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The Writing Process for New Lawyers: Getting It Written and Right

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The Writing Process for New Lawyers: Getting It Written and Right

The legal-writing process is how we write, from receiving an assignment through submitting the final product. Good legal writing helps lawyers enhance their credibility with judges, lawyers, and clients; prevent malpractice and grievances; and win cases. A good writing process—thinking at its hardest—enables lawyers, notably new lawyers, to capture ideas, write efficiently, and overcome difficulties. It’s done through the “Madman, Architect, Carpenter, Judge” method, in which your madman generates ideas, your architect builds the outline, your carpenter fills in the details, and your judge edits your writing.

This method articulates the three stages of legal writing: (1) the pre-writing stage—when the assignment is organized, researched, and analyzed; (2) the writing stage—in which research, analysis, and ideas are assembled into a written product; and (3) the post-writing stage—the stage at which the assignment is revised, edited, and assembled in final form.

A good writing process leads to good legal writing, the toughest and most important legal art to master, especially for the new lawyer.

I. Pre-Writing Stage
1. Understanding Your Goal
If you’re unclear about what you’re writing, you’ll research irrelevant topics and draft something your audience neither wants nor needs. Legal writing requires solving, diagnosing, defining, informing, and exploring issues.

Understanding what you want is critical.

Understanding the Purpose of Your Writing: Why
Writing before identifying your purpose is like plotting a road trip without knowing where you want to end up. Good writers identify and articulate their purpose—what they want to achieve—before planning to write. Legal documents serve different purposes: to inform, elicit information, persuade, memorialize, record, or describe.

Determine before writing whether you want your document to introduce your reader to the subject or to supplement your reader’s knowledge.

Understanding the Nature of Your Writing: What
The purpose of your writing determines your format, content, style, tone, structure, and word choice. Before writing, ask yourself several preliminary questions. Are you writing a legal document to create a contract or will, to analyze and predict objectively the strength of your client’s position (memorandum), to persuade (litigation document to a court), or to educate and advocate a position (academic papers)?

Some legal writing is made up of assignments from your supervisor. Your supervisor will tell you what you’re writing about, although often too briefly. If you aren’t clear about the nature of your task, get clarification without making a nuisance of yourself.

Sometimes you’ll need to decide for yourself the nature of your writing assignment. Doing so in our client-centered legal system requires discussion with your clients and a thorough understanding of what they want you to achieve. In litigation, for example, you’ll need to decide whether to write a motion to dismiss or a motion for summary judgment. The legal action will determine what and how you’ll write.

Understanding Your Audience: Who
Before writing, you’ll need to know who your readers are. If your readers—your audience—don’t understand what you’re trying to convey, then your document is ineffective. While brainstorming, keep your audience in mind. Your audience can be a judge, a client, a supervisor, or an adversary. If you’re writing a brief to a court, you might lose your case if the judge doesn’t understand your argument. Judges are busy and skeptical creatures; keep your points concise, and prove your case: don’t be conclusory.

If you’re writing to your client, explain legal concepts in a way a non-lawyer will comprehend. Avoid using legal terms your client won’t understand, including certiorari, dictum, stare decisis, or res ipsa loquitur. If you must use them, explain them to your client.

If you’re writing to your supervisors, appreciate not only that they’re busy, but also that their definition of a “draft” will be different from yours. When they say, “Just give me a draft,” they mean “Give me a perfect, final product tomorrow.”

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And make their edits. Pick your writing battles with supervisors carefully: Fight over big things only, and have a good authority on your side to support your position.

Writing to adversaries requires firmness — and also civility and professionalism. The goal with adversaries is not to let your clients’ acrimony affect your relationship. Thus, strive mightily, but afterward eat and drink as friends.12

Understanding Your Time

Time management is essential to good legal writing. You must deliver your product on time. For some court documents, time is of the essence. If you don’t file a document within the required time frame, you’ll jeopardize your client’s case and face malpractice. Remember your deadline, and make a schedule that allows you to meet the deadline. Assign reasonable time to each stage of your writing; allow more time for the complicated parts of the writing.

When you first get a writing assignment, it might seem unwieldy and intimidating. The trick is to break down your writing into stages and do smaller tasks in each stage to make the process less overwhelming.13

Allocate your time between researching, composing, and editing. If you’re producing a first draft from scratch, devote no more than 30% of your time to researching and up to 40% to composing. Spend the remaining 30% editing.14

Understanding Format and Length: How

Different forms of legal writing have different formatting requirements. If you’re working for a law firm, you may get a template you’re required to follow. Otherwise, beware of boilerplate, especially one-size-fits-all boilerplate created years ago. If you’re writing legal documents for a court, always check the court’s rules.

You must know the maximum word or page limit. Is your maximum number of words or pages fixed or flexible? If it’s fixed, roughly how many words would you assign to each part of your legal writing? If it isn’t fixed, do you know how much you may write? Refer to previous, similar documents of similar nature to get an idea of how much you can write and what you must include, taking into account your document’s goals and requirements.

2. Gathering Your Materials and Researching

Once you’re clear on your document’s purpose, gather the materials you need to write. You’ll likely gather facts and do legal research.

Gathering Factual Information

Some types of legal writing require applying rules to fact, but not all do. If factual information is relevant to your document, gather information by interviewing witnesses, conducting a survey, or relying on the facts in other documents. If you decide to interview, consider the questions and learn how to interview efficiently.15 If you plan to do a survey, you might need to design your survey questionnaires and know how to interpret and analyze the results. If you rely on factual information in other documents, verify facts from reliable sources.

Deciding the Scope of Research

Before you start researching, consider where to find the information you’re looking for. Some sources you may want to look into are journals, books, treatises, and caselaw. Narrow the scope of cases and jurisdiction.

The scope of your research can constantly change depending on other cases, facts, or practical advice you find or are given. When you get deep into the research, you might find it necessary to research other related topics or other factors that might affect your case.

Taking Research Notes

You’ll eventually need to gather your research and write. Taking notes while you’re researching will make everything easier, faster, and more accurate. Write down key points of a journal article you read, and make a reference note of the sources. You must cite your sources for their words and ideas.16 Taking notes will help you organize your research materials without going back to check your sources a second time. Doing so also avoids plagiarism.

3. Analyzing and Thinking

The process of legal writing involves analyzing and thinking about your subject. You might not have a conclusion ready before you write, but you can form your own opinion throughout the researching process. You might agree or disagree with the materials you read. You might or might not apply law to the facts of your case. Either way, evaluate critically the research you find, a difficult task with American law, in that primary and secondary authorities are often contradictory, vague, and sometimes unknown. Competent legal writing relies on proper training in legal research, the ability to identify governing law, one’s skill at arguing correct authority, and applying law to fact.17

You’ll know your research is done when your keep seeing the same authorities. But don’t wait to find and understand every piece of research. The goal is to know everything when you’re done writing, not before you start writing.

4. Organizing the Structure

Now that you understand your goal and have research materials on hand and your analysis in mind, brainstorm on how you’ll organize your writing. Analyzing and writing require a good structure that logically connects the introduction to the legal argument and finally to the conclusion.

The organization of your legal writing doesn’t necessarily mirror the process of your thinking while you’re doing your research. Your research process could be disorganized, but when you approach the writing stage, present your thoughts in an organized way to allow readers to follow you easily. Appropriate organization makes your analysis more easily understandable to readers. It’ll lead your readers through the steps of your reasoning.18

Some kinds of legal writing — the discussion section of an objective memorandum or the argument section of a brief, for instance — have particular struc-
tutes. The structures include devices like IRAC (Issue, Rule, Application and Conclusion) or CRARC (Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion). If that’s the case, use a special structure to organize your materials. Your structure depends on the purpose of your writing. If you want to persuade your readers, start with your strongest arguments supported by your strongest authorities. To inform others how you’ve concluded, start your analysis with a roadmap, or thesis — your conclusion. Starting with your conclusion gives your reader the essence of your argument in case your reader reads nothing else. It also gives context to enable your reader to understand you.

5. Outlining
An outline is an organized list of raw materials. Before you progress too far in your research, jot down notes for a rough outline and rearrange them into an effective sequence later.

Outlining is structuring your thoughts after thorough research and forming a logical construction about the entire project. At this stage, you don’t need to worry about brevity. The outline should contain everything pertinent. Once the initial outline is complete, eliminate nonessential matters. Being selective with what you include ensures that your final draft is no longer than necessary. There are many outlining techniques. Pick one that works for you, and be flexible. But outline if you have a complicated and lengthy product. An outline will control your writing. You’ll know what to include and exclude, what to emphasize or deemphasize, and where things go. Outlining is a time saver, not a time waster.

II. Writing Stage
After you have an outline, fill in the details. And keep a legal-writing guide or two nearby so you can reference rules and tips as you write.

1. When to Start Writing
Just Start
No clear dividing line separates the pre-writing and writing stages. You might start writing down your ideas after brainstorming and taking research notes even before outlining. Writing notes and adhering with anything down is the starting point of your first draft. The first draft is the least important part of your writing. So just start writing, and don’t worry about what your first draft looks like. You’ll have lots of opportunities to improve it.

Start Writing Early
Start writing as early as you can. But outlining beforehand is an essential step. The earlier you start writing, the less likely you’ll end up with a bad draft. If you start writing early, you’ll have enough time to revise. If you leave little time for revision, a document that might have been rewritten into something wonderful will be subpar. It’s never good when your first draft becomes your final draft.

2. Where to Write
We all have places where we prefer to write. Some prefer quiet places; others, some background noise. Some prefer writing in a library or office; others, writing at home. Pick a place where you won’t want to nap. Oliver Wendell Holmes and Ernest Hemingway wrote standing up. They were uncomfortable, but they got to the point quickly and wrote to the bone.

Legal writing isn’t easy. It requires concentration. Know what distracts you, such as Facebook and Twitter. If social media distracts you, turn off your smartphone, or leave it at home while you write elsewhere.

3. What Part to Start Writing First
The thinking process isn’t necessarily coordinated with the structural sequence of your writing. Some parts of your legal writing are more difficult than others. You don’t have to write the first draft from beginning to end. You may start with any part of the writing you feel ready to write. You may begin at the middle and write the rest later. You might be able to complete the introduction only after you’ve finished the rest of the writing. You might not be able to write a conclusion until you’ve finished your analysis. It’s not worth your time to write your introduction or conclusion at the beginning, when everything else is unclear and unsettled.

If you start writing from the part you’re most familiar with, you’ll enhance your confidence. For instance, if you know the facts of a case well, summarize the facts; if you’re familiar with the cases, start citing them. If you’re sure about the issues, just jot them down. Write whatever is easy for you first, and continue to write those more complicated parts, which require more analysis and thinking. This approach will help you feel more confident to handle the more difficult parts of your document.

4. Research Again, Rethink, and Reorganize
Your research doesn’t end in the pre-writing stage. You might need to research more while you write. You might discover that your argument is weak in some areas, that you’re missing something essential, or that you have new thoughts.

The process of legal writing is also the process of thinking. And thinking is rarely straightforward. The more you write, the more you reconsider the issues involved in your writing. You’ll confirm or refute your notions when you organize your thoughts in writing.

The original organization of your outline might not hold when you do further research and reconsider the issues. You may amend your structure as needed depending on your further research.

Furthermore, what’s clear to you might be ambiguous to a reader who doesn’t know how you think, how you arrived at what you wrote, and what you intend.

5. Overcoming Writer’s Block
At some point, you might feel that your mind is empty and that you can’t continue writing. You might be tired or bored, or have something more important to do. Especially when you focus on the details, you might lose track of your main points and find it hard to get back on track. Writer’s block is normal: there’s no need to be afraid of that. Don’t expect perfection in your first drafts.
You may want to do something unrelated to keep your mind off of writing temporarily, such as getting a coffee, taking a walk, or listening to music. Some distance from the topic may help you to gain perspective.30

If a short break isn’t enough for you to overcome writer’s block, rest for a day or two — if you’re still ahead of your deadline. Return to your writing when you feel fresh and comfortable. The point is, don’t panic. And don’t be afraid of creating some mental distraction for yourself.

6. Writing Approaches

Young lawyers may have to prepare a memo for their supervisors or clients, draft a contract for clients, or write a persuasive brief for a judge. Different legal documents require different writing approaches.

To write a memo, you’re expected to write concisely, accurately, and in a way that’s easy to understand. You should write the memo so that it could be transformed into a motion or a memorandum of law.31 If the underlying supporting documents signal a particular legal issue, identify it. In doing so, include relevant caselaw, but avoid unnecessary procedural history or factual details about cases.

To write a contract on your client’s behalf, you don’t need to define each contractual term in accordance with Black’s Law Dictionary.32 The terms of the contract must be clear. When you write additional clauses, add to the definition section, where appropriate. Because additional clauses might be subject to further negotiations, your drafting should lean heavily toward your side, leaving room for both parties to agree.

To write a persuasive brief for a judge, write so that the judge will want to rule for you and so that it’ll be easy for the judge to rule for you. Get to the point quickly. Show the court that it has the jurisdiction to hear your case. Enunciate immediately the relief you seek. Write in plain English. Use mostly simple, declarative sentences. Be accurate and precise. Follow the court’s rules; focus on the elements of your cause of action, defense, burden of proof, and standard of review. Limit your issues to the ones that count. Don’t waste space on givens. Avoid lengthy quotations. Don’t string cite. Cite after you give your rules.

III. Post-Writing Stage

Revising

Some legal writing requires more revising than others. It depends on the complexity of the document and your skill at writing. Don’t be in love with your writing. Let go of words, sentences, and citations that don’t help you.

Always read your writing with a critical eye. View your writing as whole; have a big picture in mind when you’re revising. Does your legal document fit into your purpose of writing? Is it complete or missing some essential points? Do you need more research to support your arguments? Is your writing concise, or does it contain repetition? Does your writing clearly address your points, or is it ambiguous in that it confuses or misleads? If so, revise, and revise again.

In addition, is the structure of your writing understandable from the reader’s perspective? Your readers are the only ones who count; you don’t count, and neither does your ego. Is it too difficult for the reader to digest, or is it so simple that it will make them bored? Is your writing structured in a way that is logically connected in a whole and easy for readers to follow?

Many young lawyers struggle with grammar, organization and sequencing, road mapping, verbosity (excessive detail, redundancies, extra words, multisyllabic SAT words), analysis (including use of authority, attention to facts, identification of counter-arguments, bold conclusions), and rhetorical issues (audience, purpose, and tone).33 Tone is the attitude you express through writing.34 Tone reflects the writer’s character and personality. Writers create tone through their attention to detail and word choice.35 To write persuasively, understate. Never overstate or overpromise. Limit adverbs and adjectives. Prefer verbs to nouns. Eliminate false emphatics like exclamation points, bolded words, or quotation marks for emphasis or sarcasm. Avoid the Jackie Chiles intensifier syndrome: Think “It’s outrageous, egregious, preposterous.” Put your strongest argument first. Write formally, not colloquially.

When you want to be objective, make your tone neutral. Predict an outcome, but articulate the other side’s position. Don’t case dump.36 Find the rules from the cases and apply them to your facts. Don’t list all the rules you find; mention only rules central to your position.

Use “shall” to set out an obligation. Use “may” to detail language of authorization.

Elegant variation, another bad practice, means using synonyms. Using the same word provides clarity, and repetition of words powers delivery.

Use a defined term once you’ve defined it. For example, in a motion for summary judgment, if the moving party is defined as “the plaintiff,” all references in the document to the moving party should be to the plaintiff.37 Another example is language of obligation, which is commonly found in contracts and legislation. Drafting conventions designate “shall” for language of obligation and “may” for language of authorization. Use “shall” to set out an obligation. Use “may” to detail language of authorization. And no metadiscourse, the running starts of writing. Instead, forget the wind-up: Just deliver the punch.

Use the active voice when attributing action or obligation.38 In contracts and legislation, obligations should be expressed in the active voice and attributed to the obligated party. For example, “Purchaser shall pay Buyer the purchase price” is clearer than “Buyer shall receive the purchase price.” Action, too, should be stated in the active voice and attributed to the appropriate party. For example, “Sam shot John” is clearer than “John was shot.”

Avoid redundancy, which is boring and creates ambiguity.39

Write affirmatively so that your writing is easy to understand. In particular, avoid double negatives, which confuse readers. For example, “Purchaser cannot opt not to purchase unless the following
events occur” is more difficult to parse than “Purchaser must purchase unless the following events occur.”

It’s a misconception that a lengthy piece of legal writing is better than a short one. Raising every argument you’ve dreamed up is a failed approach. Pick your best contentions. Unless you must preserve the record, forget the rest. Shorten your writing by excising complicated words, long sentences, and legalese.

**Editing**

When you’re satisfied that you’ve done a good revising on your large-scale organization, edit on a micro scale. Edit your sentences for clarity: “A clear sentence is no accident. Very few sentences come out right the first time, or the third.” A sentence is readable if a reader can understand it on a single reading and needn’t reread it to figure out what the sentence means.

Editing focuses on cleaning up spelling, grammar, punctuation, word choice, quoting, and citing. Editing is the last but a significant part in the writing process. Editing isn’t simple; you might not be able to identify and fix all errors and mangled sentences in a single pass. You’re committed to editing until you’re happy with your work, or at least until you run out of time.

Nowadays, people use Microsoft Word or other word-processing programs to check their writing. Use, but don’t rely, on spell and grammar checkers. They don’t catch every mistake. Use a grammar checker program. Try Flesch Kincaid, which assesses by age and grade level how easy or difficult your writing is to read and suggests ways to make your writing simpler. Then edit on a hard copy. Some mistakes are hard to see when you edit on your computer screen. When you read on paper, your eyes are sharper. Readers often see problems on the printed page that are not apparent on a computer screen.

Read your writing aloud. Good writing works for the ear; it’s not directed to the eye, like good formatting is. You’ll realize that some sentences don’t make sense or don’t fit properly into the context. Bad phrasing often sounds terrible when you say it. If it doesn’t sound right, it won’t read right. Amend it until it sounds right.

In addition, get someone to proofread your work, someone who’ll edit it from a reader’s perspective. That’s the best perspective from which to edit. The main purpose of legal writing is to make your audience understand you and make a decision based on what you’re explaining. Be nice to your editors. They care about your readers and aren’t hung up by your ego. Before you submit your work, take one last look for wording that doesn’t state clearly and unambiguously what you mean. You might have to wait at least a day after your second-to-last draft to do your final edits.

**Conclusion**

Legal writing is a process that takes ages to master. New lawyers will be happy to learn that their writing will get better, faster, and easier the more they write.

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6. Id.
7. Id.
10. Id.
11. Walsh, supra note 8, at 6.
12. From William Shakespeare, *Taming of the Shrew*, act I, sc. II (“Do as adversaries do in law, strive mightily, but eat and drink as friends.”).