How to Improve Your Legal Writing

One of the most important skills every law student and lawyer should seek to perfect is legal writing.[1] Whether you're analyzing an important legal issue for a partner at a firm, filing a motion in court, or preparing a contract for a client, good legal writing will enable you to effectively advocate your client's best interests. While there are many types of legal writing, below are some of the most common documents you'll be asked to prepare as a law student and lawyer:

1. Legal Memoranda

As a law student and young attorney, you'll be tasked with analyzing legal issues in a case for a partner or associate. More often than not, this analysis will be in the form of a basic legal memorandum, or memo. These memos are used by your managing attorneys to understand the turning points a case may hinge on, decide whether or not to represent a client in a particular matter, and/or develop the best litigation strategy for a case.

Thus, it's important that you write as objectively as possible, highlighting both strengths and weaknesses in the facts of your case relative to the legal issue(s) you're researching. Unlike a motion for a judge that is written with a persuasive flair to render a judgment in your client's favor, an inter-office legal memo is used for its informative and predictive value.

Generally speaking, your memo should inform the reader of the salient facts in the case (i.e.: only those facts that are relevant to the legal issue(s) you're assessing), and proffer a prediction as to the likelihood of success on that issue(s), given your analysis of the law in similar cases.

You may find it useful to organize your memo like this:

> **Question(s) Presented:** In this section, you introduce the reader to each specific legal issue you're analyzing, the body of law you're analyzing it with, and the specific facts that are outcome-determinative (i.e.: facts that address each element of the relevant law).
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> You can use the "under, does/is, when" formula to ensure that you cover all the important details: **Under** (a particular statute or body of law), **does/is** (an actor) + (legal term of art representing the legal issue) **when** (the actor takes or fails to take a certain action) + (and any result caused by that action or inaction).
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> Of course this formula is very generic and must be modified for the specific facts and law of your case. Here is an example: ***Under*** *Florida common law,* ***is*** *an employer negligent* ***when*** *it fails to clear the snow from its parking lot, and an employee injures herself getting out of her car?*
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> Remember, it is possible you're analyzing only a small piece of a larger case, so you want to give your reader a broad understanding of only the legally relevant facts (those that address each element of the applicable law). Also, without having had the opportunity to develop certain facts (such as people, their

[1] For a general resource on legal writing, please see Richard K. Neumann, Jr., "Legal Reasoning and Legal Writing" (Aspen Law & Business, 5th ed. 2005).

relationships to one another, places, etc), mentioning specific actors and events in this section will only confuse the reader.

Brief Answer(s): As its title suggests, this section provides an opportunity for you to briefly answer the questions you presented above.

First, answer the question presented with "probably yes" or "probably no." There are no certainties in the law, and you can only state whether it is probable or improbable that a particular factual scenario can be interpreted in accordance with a legal rule.

Second, explain what the standards of the law are by enumerating the elements necessary to the analysis.

Third, mirror the format of the question presented. As much as possible, follow the enumerated list of the second part of the brief answer, and add additional, legally relevant facts that serve as important sub-elements.

Here is an example brief answer to the example question presented: *Probably yes. According to Florida tort law, an employer can be negligent when it (1) has a duty to an employee that it (2) breaches, and when it (3) proximately causes (4) the employee's injuries. The employer has a duty to maintain its parking lot in a reasonably safe condition for its employees or warn its employees of hidden dangers. By failing to clear the snow from the parking lot, or warn employees of slippery surfaces, the employer breached its duty to its employee. But for this failure to clear the snow, alternatively but for the failure to warn of the snow, both of which were reasonably foreseeable and necessary, the employee would not have slipped and injured herself while she get out of her car.*

Facts: Finally, this is the section in which you will use specific names, dates, locations, and events. The easiest way to organize a fact section is chronologically. Try to tell a story in an easy-to-read, logical manner without using flowery or heavily descriptive language. Feel free to add facts and details that were not necessarily relevant for the previous sections, but make sure that you are not inundating your reader with useless information. A person's age may not be legally relevant to your case, but it's useful to the extent that it provides background information about the involved parties and can inform a partner's expectations/interactions with that party in the future. If a fact is not legally relevant, and does not otherwise add value to the reader's understanding of the case, it's best to omit that fact. But it's important to know that you may not introduce new facts in the analysis section if they were not included earlier in the fact section. So be wary of withholding too many facts, and try to gage which facts are the most crucial to your interpretation of a legal rule.

Analysis/Discussion: This section will comprise the body of your memo. Here is where you will be making analogies and arguments between the facts of your case and the facts of the cases you've researched.

Your discussion section should start with a "roadmap" paragraph explaining the crux of the analysis, mentioning the important facts that either support or undercut each element of the law you're analyzing. You will want to

mention specific names, dates, events, and locations in this paragraph, but try to keep it as short as the brief answer. Your brief answer and roadmap paragraph should be structured similarly, and to show how the facts correlate to the elements, it may be helpful to enumerate the facts as you would enumerate the elements. You will need one roadmap paragraph preceding every issue discussed in your memo, with each roadmap paragraph listing the specific facts in the order of the elements of that issue.

After your roadmap paragraph (which has enumerated the elements of the issue), you should divide your discussion of the issue according to the number of elements within it. For example, if the legal issue is whether an actor is negligent, you will need to discuss each of the 4 elements of negligence. For each element, it is useful to follow the IRAC method (**issue, rule, analysis, conclusion**).

First, identify the **issue** of proof for that element. Using the example of negligence, an issue statement for the element of duty may be: *To prove Home Depot was negligent, John Smith will have to establish that Home Depot owed him a duty to maintain its parking lot in a reasonably safe condition, or warn him of possible dangers on its property.*

Second, provide the legal **rule** of that element. Again, regarding duty, here is a sample legal rule: *An employer has a duty to its employees to reduce foreseeable risks on its property and to warn employees of foreseeable danger if the risks cannot be reduced.* See Employee v. Employer*, 100 U.S. 100 (2009).*

Third, apply the facts of your case to the cases you cited in the rule, which will form the basis of your **analysis** of the element. Compare and contrast the main facts from your case and the case law, explaining how the cases might be distinguished or not. Remember to cite every case that you reference, and only cite the facts that you've already mentioned in the fact section of your memo. If the case law suggests that your case does not comport with the legal rule, explain the basis for this difference and whether or not these factual differences are/will be material to the outcome in your particular case.

Fourth, **conclude** whether or not your case's facts provide sufficient grounds for proving or disproving the element, and explain what, if any, consequence this conclusion has on the bigger legal issue you're analyzing.

Conclusion: After IRAC-ing all the elements for all the issues in your memo, you will make a broad conclusion about the facts of your case relative to the standards of law you've discussed (e.g.: the likelihood of success on this claim is high, not high, etc, because so-and-so can/cannot prove elements a, b, and c of a particular law). Refer back to the structure of your roadmap paragraphs, remembering to use specific facts of your case to explain how you came to your conclusion. The conclusion section of your memo should be no more than one or two paragraphs, depending on how many issues you were analyzing in your memo.

2. Submissions for Court

Writing for a judicial tribunal is very different from writing an inter-office legal memo. Of course, no matter what you write, be cognizant of your audience and ensure that you understand the *purpose* of your legal writing. As mentioned above, an inter-office legal memo is best described as a predictive aid for the reader (who is probably a decision-maker at your firm, agency, etc). A document prepared for a court, however, is a persuasive tool that allows you to advocate a certain position for your client's best interests. As such, these types of documents are written to emphasize the facts and law in favor of your client's position, and to minimize or distinguish unfavorable facts and law.

As with the analysis section of your legal memo, any legal analysis in a court filing (mostly applicable to motions) should follow a particular formula: CRAC (**conclusion, rule, analysis, conclusion**). These are similar to the legal memo categories with the same names, so refer to section one for more details. However, rather than writing objectively and explaining the strengths and weaknesses of a case, as you would in a legal memo, you want to ensure that what you are writing for the judge leaves him/her with a strong impression to rule in your client's favor. Of course, it would be unethical to ignore or misrepresent the negative facts and law regarding your case, so the main purpose of a court document is to effectively shine enough light on the positive aspects of your case, such that the unfavorable information appears to be immaterial or irrelevant. This may not always be possible, especially if you are confronted with a lot of bad facts or bad law, but there are always ways to emphasize the strongest points of your client's case.

First, procedurally speaking, you should familiarize yourself with the local rules of the court with which you are filing a complaint, motion, etc. Each court in every jurisdiction publishes a set of local rules that explain what page limits, font-size, cover sheet color, line-spacing, paper-size, filing times, methods of filing, forms of service, etc it requires of documents filed with the court. These rules can be very specific and can affect how you write and what you include in your submissions. So before embarking on a lengthy motion for summary judgment, check the local rules of the jurisdiction in which you're filing the motion to ensure that you're meeting all its procedural requirements.

Second, be aware of the role you're playing in the adversarial system. If you're a prosecutor who wants to emphasize how heinous a criminal defendant's actions were, use the names of the victims rather than referring to them generically as victims. Draw out the facts that you want the judge to remember or sympathize with. Humanize the parties you want the reader to relate to, and dehumanize those who you want to create distance from. If you're a criminal defense attorney in a murder case, you may want to highlight your client's childhood history if it can help detract attention from the severity of his actions. Being a proper advocate for your client means appreciating the facts that serve his/her benefit and writing strongly and persuasively about them in order to offset the facts that do not help the case.

Third, always start with the strongest arguments in the beginning. Obviously for some filings such as complaints and answers, which have their own format and do not require analyzing case law, this advice will not apply. However, whenever you are trying to persuade a judge to issue an order or judgment for your client, such as through a motion, you should start with your strongest arguments. This technique will not only ensure that the judge has a greater likelihood of reading the argument (given the time constraints of the court and the lengthiness of some motions), but will impress the judge

of the strength of your claim early on, which may result in a positive bias as he reads the remainder of your document. Again, this tip speaks to the idea of shedding enough light on positive arguments in order to make weaker arguments appear insignificant.

Fourth, whether used in a fact/background section, or in the substantive argument/analysis section of your persuasive writing, try to bury bad facts in the middle of paragraphs and emphasize good facts at the start and end of paragraphs. Lead and leave your reader into and out of paragraphs with a strong, favorable impression of your claim. And although you have an ethical obligation to address unfavorable facts and law, sandwiching these details between favorable facts and law will help minimize the negative effects of the former.

Fifth, emphasize good facts and law in short, direct sentences that leave a strong and memorable opinion with the reader. Bad facts and law can be minimized if buried in long sentences with more complicated syntax, which are naturally more difficult to read and internalize quickly than short sentences. Of course, you do not want to use such complicated and lengthy syntax that your reader cannot follow your argument or loses interest in your claim. Artfully, place your strong arguments in sentences that resonate clearly and convincingly, and place your weak arguments in sentences that are less memorable and direct.

3. Contracts[2]

As a lawyer, you will forever make contracts for representation with clients, help them make their own contracts with other parties, and interpret contracts that have already been made. Usually, you interpret contracts when you investigate the strength of a contract (i.e.: examine whether a contract has been breached, or whether it is detrimental to your client's interests and shouldn't be signed), or once litigation has already proceeded. Therefore, you analyze whether the contract has failed its purpose, which was to govern parties' interactions with one another with a common set of expectations for a mutually-beneficial result.

Your purpose in writing a contract is to safeguard your client's interests vis-à-vis those of the other parties, all the while predicting and mapping the future relationship between the parties to decrease the uncertainty that may lead to litigation. A contract is cheaper than litigation, and therefore incentivizes parties to create clearly-defined, mutual expectations of future interests in order to avoid making costly/harmful decisions without full knowledge of their legal obligations or rights. There are many things you can do to write contracts that will remain intact and save your client the expense and hassle of litigation.

Because a contract becomes binding upon the parties that enter into it, you should aim to write as clearly as possible. Define every word that may have variations in meaning, or that the other party has an incentive to interpret differently. Organize the contract clearly with headings and sub-headings to direct the parties' attention to their various representations, covenants, and rights. Write short sentences that clearly make their point. Use clear diction and grammar to ensure parties understand what is obligatory

[2] For more information on drafting contracts, please see Tina L. Stark, "Drafting Contracts: How and Why Lawyers Do What They Do" (Aspen Publishers, 2007).

("shall"), discretionary ("may"), inclusive ("and"), exclusive ("or"), etc. Use conspicuous type-face and font-size to place parties on notice when you are drafting language that one or more parties may be inclined to challenge in the future, especially if these sections attempt to take rights away from parties (such as binding arbitration clauses, waivers of claims, etc). Be forward-looking; try to predict all the possible scenarios that may take place in the future and plan against those possibilities by delineating the specific actions certain parties must/may make in those circumstances. Essentially you want to leave no stone unturned and leave nothing to chance, such that you're prepared for every contingency in a way that maximizes your client's interests.

Some contracts are organized according to very specific formats. You want to ensure the form/format you use is acceptable in your particular jurisdiction. Also check to see that you're including all the "magic" words necessary to create certain covenants or rights, which you can find doing after researching your jurisdiction.

4. General Tips

No matter what you write, always remember the tips below to make sure your writing is as effective as possible.

Simplicity, simplicity, simplicity! No audience is inclined to read a longer word, sentence, paragraph, or document over a shorter one. Whenever possible, say what you can say in as few words as you can. You are often writing for readers who are short on time and want to know the most essential facts as quickly as they can, because they have to make time-sensitive decisions. Simple sentences are preferred over grammatically complex ones, because simple sentences can be read more quickly and coherently. You want to convey your message in the most salient and memorable way possible. Short sentences are clearer than long ones, and clear writing conveys confidence in your position. When writing is complicated, it becomes ambiguous, and the message of your writing gets lost in translation. No reader is inclined to translate and fish-out your point for you, if you cannot do it yourself. Complicated writing also creates confusion. Rather than thinking that your writing is unclear or complicated, a reader will assume that your legal position is confused or that you are confused with what you are arguing. Obviously, you want to avoid creating this impression with your reader.

No legalese, please! [3] Lawyers are inclined to impress readers with archaic words such as "heretofore," when a simpler and common alternative is available such as "until now." Legalese complicates and confuses legal writing, despite the fact that it may have been acceptable at one point, or that the reader will know the word and its context. Just because you're writing for another lawyer does not mean you shouldn't try to convey your message through common, simple words. Of course, there will be times when the legally complicated word is necessary, especially when discussing legal terms of art, but if you can replace legalese with acceptable, professional alternatives, try to do so.

Be active! Use the active voice whenever possible. Model your sentences along the "subject, verb, object" formula to help you write in the active voice. First, your writing will sound more confidant and trust-worthy. Second, the active voice generally

[3] For a great resource on this point, please see Richard C. Wydick, "Plain English for Lawyers" (Carolina Academic Press, 5th ed. 2005).

requires the use of fewer words than the passive voice, allowing you to make your point more quickly and effectively. Note that it may be advantageous to use the passive voice when you want to minimize bad facts or emphasize the verb/object instead of the subject. However, unless you use the passive voice for a tactical or strategic purpose, try to implement the active voice.

Hopefully this guide will help you grasp some of the important concepts of legal writing. Of course, no one guide or resource can help you improve your writing until you practice writing various legal documents. So, welcome the opportunity to get practice and critiqued on your legal writing, because it will be the best way for you to develop a natural, legal writing style for effective advocacy. Good luck!