

Legal Writing by Design

A Guide to Great Briefs and Memos

SECOND EDITION

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To our families for their love and support

Thomas
Matthew
Lorraine (Mom)
Carlyn (Dad)
Bill
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Thomas
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Sylvester (Dad)

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Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 488 (1993). Copyright © 1993 by the Journal of Legal Education.

Introduction

There was a man who disliked seeing his footprints and his shadow. He decided to escape from them, and began to run. But as he ran along, more footprints appeared, while his shadow easily kept up with him. Thinking he was going too slowly, he ran faster and faster without stopping, until he finally collapsed from exhaustion and died. If he had stood still, there would have been no footprints. If he had rested in the shade, his shadow would have disappeared.

—Benjamin Hoff, *The Tao of Pooh*

The goal of our book is to help you “rest in the shade,” at least when it comes to legal reasoning and writing. It’s to remind you, in easily understandable terms, that you already know how to reason and how to argue. You’ve been doing both since you could speak.

We are by nature logical creatures, meeting situations with the memory of how we and others have acted in the past and projecting how we might act in the future. As children, we learned the value of precedent: “Well, Matthew got to stay up *this* late when he was *my age*, so why can’t I?” We also learned that there were rules and then there were *RULES*. Just as it was when we were kids, as lawyers, our goal in employing reasoning in a legal writing format is simple: it’s to make a point; it’s to get what we want.

We hope to give you the confidence and direction to apply to your legal writing the reasoning skills you’ve spent your life exercising and mastering. We want to demystify the writing process by explaining the logic of deductive, inductive, and analogical reasoning, and by explaining the concept of “relevancy” as a link between rule and fact. We present a common sense approach to understanding and structuring legal analysis.

Effective legal research and oral and written communication are core skills every lawyer must master. You don’t have to take our word on this. The importance of these goals in your professional careers is corroborated by a survey cited in an article by Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 488 (1993). That timeless survey asked hiring partners in a large city which skills they expected applicants to bring to the job and which could be developed after hiring. Here are some partial results of that survey:

Skill	Bring	Develop
Library legal research	92	9
Oral communication	91	9
Written communication	90	10
Computer legal research	84	16
Legal analysis and legal reasoning	81	19
Sensitivity to professional ethics	74	25
Counseling	9	91
Ability to obtain and keep clients	8	92
Understanding and conducting litigation	6	94
Negotiation	4	96

(Because of rounding, percentages may not add to 100).

A more recent survey of hiring partners and recruiters in law firms¹ includes **writing** as one of the five basic skills lacking in new attorneys. No matter how well you know the law, that knowledge alone has little value unless you can communicate it effectively. And, to those of you who may be thinking either: (1) I don't need to learn legal writing because I'm going to be a trial attorney; or (2) I already know how to write, allow us to briefly address these thoughts.

First, even those of you who will be trial attorneys will need to know how to write motions and memoranda of law. Second, even though you already know how to write, you likely don't know how to write legal documents, which have their own special structure, format, and citation requirements.

Indeed, the importance and distinctive requirements of legal writing set it apart from other types of writing. The heightened importance of legal writing derives from the critical impact it can have on the lives of the people who are the subject of such writing. Legal writing requires you to be able to analyze a legal issue and to communicate your analysis to others.

Legal analysis generally takes two forms: (1) predictive analysis, and (2) persuasive analysis. The most common type of document used in predictive legal analysis is the legal memorandum, although a client letter providing an opinion on a legal issue is another. The legal memorandum predicts the outcome (favorable or unfavorable) of a legal question by analyzing the authorities governing the question and the relevant facts giving rise to the legal question. It explains and applies the authorities in predicting an outcome, and ends with advice and recommendations. The legal memorandum also serves as a record of the research done for a given legal question on a certain date. Traditionally, and to meet the legal reader's expectations, it is formally organized and written.

On the other hand, a document employing persuasive legal analysis, generally a motion or a brief, attempts to convince a deciding authority to resolve the dispute in

1. Katy Montgomery & Neda Khatamee, *What Law Firms Want in New Recruits*, N.Y.L.J. (May 28, 2009).

favor of the author's client. Motions and briefs are submitted to judges, mediators, arbitrators, and others. In addition, a persuasive letter might be sent to the opposing parties in a dispute to persuade them to settle the case. Although a brief, similar to a memorandum, states the legal issues, describes authorities, and applies those authorities in analyzing the facts, the brief's discussion section is framed as an argument. The author argues his or her approach for resolving the legal matter, rather than presenting a neutral analysis.²

In both situations, whether writing predictively or persuasively, your job is to evaluate the strength of your client's legal situation and to effectively communicate your case. These two types of analysis and writing tend to overlap: to predict an outcome, the writer must recognize both sides of an argument; and to persuade a decision-maker to accept the client's view, the writer must recognize how the argument will be viewed objectively.

As with any type of writing, what is most crucial is to know the "who" and "why" and "how" of what you are writing. The "who" is your audience, the "why" is the purpose of the communication, and the "how" is the manner in which you write the document.

In the legal arena, the "who" could be a partner in your law firm; a judge or justice for whom you're clerking; a court, mediator, arbitrator, or regulatory body. In short, we're writing for a reader who understands legal reasoning and writing in general, but does not necessarily know the law relevant to a particular problem. Therefore, your job is to educate your reader by explaining the relevant law and how that law applies to the facts of your client's case.

The "why" of legal writing depends on whether you are being asked to provide advice to a law firm partner or a judge for whom you clerk (predictive analysis), or whether your task is to persuade some official body of your client's position (persuasive analysis). The "how" addresses the format, organization and structure of the writing.

Good legal writing is clear, concise, and cohesive. It flows well from point to point. And, it is absolutely accurate and thorough regarding the facts, the law, and how the law applies to a client's case.

Accuracy is critical because a legal document built on a faulty premise, or on the absence of a critical premise, is unprofessional and cannot withstand careful scrutiny. Thoroughness is critical because whether in the realm of predictive or persuasive writing, a legal document must contain the information the decision-maker needs to do his or her job. Thoroughness does not, however, require you to include everything you know about an area of law—remember, you are writing for very busy readers. A thorough legal document includes all that is *relevant*, and nothing extraneous.

Both accuracy and thoroughness require you to comply with all relevant rules governing formatting your document and citing to authority. To control the length and structure of briefs and memos, courts have specific requirements regarding typeface

2. Other documents sometimes written by attorneys, not covered by this book but often taught in Legal Drafting courses, include contracts (specifying legal obligations for the parties to the contract); litigation documents such as complaints, answers, certain motions and notices; and various documents involved in the transfer of real or personal property such as wills, trusts, deeds, and bills of sale.

font and size, margins, and page limits. In some courts, even the color of the brief cover or the dimensions of the brief may be specified. Documents submitted electronically are governed by a host of other rules. Failure to follow these requirements can result in the court's rejection of the document and even in the loss of the client's case. In addition, many law firms have internal specific requirements regarding the format and organization of documents. As for citation, legal readers expect, (and courts require), legal authorities to be cited for every statement that relies on a source other than the writer's own ideas. Standardization of citations and abbreviations makes it easier for readers quickly to recognize and identify an authority.

Because we are writing for busy readers, we must make our legal documents clear, concise, and cohesive. Cohesion requires that the entire document be internally consistent, easy to read and digest, and simple. Thus, short sentences and paragraphs, recognizable words rather than "legalese," and transitions moving the reader gently through the document are essential.

These legal writing skills will be new to you, even a bit intimidating, but it is crucial to your career that you learn them. You'll learn how to research in law school, and through the principles explained in this book, will learn how to process and apply that research to produce first-rate written legal analysis. And make no mistake, writing is a **process**—no good legal writer gets it right the first time. You'll find that you must continue to assess, and reassess your position throughout the process, sometimes back-track or even start over, and revise again and again. Writing, and rewriting is the way to produce high quality legal documents.

Through hypotheticals, samples, and commentaries in the upcoming chapters, we'll show you how to *design* a legal analysis or argument and write it in a legal format. Our book, designed primarily for first year law students, but applicable to even seasoned attorneys, focuses both on predictive writing, (explaining the law and predicting an outcome), and on persuasive writing (explaining the law and then convincing the reader of the correctness of your position). We've included some exercises to allow you to apply the new skills you're learning. Although many of the samples rely on predictive legal memoranda, these guidelines apply to persuasive writing as well.

We've divided our book into six **Sections**. In **Section I**, we'll discuss legal rules and reasoning. We'll explore how to select, from an almost limitless number of possibilities, an orderly sequence of statements that lead logically to a conclusion, focusing primarily on analyzing and writing predictively (with a few detours into persuasive analysis). We'll talk a bit about logic, and we'll use terms like *syllogism*, *premises*, *analogy*, *induction*, and *deduction*, but we won't delve too deeply into any other logic concepts. We'll keep our book user-friendly. Our purpose in discussing the logical underpinnings of "the argument" is simply to *remind* us of *how* we think.

In studying legal reasoning, we've got to keep one paramount principle in mind: writing and reasoning are joined at the hip. We can't write effectively without reasoning effectively. Writing is just a by-product of reasoning. This book explains how to transform thoughts into writing by explaining the link between thinking and writing.

After reviewing the *reasoning* process, we'll see how to transform our thoughts into writing. To that end, in **Section II**, we'll see how to design and write a predictive memo. In **Section III**, we'll explore how to design and write a persuasive brief. Because attorneys

must often present their arguments orally, we'll also explore how to design and deliver an effective oral argument. In **Section IV**, we'll discuss the beginning, middle, and end of the writing process; case briefing; citation; and professional ethics. In **Section V**, we'll review the basics of clear and effective writing. Finally, in **Section VI**, we'll show how all of these principles come together in a sample memo and three sample briefs.

In all Sections, we'll go step-by-step through each subject and address strategies that work. (After teaching *thousands* of students, and writing memos and briefs ourselves as practicing lawyers, we've seen what works and what doesn't.) We've included some exercises throughout so you can practice the concepts you're learning, and at the end of most chapters, we've included a chapter review. Our approach, of course, isn't the *only* way to design a well-reasoned legal memo and brief, but we think it's an effective way of doing so. Once you understand the basic principles of analyzing and outlining a legal issue, you may find that you can vary the approach and design of your written analysis to suit your own style. Until you reach this point, however, it's best to stick with the general principles and with the methods we've recommended.

Although we'll highlight some general procedural rules of court practice, we won't get too specific about these. Similarly, although we'll demonstrate some formatting requirements for both legal memos and briefs, it's important that you be aware that the requirements for memos can vary from law firm to law firm; and for briefs, from state to state and court to court. Thus, the most important thing we can tell you in this regard is to always consult the "rule book" before beginning to write. In a law firm you might consult an available firm policy manual, or ask an office manager, managing partner, or an associate for the correct format to follow. In writing a document to a court, you *must* consult the appropriate local practice rules for *that* court. Beyond those requirements, the most important consideration is always the audience for whom you are writing. As such, all your documents should be written with the utmost attention to the readers' needs, as well as to thoroughness, accuracy, and clarity.

The "tone" of our book is conversational; it's how we teach our students. We don't preach, we discuss. And, as you'll see, we also like a good laugh every now and then.

Let's now explore the nature of an argument and the process of reasoning. We'll begin by addressing *rule-based* or *deductive* reasoning, briefly touching on *inductive* reasoning, and then exploring the *hybrid* process (part inductive, part deductive) of *arguing by analogy*. By the end of **Section I**, we'll see how understanding the *design* of the legal argument helps us transform our thoughts into great briefs and memos.