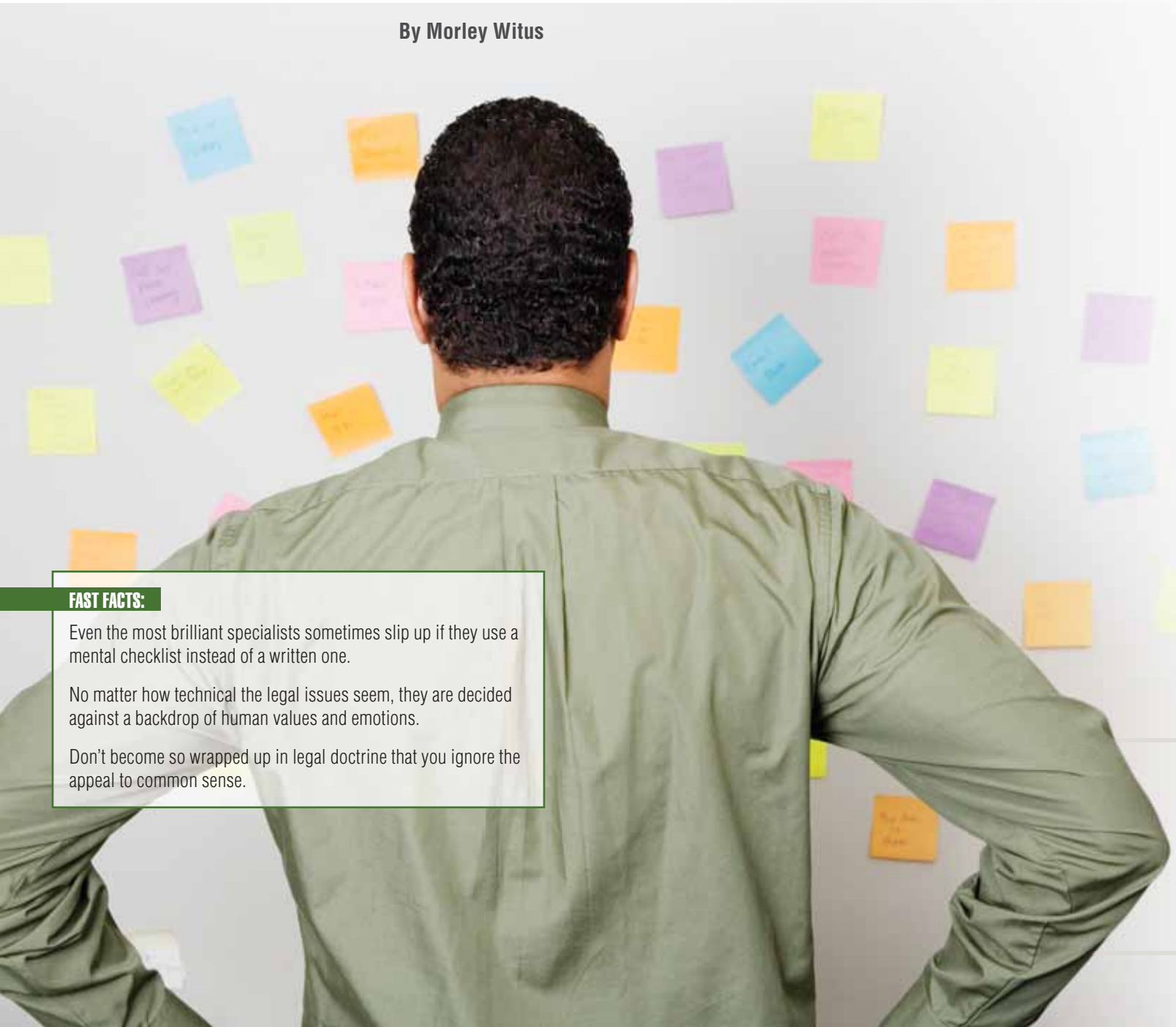
A Checklist for Legal Argument

By Morley Witus

A recent bestseller, *The Checklist Manifesto: How to Get Things Right,*[1] insists that written checklists must be used meticulously in carrying out medical procedures, and specialists in all fields should follow written guidelines that spell out the key steps in any complex procedure.

This point was on display at the 2010 Super Bowl. The Indianapolis Colts' Peyton Manning is considered one of the greatest quarterbacks of all time, particularly because of his brilliant football mind. From the time his team walks to the line of scrimmage until the ball is snapped, you can see him methodically checking every aspect of the defense, moving his teammates around, and changing the play to fit the circumstances. He's following a mental checklist. And that usually works for a genius like Manning. But the point of *The Checklist Manifesto* is that even the most



FAST FACTS:

Even the most brilliant specialists sometimes slip up if they use a mental checklist instead of a written one.

No matter how technical the legal issues seem, they are decided against a backdrop of human values and emotions.

Don't become so wrapped up in legal doctrine that you ignore the appeal to common sense.

brilliant specialists sometimes slip up if they use a mental checklist instead of a written one. And so, as his Colts were about to tie the score near the end of the game, Manning neglected to check the corner and consequently threw an interception right to a defensive back who returned it for a touchdown—thus the great Peyton Manning lost the Super Bowl.

Lawyers have long known the value of checklists. There are many practitioners' handbooks that include checklists for real estate transactions, employment law, landlord-tenant law, evidence, and other aspects of practice.

This article provides a checklist of legal arguments. It's not about how you should draft or present legal arguments, but *what types of arguments you should consider making.* It presents an all-purpose checklist as a reminder of possible points to include in your brief, and is not concerned with arguments relating to any particular area of law. Rather, it attempts to cover generic kinds of arguments that are applicable no matter what the specific topic or issue. Another caveat: most judicial decisions hinge on how the law should be applied to the facts of the case. The checklist does not attempt to address all the ways to apply various legal standards to the infinite variety of factual situations.

The checklist first addresses arguments about the text of the pertinent rule or statute (Section I), then arguments about cases construing the law (Section II), and finally considerations of policy and fairness (Section III). The checklist is in outline form to depict arguments and counterarguments as well as points that are subsidiary to the main argument or counterargument.[2]

For routine everyday issues (e.g., a motion to amend a scheduling order), there would be no reason to consult the checklist. However, using the checklist might be helpful if you are faced with more difficult issues for which the law is not clear or if you just want to be sure you don't leave out some potentially helpful type of argument.

Even in significant motions, you ordinarily won't use all the types of legal arguments listed in the checklist (textual interpretation, caselaw, policy, justice, and credibility). Often the rule or statute (Section I) is indisputably clear and not contested. The caselaw (Section II) is more frequently a battleground when briefing an issue. And concerns about morality (Section III) are always present, although not always directly addressed. No matter how technical the legal issues seem, they are decided against a backdrop of human values and emotions.[3]

Finally, the checklist is meant to be applicable generally for argument in any jurisdiction in trial or appellate courts. It is not specifically tailored to Michigan courts.

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I. The Rule or Statute

A. Argument:

The text of the rule or statute is plain, and it clearly applies to our facts.

B. Counterarguments:

1. The language is ambiguous; the meaning is not self-evident.
2. Properly construed, the rule or statute does not have the meaning given to it by the other side, in light of:
   a. Its intent or purpose.
   b. The drafting history.
   c. Canons of construction.
   d. Judicial decisions construing the rule or statute.
   e. Judicial decisions construing similar or analogous language.
   f. Secondary authority (e.g., commentaries or treatises).

II. The Caselaw

A. Arguments:

1. Our position is supported by the holding of a controlling case on point.
2. The situation presented in our case is actually stronger than the situation in the case we cite; thus, the principle of that case applies even more forcefully here.

B. Counterarguments:

1. The case cited by the other side does not stand for the proposition they advocate.
   a. It did not decide the issue.
   b. The other side quotes a remark out of context or one that was dicta; it was not the basis of the decision or necessary to reach the holding.
   c. The actual holding of the case was simply that… (so the case really just stands for a proposition that doesn't hurt us).
   d. The case actually supports our position.
   e. The case actually contains a good statement of a broader rule that helps our position.
2. The case cited by the other side is not on point.
   a. It is distinguishable in crucial respects.
   b. The cited case holds that the rule applies in a certain situation, but the case at bar does not involve that situation.
   c. Although the cited case says that the rule categorically applies in all situations, the court in that case did not face a situation like the one present here, and there should be an exception for situations like ours.
3. The case is not binding precedent.
   a. It is not from this jurisdiction.
   b. The case has been effectively overruled by a decision of a higher court or superseded by a new statute.
   c. The case has not been followed by other courts.
   d. The case has been criticized.
   e. The case is unpublished.

4. There are other contrary precedents that stand for the opposite proposition and thus support us. The split of authority favors our side because the cases supporting our position are stronger in the following respects:
   a. The majority of cases on this issue favor our side.
   b. The cases the other side cites were decided by lower courts.
   c. Their cases are outdated.
   d. Their cases contain little or no analysis.
   e. Their cases do not address or seem to be aware of the contrary caselaw.

III. Other Values

A. Fairness and Equity

1. Arguments: Whatever the law says in general, the facts here strongly support the relief we seek, and it would be unfair to rule for the other side, because:
   a. My client is good and worthy.
   b. My client has been wronged.
   c. The other side is bad.
2. Counterarguments:
   a. The other side is not pure and innocent.
   b. My client is good and worthy.
   c. The issue here is not the ultimate relief sought in the case, so the other side's jury argument is irrelevant.
   d. The governing rule of law does not make an exception for cases in which a party makes emotional pleas about unfairness.

B. Credibility

1. Arguments: The other side is untrustworthy.
   a. There are inconsistencies in their assertions and positions.
   b. Their brief misstates the law or facts or both.
   c. The other side does not disclose key cases or key facts.
   d. They have engaged in tactical gamesmanship or have abused the judicial process.
2. Counterarguments:
   a. The other side's assertions are untrue.
   b. The other side has done similar things.
   c. Their comments are impertinent and irrelevant to the issues before the court—a red herring to divert attention from the poverty of their position (since they don't have the facts or the law, they just "pound the table").

C. Policy

1. Argument: The rule advocated by the other side would lead to unacceptable consequences for society or the courts or both.
2. Counterarguments:
   a. The other side's speculation about the dire consequences is wrong—our position would not produce bad results and/or theirs would not produce good results.
   b. The rule we advocate is based on authoritative legal precedent, not on personal views about good public policy.
      i. Courts are supposed to follow the law and not substitute their policy preferences for the relevant rules, statutes, or controlling precedents.
      ii. Adherence to precedent makes the law more consistent and certain.
3. Rebuttal:
   a. In this case, the court must decide in a gray area where there is no cut-and-dried rule dictating the outcome, so policy considerations are appropriate.
   b. In the absence of any controlling authority, this court is not required to blindly follow other decisions when they are wrong from the standpoint of common sense, morality, and reason.[4] ■

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FOOTNOTES

1. Gawande, *The Checklist Manifesto: How to Get Things Right* (New York: Metropolitan Books, 2009).
2. The following website contains a helpful taxonomy of legal argument: Troy Simpson, *Win More Cases: The Lawyer's Toolkit* <http://www.win-more-cases.com/> (accessed November 9, 2011).
3. "The real and vital central job is to satisfy the court that sense and decency and justice require: (a) the rule that you contend for in this type of situation; and (b) the result that you contend for, as between these parties." Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions,* 46 Colum L R 167, 183 (1946). "The way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination." Frank, *Law and the Modern Mind* 102–103 (New York 1930). In other words, don't become so wrapped up in legal doctrine that you ignore the appeal to common sense.
4. Precedent can be wrong, as Jonathan Swift noted in *Gulliver's Travels:* "[Stare decisis] is a maxim among…lawyers, that whatever has been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind." Swift, *Gulliver's Travels* (London: Jones & Co, 1826), p 209.