brief at 4, *Thommes* (No. C9-00-1393) (asserting that "[t]here is no dispute that Respondent [Thommes] had the ability to demand a survey from the general contractor or perform one at its own expense to establish boundaries."). *But see* Respondent's Brief at 4, *Thommes* (No. C9-00-1393) (countering that "[t]his 'fact' has not been established.) Of course, the pre-trial settlement that Thommes reached with the Krajewskis meant that a jury never got to pass judgment on the reasonableness of Thommes's care with the land. For its part, the supreme court considered "the materials facts" to be undisputed. *Thommes*, 641 N.W.2d at 878.

⁵⁹ See Respondent's Brief at 32, *Thommes* (No. C9-00-1393).

⁶⁰ See O'Connor, *Lawyer Should Know*, *supra* note 7, at 15 (characterizing the business risk doctrine as a "tried and true weapon" of the insurance industry, even to the point of defeating the plain words in a CGL insurance policy).

⁶¹ 323 N.W.2d at 63.

⁶² 396 N.W.2d at 235.