

Overview of the Lawyer's Role

Most students entering law school would not call themselves writers; nor would they expect that in three years they will be professional writers, earning a significant part of their income by writing for publication. Yet that is precisely what lawyers do. Most lawyers write and publish more pages than do novelists, and with greater consequences hanging in the balance.

This book introduces the critical skill of legal writing. In this chapter, we begin with an exploration of the kinds of writing lawyers do, both in litigation and in other kinds of law practice. Understanding this legal landscape will help you understand the legal issues of the cases you read and the various research and writing tasks you will be asked to perform.

I. WRITING AND A LAWYER'S ROLES

Lawyers write many kinds of documents—court papers, letters, legal instruments, and internal working documents for the law firm. As different as these documents are from each other, they all fall into one of three categories defined by the lawyer's primary role when writing them: (1) planning and preventive writing, (2) predictive writing, and (3) persuasive writing. A lawyer's writing differs significantly depending on which of these three roles the lawyer is performing.

A LAWYER'S WRITING ROLES

- Planning and Preventive Writing
 - Predictive Writing
 - Persuasive Writing
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Planning and Preventive Writing. Lawyers engage in planning and preventive writing when they draft transactional documents such as wills, trusts, leases, mortgages, partnership agreements, and contracts. Planning documents define the rights of the parties and the limits of their conduct, much as

case law and statutes do for society at large. Thus, planning documents create what is, in effect, the "law" of the transaction. In some ways, planning and preventive writing is the most satisfying of the lawyering roles. Through planning and preventive writing, the lawyer creates and structures some of the most important transactions and relationships in an individual client's life or in the commercial world. Also, with careful planning, the lawyer can forestall future disputes, and most lawyers would rather help clients prevent injury than recover for injury.

Predictive Writing. Predictive writing is part of another satisfying task—client counseling. Clients often seek a lawyer's advice when they must make an important decision. When that decision has legal implications, the lawyer must research the law and predict the legal result of the contemplated action.

Lawyers engage in predictive writing in both transactional and litigation settings. In transactional settings, the lawyer must predict legal outcomes in order to analyze and prevent possible problems. In litigation, the client and the lawyer must decide many questions, ranging from relatively routine matters of litigation management (such as which motions to file) to such fundamental matters as whether to settle the case. To resolve any of these questions, the lawyer must predict the legal outcomes of the possible courses of action and must communicate those predictions to the client or to another lawyer working on the case.

In predictive writing, the lawyer must analyze the relevant law *objectively*, as a judge would do. The most common documents for communicating predictive analysis are the *office memo* (addressed to another lawyer who has requested the analysis) or the *opinion letter* (addressed to the client). The lawyer's role is to predict a legal result as accurately as possible, objectively weighing the strengths and weaknesses of the possible arguments. The answer might not be the answer the client or the requesting lawyer wants to hear, but it is the answer they need in order to make a good decision.

Persuasive Writing. Legal problems cannot always be prevented, and some of them inevitably result in litigation or a proceeding before some other decision-maker. When that happens, the lawyer takes on a persuasive role. No matter what result the lawyer might have *predicted*, the lawyer now must try to persuade the decision-maker to reach the result most favorable to the client. The lawyer must marshal the strongest arguments in her client's favor and refute opposing arguments. The most common persuasive document is the *brief* (also called a *memorandum of law*).

Although the goals of prediction and persuasion differ, on a fundamental level predictive (objective) analysis and persuasive analysis cannot be separated. To predict a result, a writer must understand the arguments each side would present. To persuade, a writer must understand how the argument will strike a neutral reader. Thus, as you improve your predictive analysis, you will be improving your persuasive analysis as well, and vice versa.

Before you go on, turn to Appendix A, which contains a sample office memo, and to Appendices B and C, which contain sample briefs. We will study the parts of each document in more detail later. Your goal at this point is simply to understand the function of each kind of document and to see

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what the end products will look like before beginning the process of creating them.

EXERCISE 1-1

Identify the primary lawyering role called for in each of the following situations:

1. A client (a widower) has been diagnosed with a fatal form of cancer.
 - a. The client asks a lawyer to draft a will and trust to protect his assets for his children.
 - b. The client asks whether there is a procedure by which he can designate a foster family to care for his children after his death and whether it would be wise for him to do so.
 - c. The client asks the lawyer to file a lawsuit seeking recovery against his employer for exposure to carcinogens in the workplace.
2. A client has located a piece of real property she wishes to buy and lease to a commercial tenant. The title registry lists an easement allowing the owner of the property next door to use the driveway along the back of the property. The client wishes to expand the existing structure on the property and eliminate the driveway.
 - a. The client asks the lawyer whether the easement can be challenged legally.
 - b. The client asks the lawyer to approach the owner of the property next door and seek the release of the easement.
 - c. The client asks the lawyer to draft the release of the easement and also to draft a lease for the new commercial tenant to sign.

II. OVERVIEW OF A CIVIL CASE

Because most of your first-year courses focus on reading appellate opinions, your understanding of those cases will be improved if you have an overview of how a civil case proceeds through the litigation process. This section summarizes the course of a fairly simple personal injury lawsuit with only one legal claim against only one defendant and raising no ancillary issues. As you read it, notice how many litigation stages require legal research and the writing of a legal document (identified by italics), even in a relatively simple case.

Initial Research. A civil case begins when a client consults a lawyer about a legal problem. Usually the client has been injured and believes that his injury was caused by the wrongful conduct of someone else. The client wants to know whether he has any legal recourse and, if so, whether he should pursue it.

To decide these questions, the lawyer must gather all the relevant facts and research the relevant legal issues. Rarely will the lawyer already know all the law that will be required to answer these initial questions, and the lawyer might not have time to research all of them herself. She might ask an associate

to research some of them for her. The requesting lawyer will write *file memos* to the associate, providing the necessary information and setting out exactly what she needs to know. After finishing the requested research, the associate will write an *office memo* or *email memo* to the requesting lawyer, communicating the results of the research.

The first lawyer will review the research, analyze the client's possible claims, and provide that analysis to the client. The lawyer and client are likely to discuss the analysis face to face, but often the lawyer also writes an *opinion letter* memorializing the results of the research and her advice to the client. Together the client and the lawyer decide whether to proceed with the claim.

Initial Negotiation Process. The next step is writing a *demand letter* to the party whose conduct appears to have caused the injury (the defendant). Typically, the demand letter will explain the legal basis for believing that the defendant's conduct was wrongful; the legal and factual basis for believing that the conduct caused the plaintiff's injury; and the kinds of damages the law permits in such a case. The lawyer for the defendant will write a *response to the demand letter* explaining the legal and factual bases for the defendant's defenses. The negotiation process may continue for some time, with settlement offers and counteroffers communicated by additional *settlement letters* between the lawyers and *client letters* conveying settlement offers.

Filing a Lawsuit and Resolving Initial Defenses. If the case does not settle, the plaintiff's lawyer chooses the appropriate court and files a *complaint*, a document that sets out the facts of the case and the legal basis for the claim. Once the defendant's lawyer receives the complaint, he has only a few weeks to draft and file a response. His research might have shown that the defendant has one or more defenses that can be raised immediately. If so, the lawyer will raise these defenses in documents called *motions*, which state the defense and ask the court for some kind of action, such as dismissal of the case. Each motion will be supported by a *brief* (also called a *memorandum of law*), explaining the legal and factual basis for the defense. The motions may also be accompanied by other supporting documents, such as *affidavits* from witnesses and copies of evidentiary documents bearing on the defense.

Each time one party files a motion asking the court to take some action, the other party must file a *responsive brief*, usually explaining the legal and factual basis for the argument that the court should deny the motion. The responsive brief may be accompanied by other supporting documents such as *affidavits*. The party who filed the motion (the moving party) will file a *reply brief* addressing the arguments raised in the responsive brief, and there might be a hearing on the motion, after which the court will decide the issue.

Assuming that the court declines to dismiss the case, the defendant's lawyer must file an *answer*, a document that admits or denies all the facts alleged in the complaint and may raise additional defenses as well. The defendant's lawyer also may file a *counterclaim*, a document that alleges some wrongful and injurious conduct on the part of the plaintiff. The plaintiff will then file an *answer* to the defendant's counterclaim. The answer admits or denies all the facts alleged in the counterclaim and raises all possible remaining defenses against the counterclaim.

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Factual Discovery. Now the case is ready for the discovery phase. In this phase, the parties gather all the available evidence in an effort to prepare for trial. During discovery, both parties draft and file *interrogatories* (questions directed to each other) and *responses to interrogatories* (answers to the questions). They draft and file *requests for production of documents*, *requests for admissions*, and *notices of depositions* (occasions for oral questioning of witnesses under oath). Parties can file *requests for entry on land* (to inspect the premises) or *requests for medical examination* (to subject a person to a physical or psychiatric examination). During the discovery phase, disputes might arise over how much or what kind of information can be sought. These disputes can become the subject of *motions to compel* (filed by the party seeking discovery) or *motions for a protective order* (filed by the party seeking to prevent discovery). Like other motions, discovery motions and *responses* to them are accompanied by supporting *briefs* and *affidavits*.

Motions for Summary Judgment. After the discovery phase, the parties often draft and file *motions for summary judgment*. A party seeking summary judgment is asking the court to rule on some or all of the claims or defenses without the necessity of a trial. Summary judgment motions are supported by *briefs*, by *statements of uncontested facts*, and by *affidavits*, excerpts from depositions, evidentiary documents, and excerpts from written discovery. The opposing party files a *responsive brief*, *affidavits*, and other supporting documents resisting the motion, to which the moving party files a *reply brief*. Oral argument is often held. The court might resolve the entire case at the summary judgment stage, or it might resolve some of the claims or defenses, thus narrowing the issues remaining for trial.

Trial. If the parties do not reach a settlement, they continue with trial preparations. If the case will be tried to a jury, both parties draft and file a set of proposed *jury instructions*. Jury instructions are statements to be read to the jury to help them understand the law governing the case and their role in the process. Each party also drafts and files a *trial brief*, a document that summarizes the evidence expected to be introduced, raises and argues any evidentiary issues the party anticipates, and argues for the adoption of that party's version of the jury instructions.

Trial begins with jury selection (if the case will be tried to a jury) and opening statements by each party's lawyer. Then the parties call their witnesses and offer their evidence. The trial concludes with closing statements from each lawyer, the reading of the jury instructions (if the case is tried to a jury), and a decision by the judge or the jury. Some *post-trial motions* may be decided, and then a final *judgment* will be entered.

Appeal(s). A party who is dissatisfied with the result of the trial court proceedings usually can file a *notice of appeal* to a higher court. This party is called the appellant. The other party (the appellee) may file a *notice of appeal* as well, raising other objections to the trial court result. A series of documents identify the issues to be argued in the appeal and designate the record of the trial court proceedings that will be sent to the appellate court.

After the record has been prepared and filed, the parties each file *briefs*, *responsive briefs*, and *reply briefs* arguing the issues raised in the appeal. Oral

argument is often held, after which the appellate court issues an opinion. In some circumstances, either or both parties may seek to appeal the appellate court's decision to an even higher court. If so, the procedure described in this paragraph is repeated there. When all appeals are completed, the losing party either complies with the judgment (if applicable) or enforcement proceedings begin. After the judgment has been paid, a *satisfaction of judgment* is filed, and the case is closed.

III. ETHICAL DUTIES

Your legal practice, including your legal writing, will be governed by the ethical standards your jurisdiction has adopted for lawyers. Most jurisdictions have adopted a version of either the American Bar Association's Model Rules of Professional Conduct or the earlier Model Code of Professional Responsibility. Sanctions for violation of these rules range from private censure to disbarment. No matter what your jurisdiction's ethical rules or your lawyering role, your legal writing must meet at least the following professional obligations:

1. *Competency.* A lawyer must provide competent representation, including legal knowledge, skill, thoroughness, and preparation.¹
2. *Diligence.* A lawyer's representation must be diligent.²
3. *Promptness.* A lawyer must do the client's work promptly.³
4. *Confidentiality.* Generally, a lawyer must not reveal a client's confidences except with the client's permission.⁴
5. *All lawyers are bound by the rules of ethics.* Every lawyer is bound by the rules of professional conduct, no matter whether that lawyer is in charge of the case or working under the direction of another lawyer.⁵
6. *Loyalty.* A lawyer's advice must be candid and unbiased. The advice must not be adversely influenced by conflicting loyalties to another client, to a third party, or to the lawyer's own interests.⁶

In addition to these general standards, your predictive legal writing must meet at least the following ethical standards dealing with giving advice:

7. *Moral, economic, and political factors.* While a lawyer's advice must provide an accurate assessment of the law, it may refer also to moral, economic, social, and political factors relevant to the client's situation.⁷ However, the lawyer's representation of a client does not constitute a personal endorsement of the client's activities or views.⁸

1. Model R. Prof. Conduct 1.1 (2013).

2. Model R. Prof. Conduct 1.3 (2013).

3. Model R. Prof. Conduct 1.3 (2013).

4. Model R. Prof. Conduct 1.6 (2013).

5. Model R. Prof. Conduct 5.2 (2013).

6. Model R. Prof. Conduct 1.7 and 2.1 (2013).

7. Model R. Prof. Conduct 2.1 (2013).

8. Model R. Prof. Conduct 1.2(b) (2013).

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8. *Criminal or fraudulent activity.* A lawyer must not advise or assist a client to commit a crime or a fraud.⁹ When the client expects unethical assistance, the lawyer must explain to the client the ethical limitations on the lawyer's conduct.¹⁰

Finally, your persuasive legal writing must meet at least the following ethical standards:

9. A brief-writer must not knowingly make a false statement of law.¹¹
10. A brief-writer must not knowingly fail to disclose to the court directly adverse legal authority in the controlling jurisdiction.¹²
11. A brief-writer must not knowingly make a false statement of fact or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.¹³
12. A brief-writer must not assert a legal argument unless there is a non-frivolous basis for doing so.¹⁴
13. A brief-writer must not communicate *ex parte*¹⁵ with a judge about the merits of a pending case, unless the particular *ex parte* communication is specifically permitted by law.¹⁶
14. A brief-writer must not intentionally disregard filing requirements or other obligations imposed by court rules.¹⁷

These ethical standards will apply to your legal writing after you are a lawyer. They will also apply, directly or indirectly, to the legal writing you do as a law clerk before you are admitted to the bar. They will be among the standards by which your legal writing teacher evaluates your law school writing. Be sure that every document you write meets these standards of professional responsibility.

IV. LEGAL CITATION

A. Plagiarism

Plagiarism is the act of presenting as one's own, words or ideas taken from another source. Most of us first encountered the concept of plagiarism in an academic environment. In academe, plagiarism occurs primarily in one or both of these two situations: (1) failure to attribute an idea to the source from which it was drawn; or (2) failure to use quotation marks to show that the words themselves, not just the idea, came from another source. In an

9. Model R. Prof. Conduct 1.2(d) (2013).

10. Model R. Prof. Conduct 1.4(a)(5) (2013).

11. Model R. Prof. Conduct 3.3(a)(1) (2013).

12. Model R. Prof. Conduct 3.3(a)(3) (2013).

13. Model R. Prof. Conduct 3.3(a)(1) and (2) (2013).

14. Model R. Prof. Conduct 3.1 (2013).

15. *Ex parte*, in this context, means without notice to other parties in the litigation.

16. Model R. Prof. Conduct 3.5(b) (2013).

17. Model R. Prof. Conduct 3.4(c) and 3.2 (2013).