Drexel University Thomas R. Kline School of Law

From the SelectedWorks of Terry Jean Seligmann

January, 2005

# Why is a Legal Memorandum Like an Onion: A Student's Guide to Reviewing and Editing

Terry Jean Seligmann

Available at: https://works.bepress.com/terry_seligmann/1/

# Legal Writing

# Why is a Legal Memorandum Like an Onion?—A Student's Guide to Reviewing and Editing

by Terry Jean Seligmann*

## I. INTRODUCTION—THE RIDDLE'S ANSWER

If you are a student working on a legal memorandum, you may think the answer to the question posed by the title of this Article is that they can both make you cry. This Article may help you avoid tears by giving you a way to review your work. The legal memorandum is like an onion because it is a whole made up of many layers. These layers cover each other in levels that can be cross-sectioned and examined in place without losing the sense of the whole. The guidelines offered for that examina-

---

* Associate Professor of Law and Director of Legal Research and Writing, University of Arkansas School of Law. New York University Law School (J.D., 1974). I thank the University of Arkansas School of Law for its support of this project, Professor Brad Clary for his comments on a draft, and Joseph Morrison (J.D., 2004), for his research assistance.

tion follow the priorities of your legal reader.[1] These guidelines should help you with the complex task of editing your memorandum, while guarding against straying from the core purpose of your memorandum—the presentation of your legal analysis.

Critiquing a legal memorandum forces analysis of the document on multiple levels, from that of large scale organization[2] to technical detail. Teachers know the dangers of overwhelming student writers with critique on all of these levels.[3] If you received comments on your draft, your teacher may well have identified major areas for your attention,[4] but left to you the job of attending to other aspects of the memorandum also in need of revision.

Published checklists can provide comprehensive guidance for you in creating and assessing your work.[5] Legal writing teachers frequently use checklists or comment sheets, either standardized or custom tailored to the assignment. A danger of such lists, though, is that they may lead you to neglect the big picture in favor of spending an inordinate amount of time on a relatively unimportant decision, such as how to abbreviate the party's name in a citation.[6] Any guideline or checklist should not

---

1. This Article was born out of my desire to help my legal research and writing students "own" their work as writers and editors, and draws both consciously and, undoubtedly, also subconsciously, from the extensive scholarship on legal writing and editing that I have been fortunate enough to benefit from, enabling me to avoid "reinventing the wheel." *See, e.g.*, Steven V. Armstrong & Timothy P. Terrell, *Editing: Overcoming the Dr. Strangelove Syndrome*, 5 PERSPECTIVES 77 (1997); Mary Beth Beazley, *The Self Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING 175 (1997); Jo Anne Durako, et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997); LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (3d ed. 2002); RICHARD K. NEUMANN, JR., LEGAL REASONING AND WRITING: STRUCTURE, STRATEGY, AND STYLE § 13.3 (4th ed. 2001); HELENE S. SHAPO ET AL., LEGAL WRITING AND ANALYSIS IN THE LAW (rev'd 4th ed. 2003). Also influential have been the presenters at conferences of the Legal Writing Institute who have contributed their knowledge on this topic.

2. SHAPO, *supra* note 1, at 89.

3. *See* Anne Enquist, *Critiquing Law Students' Writing: What the Students Say is Effective*, 2 LEGAL WRITING 145, 188 (1996) (noting dangers of excessive commenting).

4. OATES, *supra* note 1, TEACHER'S MANUAL § 4.2. The authors advocate prioritizing before critiquing but caution that students must be aware the professor is being selective so they do not assume everything unmarked is perfect.

5. *See, e.g., id.* at § 5.15.6 (offering checklist for critiquing the discussion section); SHAPO, *supra* note 1, at 159; NEUMANN, *supra* note 1, at inside front and back covers; Durako, *supra* note 1, at 748-49, App. A.

6. This comment is not intended to undervalue the significance of proper citation form as part of a good legal memorandum. Citations serve important functions. Authority vsignals support for the writer's legal assertions. The citation tells the legal reader where the authority can be found and what kind of weight it carries. However, some aspects of

be viewed as setting up rules applicable to all situations, or formulas that must be slavishly followed whether or not the legal analysis for the case fits the formula.[7]

Weighting the components can give some perspective, but this too can send the wrong message in terms of a legal reader's expectations for the memo, because most legal readers will be responding to the memo on the same set of multiple levels that this article suggests for review. For example, although proper citation form may be ranked below quality of legal analysis in terms of grading points and even in terms of the attorney reader's expectations, a wonderful analysis that has egregious citation errors will quickly lose its credibility with the attorney or judge who reads it.[8]

The model for review of a legal memorandum that follows suggests that the reader or self-editor proceed through a series of levels of review of the whole document, rather than try to operate on all levels at once. The order suggested reflects that which is most likely to produce a legal memorandum that is comprehensive in its analysis and well-written, by maintaining as primary the analytical integrity of the memorandum. One could, in theory, read the memorandum several times, each time focusing on a different level of review. In practice, as with the onion, both the writer and the reader will look at the layers at the same time as a whole. By focusing on these levels as a separable series of critiques,

---

citation form that do not transmit such information are less significant to the legal reader. I put the number of words abbreviated in a case name into this category.

7. Take the example of IRAC, an acronym for a commonly taught order for presenting analysis of a single legal claim: Issue, Rule, Analysis, Conclusion. Some legal writing experts modify this label to stress assertive issue statements in the form of a conclusion (CRAC), or expand it to emphasize that both the legal authority and the application of the law to the facts should be analyzed in detail (CREAC). *See* DAVID S. ROMANTZ & KATHLEEN E. VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 89-94 (1998) (explaining CREAC); Terill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 888-89 (2002) (discussing the variety of approaches to IRAC in the context of the analysis of jargon). Other scholars reject any use of IRAC on the grounds that it will be followed formulaically in all situations, including those where the legal claims require a different type of presentation and analysis, or because they believe it results in a rote, superficial approach to written analysis. *See* THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995 (devoting an issue to essays on the pros and cons of teaching IRAC). All legal analysts agree, though, that a complete written analysis of an issue must consider the law, the facts, and reach a supported conclusion. *E.g.* NEUMANN, *supra* note 1, § 10.1, at 95.

8. *Cf.* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1 (1997) (cataloguing grammar, punctuation, and citation errors as drawing judicial fire and as leading to loss of credibility or worse).

you can assure that you have considered the range of editorial issues that your legal memorandum raises. Instead of relying on a teacher's comments or changing only those items marked for your attention, shouldering the responsibilities of legal analyst, explicator, and editor can equip you to produce a tear-free legal memorandum.

## II. LEVEL ONE REVIEW—THE LARGER ISSUES

Begin with your discussion or argument section. This is the heart of your memorandum, the part that must be the healthiest. The summary and fact sections take their form and shape from the analysis, so they can be most effectively created and reviewed once the analysis is settled.

### *A. The Thesis Paragraph*

Read the thesis paragraph. Look for an opening sentence that provides the essence of the legal topic the memorandum addresses and relates the essence to the client.[9] Make sure that the paragraph contains the overall legal standards governing the issues covered in the memorandum in the order the memorandum discusses them. Give a prediction to close the paragraph, explaining briefly the basis for the prediction. This is one place where it is acceptable to be conclusory.

The essay technique of beginning with a thought-provoking quotation and then providing an exegesis that leads up to one's thesis has no efficacy here. Nor should the ultimate destination of your analysis be held in reserve; this is no "whodunit." The legal reader will be looking for an early bottom line. The reader understands that what follows provides the explanation and support for the conclusion you forecast here. At this point you need not be concerned with laying out the detailed foundation of law and fact analysis that will shortly unfold.

### *B. The Flow of The Discussion*

Review the overall structure of the discussion. Are the issues treated in a logical order?[10] Often the applicable case law will be the best

---

9. For example, instead of writing "The issue in this case is whether or not a claim exists for negligence under Massachusetts law when a tenant is injured by the criminal act of a third party," write "Shawn can recover against her landlord for his failure to install adequate locks on her apartment door because her rape was a foreseeable result of his negligence."

10. Logical order is not necessarily the order that the caselaw or statute follows to provide the elements of a claim. Issues may be central or peripheral; hotly contested or conceded; analytically complex or straightforward; or threshold to the resolution of others. *See* NEUMANN, *supra* note 1, § 10.6.1 (discussing organization of multi-element discussions); SHAPO, *supra* note 1, at 78. Shapo writes: "Sometimes discuss elements out of order. For

guide on how to order your discussion. If the leading cases establish a three element test, then your memo will probably organize itself around those elements.[11] A statutory claim may track the statute's structure, or the cases interpreting the statute may utilize a slightly different structure.[12] If there is one issue that must be resolved before proceeding further with a claim, that threshold issue will ordinarily be analyzed first.[13] If a case presents a significant procedural issue, this may warrant early treatment.[14]

Within each issue, conduct a similar review. Look at the topic sentences of each paragraph to see if the topic sentences, taken sequentially, provide a coherent outline of the discussion.[15] If not, see where new paragraphing or new topic sentences will accomplish this.

Do not, however, be afraid to critically assess the need to analyze a particular issue in depth. Often, on one or more of the elements or issues, the client's case presents little controversy or complexity. Such issues deserve far less of your memorandum's attention—just enough to

---

example, one might be more important or discussing a less controversial issue first might dismiss it quickly so that you can go into detail on the most problematic issue." *Id.*

11. A classic example of this is how the courts will treat a negligence claim. They will typically establish a three or four element standard that covers the issues of duty, breach, causation, and damages. *Compare* Rose v. Miller & Co., 432 So. 2d 1237, 1238 (Ala. 1983) (setting out three-part test of (1) the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by a defendant to perform the duty; and (3) an injury to the plaintiff from such a failure) *with* Palomar Ins. Co. v. Guthrie, 583 So. 2d 1304, 1306 (Ala. 1991) (citing four elements as (1) duty to a foreseeable plaintiff; (2) a breach of that duty; (3) proximate cause; and (4) injury/damage).

12. For example, an analysis of claims of employment discrimination, although statutorily based, will follow the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

13. So, for example, a plaintiff in a disability discrimination case must show the existence of a disability before moving on to allege discrimination. *See* Americans with Disabilities Act, 42 U.S.C. § 12102(2).

14. Judicial opinions almost invariably begin with a discussion of those procedural issues that are significant to the case's resolution, for example, the summary judgment standards and the state of the record on such a motion, see, for example, *Lundell Manufacturing Co. v. ABC*, 98 F.3d 351, 355-56 (8th Cir. 1996) (characterizing standard of review on summary judgment in defamation case a "critical dispute"), or the standing of a party to raise a particular claim, see, for example, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 345 (1977) (addressing Commission's representational standing before considering interstate commerce claim).

15. *See* JOHN C. DERNBACH & RICHARD V. SINGLETON, II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 144 (2d ed. 1994); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 140 (2002) (applying this idea to appellate briefs).

note them as part of the claim and to show that they are clearly present or absent in your client's case.[16]

Nor is there some stipulated amount of space for the analysis of each legal issue or sub-issue. A single legal issue can be complex.[17] A general rule may yield several exceptions that must be reviewed and explained.[18] Knowing the policies underlying the law may be of particular importance in resolving and predicting your client's case.[19] The fact-specific nature of the issue may require you to provide several examples of precedential treatment on varying factual records.[20] For this reason there is no preset number of paragraphs, or even pages, per issue. The goal is providing a complete discussion without bogging down.

Making sure that the paragraphs proceed from point to point, rather than from case to case, is an important part of keeping the flow of analysis clear and moving. If you find your paragraphs beginning "In *Baker v. Jones,*" this is a signal to reexamine the structure of your discussion. The reader should know from your writing why a particular

---

16. For example, in an intentional infliction of emotional distress case, the facts may leave no question of causation, but raise a significant issue on the outrageousness of the defendant's conduct. As a result, your memorandum may spend several pages on outrageousness and identify and dispose of causation in a two to three sentence paragraph. *See* NEUMANN, *supra* note 1, §§ 10.5.1-10.5.3, at 100-04 (differentiating between conclusory, substantiating, and comprehensive explanations).

17. Most constitutional claims will fall in this category. "Due process of law" is a short phrase in the Constitution that covers a great deal of legal territory. *See, e.g.,* Rochin v. California, 342 U.S. 165, 170 (1952) (calling due process "the least specific and most comprehensive protection of liberties"), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961).

18. For example, a defamation claim has defenses of truth and privilege and may invoke first amendment protections. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:34 (2d ed. West 2004). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-45 (1974) (defining public figure analysis that will determine whether First Amendment requires application of actual malice standard to defamation claims).

19. Claims requiring application of a statute may call upon an understanding of the purpose of an act. *See, e.g.,* Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (rehearsing Congress's purposes in enacting the Freedom of Information Act (FOIA)). So may claims that require a court to choose between judicial approaches of other jurisdictions on an issue of first impression on the expansion of the common law. *See, e.g.,* Albrecht v. Clifford, 767 N.E.2d 42, 45-47 (Mass. 2002) (citing policy considerations and persuasive authority from other jurisdictions in holding an implied warranty of habitability exists in the sale of newly constructed homes).

20. A challenge to personal jurisdiction requiring examination of the nature of a defendant's contacts with a forum state would fall into this category. *See, e.g,* Sher v. Johnson, 911 F.2d 1357, 1362-66 (9th Cir. 1990) (considering whether contacts by Florida legal partnership and partners supported jurisdiction in California in legal malpractice case).

case warrants discussion and how it fits into the legal analysis. For the reader's sake, the writer should extract and write a topic sentence for the paragraph that lets the reader know why it is important to know about *Baker v. Jones* and what point the reader will be able to learn from the case that will help in resolving the client's problem. Compare this paragraph:

> In *Baker v. Jones*, the Oklahoma Supreme Court decided that a woman who was raped in her apartment could sue the landlord for failing to supply adequate locks. [cite]. The facts that there had been an earlier break-in attempt and that the landlord refused to let the tenant replace the lock herself affected the court's decision. [cite].

with this one:

> Prior incidents that provide notice to the landlord of the likelihood of criminal activity, coupled with the landlord's exclusive control over the premises, can give rise to liability. *Baker v. Jones*, [cite]. In *Baker*, . . . .

This second paragraph would belong in a section discussing the law of premises liability in terms of the factors giving rise to the duty. Finally, if the only reason you can come up with for writing about a case is that you read the case, or that someone else in the class said they were using it, then you have not synthesized your research sufficiently and may be producing the disfavored "case by case" analysis rather than the desired "issue by issue" organization.

## III. LEVEL TWO—LEGAL LOGIC

Put yourself in the position of your reader—a busy, educated attorney trained in skepticism and disputation.[21] Think about what that attorney hopes to gain from the memorandum: an education in the legal issues (without reading any of the authorities); an analysis of the facts of the client's case that anticipates and deals with the weaknesses as well as the strengths of the case; and a bottom line.[22] These are the guiding principles of audience and purpose.[23] These principles underlie

---

21. The recipient of the memorandum, a supervising attorney, "will be busy and by nature skeptical and careful." NEUMANN, *supra* note 1, § 5.1, at 52, § 7.1, at 70.

22. *Id.*

23. Purpose and audience, i.e., the uses to be made of a legal document and the characteristics and role of the legal readers of that document, are defining markers of legal

the teachings concerning the ordering and components of a complete legal analysis, whether labelled IRAC[24] or not. In legal writing the bottom line is only as good as the legal and factual analysis that supports it—you get more credit for the proof than for the right answer.[25]

With respect to each legal issue, the memorandum should fully educate the reader on the applicable law. Beyond stating the rule in black letter terms, this usually means giving definitions for terms in the rule; showing the reasons for the rule through appropriate authority; making the rule's limits and exceptions clear through discussion and example; and elaborating upon any legal concepts, factors, balancing tests, or other sub-issues that will come into play in using the rule.[26] If you do not tell the reader that an exception exists, it is as if it does not. Review the discussion of the law to see if you have fully communicated the understanding you achieved when you did your research.

The reader needs to come away with an understanding not only of how the law applies to the client's case, but how it does not apply. Although you may have come early to the opinion that a particular fact is easily disposed of under the law, you presumably did so after learning the law. Now you need to reduce that same reasoning process to paper. As long as the facts arguably raise an issue, even if the ultimate conclusion, once the standard is known, is not debatable, the memo should apply the law to those facts.[27]

---

writing as a distinct type of writing. *See, e.g.*, SHAPO, *supra* note 1, at 141-42; BEAZLEY, *supra* note 15, at § 1.2. *See also* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 57-58 (1994) (emphasizing the social perspective leading to students' membership in a distinct discourse community).

24. *See supra* note 7.

25. This is why intelligent engineers and science majors can sometimes struggle with legal analysis—they screen out what they see as "unproductive" intermediate steps and cut to the chase.

26. For example, if the element under discussion requires that actionable conduct be "outrageous" for purposes of the tort of intentional infliction of emotional distress, the reader needs to know not only what kinds of acts meet this threshold, but that insults or curses do not. *See, e.g.*, Slocum v. Food Fair Stores of Fla., 100 So. 2d 396, 398 (Fla. 1958) (noting that "meaningless abusive expressions" and "mere vulgarities" are excluded). *Id.* Depending upon whether the facts implicate them, factors like the authority wielded by the actor, the known vulnerability of the victim to emotional distress, and any legal right arguably authorizing the actor's conduct would be discussed. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

27. To continue the last example, if the defendant shouted at your client, the memorandum should tell the reader that, because insults are not actionable, the client cannot make a claim based on the defendant's rude verbal encounters. Then it can consider at greater length other acts that are more likely to support the claim.

The comprehensive memorandum will also anticipate counterarguments and provide enough analysis to respond to them. Imagine the attorney taking your memorandum, writing a brief, and going to court to argue a dispositive motion. If the other side's attorney raises an argument you have not addressed in the memo, your client (and probably you) will suffer serious consequences. Your job is to make sure this does not happen.

There should also be no hiding from bad news.[28] If there really is no valid response to a counterargument, then you may be predicting the wrong outcome out of hope or sympathy, rather than based on your best objective legal analysis. It is your obligation, and the expertise that your client is paying you for, to face this, whether it is your client's desire or not. After all, it is your professional opinion that the client is seeking, not that of a "yes man" (who is available without paying for a Juris Doctor degree).

For a final review of legal logic, read through each section of your analysis, asking yourself "why" at every point that you make an assertion about the law or the facts. I call this the three-year old test.[29] If the memorandum does not yet give a legal or factual answer, then you should make your reasoning explicit in that place. For legal assertions, the "why" can often be answered by adding a citation to authority.[30] For assertions about the facts, it may mean using the details of the client's case to explain the path to a factual conclusion or naming the legal standard or case comparison supporting the conclusion.[31] If all of your "whys" are answered, the legal logic is solid.

## IV. LEVEL THREE—A CLOSER LOOK

### *A. Paragraph Perspectives*

Once you have satisfied yourself that the content of your analysis is complete, and that it follows a clear and logical sequence, hone in on the individual paragraphs. The opening sentence should alert the reader to the coverage of the paragraph. Check that the paragraph you wrote matches the scope of the topic sentence. Sometimes you will have departed from the designated issue and introduced additional points.

---

28. NEUMANN, *supra* note 1, § 9.2, at 88.

29. As in "Mommy, why do dogs bark? Why is there rain? Why is the sky blue?"

30. For example, employers have a valid interest in protecting against the loss of their customers. Girard v. Rebsamen Ins. Co., 685 S.W.2d 526, 528 (Ark. Ct. App. 1985).

31. For example, "Unlike the insurance salesman in *Girard*, however, the employee here had not established personal relationships with the customers."

This is a cue that you should break up the material into separate paragraphs.

A paragraph that goes beyond the point signaled at its start can also reflect a loss of focus on the particular subtopic. For example, a claim may require several elements, including causation and a particular type of damages. If your paragraph announces a discussion on the lack of causation between a party's acts and the injury suffered by the claimant, refrain from adding that the claimant will also lose because of the absence of a cognizable injury.

The final sentence in a paragraph of legal analysis should summarize that paragraph, not introduce the next topic. Some writers attempt to link the topics of two paragraphs in the concluding sentence of the first one, as a way of transitioning to a new topic. Most legal readers, though, will react to this technique as straying from the subject. To supply the desired transitional effect, instead of linking the paragraphs with the final sentence, do so in the next paragraph's topic sentence.[32] The new topic sentence can use the technique of naming both the old and the new topic:

> Not only will Scott have difficulty showing causation, but she cannot prove the physical harm required to recover for negligent infliction of emotional distress.

If your work contains sentences like these as conclusions to paragraphs, convert them to the first sentences of the next paragraphs.

The flip side of confining paragraphs to one idea is that it can take several paragraphs to develop an idea, or even a case description. Do not try to cram too much into one paragraph. The typical paragraph is more than one sentence but never more than one page—too much unbroken text discourages and intimidates the reader.

### *B. Sentences and Sensibility*

There are now several books on legal writing style, which offer similar advice to writers about creating sentences and about editing at the sentence level.[33] Writers should prefer the active voice and reach for

---

32. A number of techniques used to bridge from one paragraph to another appear in BRYAN GARNER, THE WINNING BRIEF 96-98 (1999).

33. *E.g.*, BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); TERRI LECLERCQ, GUIDE TO LEGAL WRITING SYLE (2000); RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS (1998). Most general legal writing texts devote space to style issues as well. *E.g.*, OATES, *supra* note 1, §§ 24, 25; NEUMANN, *supra* note 1, § 16; SHAPO, *supra* note 1, at 205-19.

action verbs to avoid becoming mired in forms of the verb "to be."[34] Extra words should be consigned to the waste bin, leaving lean and forceful prose.[35] Legalese—therein, aforementioned, etc.—should be banished. Yet the legal writing we read pushes in the other direction. Opinions, law review articles, and legal papers drafted by practitioners continue to be cramped and clogged with clauses, hedged with qualifiers, and use a high quotient of doctrinal dialect. What is a student to do?

What pushes writers of legal material toward these kinds of sentences are the twisting corridors of legal thought. Legal principles are complicated. Rules may have parts and almost always have exceptions. Explaining concepts completely may require longer sentences than "Spot chased the ball." Prediction is also a hazardous business in a common law legal world where cases are decided and law made one case at a time. This leads writers to use qualifiers and to link discussions to the authorities the writer relied upon.[36] Using legal vocabulary may be partly a signal of insider status, but it also provides a way to invoke shared understandings of even more complex doctrines—standing, proximate cause, res ipsa loquitur.

Producing a cogent and readable legal discussion requires accepting these constraints and striving for transparency without sacrificing complexity. The best ticket to this is to thoroughly understand the law under discussion enough that you could explain it to someone else who does not have a law degree.[37] This is also good practice; as attorneys, we will be counseling clients for most of our careers. Before writing, discuss the legal problem, the results of your research, and your analysis of the facts with a relative or friend. If you needed to use legal terminology to have this discussion, you would define those terms. You can use those definitions when you sit down to write. This will also help you to avoid misusing legally significant terms because you do not know their meaning, which is one of the most dangerous tendencies of neophyte law students.[38] It also will prevent you from cutting and

---

34. OATES, *supra* note 1, § 24.3.

35. WYDICK, *supra* note 33, at 9-24.

36. Thus, those deadwood phrases, "review of the decisions of the X Supreme Court shows that . . ." or "the New Jersey Supreme Court recently held in a similar case that . . . ."

37. Law is not rocket science; we do not use mathematical formulas that require another language. Legal concepts govern people in their daily affairs and should not be beyond their grasp if they are to be accepted and followed by society.

38. For example, when determining citizenship for purposes of diversity of citizenship, one examines domicile, the place that the person intends as his permanent home; mere residence is not sufficient. *See* Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974). A few years ago, I had a student who used "residence" to mean "domicile" and vice versa, both

pasting quotations of the law from opinions or statutes without mastering their content. Thus, the first step to clean and clear writing on the sentence level is really an analytical one—mastery of the meaning of the law to the point that you can explain it, both to yourself and others.

The next test for sentences should be to read them one by one within each paragraph. First, see whether each sentence contains a discrete thought rather than several related ones. Break up sentences that try to link too many ideas. A complicated doctrine can be discussed in several sentences rather than crowded into one clause-laden sentence. Compare the following examples:

> Example A: Due process applies to Y's deprivation of education by State X because the Due Process Clause, which requires due process of law when depriving a person of life, liberty, or property, looks to state law to determine what a property interest is and State X includes education as a constitutional and statutory right. [cites].
>
> Example B: Due process applies to Y's expulsion from high school. The Due Process Clause guarantees that a person will not be deprived of life, liberty, or property without due process of law. [cite]. A property interest must be derived from an independent source such as state law. [cite]. Education is a property interest in State X because the state constitution directs the state to provide a system of common schools. [cite]. Also, state statutes requiring student attendance create a right to a public education. [cite].

Second, still reading through the paragraph, ask whether each sentence advances the analysis from the previous sentence. There is no reason to state the same legal concept more than once, even if you have read ten cases applying that concept and want to show your reader the depth of your research.[39] One statement of the concept, plus a citation

---

on his civil procedure exam and in a related legal memorandum in my legal research and writing class. When I met with him, it became clear that he understood the requirements for establishing diversity jurisdiction but was using the wrong term in his memo. Unfortunately, that did not emerge from a reading of his bluebook by his Civil Procedure professor.

39. Indeed, a student who provides several formulations of the same rule is likely to be told that the memorandum has failed to pull the authorities together in order to provide

to multiple authorities, will do that. Pick one good quotation, if you like, and use it to prove the distilled statement of the law you have written:

> For priest-penitent privilege to apply, the communication must be made to a clergyman who was acting in his professional capacity as a spiritual advisor. [cites]. "It is only those communications . . . ." [cite].

Once you have stated a concept, each additional sentence should add new information concerning the reasons for the doctrine, its subdivisions, limits, or exceptions. To continue from the example above:

> Statements made outside of the sphere of the clergyman's role as a spiritual advisor are not privileged. [cite]. When the speaker is looking for secular help, such as obtaining an attorney or negotiating for more favorable prison conditions, the privilege does not attach. *See* [cites with parenthetical].

An easy way to do this kind of testing for stalled analysis is to ask, after reading a sentence, "what have I learned from reading this sentence that I have not already been told?" Sometimes the writer has a new point in mind, but has failed to highlight it by repeating too much of the previous content. Here, revision can cut out the old and leave only the new. On the other hand, if the sentence adds nothing new, consider eliminating the sentence or revising it to provide added value.

> Example A: A person acts intentionally for purposes of the tort of intentional infliction of emotional distress when he intends his behavior and either knows, or should know, that emotional distress will likely result. [cite]. Reckless action where the actor should know emotional distress is likely satisfies this standard. [cite]. The actor need not intend to harm the plaintiff if he acts with disregard for the likelihood that distress will follow. [cite].
>
> Example B: Intentional or reckless behavior in circumstances where the actor knows, or should know, that emotional distress is likely to result satisfies the element of intent. [cite]. The actor need not have sought to harm

---

a single, synthesized statement of the applicable law.

> the victim; it is enough if he should have known that emotional distress would be the result of his deliberate conduct. [cite].

Once you are satisfied that each sentence is discrete and cumulative in terms of content, you can focus on word editing using the guidance of the style experts. Clear out all deadwood and leave only the critical material.[40] Editing for passive voice is perhaps the easiest way to enliven and clarify legal writing and is easily done on the computer screen.[41] Look once again at those long, clause-laden sentences, and see if you can divide them easily. Finally, take full advantage of citation as a way of providing information, in lieu of naming the court, date, and case name within your sentences.[42]

## V. LEVEL FOUR—NEATNESS COUNTS

It is no secret that a clean looking document without typographical errors, spelling mistakes, citation gaffes, or grammatical glitches[43] makes a better impression on a reader than one reflecting poor proofreading or rushed preparation. We all know the story of the job applicant who never got beyond the cover letter stage because he did not take enough care to avoid a typo. The extrapolation by the reader is a logical one. The writer who does not take enough time and care to eliminate such errors may not be trustworthy when it comes to his research and analysis. Credibility once lost is hard to regain, no matter how long the writer labored in the library or sweated over the doctrinal

---

40. Here, I refer to "throat clearing" introductory phrases, and words that are not "working words" or necessary "glue words" to link the working words. *See* NEUMANN, *supra* note 1, § 16.5 (throat clearing phrases); WYDICK, *supra* note 33, at 9-24 (working words and glue words).

41. Look back at your sentence and try to identify the subject, verb, and object—the actor, what he is doing, and to whom. If what you see is a verb with "is - - - - -ed" there is a good chance you have written in the passive voice. Turn the sentence around by putting the actor up front, unless you have a strategic or analytical justification for highlighting the object. *See, e.g.*, SHAPO, *supra* note 1, at 208-09 (discussing appropriate use of passive voice to de-emphasize the actor or subject, or if the object of the sentence is more important than the actor).

42. For example, because a citation will tell the reader the identity of the court and the date of the decision, it is usually not productive to write, "In its decision in 1999, the Florida Supreme Court held that . . . ." Similarly, it is possible to edit out phrases such as "the courts have held that" when a good multiple citation will convey this. My slogan for this is adapted from the Nike ad campaign—"Just say it."

43. Common grammatical errors in student papers include inconsistent verb tenses (switching back and forth from past to present tense), inconsistent singular or plural nouns and pronouns, and use of "it's" as a possessive form.

subtleties. So, although these kinds of errors are on one level not as significant as the quality of legal analysis in a memorandum, they can infect the reader's reactions, sometimes fatally. It is precisely because they are minor and easy to avoid, if time is devoted to them, that they take on significance when the writer does not invest that time.

Technical perfection is a goal not always achieved, even by practicing attorneys who have proofreading help. But the reader looks for evidence that the writer made an effort to provide an error-free document. Happily, there are spell-checkers and grammar correction programs to assist us. But they do not catch everything. There is really no substitute for reading a paper copy of the document, word by word, with pen in hand, preferably aloud. Reading aloud helps the writer hear what is actually on the page rather than what he meant to and thought he wrote. If your professor allows it, proofread with a non-lawyer partner across the table to double the chances of finding errors.

Of course having time to proofread means writing the memo far enough in advance to leave time for this. The two a.m., all-nighter method of meeting deadlines, which may have worked well enough for you in college when your history or philosophy paper was due, will ill-serve you as an attorney when you must file a brief in multiple copies by a given day and hour. If you are one of the many who work best as the deadline approaches, work on revising your internal clock to include sufficient time for proofreading, as well as any computer or copying disasters. Even if your professor gives you a break, the clerk's office will not be so forgiving.[44]

## VI. LEVEL FIVE—THE ONION SKIN

Have you used all the sections needed for the memo, in the order appropriate for the assignment?[45] Are headings and subheadings consistent in typeface, capitalization, punctuation, spacing, and underlining? Have you reviewed the paging of the document and made sure that any heading is with at least two lines of related text, and that pages do not end or begin with only one line of text from a paragraph?[46] The reader-friendly document makes it easy for the reader to go to the relevant material. Similarly, use margins to make the

---

44. No one wants to explain to a client that his brief was rejected for formal non-compliance with a court rule. *See generally* Fischer, *supra* note 8 (collecting cases).

45. Some memorandum formats lead with a "Question Presented" and "Brief Answer," others start with the "Facts." Do not copy from samples; follow the format used by your class.

46. These paging problems are referred to as "widows and orphans." BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 4.19 (2002).

document inviting rather than to crowd in more text. An intact "skin" for your memorandum will promise sound content.

## VII. CONCLUSION

A good memorandum is remarkably simple. It tells the reader what she needs to know about the law in a clear and logical way, and explains how the writer reasons with that law to reach a prediction about the client's situation. The effective memorandum provides this information accurately and makes it easy to digest. The less effective memorandum may have the same doctrine, authorities, and predictions, but has usually failed to pull it together into a tight, translucent package. Reviewing your memorandum as a multilayered whole, like an onion, may help you get closer to the goal.

HeinOnline -- 56 Mercer L. Rev. 744 2004-2005