



Legal Writing 101: Tips & Tricks For Effective Legal Writing

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Why strive to improve our writing skills?

- ❖ The ability to write well—meaning, the ability to write plainly, precisely, and persuasively—is critical to *any* lawyer's work.
- ❖ Many lawyers spend over 50% of their time writing, and attorneys in their first five years of practice can spend up to 75% percent of their working day writing.
- ❖ Language is a lawyer's primary tool, and like any other skill, one can practice using language to communicate effectively.

What does it mean to “write like a lawyer”?

- ❖ “Writing like a lawyer” means writing clearly and concisely and dealing with a problem by applying appropriate rules.
- ❖ “Writing like a lawyer” does *NOT* mean obscuring meaning with wordy, jargon-laden prose.

Today's Discussion

- Review of Legal Analysis
- Legal Analysis: Illustrations
- Analogizing and Distinguishing Cases:
Using Case Authority to Develop Legal Arguments
- Comparing Legal Writing Styles
- Writing in Plain English
- Questions

Review of Legal Analysis

Using the IRAC or CRAC Formula

Issue

- Begin each section of the Discussion or Argument with a short declaration of the issue.
- The issue statement may be the subject heading of each section. In a single-issue memo, it will be the topic sentence of the main paragraph.

Rule

- Present an overview of the relevant law for each issue and explain how the rules of law were applied in relevant cases.
- Keep this section as concise as possible so it does not sound like an inventory.
- Sometimes this section will only present the general rules of law, saving the more specific rules for the analysis portion.

Analysis

- Discuss how the specific rules of law apply to the facts of your case by comparing and contrasting your facts to the facts of other relevant cases.
- Connect the facts and the rules, even if the connection between the two is obvious.
- Within the analysis of each issue, you will discuss sub-issues and compare those issues to the facts. Break the sub-issues apart from one another and discuss them separately. The discussion of each sub-issue should follow the IRAC or CRAC formula.

Conclusion

- End each section with one or two sentences that summarize the analysis.
- Be direct.
- The conclusion will rephrase the introduction of the section.
- **Do not assume that the reader will be able to infer the conclusion.**
- The conclusion may feel repetitive, but the purpose of a memo or brief is to have a supportable conclusion.

Legal Analysis

Illustrations

Fact Pattern

Henry Homeowner fails to mow his lawn, and the weeds spread to the lawn of his neighbor, Gary Gardener, and destroy it. Gary sues for the cost of replacing his lawn with grass that resists this type of weed. He also requests an injunction forcing Henry to mow his lawn once a month.

Bad Legal Analysis

Gary is absolutely justified in suing Henry. Henry's failure to mow his lawn is nasty and is the cause of the destruction of Gary's lawn. Henry owes Gary for the replacement of a lawn. Gary should also get the injunction because good neighbors are supposed to mow their lawns regularly.

Good Legal Analysis

Gary Gardener has no legal right to require his neighbor Henry Homeowner to mow his lawn or pay damages for weeds on Gary's property. Generally, a person is liable to another for damages only if he has a fundamental duty to take reasonable steps to prevent foreseeable harm and fails to do so. Under *Giles v. Walker*, 34 Cal. App. 234 (1890), a person is not responsible for damages resulting from the natural growth of the soil on his property.

Here, the weeds are a natural condition of Henry's land, and *Giles* makes clear that Henry is not responsible for damages alleged to result from this natural growth. Gary may argue that the standard practice in this urban neighborhood is reasonable lawn maintenance, and Henry has therefore deviated from the standard of what is acceptable as natural growth. However, a reasonable jury would be unlikely to find that natural growth is determined by community standards.

Based upon *Giles*, Henry has no fundamental duty to prevent harm to his neighbor's lawn and is not responsible for damages from natural conditions. Therefore, Henry is not likely to be held liable to his neighbor for damages resulting from the growth of weeds on his property.

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Another Example of Good Legal Analysis

The issue is whether our client, Dave, may be liable for battery for blowing smoke in Peter's face during a heated confrontation. A defendant may be liable for battery where, by blowing smoke, the defendant intended to cause offensive or harmful contact, and such contact resulted. For example, in Leichtman v. WLW Jacor Communications, Inc., the defendant deliberately blew cigar smoke into the plaintiff's face while the plaintiff was participating in a radio interview on the dangers of second-hand tobacco smoke. 634 N.E.2d 697, 698 (Ohio Ct. App. 1994). First, the court observed that smoke was a particulate material capable of legally significant contact. Id. at 699. Second, given the circumstances, the court held that the defendant had intentionally caused an unwanted contact. Id. Thus, the plaintiff had pleaded a cognizable claim for battery. Id.

On the other hand, in McCracken v. Sloan, the defendant, who knew that cigar smoke was offensive to the plaintiff, smoked in the plaintiff's presence. 252 S.E.2d 250, 251 (N.C. Ct. App. 1979). Nevertheless, the court observed that smelling exhaled smoke was "generally permitted contact" and is not typically a basis for battery unless the plaintiff pleads actual physical harm from the contact. Id. at 252. Without evidence of such harm, the court held that the plaintiff had not pleaded a sufficient case for battery. Id.

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Peter is likely to succeed in his claim of battery against Dave.

A court is likely to hold that Dave is liable for battery when he blew smoke in Peter's face during a confrontation.

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In this case, Dave, in response to your plume of smoke directly into Peter's face during a heated confrontation. Dave may try to argue that the environmental circumstance, and the harm, similar to McCracken. However, given the strength of the analogy to Leichtman, a court is more likely to reach the same conclusion as that case and hold Dave liable for battery.

This is a case "mini-brief." It contains facts, analysis, and the conclusion of the precedent case authority -- everything the reader needs to understand how the rule in that case corresponds, compares, and/or contrasts with our case.

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Another Example of Good Legal Analysis

Another “mini-brief”: This is an example of a case that reached a contrary outcome based on different facts. Like the first “mini-brief,” it summarizes the relevant facts, the court’s reasoning, and the court’s conclusion.

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Analogizing and Distinguishing Cases

Using Case Authority To Develop Legal Arguments

Fact Pattern

Ned Nextdoor has sued Hal Homeowner, and claims that the branches of Hal's tree are damaging Ned's gutters. There is only one relevant case, *Smith v. Jones*. In that case, a homeowner allowed the roots of his tree to clog his neighbor's drainage pipes. The court held the homeowner liable for the damage to the neighbor's property.

Facts

Case favors client (Ned)

Argue that the facts are similar.

Ned will argue that the result should be the same and the defendant should be liable because the case is about trees that damage a neighbor's property.

Case hurts client (Hal)

Argue that the facts are distinguishable.

Hal will argue that Smith is not useful authority because it deals with roots, not branches.

Legal Issue

Case favors client (Ned)

Characterize legal issue as the same or substantially similar.

Ned will argue that Smith dealt with the legal issue of damage to a neighbor's property by natural growth on adjacent property.

Case hurts client (Hal)

Characterize the legal issue as dissimilar.

Hal will argue that Smith dealt only with the issue of a neighbor's liability with respect to drain pipes, not gutters.

Case Holding

Case favors client (Ned)

Depict holding as broadly as possible so it applies to your case.

Ned will argue that the court in Smith held that a property owner is liable for harm to a neighbor's property caused by a tree on the defendant's property.

Case hurts client (Hal)

Depict holding as narrowly as possible so the case is distinguishable.

Hal will argue the court in Smith narrowly held that a property owner is liable for harm done by his tree roots to a neighbor's drainpipes, which is irrelevant to harm above ground.

Public Policy

Case favors client (Ned)

Similar policy reasons warrant the same result.

Ned will argue that, according to Smith, public policy favors the requirement that property owners prevent trees or other growth on their land from damaging the property of adjacent neighbors.

Case hurts client (Hal)

Sound policy supports a different result.

Hal will argue that, under Smith, public policy requires that homeowner liability be limited to severe cases of interference with drainpipes on adjacent property, but liability should not extend to ordinary occurrences such as overhanging branches.

Comparing Legal Writing Styles

Comparing Legal Writing Styles

Predictive Memos and Exams

- Tone is neutral, objective;
- Conclusions are in terms of recommendations and **likelihoods**;
- Must consider and weigh counterarguments objectively;
- Basic analytic structure: **IRAC** or **CRAC**.

Briefs, Motions, Letters to Opposing Counsel

- Tone conveys sense of advocacy and controlled urgency;
- Conclusions are described as **absolutes**, and in the light favorable only to your client;
- Downplay other side's arguments, attack and undermine wherever possible;
- Basic analytic structure: **CRAC**.

Writing in Plain English

Building a Good Sentence

- Three elements of a basic declaratory sentence:
 - Subject (the actor)
 - Verb (the action)
 - Object (the thing that receives the action of the transitive verb)
- Put the subject, the verb, and the object—*in that order*—close together, and close to the front of the sentence.

S-V-O

Building a Good Sentence

The class ate the snacks.



Subject



Verb



Object

Building a Good Sentence

What's wrong with this picture?

The dog, whose name is Greta, who weighs well over 75 pounds, and who is half German shepherd, a quarter husky, and a quarter wolf, chased the cat.

Active Voice

- In legal writing, it is usually desirable to use the active voice, in which the subject of the sentence performs an action, rather than the passive voice, in which the subject is the recipient of the action.
- Compare:
 - The dog chased the cat.
 - The cat was chased by the dog.

Active Voice and Legal Rhetoric

GOOD

The court used a three-part test to determine whether the evidence was admissible.

BAD

The admissibility of the evidence was determined by a three-pronged test.

Nominalization

- Nominalizations are words that should be verbs, but instead are made into nouns.
- Example: “John’s decision was made too hastily.”
 - In this example, “decision” is a nominalized form of the verb “to decide.”
 - Instead, say “John decided too hastily.”
- Nominalizations weaken your sentences because as the subject of the sentence, they are abstract rather than concrete nouns. And because the word that should be the verb is now a noun, the verb that is used (“was made”) has no power.

Nominalization

Identify the nominalized verb in the following sentence:

Rejection of an insurance policy holder's facially valid claim is not an action that an insurance claims agent should undertake lightly.

Nominalization

Identify the nominalized verb in the following sentence:

Rejection of an insurance policy holder's facially valid claim is not an action that an insurance claims agent should undertake lightly.

Nominalization

How would you re-word the sentence to avoid nominalization?

Rejection of an insurance policy holder's facially valid claim is not an action that an insurance claims agent should undertake lightly.

Nominalization

Sample revision:

An insurance claims agent should not reject an insurance policy holder's facially valid claim without good reason.

“It is” and “There Are”

- If you’re starting a sentence with “it is” or “there are,” ask yourself: what is the “it”? Where is the “there”? If it’s not obvious, edit by focusing on the **actor** and the **action** that you want to describe, instead of some fuzzy, indefinite pronoun.
- Example:
 - “There are three reasons why this Court should reverse.”
 - Change to: “This Court should reverse for three reasons.”
- Example:
 - “It is likely that Mr. Mao will be chased by Austin.”
 - Change to: “Austin is likely to chase Mr. Mao.”
- Compare:
 - “The motion arrived this morning. It is on your desk.”

Avoid Compound Constructions

- Compound constructions use three or more words to do the work of one or two words.
- Example:
 - “The parties were in complete agreement with respect to the amount of rent due and also as regards the due date.”
 - Change to: “The parties agreed completely about the amount and due date of the rent.”

Use Short Sentences

- ▣ Lawyers are notorious for writing long, complicated sentences. One way to avoid this is to put independent thoughts in separate sentences.

Use Short Sentences

- Example:
 - “By establishing a technique whereby the claims of many individuals can be resolved at the same time, class actions serve an important function in our judicial system in eliminating the possibility of repetitious litigation and providing claimants with a method of obtaining enforcement of claims that would otherwise be too small to warrant individual litigation.”
 - Change to: “Class actions serve an important function in our judicial system because they permit courts to resolve claims of many individuals at the same time. This avoids repetitious litigation and allows litigants to enforce claims that are too small for individual litigation.”

Avoid Lawyerisms

- Lawyerisms are words that sound legal but carry little or no legal substance. Examples include “whereas,” “hereinafter,” and “aforementioned.”
- For example:
 - “The prisoner’s aptitude for acclimatization to lack of confinement is one factor that must be taken into account in the deliberations of the Parole Board.”
 - Change to: “In deliberating, the Parole Board should consider the prisoner’s ability to adjust to freedom upon release.”

Questions?

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