PART I STUDY OUTLINE

I. INTRODUCTION
A paralegal’s role in conducting legal research, or in any situation where legal analysis is required, includes determining the potential weaknesses of a legal argument and the counterarguments the other side may present.

II. COUNTERANALYSIS—DEFINITION
Counteranalysis is the process of discovering and considering the counterargument to a legal position or argument. It is the process of anticipating the argument the opponent is likely to raise in response to your analysis of an issue. It involves an identification and objective evaluation of the strengths and weaknesses of each legal argument you intend to raise.

III. COUNTERANALYSIS—WHY?
Counteranalysis is important for several reasons:
1. Under Rule 3.3(a)(3) of the American Bar Association’s Model Rules of Professional Conduct, an attorney has an ethical duty to disclose legal authority adverse to the position of the client that is not disclosed by the opposing counsel.
2. Both the attorney and paralegal have an ethical duty to do a complete and competent job. See Model Rule 1.1. Research and analysis are not complete unless all sides of an issue and all legal arguments have been considered.
   The identification of opposing arguments allows you to consider what the other side’s position is likely to be and answer these questions:
   ● “What will they do?”
   ● “How can we counter their arguments?”
   ● “What preparation is necessary to respond?”
3. Counteranalysis aids in the proper evaluation of the merits of a case and can assist in the selection of the appropriate course of action to follow.
4. It is important to locate and disclose adverse authority to maintain credibility with your supervisor.
5. When a legal brief is submitted to a court, if you identify and address adverse authority in the brief, you have an opportunity to soften its impact by discrediting or distinguishing it.

IV. COUNTERANALYSIS—WHEN?

Employ counteranalysis whenever legal research is conducted or the strengths and weaknesses of a case are considered, in other words, always.

V. COUNTERANALYSIS—RESEARCH SOURCES

There are several things to keep in mind when conducting counteranalysis and legal research:

■ When researching statutory law, always Shepardize the statute or check the annotations for cases that analyze or interpret the statute.

■ When researching case law, if you have found a case that supports the client’s position, Shepardize the case to determine if another case or cases analyze the law differently.

■ Check the headnote of the case you are researching, identify the key number for the issue in question, and then check the appropriate digest for other cases on the topic.

■ When reading a case that supports the client’s position, always check for a dissent. If there is a dissent, it will present the counterargument to the position taken in the majority opinion and often include references to cases and other sources in support of the counterargument.

VI. COUNTERANALYSIS—TECHNIQUES

A. In General

Before counteranalysis can begin, a prerequisite is that you must thoroughly research and analyze the issue or legal position being analyzed. Put yourself in the opponent’s place and ask yourself:

● “How do I respond to this argument?”
● “What is the argument in response to this position?”

B. Enacted Law

Ways to challenge or attack a legal position or argument based upon an enacted law:

1. Elements of the Statute Are Not Met

   One way to attack a legal position based upon a statute is to argue that the elements of the statute have not been met—that is, there are not facts present in the case to establish each element(s) of the statute.

   Ask yourself, “Have the elements of the statute been met?”

2. Statute Is Sufficiently Broad—Different Construction

   Where the language relied upon in a statute is broadly crafted, look for the counterargument that a different interpretation is permissible because of the broadness of the language. Ask the question, “Is the statute sufficiently broad to permit a construction or application different from that urged by the opposition?”
3. Statute Misconstrued or Does Not Apply
When a legal position or argument is based upon a statute, engage in counteranalysis to ensure that the statute is not being misconstrued or applied in a situation to which it clearly does not apply. Ask the following questions: “Has the statute been misconstrued or does it not apply? Does another statute apply?”

4. Statute Relied upon as a Guide Does Not Apply
In every situation where it is argued that a provision of one statute may apply or be used to interpret a provision of a different statute, a counterargument can always be made that no matter how similar in language and function, the statutes differ functionally in some way. Keep in mind the question, “Is it possible that the statute relied upon as a guide is so functionally different that it cannot be used as a guide to interpret the statute being analyzed?”

5. Statute Relied upon Has Not Been Adopted in Jurisdiction
When conducting counteranalysis, look for the argument that the statute relied upon has not been adopted and should not apply. Ask the question, “Where a legal position is based upon an argument that advocates the adoption of the language or principles embodied in a statute of another jurisdiction, are there differences in the jurisdictions that preclude the adoption of the language or principles of the statute?”

6. Interpretation of Statute Is Unconstitutional or Violates Another Legislative Act
Counteranalyze a legal position or argument based upon an interpretation of a law for the possibility that the interpretation violates a constitutional or statutory provision.

7. Statute Relied upon Is Unconstitutional
When working with statutes, consider a counterargument based upon a challenge to the constitutionality of the statute. Always consider the question, “Is the statute unconstitutional?”

Caveat: When a legal position or argument is based upon a statute, be sure to conduct thorough research to ensure that some other law, provision, or court decision does not apply that affects your reliance on the statute.

C. Case Law
Ways to challenge or attack a legal position or argument based upon case law:

1. Reliance on Court Opinion Is Misplaced—Key Fact Difference
   Conduct counteranalysis to identify a possible counterargument that the court opinion relied upon does not apply because of differences in the key facts. Ask the question, “Is the opinion relied upon not on point because of key fact differences?”

2. Reliance on Court Opinion Is Misplaced—Rule of Law or Legal Principle Does Not Apply
   When conducting counteranalysis, look for the counterargument that the legal principle applied in the court opinion does not apply in the case at hand. Ask the question, “Is reliance on the opinion misplaced because the principle applied does not apply to the case at hand?”
3. Court Opinion Is Subject to a Different Interpretation
Closely scrutinize the language of the court opinion to determine if it is subject to another interpretation. Ask the question, “Is the court opinion subject to a different interpretation from that relied upon?”

4. Rule or Principle Adopted in Opinion Relied upon Is Not Universally Followed
This should be a consideration when the opinion relied upon is not mandatory precedent—that is, when there is no court opinion directly on point, and a party is urging the court to follow a rule or principle adopted by another court ruling in a similar case in either the same or a different jurisdiction.

   Identify the other rules or legal principles that may apply by reading the opinions of courts that have adopted other positions in similar cases. Keep in mind the question, “Is the rule or principle of the case relied upon universally followed?”

5. Opinion Presents Several Possible Solutions; One Urged by Opposition Is Not Mandatory and Is Not Best Choice
Check the court opinion relied upon in support of a legal position to determine if the opinion includes other solutions in addition to the one relied upon. Ask yourself, “If the opinion relied upon is not mandatory precedent, does the opinion or another court opinion allow for other possible positions?”

6. Position Relied upon No Longer Represents Sound Public Policy and Should Not Be Followed
If the court opinion is mandatory precedent and, therefore, must be followed, explore the possibility that it no longer represents sound public policy and should be overruled. This approach is available only if the court considering the question has the authority to overrule the precedent.

   Consider the question, “Does the court opinion relied upon no longer represent sound public policy and, therefore, should it not be followed?”

7. Other Equally Relevant Cases Do Not Support Position Adopted in Case Relied upon
Where a matter has not been clearly settled by the highest court in the jurisdiction, or the opinions of the highest court appear to conflict, look for other opinions that may take a position different from the one taken in the court opinion relied upon to support a legal position or argument. Ask yourself, “Are there equally relevant cases that do not support the position adopted in the case relied upon?”

Caveat: When a legal position or argument is based upon a court opinion, be sure that thorough research is conducted to find any other law, provision, or court decision that may affect your reliance on the opinion.

VII. COUNTERANALYSIS TECHNIQUES—COMMENTS
When engaging in legal research or analysis, review all the approaches presented in the preceding sections and determine if the legal position or argument may be challenged through any of them. In addition to using the techniques listed, use any other approach that comes to mind. Also, you may use combinations of methods.
PART II  STUDY QUESTIONS

1. What is counteranalysis?
2. What does Rule 3.3(a)(3) of the American Bar Association’s Model Rules of Professional Conduct provide?
3. Why counteranalysis is important? Give five reasons.
4. When should counteranalysis be employed?
5. What are seven approaches to consider when attacking a legal position based upon a statute?
6. What question should you ask when a legal position is based upon an argument that advocates the adoption of the language or principles embodied in a statute of another jurisdiction?
7. What are seven approaches to consider when attacking a legal position based upon a court opinion?
8. If an old court opinion is used by the opposition to support an argument, what question should you ask when conducting counteranalysis?
9. What should be kept in mind when conducting counteranalysis and legal research?

PART III  ASSIGNMENTS

ASSIGNMENT 1

Facts: The client drove her boyfriend to a convenience store. She knew that he was going to purchase a few items and probably shoplift others. She thought he was going to shoplift because he usually tried to steal at least one item when he went shopping. She waited in the car with the engine running. When her boyfriend approached the checkout stand, the clerk confronted him about items he had put in his pocket. The boyfriend pulled a gun, shot the clerk, and fled the store. The client drove her boyfriend to her apartment, where they hid out. The clerk died that evening. The client and the boyfriend were arrested the next day. The client was charged with first-degree murder in violation of part b of Criminal Code § 18-8-101 Murder in the first degree.

Rule of Law: Criminal Code Section 18-8-101 Murder in the first degree. A person commits murder in the first degree if:
   a. After deliberation and with the intent to cause the death of a person other than himself he causes the death of that person or another person; or
   b. Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault, and in the course of the crime the death of a person is caused by anyone.

Criminal Code Section 18-8-401 Robbery. A person who knowingly takes anything of value from the person or presence of another by the use of force, threat, or intimidation commits robbery.

Assignment: Identify the counterargument(s) to the charge that the client committed first-degree murder.
ASSIGNMENT 2

**Facts:** While working on his computer at work, the client accidentally accessed a file that contained the secret formula for the company’s most successful product. The client was authorized to work on the computer, but he was not authorized to access certain files. He took the secret formula and posted it on the Internet. He was charged with violating part c of Criminal Code § 18-5-1.

**Rule of Law:** The relevant part of Criminal Code Section 18-5-1 Computer Crime is presented here.

*Criminal Code Section 18-5-1 Computer Crime*

A person commits computer crime if the person knowingly:

* * * *

c. Accesses a computer, computer network, or computer system or any part thereof to commit theft;

*Criminal Code Section 18-16-401 Theft.* A person commits theft when he or she knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception.

**Assignment:** Identify the counterargument(s) to the charge that the client violated part c of Criminal Code § 18-5-1.

ASSIGNMENT 3

**Facts:** The client works in a convenience store. Her duties include stocking shelves. One day an order of aspirin arrived. The invoice listed 50 bottles, but 55 bottles were in the shipping box. She put the extra 5 bottles in her jacket pocket, intending to ask her boss what to do with them. She inadvertently took them home and never returned them. Another employee saw the client put them in her pocket and reported her to the employer. The employer called the police and the client was charged with theft.

**Rule of Law:** *Criminal Code Section 18-16-401 Theft.* A person commits theft when he or she knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception.

**Assignment:** Identify the counterargument(s) to the charge that client committed theft in violation of Criminal Code Section 18-16-401.

ASSIGNMENT 4

**Facts:** Junior Cobert, a convicted murderer serving concurrent state and federal life sentences at the State Penitentiary, failed to return from a four-hour “social” pass issued to enable him to visit his niece at a local motel. The client was at the motel with the niece when Cobert arrived. Cobert arrived at 9 a.m. Both the client and the niece knew that Cobert had to return to the prison after four hours. At 3 p.m. Cobert asked his niece to drive him to another friend’s house in a near-by town—one hour away. The client rode in the car with the niece and Cobert. After staying at the friend’s house for a couple of hours, the client and the niece returned to the niece’s apartment. They did not notify the authorities about the location of Cobert. The client was later indicted and charged with harboring or concealing an escaped prisoner in violation of 18 U.S.C. § 1072.
**Rule of Law:** 18 U.S.C. § 1072 Concealing Escaped Prisoner. Whoever willfully harbors or conceals any prisoner after his escape from the custody of the Attorney General or from a Federal penal or correctional institution, shall be imprisoned not more than three years.

**Assignment:** Identify the counterargument(s) to the charge that client concealed an escaped prisoner in violation of 18 U.S.C. § 1072.

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**PART IV  WEB ASSIGNMENTS**

**WEB ASSIGNMENTS**

**ASSIGNMENT 1**

**Legislative Act**
Section 51-2-314 of the state commercial code provides that a “warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” A merchant is defined as a person routinely engaged in the purchase and sale of goods of the type sold.

**Facts**
Mary makes wooden rocking chairs at her home. Twice a month for the past five years Mary has taken her chairs to sell at the local flea market. Last month Pam purchased one of the chairs. Mary did not make any statement concerning the quality of the chair when Pam purchased it. When Pam took it home and sat in it, the chair collapsed and she was injured. Pam, relying on Section 51-2-314, is suing Mary for breach of warranty.

**Assignment**
What is Mary’s counterargument to Pam’s reliance on Section 51-2-314?

**ASSIGNMENT 2**

**Common Law**
The common law provides that in a negligence case punitive damages may be allowed when the defendant’s actions evidence a willful or wanton disregard of the safety or interests of others.

**Case Law**
In the case of Stewart v. Echo Gas the defendant negligently installed a propane conversion system in the trunk of plaintiff’s vehicle. Knowing the vehicle was in an unsafe condition, the defendant allowed the plaintiff to pick up the vehicle. In addition, the defendant had performed more than 50 conversions without ever filing the safety checklist required by the state. In allowing punitive damages, the court held that the negligence of the defendant in releasing the vehicle knowing it was unsafe and the failure to file the safety checklist amounted to wanton and reckless conduct.
Facts
Defendant, a local power company, installed a pole and power line across part of plaintiff’s property. The pole was crooked, and over a period of time it gradually tilted to one side and the power line sagged. During a storm, the power line touched plaintiff’s garage and set it on fire. Plaintiff is suing defendant for negligence in installing, maintaining, and inspecting the pole. The plaintiff claims punitive damages relying on Stewart v. Echo Gas.

Assignment
Discuss the counterargument to plaintiff’s reliance on Stewart v. Echo Gas.

ASSIGNMENT 3
Constitutional Law
Article V of the state constitution provides that an individual has the right “to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.”

Case Law
In the case of State v. Wilson, the defendant sought access to psychotherapy records of the eight-year-old girl whom he had allegedly raped. The trial court reviewed all the records to determine whether the records contained information that would assist the defense. The trial court noted there was no information in the files that would aid the defense and refused to allow defendant to inspect the records. In upholding the trial court, the Court of Appeals held that an in-camera review by the trial court protected the defendant’s interests without violating the privilege against disclosure of communications between a patient and a psychotherapist.

Facts
Defendant is charged with various sex offenses against his stepdaughter. The stepdaughter met several times with a psychotherapist. The trial court refused defendant’s request for access to the psychotherapy records after a review of half of the records. The court stated that a review of the files revealed no information favorable to the defense. On appeal, the prosecution argues that State v. Wilson supports the decision of the trial court.

Assignment
Discuss the counterargument to the prosecution’s reliance on State v. Wilson.

PART V  CHAPTER SUMMARY
Counteranalysis is the process of discovering and presenting the counterarguments to a legal position or argument. It is important because to be able to address a legal problem adequately, all aspects of the problem must be considered. This includes identifying all
the potential weaknesses in a legal position and being prepared to respond to all
delights to the position.

Employ counteranalysis whenever you are researching a legal issue or addressing a
legal problem. Always be alert and look for counterarguments.

A prerequisite to engaging in counteranalysis is thorough research of the question or
legal argument. When conducting legal research, counteranalysis means looking for legal
authority that supports the argument the opponent is likely to raise in response to your
analysis of the issue. After the research is complete, you can employ many approaches to
assist you in counteranalysis.

Because most legal arguments are based upon enacted law or case law, this chapter
focuses on various counterarguments that may be raised when attacking reliance on an
enacted law or case law. The list of approaches presented in this chapter is by no means
inclusive of all the available ways to challenge a legal argument or position. It is
important to make sure that you engage in counteranalysis using all the avenues listed
(and any other approach) when looking for potential weaknesses in or counterarguments
to a legal position. You can count on the opposing side to discover weaknesses in your
position and use them against you. Remember, whenever you are reviewing your client’s
case, you are negligent if you fail to engage in counteranalysis.