

Legal Writing

Teaching Material

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Chapter One

Introduction to Legal Writing

You may wonder asking why legal writing at all as distinct from the writing skills which you have acquired since your primary education. You may further inquire if legal writing serves a special purpose that is not covered by your skill. Certainly the skills of writing that you have acquired so far from different courses would not be useless. Rather, your background would furnish great support to your ability to practice legal writing. Never the less you will need more time and effort to understand and practice legal writing. This is because legal writing involves specialized forms of writing. Hence, this chapter will introduce you with the nature and distinguishing features of legal writing.

Specific objectives

At the end of this chapter, you will be able to:

- Explain the nature of legal writing;
- Justify the need for legal writing;
- Identify the major distinguishing features of legal writing; and
- Discuss sufficiently the distinguishing features of legal writing.

1.1 What is legal writing?

Legal writing is a type of technical writing used by legislators, lawyers, judges, and others in law to express legal analysis and legal rights and duties. Its distinguishing features include reliance on formality and citation to authority, specialized vocabulary or jargon, and over formality.

1.2 Distinguishing features of legal writing

I. Authority

Legal writing places heavy weight to authority. This is so because the law operates with reference to authority. In most legal writings, the writer must back up assertions and statements with proper reference to authority. This is particularly the case when one is writing articles, teaching materials and books. Here the authority may pertain to rules, custom or contract, as the case may be. In the common law legal system precedents (i.e. judgments of higher courts) are also invoked as authorities.

II Citation

The legal profession has its own unique system of citation. While it serves to provide the experienced reader with enough information to evaluate and retrieve the cited authorities, it may, at first, frustrate a lay reader. Every legal school, no matter whether it has adopted its own code of citation, requires proper use of citation.

What may be cited?

In legal writing ideas and/or facts incorporated in books or articles are the subjects of citation. Thus any one who has taken facts or ideas from the work of another would be bound to show his sources through proper ways of citation. Primarily, the purpose of citation is to enable reader's use and refer to the sources that the writer has used. But equally important it ensures that the writer has not misappropriated the work of another author.

The classical rule of citation covers only books, articles or cases or judicial reports that are materially at the disposal of some one or readers. However, recent legal research has shown that online and disk-based law collections are becoming primary research tools for many lawyers and judges. Because of these changes, there has been growing pressure to establish new rules of citation that accommodates the developments in legal research.

What are the methods of citing authorities?

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The methods of citing authorities varies from one country to another. And even in a single nation the rules of citation of authorities may differ from one school to another school of law. In USA, for example, some states and law schools use the Bluebook, whereas others follow the ALWD citation manual. (See legal research materials)

What are the methods of citation that are in place in Ethiopia?

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Perhaps one of the major challenges to research works in Ethiopia is lack of uniform book of citations. To the worst, many of the law schools in Ethiopia do not have books of citation. Indeed, this situation presents a real challenge to the quality of legal writing. Students, in particular, would face difficulties while writing term papers and senior thesis. However, it is expected that the new teaching material on legal research method which is being prepared parallel to this material would suggest a uniform code of citation that works in all law schools.

III Vocabulary

Legal writing makes extensive use of technical terminology. This distinctive vocabulary can be classified in four categories:

1. Specialized words and phrases unique or nearly unique to law, such as *tort*, *fee simple*, and *novation*.
2. Everyday words that when used in law have different meanings from the everyday usage, such as *action* (a lawsuit, not movement), *consideration* (support for a promise, not kindness), *execute* (to sign, not to kill), and *party* (a principal in a lawsuit, not a social gathering).
3. Archaic vocabulary: legal writing employs a fairly large number of outdated words and phrases that were formerly part of everyday language but are today rare except in law. Some date from the 1500s. Most are long-abandoned outside the law. Some English examples are *herein*, *hereto*, *hereby*, *heretofore*, *whereas*, *whereby*, and *wherefore*; *said* and *such* (as adjectives).
4. Loan words and phrases from other languages: In English, this includes terms derived from French (such as *estoppel*, *laches*, and *voir dire*) and Latin (both terms of art such as *certiorari*, *habeas corpus*, and *prima facie*; and non-terms of art such as *inter alia*, *mens rea*, and *sub judice*). These foreign words are not written in italics or other distinctive type as is customary when foreign words appear in other English writing.

State some words which you think are unique to law.

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What does the term *pacta servanda* mean?

.....

State at least five words which take different meaning when used in legal context

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IV Formality

The three preceding features bring to legal writing a high level of formality. The resort to authorities that were created long ago can lead lawyers to follow an older and more formal style of writing. The use and re-use of form documents without updating their language also perpetuates a formal style of writing. Many law schools teach writing in this classical, formal, and sometimes over complex manner, which has allowed this style to continue. However, in

recent years, there has been a movement away from classical legal writing, towards a more reader friendly and concise method of conveying ideas. While legal vocabulary and sometimes verbose sentences make legal writing a difficult read for non-attorneys, they are in many cases necessary. The primary purpose of legal writing is to provide a thorough and precise document to serve a need for formal documentation. By following the tried and true path of formal legal writing, a document will leave very little to interpretation. Using a less formal, more reader friendly format makes it more difficult to ensure the document is clear cut in its intentions.

Explain why legal writing is subjected to formalities unique to other forms of writing.

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1.3 Prewriting considerations

Before you start writing a full document, identify your audience and your purpose, and define and research the issues presented as well as time constraints.

1.3.1 Identifying the audience

Lawyers prepare a wide range of writings of a diverse group of recipients.

- To whom the document is directed;
- The level of legal expertise of that person or persons; and
- The degree of that person or persons familiarity with the subject.

Don't make assumptions when determining the audience.

Identify the purpose

In order to draft any effective writing, you must identify your purpose. Do you want to update a client on the status of a lawsuit? Do you want to convince a court that your client's position should prevail in a pending motion? Are you summarizing a deposition transcript? Depending on your purpose, your approach to the task will differ markedly. It is therefore critical that you identify this purpose before you begin drafting.

The purpose of most legal documents falls in to one of two broad categories objective or adversarial objective documents accurately convey information and avoid bias. A letter to your client estimating his chances for success would be an objective document. Adversarial documents, on the other hand are argumentative, drafted to emphasize the strong points of your clients position and the weaknesses of the opposing party's. They are not objective; they are not designed to balance both sides, either.

Strategies for different writing purposes

Purpose	strategy
To inform	<ol style="list-style-type: none"> 1. Identify audience 2. Determine extent of audience knowledge 3. Research relevant information 4. Determine what you desire to communicate
To persuade	<ol style="list-style-type: none"> 1. Identify audience 2. Determine relevant information 3. Research relevant information 4. Emphasize positive information and present in most favorable light 5. Convince audience that your position is the better position
To discover information	<ol style="list-style-type: none"> 1. Identify audience 2. Determine information you need 3. Research relevant sources 4. Determine information that audience may possess 5. Elicit information that is important without revealing your position
To prepare a legal Document	<ol style="list-style-type: none"> 1. Identify audience 2. Determine legal requirements 3. Elicit client's need

1.3.2 Defining and Researching the Issues

After identifying your audience and determining your purpose, you must define the issues presented and conduct the research necessary to address these issues. The most common and simple techniques in defining issues is the IRAC method.

Time constraint

Deadlines are a fact of life in a legal practice. Virtually every document filed with a court is governed by a time requirement. In addition, practical considerations often create unofficial deadlines (a client may need certain legal questions answered immediately to gain an edge on his competitor).

An important prewriting consideration is thus to evaluate the time available and allocate efforts accordingly.

1.3.3 Organizing the Legal Document

Organizing the document might be considered your final prewriting consideration in the writing stage itself. Your plan of organization provides the blue printing by which your document will be crafted.

➤ **Outlining**

The best method of organizing a legal document is by outlining. An outline is the skeleton of a legal argument, advancing from the general to the specific. You have no doubt prepared outlines in the other contexts in the past. It is intended to help you to critically examine your approach, leading to a document that flows logically to a conclusion which accomplishes your purpose. An outline will assist you in

- Focusing on logical development
- Preventing critical omissions; and
- Evaluating how well you accomplish your purpose

An outline may use a sentence format or a shorthand topic format. When using a topic format, be sure you include enough information to enable you to remember why you included each topic. Unless you are comfortable or familiar with a particular subject area, the fuller sentence format is preferable.

Look to the following example of an outline

1. General topic

A (Issue)

1. Rule of law
2. Applicable rule to the fact
3. Conclusion

Outlining is an effective method to focus and strengthen your document. It provides a guide that, carefully followed, leads to an organized and effective document.

1.4 Primary and Secondary Sources of Information

At its best, law is bold assertion plausibly maintained because a sovereign said it. As per the 1994 FDRE constitution, no one is above the law. Need less to mention, the constitution is the supreme law of the land. However, the constitution is not the only law that operates with legal force in our land. We have body of laws which come from the Federal Government, by the HPR, and the states, by their respective state councils.

The constitution is the fundamental law. The legislator makes statutes. The executive issues executive orders. The courts decide cases. Administrative agencies regulate the special areas of law. These acts of the constitution, the statutes, the executive orders and administrative regulations ...are authoritative acts of the sovereign and, hence, known as primary sources.

Every thing else is secondary authority. It includes Encyclopedia, law review articles, newspapers, personal opinions, company policies, and teacher's assertions. Please follow the following table for your better understanding of the difference between primary and secondary sources

Legal authority: Primary and Secondary

Primary (The law it self)	Secondary (Explanations; Not the law)
<p style="text-align: center;">The Constitution</p> <p>Legislative Executive Judicial statutes Orders (Cases decided the federal supreme court in its cassession bench)</p> <p>Administrative Agencies</p> <ul style="list-style-type: none"> • Regulations • decisions 	<ul style="list-style-type: none"> • Examples • Dictionaries • Encyclopedias • Indexes • Law Review • Magazines • Newspapers • Policies • Polls • Professors • Pundits • Textbooks

Chapter Two

Types of Documents

There are many types of legal documents, which vary from one to the other depending on the nature of the legal subject matter that the document describes. The most known legal documents include: Letters, Internal memoranda, Operative documents and forms, Pleadings, Motions, and Briefs.

2.1 Letters

Correspondence is essential in virtually every legal matter; letters to the client, to opposing parties, to the court, to witnesses, to government agencies- the list is endless (see unit six)

2.2 Internal memorandum

An interoffice memorandum explains the law so as to inform the attorney. This memo is an objective writing that relates both good news and bad about the law as it applies to the client's case, and it can be used as a basis for strategy, as basic research for a brief, or as background when drafting pleadings or other documents.

Paradigm for preparing internal memoranda

By tradition and to meet the expectations of typical legal readers, the inter office memoranda is organized and written in a fairly formal way. The most suitable and common paradigm of predictive writing is referred to as the IRAC rule. Simply put, IRAC stands for the following detail:

- I. identification of issues,
- R. describing the rule
- A. analysis of facts
- C. describing the conclusion

Predictive legal writing uses IRAC structure because it is a logical way to explain and

justify prediction. Because of this, lawyers have come to expect that structure when they read an office memorandum of law. If the document deviates from that structure for no apparent reason, it will confuse the reader and force him or her to work harder to understand what you have written. This means that you may lose your audience and that your reader may not trust the document as much as he or she would have if you had followed the expected structure.

2.3 Operative Documents

Many documents have, as a result of their language and content, legal effects beyond the mere transmission of information. Executed contracts, leases, wills, and deeds are examples of operative documents that lawyers and junior practitioners draft. Such documents serve to define property rights and performance obligations, and slight alterations in meaning can have great impact on the parties involved.

The creation of legal documents is integral to the practice of law. Litigators draft complaints and other pleadings. Business lawyers draft articles of incorporation, and contracts ranging from employment of individuals to security of goods. And of course lawyers draft legislations, directives, working procedures, disciplinary measures and the like. Because of this, drafting skills are essential for every practicing lawyer.

It is one of the most intellectually demanding of all lawyering skills. It requires knowledge of the law, the ability to deal with abstract concepts, investigative instincts, and organizational skills. Nevertheless, it is often overlooked in legal training. In the first place a student must be lucky to take legal drafting course because there are many law schools which do not give legal drafting as a separate course. Furthermore our students are always preoccupied by knowledge based courses such as constitutional law, contract law, administrative law and the like. As a result new graduates of law always face difficulty in practicing law.

No doubt, lack of adequate skill on legal drafting frustrates the confidence of students to practice law. And to the worst it may force students to surrender to traditional practice with all its defects. Thus it is high time that law schools provide enough space for legal drafting, and legal

writing in general. In our country there are recent developments concerning the places of skill based courses. The new national legal curriculum, for example, has incorporated skill based courses such as legal writing, legislative drafting, research method, and trial and appellate advocacy. Thus, if this new advance is implemented properly, the existing practical challenge of students would be substantially reduced. Under this section you will learn about the importance of forms and general techniques in legal drafting. However we do not profess that this section is comprehensive. Students are, therefore, advised to substantiate their skill by reading other materials on legal drafting. Look to the following example:

Form for securing bond

I.....of.....being brought before the police station at.....under arrest to answer the charge of.....do hereby **bind** my self to attend at the police station at...../in the.....court of.....at.....on the.....day of.....next, and to continue so to attend until other wise directed by the police/court; and, in case of making default herein, I bind my self to forfeit to the Ethiopian government the sum of Eth. Dollars.....

Dated this.....day of.....

Signature

2.4 Pleadings

When a lawsuit is begun, it is important for the court and the litigants- the competing parties – to identify the issues undisputed. If the issues are unclear, the plaintiff will be unable to prepare for trial, the defendant will be unable to prepare a defense, and the court will be unable to evaluate the competing positions. The problem is solved by the filing of pleadings are formal document filed with the court that establish the claims and defenses of the parties to the law suit. The type and components of pleadings are exhaustively discussed under unit-five.

2.5 Briefs

A brief is a formal written argument presented to the court, usually countered by a brief written by opposing party. A brief filed with the trial court is called a trial brief, if filed with appellate court it is called an appellate brief. (See page 47).

Chapter Three

Predictive Writing

Introduction

By coming to a lawyer, people wish to know under what circumstances they can win a case or how far they will run risk of defeat by opponents. Largely, the job of lawyers is to predict how courts would decide a case. Most popularly, this kind of job is known as prediction. Except in limited instances, lawyers make prediction in writing. As such, the form of legal writing that critically expresses how a certain matter could be resolved or how a judge decides a case is known as predictive writing. Many law schools require students to practice writing such as a memorandum that predicts an outcome for a client whether positive or negative. In this chapter you will learn how to write predictive writing.

Specific Objectives

At the end of this chapter, you will be able to:

- Understand the character of predictive writing;
- Acquire specific skills of predictive writing; and
- State the features and significance of predictive writing.

3.1 Predictive Analysis

The legal memorandum is the most common type of predictive legal analysis, but this type may also include the client letter or legal opinion. The legal memorandum predicts the outcome of a legal question by analyzing the authorities that govern the question and the relevant facts related to the rise of the legal question. The memorandum explains and applies the authorities so as to predict an outcome, and it ends with offers of advice or with recommendations. To be effective in this form of writing, the lawyer must be sensitive to the needs, level of interest and background of the parties to whom it is addressed. For example, a memorandum to a colleague in

the same occupation that deals with definitions of basic legal concepts would be inefficient and an annoyance. In contrast, their absence from a letter to a client with no legal background could serve to confuse and complicate a simple situation. The legal memorandum also serves as a record of the research undertaken on a given legal question.

3.2 Paradigm of Predictive Writing

By tradition and to meet the expectations of typical legal readers, predictive writing is organized and written in a fairly formal way. The most suitable and common paradigm of predictive writing is referred to as the IRAC rule. Simply put, IRAC stands for the following detail:

- I. identification of issues,
- R. describing the rule
- A. analysis of facts
- C. describing the conclusion

Predictive legal writing uses IRAC structure because it is a logical way to explain and justify Prediction. Because of this, lawyers have come to expect that structure when they read an office memorandum of law. If the document deviates from that structure for no apparent reason, it will confuse the reader and force him or her to work harder to understand what you have written. This means that you may lose your audience and that your reader may not trust the document as much as he or she would have if you had followed the expected structure.

3.1.1 Issue: Identifying the problem to be solved

a) Identification of the issue

The **issue** is the question that you should address by identifying the parties and their relationship to each other, as well as the precise legal issue involved. It is the first sentence in your IRAC that introduces the question you are about to discuss and draw the reader's attention to the legally determinative facts that are relevant to that issue. The legally determinative facts are those that are key and on which you rely in your analysis.

The nature of the issue varies depending on whether your analysis involves a pure legal question, or the application of a legal rule to specific facts. A purely legal question examines the scope or interpretation of a law or legal principle irrespective of the facts under the case. Such issue usually takes the following forms:

Whether our property law allows private ownership of immovable property
Does the regulation, statute, or rule violate the constitution?

On the other hand a fact based question examines how a law or legal principle {a constitutional provision, statute, or rule} applies to particular facts. For example: whether the nonpartisan principle is violated by the presence of the army general in party meeting. The advantage of this format is that it helps readers to focus on the relevant issues instead of taking more time looking to the list of facts.

Formulate any issues based on the above format

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Explain the meaning of issue in your own words.

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b) Identification of the issue in the form of a conclusion

Instead of merely identifying the point under discussion, you can instead draft the topic sentence in the form of your conclusion on the issue. This option may, in fact, be more helpful to your reader. The following are examples of topic sentences identifying the issue under analysis in the form of a conclusion:

A dog owner is not responsible to a person bitten by the dog on the owner’s property if the owner posts an easily readable sign warning “dangerous dog”.

The defendant purposefully lay across a railroad tracks in front of an oncoming train and remained there until he was struck by the train and his legs amputated.

Note that, even in the form of a conclusion, the topic sentence still clearly alerts the reader to the issue under discussion and advances the facts relevant to the determination of that issue.

Restate the above example in to a question form

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3.1.2 RULE

Next to identifying the issues, you must discuss the law that defines or governs the issue. A complete discussion of the rule requires a statement of the rule of law on the particular issue under discussion. The statement of the rule governing the issue places the rest of the analysis in context for the reader. You will rely on this statement of the rule to reach your conclusion.

Rules have different characters: prohibitive, mandatory, and discretionary. Prohibitive rules prevent some one from doing certain acts. For example, driving with out a license is not allowed. On the other hand, mandatory rules impose obligation to do or perform certain acts {you must pay taxes out of your income}. And discretionary rule provides the right to act, or follow or adopt something free of any imposition or legal obligation. The right to elect or to be elected is typical examples of discretionary rules.

a) Organizing the application of a rule

Effective application of a rule requires thorough analysis of the elements of the rule. However, quite often, students overlook the significance of adequate clarity about the elements of a rule. Hence, they are usually prone to make mistake in applying the rule. See the following example:

Birhan and Ruth are students who have rented apartments on the same floor of the same building. At midnight, Birhan is studying, while Ruth is listening to a Radio head album with her new four-foot speakers. Birhan has put up with this for two or three hours, and finally she pounds on Ruth's door. Ruth opens the door about six inches, and, when she realizes that she cannot hear what Birhan is saying, she steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Birhan pushes the door completely open and strides into the room. Ruth turns on Birhan and orders her to leave. Birhan finds this to be too much and punches Ruth so hard that she suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Birhan also guilty of burglary?

You probably say "no," and your reasoning probably goes something like this: "That's not burglary. Burglary happens when somebody gets into the house when you're not around and steals all the valuables. Maybe this will turn out to be some kind of trespass." But in law school a satisfactory answer is never merely "yes" or "no." An answer necessarily includes a sound reason, and, regardless of whether Birhane is guilty of burglary, this answer is wrong because the reasoning is wrong. The answer can be determined only by applying a rule like the definition of burglary found above. Anything else is a guess.

Where do you start? Remember that a rule is a structured idea: the presence of all the elements causes the result and the absence of any of them cause's the rule not to operate. Assume that burglary constitutes the following elements:

1. a breaking
2. and an entry
3. of the dwelling
4. of another
5. in the nighttime
6. with intent to commit a felony therein.

To discover whether each element is present in the facts, simply annotate the list:

a breaking: If a breaking can be the enlarging of an opening between the door and the jam without permission, and if Ruth's actions do not imply permission, there was a breaking and an entry: Birhan "entered," for the purposes of the rule on burglary, by walking into the room, unless Ruth's actions implied permission to enter of the dwelling: Ruth's apartment is a dwelling of another. And it is not Birhan's dwelling: she lives down the hall.

In the night time: Midnight is in the nighttime.

with intent to commit a felony therein: Did Birhane intent to assault Ruth when she strode through the door? If not, this element is missing.

Now it is clear how much the first answer ("it doesn't sound like burglary") was a guess. By examining each element separately, you find that elements 3, 4, and 5 are present, but that you are not sure about the others without some hard thinking about the facts on 1, 2, and 6.

Suppose that, although the above rule defines Birhan's actions as a breaking and an entry, on the sixth element it strictly requires corroborative evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had confided to another that he intended to murder the occupant. Against that background, the answer here might be something like the following: "Birhan is not guilty of burglary because, although she broke and entered the dwelling of another in the nighttime, there is no evidence that she had a felonious intent when entering the dwelling."

Suppose, on the other hand, that under the same rule Birhan's actions again are a breaking and an entry; that the rule or a subsidiary rule do not require corroborative evidence of a felonious intent; and that such rule defines a felonious intent for the purposes of burglary to be one that the defendant could have been forming-even if not yet consciously -when Entering the dwelling. Under those sub-rules, if you believe that Birhan had the requisite felonious intent, your answer would be something like this: "Birhan is guilty of burglary because she broke and entered the

dwelling of another in the nighttime with intent to commit a felony therein, thus meeting all the elements of burglary." These are real answers to the question of whether Birhan is guilty of burglary: they state not only the result, but also the reason why.

Discuss the importance of breaking the elements of a rule.

b) Some advices in applying rules

Rules must be expressed in terms of categories of actions, things, conditions, and people and you have already had a taste of how slippery those kinds of definitions can be. Some of the slipperiness is there because precision takes constant effort, like weeding a garden. But some of it is there to give law the flexibility needed for sound decision-making. The language "in which law is necessarily expressed ... is not an instrument of mathematical precision but possesses ... an "open texture"(a term that is susceptible of multiple interpretation). That is because a rule's quality is measured not by its logical elegance-few rules of law have that-but by how well the rule guides a court into making sound decisions. A rule that causes poor decisions begs to be changed.

In addition, a given rule might be expressed in any of a number of ways. Different judges, writing in varying circumstances, may enunciate what seems like the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have spoken of the same rule in different voices or instead have spoken of slightly different rules. In either situation, it can be harder still to discover -because of the variety-exactly what the rule is or what the rules are. All this may at first seem bewildering, but in fact it opens up one of the most fertile opportunities for a lawyer's creativity because in litigation each side is free to argue a favorable interpretation of the mosaic of rule statements found in the law, and courts are free to mutate the law through their own interpretation of the same mosaic.

And even where the rule is expressed in one voice, ambiguity and vagueness can obscure intended meaning unless the person stating the rule is particularly careful in using and defining language. The classic example asks whether a person riding a bicycle through a park violates a rule prohibiting the use there of "vehicles." What had the rule-maker intended? How could the intention have been made clearer?

Even where the rule-maker is careful with language, the structure of a rule does not always easily accommodate an expression of the rule's purpose -or, as lawyers say, the Policy underlying the rule. But the rule's policy or purpose is the key to unraveling ambiguities within the rule. Is a self-propelled lawn mower a prohibited "vehicle"? To answer that question, try to imagine the problem the rule-makers were trying to solve. Why did they create this rule? What harm were they trying to prevent, or what good were they trying to promote?

Not only it is difficult to frame a rule so that it controls the entire rule maker wishes to control, but also once a rule has been framed, situations will inevitably crop up that the rule-maker did not contemplate or could not have been expected to contemplate. Is a baby carriage powered by solar batteries a "vehicle"?

Finally, the parts of a rule may be so many and their interrelationships so complex that it may be hard to pin down exactly what the rule is and how it works. And this is compounded by interaction between and among rules. A word or phrase in a rule may be defined, for example, by another rule. Or the application of one rule may be governed by yet another rule or even a whole body of rules.

More than any others, two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an "ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word ... and to analyze and elucidate class words and abstractions." The second is the capacity to think structurally. A rule is, after all, an idea with structure to it, and, even though the words inside a rule might lack mathematical precision, the rule's structure is more like an algebraic formula than a value judgment. You need to be able to figure out the structure of an idea, break it down into sub-ideas, organize the sub-ideas usefully and accurately, and apply the organized idea to facts.

Describe the lessons that you acquired from the above advice

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3.1.3 Analysis of Facts

The process of application of rule starts with analysis of facts. Analysis of fact helps you to distinguish the determinative facts from the irrelevant facts. It is a skill which requires extensive exercise. This section is designed to introduce with the useful techniques of fact analysis. Hence, dear student you are advised to substantiate your skill by studying cases.

a) What Is a Fact?

Consider the following statements:

1. *The plaintiff's complaint alleges* that, at a certain time and place, the defendant struck the plaintiff from behind with a stick.
2. At trial, *the plaintiff's principal witness testified* that, at the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick.
3. At the conclusion of the trial, *the jury found* that, at the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick.
4. At the time and place specified in the complaint, *the defendant struck* the plaintiff from behind with a stick.
5. At the time and place specified in the complaint, the defendant *brutally* struck the plaintiff from behind with a stick.
6. At the time and place specified in the complaint, the defendant *accidentally* struck the plaintiff from behind with a stick.
7. At the time and place specified in the complaint, the defendant *committed a battery* on the plaintiff.

Which of these statements express a fact?

Number 7 plainly does not: it states a conclusion of law because battery is a concept defined by the law, and you can discover whether a battery occurred only by consulting one or more rules of law. Numbers 5 and 6, however, are a little harder to sort out.

Statement 6 includes the word accidentally. The defendant might have wanted to cause violence, or he might have struck the plaintiff only inadvertently and without any desire to do harm. With both possibilities, an observer might see pretty much the same actions: the stick being raised, the stick being lowered, the collision with the back. There might be small but perceptible differences between the two- defendant's facial expression, for example, the words spoken immediately before and after the incident. But, even those differences might not occur. A cunning defendant intent on harm, for example, can pretend to act inadvertently. The difference between the two possibilities is in what the defendant might have been thinking or feeling when he struck the plaintiff. If we say that the defendant struck the plaintiff "accidentally," we have inferred what the defendant was thinking at the time. That is a factual inference. (It would be a conclusion of law if it were framed in terms that the law defines, such as "intention to cause a contact with another person.") An inference of fact is not a fact: it is a conclusion derived from facts.

Statement 5 contains the word brutally, which is a value-based and subjective characterization. If one is shocked by the idea of a stick colliding with a human being- regardless of the speed and force involved-even a gentle tap with a stick might be characterized as brutal. (Conversely, an observer who is indifferent to suffering and violence might call repeated lacerations with a stick "playful.") And a friend of the plaintiff or an enemy of the defendant might construe whatever happened as "brutal," while an enemy of the plaintiff or a friend of the defendant might do the reverse.

Assuming the term brutally is deleted from the statement, would your analysis be different from the above,

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Assuming that we have not seen the incident ourselves, we should wonder whether the word brutally accurately summarizes what happened, or whether it instead reflects the value judgments and preferences of the person who has characterized the incident as brutal. A characterization is not a fact; it is only an opinion about a fact.

We are left with statements 1 through 4. Do any of them recite a fact? There are two ways of answering that question. Although the two might at first seem to contradict each other, they are actually consistent, and both answers are accurate, although in different ways.

One answer is that statements 1, 2, and 3 are layers surrounding a fact recited in statement number 4: number 1 is an allegation of a fact; number 2 is evidence offered in proof of the allegation; number 3 is a conclusion that the evidence proves the allegation; and number 4 is the fact itself. This is an answer that might be reached by a perceptive lay person who has noticed what you now know to be a sequence inherent to litigation: the party seeking a remedy first alleges, in a pleading, a collection of facts that, if proven, would merit a remedy, and that party later at trial submits evidence to persuade the finder of fact that the allegations are proven. Notice that this first answer is built on the ideas that a "fact" is part of an objective, discoverable truth and that the purpose of litigation is to find that truth.

The other answer is that numbers 1 through 4 all recite facts, the first three being procedural events, This answer is derived from the requirement, inherent to litigation, that the decisions of the finder of fact be based not on an objective "truth" that occurred out of court, but instead on whether in court a party has carried her or his burdens to make certain allegations and to submit a certain quantum of evidence in support of those allegations. Because it is not omniscient, a court cannot decide on the basis of what is "true." In a procedural sense, litigation is less a search for

truth than it is a test of whether each party has carried burdens of pleading, production, and persuasion that the law assigns to one party or another.' Because of the adversary system, the court is not permitted to investigate the controversy: it can do no more than passively weigh what is submitted to it, using as benchmarks the burdens set out in the law. Thus, if a party does not allege and prove a fact essential to that party's case, the court must decide that the fact does not exist. And this is so even if the fact does exist. That is why experienced lawyers tend to be more confident of their abilities to prove and disprove allegations than they are of their abilities to know the "real" truth about what happened between the parties before litigation began.

Both answers are correct, but their value to you will change as time goes on. Right now, the first answer gives you a model of how facts are processed in litigation. But soon the second answer will become increasingly important. That is because, as you learn layering, you will have to learn the ways in which the law compels lawyers to focus on whether a party can carry or has carried a burden of pleading, production, or persuasion.

b) The nonexistence of a fact can itself be a fact.

For example, consider the following:

8. The plaintiff's complaint does not allege that the defendant struck the plaintiff with a malicious intent to cause injury.

Here, if malicious intent is required, failure to allege it may affect the claim of the defendant to recover damage. Accordingly the absence of an allegation would constitute itself a fact.

9. At trial, no witness has testified that the plaintiff suffered any physical or psychological injury or even any indignity.

Now the absence of certain evidence is itself a fact. Consequently, the claim of the plaintiff may be defeated.

You might by now have begun to realize that facts are not as simple as they at first seem. Facts have subtleties that can entangle you if you are not careful. Beginners tend to have difficulties with four fact skills: (1) separating facts from other things; (2) separating Determinative facts from other kinds of facts; (3) building inferences from facts; and (4) purging analysis of hidden and unsupported factual assumptions. When you have mastered these skills, you will be able to make reasoned decisions about selecting and using facts.

c) Identifying Determinative Facts

Facts can be divided into three categories. The first category is made up of facts that are essential to a controversy because they will determine the court's decision: if a change in a fact would have caused the court to come to a different decision, that fact is determinative. The second is a category of explanatory facts that, while not determinative, are nevertheless useful because they help make sense out of a situation that would otherwise seem disjointed. The third category includes coincidental facts that have no relevance or usefulness at all: they merely happened. Part of life's charm is that all three categories of facts-the relevant and the irrelevant- occur mixed up together in a disorderly mess. But lawyers have to separate out the determinative facts and treat them as determinative.

You have already started learning how to do that in this and other courses, mostly through the analysis of precedent. When, for example, you are asked to formulate the rule of a case, you have begun to develop the habit of isolating the facts the court considered determinative and then reformulating those facts into a list of generalities that-when they occur together again in the future-will produce the same result that happened in the reported opinion. But when you look at a given litigation through the lens of an opinion, you are looking at it after a court has already decided which facts are determinative: you are explicating the text of the opinion to learn what the court thought about the facts. We are concerned here with another skill: looking at the facts at the beginning of the case, before they are even put to a court, and predicting which the court will consider determinative.

Now recall the case: *Berhan V Ruth*

Birhan and Ruth are students who have rented apartments on the same floor of the same building. At midnight, Birhan is studying, while Ruth is listening to a Radio head album with her new four-foot speakers. Birhan has put up with this for two or three hours, and finally she pounds on Ruth's door. Ruth opens the door about six inches, and, when he realizes that he cannot hear what Birhan is saying, she steps back into the room a few feet to turn the volume down, leaving the door open about six inches. Continuing to express outrage, Birhan pushes the door completely open and strides into the room. Ruth turns on Birhan and orders her to leave. Birhan finds this to be too much and punches Ruth so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Birhan also guilty of burglary?

You already know that burglary is the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein. Whichever way a court rules, the size of the opening between Ruth's door and the door frame is going to be one of the determinative facts because the size of the opening helps to determine whether, at the moment Birhan walked in, Ruth's dwelling was surrounded by the kind of enclosure that can be broken. Depending on one's theory, Ruth's activities before Birhan knocked on the door could be either explanatory or determinative: they help make sense out of the situation, but they also help explain Birhan's actions and intent, which go to other elements of the test for burglary. But you have not been told that Ruth only recently got into hard rock and that previously he had been a devotee of country music; those facts are omitted because they are purely coincidental and do not help you understand the issues.

3.1.4 CONCLUSION

After your application, you should state (or restate, if you have already stated it in your topic sentence) your conclusion on the issue. This lets the reader know you have come to the end of the analysis of an issue and summarizes your prediction. Be sure to draw a conclusion only as to the issue under discussion, not as to the broader question (of which the issue is only a part).

Formulate a conclusion from the Birhane and Ruth case

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Self check questions

1. Discuss the characteristics and significance of predictive writing.
2. Ato Z, who had lived in a kebele house for 20 years, is requested to evacuate by clearing his property within a month's time. But, he objected the request of the kebele stating that he does not have an abode other than the kebele house. He argued that leaving the house would mean taking his family to the street. He further mentioned that the silence of the kebele authority over the last 20 years has made him not to worry about evacuation. On the other hand, the kebele authority asserted that it has the power to use its property like any other owners of immovable. Based on this hypothetical case, state the facts, issues, and the appropriate law in the IRAC form.

CHAPTER 4

PERSUASIVE WRITING

Introduction:

In the previous unit, you learned the concept of predictive writing, and how it is used. You also learned the basic paradigm of legal writing, i.e., the IRAC structure. In this Unit, we will extend the basic paradigm to the concept of persuasive writing. We will explore the distinctions between persuasive writing and predictive writing, and the various considerations for creating an effective persuasive argument. Then, persuasive writing will be viewed in the specific context of the brief in support of a motion. Finally, as in the previous unit, you will undergo a revision exercise.

Objectives:

By the end of this unit, students will be able to:

- Identify the differences between persuasive and predictive legal writing;
- Know and utilize various techniques for writing strong persuasive arguments;
- Extend the basic legal writing paradigm to persuasive writing;
- Draft briefs in support of a motion; and
- Revise arguments for persuasion.

Section 1: Developing Persuasive Arguments

1.1 Technical Stylistic Strategies

Persuasion in general is an attempt to shape another's attitude about a particular matter. In the legal context, it is the attempt to shape another's attitude about a legal position. Whereas predictive writing involves an objective assessment of the law as it applies to a particular set of facts, persuasion in legal writing involves a balance between fervent advocacy and predictive legal analysis. Strong persuasive writing, therefore, avoids language that too strongly promotes

one's position because it could create a loss of credibility; on the other hand, straight-forward objectivity itself would violate an attorney's obligation of advocating on behalf of his or her client. Therefore, the optimal balance between these two focuses on subtlety and moderation, rather than falling too far to either extreme.

Many techniques may help you to strike such a balance. The discussion below on word choice, active verbs, conclusive and affirmative statements, parallelism and de-emphasis of negative information will help you improve the persuasive strength of your written argument.

1.1.1 Know Your Purpose and Your Audience

Effective persuasion first requires knowledge of your purpose and your audience. Again, your purpose is to persuade. Thus, you should always represent facts and arguments in a light most favorable to your client - even if they are objectively unfavorable to your client.

Your audience will usually be a judge. If you know which judge you are writing for, you should take the time to gather as much information about that judge and how he or she has ruled in the past on similar cases. If not, you should present your argument that will work as much as possible for most judges. It is also important to bear in mind that judges have extremely limited time with which to read your brief. Thus, you should also be concise, avoid repetition, and keep your writing impeccably organized. Judges also must apply the applicable law. Thus, they need to know what the law is, rather than what you think it should be.

1.1.2 Word Choice

Words have both explicit and implicit meanings. Oftentimes, two or more words have the same explicit meaning, but may convey quite different connotations. Effective advocacy requires the writer to be cognizant of these subtleties. Complete the following exercises:

Exercise 1: Conveying connotations through word choice

Read the sentence pairs that follow, and consider the following questions:

Which sentence is more favorable and to which party? What types of words (verbs, adverbs, nouns, or adjectives) are changed to convey a different tone?

First Group

The defendant shouted viciously at the alleged victim, “I will hurt you.”

The defendant stated to the alleged victim, “I will hurt you.”

Second Group

The police officer requested that the defendant open the trunk of her car.

The police officer demanded that the defendant open the trunk of her car.

Third Group (in a breach of contract action):

The attorney signed the contract.

The attorney signed the paper.

Fourth Group:

Sharp rocks in hand, the plaintiff charged the defendant.

Pebbles in hand, the plaintiff approached the defendant.

Exercise 2: Rewriting for a stronger message

Rewrite the following sentences to convey a stronger message, and answer the questions that follow:

Sentence 1: The victim remembers seeing the defendant outside the convenience store on the night of the robbery. (Advocate for the defendant in a robbery case.)

Sentence 2: The police officers looked through the defendant’s room. (Advocate for the defendant in a drug possession case.)

Sentence 3: The lawyer seemed to agree to the representation. (Advocate for the plaintiff in a breach of agency suit.)

In your answers above, what type of words did you change (nouns, verbs, adjectives, or adverbs)?

1.1.2.1 Subtlety

The above exercises bring us to the important persuasive technique of subtlety. Subtlety, in persuasion, is the art of masking your strategy to a certain extent, while still guiding your reader in the direction you desire. If your strategy is too obvious, your reader may resist it, or your writing may lose credibility. Also, it is usually more persuasive to allow your reader to believe he or she reached a proper conclusion on his or her own, rather than the conclusion being dictated to him or her.

Consider the following example. Which statement loses some of its persuasive influence because it is too extravagant?

1. The government wiretapped the Defendant's home telephone, or
2. The government wiretapped one of the Defendant's most personal possessions - a possession he uses to discuss his private yearnings and dreams - his home telephone.

Consider your responses to Exercise 2 above. Do you think they are subtle, or do they give away too much of your strategy?

1.1.3 Active versus Passive Verbs

Paying attention to your use of active or passive verbs can play an important role in persuasion. Please recall from your previous English language courses, and writing courses, the different sentence structures of the active and passive verbs:

- **Active verb sentence structure:** Actor/Subject → Action Verb → Object.
For example, "The defendant *kicked* the complainant."
- **Passive verb sentence structure:** Object → Passive Verb → Actor/Subject.
For example, "The complainant *was kicked* by the defendant."

From a strategic point of view, using the active verb sentence structure tends to connect the actor to the action; using the passive verb sentence structure tends to distance the actor from the action. Therefore, in the above example, an advocate for the complainant would want to use the active verb sentence structure, in order to link the defendant to the action of kicking the complainant. On the other hand, an advocate for the defendant would want to use the passive verb sentence structure, in order to separate the defendant from the action of kicking the complainant. Look again at the examples and notice how both sentences convey the exact same information, but the tone is different for each.

Exercise 3: Using active and passive verbs advantageously

Which of the following sentences favors the complainant in a civil suit? Which favors the defendant?

First Group

“The defendant robbed the bank.”

-or-

“The bank was robbed by the defendant.”

Second Group

“The new evidence was not disclosed to the defendant before the trial, due to an oversight by the prosecutor’s office. After our office discovered its mistake, we produced the evidence to the defendant’s attorney.”

-or-

“The defendant did not receive the new evidence before the trial, due to an oversight by the prosecutor’s office. After their office discovered their mistake, the evidence was produced to the defendant’s attorney.”

Exercise 4: Rewriting using active or passive verb tenses

Rewrite the following sentences as instructed, using the techniques discussed above:

Sentence 1: The death of the victim allegedly resulted from repeated blows to the head by the defendant. *Rewrite as though you were advocating against the defendant.*

Sentence 2: The defendant allegedly smashed her car into the pedestrian, causing permanent damage to the victim. *Rewrite as though you were advocating for the defendant.*

1.1.4 Conclusive versus Opinion Statements

In general, a conclusive statement, as opposed to an opinion statement, is more forceful, and therefore leads to stronger advocacy. Also, conclusive statements may be effective as thesis or topic sentences. Complete the following exercises, keeping in these issues in mind.

Exercise 5: Writing using conclusive statements

Rewrite the following sentences using a stronger, conclusive statement.

Sentence 1: It is my belief that the defendant is guilty.

Sentence 2: It is our lawyer's contention that a valid meeting of the minds occurred.

Sentence 3: In my opinion, the defendant must have been at the scene of the crime.

1.1.5 Affirmative versus Negative Statements

An affirmative statement of your position is one that states clearly the position you have, and the reasons why your position is correct. A negative statement is one that only denies the correctness of your opponent's position. Consider the following illustration. Which of the two statements is affirmative, and which is negative?

- 1) My opponent's reading of the First Amendment is inconsistent with past Supreme Court precedent, because the statements my client made were 'political speech.'
- 2) The statements my client made were political speech, and therefore, due to past Supreme Court precedent, deserve stronger protection under the First Amendment.

Writing persuasively should involve an affirmation of your position, rather than simple denial of your opponent's position. Merely denying your opponent's position will make you appear defensive. Appearing defensive sends the signal that you do not have complete confidence in the merits of your legal position.

Furthermore, denying your opponent's position rather than stating positively your own position will lock you into your opponent's strategic framework. You should prefer that an adjudicator views laws and facts from within a framework favorable to your client.

Of course, there are circumstances where it is appropriate to deny your opponent's legal position, such as when you must directly respond to your opponent's argument. However, stating arguments positively can still have a specific place in persuasive technique when it comes time to directly rebutting an opponent's argument. For example, when it is necessary to respond directly to an opponent's argument, it may still be appropriate to begin by trying to convince the adjudicator that your position is correct, *before* addressing your opponent's argument. That will make your direct rebuttal even stronger, because you have already implicitly attacked your opponent's position.

Exercise 6: Affirmative statements in context

To further illustrate the importance of proper utilization of affirmative statements, consider the following example¹:

“In the following example, an advocate for the defendant, Mr. Tadesse, seeks to suppress wiretap evidence the government obtained from Mr. Tadesse's telephone. The wiretap statute requires that, in order for the evidence to be admissible in court, the government must either obtain an “immediate” judicial seal safeguarding the evidence, or provide a “satisfactory explanation” for its failure to do so. The government did not immediately secure the integrity of the wiretap evidence by obtaining a judge's seal. Mr. Tadesse's attorney seeks to convince the court that the government also failed to provide the required alternative - a “satisfactory explanation.” Compare the persuasive appeal of the following two examples of Tadesse's argument.

“(1) The government incorrectly contends that the wiretap tapes are admissible as evidence during trial. The federal wiretap statute requires that the government either obtain the protection of an “immediate” judicial seal to safeguard the integrity of wiretap evidence, or provide a “satisfactory explanation” for its delay. The government argues

¹ Taken from Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* (2nd edit. Matthew Bender & Company 2006) pages 317-318.

that, even though it did not obtain an immediate judicial seal, it had a “satisfactory explanation” because it did not know the tapes were not sealed. The government points out that, as soon as it discovered its mistake, it obtained a judicial seal. However, the government’s argument should be rejected. Although the government was unaware the tapes were not immediately sealed, it stored the tapes in an open box and misplaced them for over two months. Thus, its explanation was not “satisfactory.”

“(2) The wiretap tapes the government obtained from taping Mr. Hart’s home telephone are not admissible at trial. The evidence is inadmissible because the government failed to comply with the requirements of the federal wiretap statute. The wiretap statute requires the government to safeguard the integrity of wiretap tapes by obtaining an “immediate” judicial seal, or by providing a “satisfactory explanation” for its failure to do so. By waiting for over two months, the government failed “immediately” to obtain the protection of a judicial seal. The government also failed to provide a “satisfactory explanation” for its failure to do so. Instead, the government lost this sensitive evidence as it allegedly sat exposed in an open box in a busy, unlocked storage room for over two months. By failing either to store the tapes in a manner that affords the same level of protection as an immediate judicial seal, or to act with reasonable diligence, the government failed to offer a “satisfactory explanation” for its lengthy delay.

Which represents stronger advocacy on behalf of the defendant? Where does the writer state the thesis?

Exercise 7: Re-writing using affirmative statements

Re-write the following passages to change them from an objective statement about the law, to one that supports a hypothetical client/defendant (keeping in mind what you have learned above).

- a) In a case involving burglary, the prosecution must establish, beyond reasonable doubt, that the defendant entered a dwelling at night with the intent to commit a felony.
- b) Statements made to the police by an arrested suspect after invoking the right to be provided an attorney by the state are not admissible, unless the client clearly, unequivocally, and intentionally waives his or her right.

1.1.6 Parallelism & Juxtaposition

Juxtaposition is a technique that points out two conflicting or inconsistent statements or theories.

This technique is used to discredit your opponent's legal strategy or factual construction.

Recall the discussion in section 1.1.1 above concerning the art of subtlety. Again, it is often a stronger persuasive tactic to suggest to a reader or adjudicator that one position is inconsistent, and allow him or her to come to the conclusion on his or her own.

Consider the following illustration. Which one has more persuasive appeal?

- (1) The police officer testified that he had not used handcuffs to apprehend the suspect. However, this is clearly a falsehood because when the suspect reached the police station, another officer had to unlock the handcuffs.
- (2) Even though the police officer testified that he did not handcuff the suspect, the other officer testified that when he gained custody of the suspect, he was still in handcuffs. The prosecution has failed to explain this discrepancy.

1.1.7 De-emphasis of Negative Information

Quite often, lawyers must address information that hurts their client's position, such as when the lawyer has an ethical responsibility to disclose a certain point of law or a fact. This is called 'negative information'. It is important to understand how to deal with negative information effectively, by de-emphasizing their impact on your position.

The following words and word phrases are commonly used for this purpose:

- *However...*
- *Even though...*
- *Despite the fact...*
- *Regardless...*
- *Notwithstanding...*
- *Still...*

Consider the following examples, and pay close attention to the overall tone of each. Which statements sound more damaging to a criminal defendant?

- (1) The defendant was at the scene of the crime that day.

-or-

Even though the defendant was at the scene of the crime, she was working and did not have the time to commit the violation.

(2) The defendant took the car even though it was not his.

-or-

Regardless of the fact that the car was not the defendant's, he took the car in an emergency situation.

1.2 Pre-drafting Strategies

Before writing your first draft, it is important to keep in mind certain pre-drafting strategies that you can use to help keep your organization sound, and your argument clear and persuasive. The following discusses issues you should pay attention to before you begin to write your trial brief, etc.

1.2.1 Elements

One of the very first things you should do before writing a draft of an argument is to make sure that you have a thorough understanding of the elements of the law you are dealing with. Legal elements were discussed in Unit 2. Breaking a statute down into its elements will help you better understand the law. Also, the elements of a statute will eventually form many of the sub-issues of the outline of your argument.

1.2.2 The Facts

Before drafting your persuasive argument, you should have a thorough understanding of the facts you are dealing with. If you are given a set of facts, you should first take the time to read and re-read them as many times as possible. Oftentimes, new facts will emerge each time you read through them.

You should also make a note of which facts are favorable to your client, and why. Likewise, you should begin thinking about which facts are unfavorable to your client, and how you will deal with them.

1.2.3 The ‘Devil’s Advocate’

You should also try to get an idea of how your opponent will argue the case. Using the unfavorable facts you identified above, construct a rough argument of how you would, hypothetically, argue the case from your opponent’s viewpoint. This will allow you to make a more precise argument by addressing counterarguments before they arise. It will also better prepare you for oral argument.

Many law firms assign an attorney to play the role of devil’s advocate. The devil’s advocate’s job is to challenge all aspects of your legal position, as strongly as possible. In **your** writing, you may wish to consider having a classmate or attorney scrutinize your work so that you may better understand the weaknesses of your argument.

Section 2: Persuasive Writing in Context: The Legal Brief

2.1 Preliminary Considerations

The Legal Brief is one of the strongest tools in an advocate’s arsenal when persuading a judge of your position, whether it is to permit or deny a motion, suppress evidence, grant an appeal, etc. The brief is much more than a formality, as it is one of the official records of your request to the court.

In addition, your legal brief will form the foundation of your oral argument. Very rarely will your oral argument persuade a judge if your brief is not strong. However, writing a strong legal brief is quite difficult, and mastering the art takes a great deal of practice. But if you focus on solid writing principles and learn to control your writing, you will become a stronger advocate.

Three preliminary considerations of legal brief writing deserve mention: when writing a brief, it is important to pay particular attention to the purpose of the legal brief, your audience, and to the jurisdiction's conventions. You also need to develop your 'theory of the case.'

2.1.1 The Purpose of the Legal Brief

First, recall the purpose of the legal brief. The legal brief serves two primary functions: an education function and persuasion function. A brief should educate the judge about the pertinent law by explaining what laws are relevant to the legal issue, and how they should be interpreted. Remember, you must explain what the law is, rather than what you think the law should be. The brief then persuades by establishing your theory of case and how that fits within the framework of applicable law. It then establishes the merits of that theory, and it undermines your opponent's theories.

2.1.2 Knowing Your Audience

Before applying what you have learned above in context, it is important to recall the characteristics of your reader. Your reader will most likely be a judge, who is both a professional legal expert and a human being.

As a professional legal expert, judges will appreciate documents that are accurate, relevant and credible. The role of the judge is to make clear, logical decisions. Therefore, judges will be more willing to rule in your favor when your writing represents thoroughness and clear logic. Judges' decisions are also scrutinized by appeals courts, and usually they will want their decisions to be upheld against that scrutiny.² You should avoid using lecturing or patronizing tone.

A judge's time is usually quite limited. Therefore, it is important that you state your positions as clearly and concisely as possible, lest you lose the judge's attention, or give him or her the

² **RAY PAGE 168**

feeling that you are wasting their time. Oftentimes the best written arguments are short and to the point. Avoid verbose sentences and paragraphs. Also avoid legalese and obscure Latin phrases. Remember, you are advocating rather than writing eloquent prose.

Also, you may find yourself in a situation where you have practiced in front of a particular judge before, or know the judge's reputation and style. Try to collect as much information about the judge as possible, and use that information to your advantage. For example, you may know that the judge is generally favorable to plaintiffs in workers compensation cases, or that he or she is liberal when it comes to hearsay exceptions. This type of information may be quite valuable, and could afford your client an additional advantage.

However, as much as a judge is responsibility for objectively applying the law to a given situation, he or she will also respond to human emotion. After all, "the life of the law has not been logic, but experience."³ Therefore, conclusions you draw through your writing should be logical and accurate, but also should appeal to a sense of justice and fairness. This may give you the extra edge in convincing a judge to rule in your favor.

2.1.3 Developing Your Theory of the Case

Effective attorneys do not just apply the law to the facts. They use the facts and the law to tell a story. This is called the 'theory of the case.' It is your client's side of the story, the one which you are trying to convince the judge is the appropriate one to believe. A good theory of the case puts together a story which fits into a legal framework, but also appeals to a sense of justice.

The theory of the case is usually the story through your client's viewpoint. According to your client, what happened that led to the current litigation? Why did your client act in the way he or she did? Why did other people act as they did? etc.

³ HOLMES

A second way to develop a theory of the case is to pay close attention to how the court or judge has ruled in similar cases. Ask yourself, how did the winning party win, and why? Then try liken your client's story to those winning stories.

2.2 Parts of the Legal Brief

The most important thing about writing a brief is to maintain control at all times over what you are writing, in order to ensure that you are writing deliberately. Lack of control is evidence of lack of confidence in your position. The first step in controlled writing is knowing how to organize the different parts of your brief, and more importantly, understanding the purpose of each section. In general, the different sections of a legal brief are:

- the caption,
- the statement of facts,
- the issue statement,
- the arguments, and
- the prayer for relief.

Note that it is rarely appropriate to address the court in handwritten form—you should always print briefs and other documents from a word processor.

2.2.1 The Caption

In general, the caption of a brief gives the parties' names, the name of the court, the title of the document, and the case number. Spacing and centering are jurisdictional conventions. For example, a caption may look as follows:

Ato Hailu Vs National Plc
Federal high court, civil bench
Appellate Jurisdiction
Case No.540 April 2, 2000

2.2.2 The Statement of Facts

Like its name implies, the statement of facts provides the reader with the necessary factual elements of the case that will later be analyzed in light of relevant law. Most of the time, particularly at the trial level, it is the facts that decide cases rather than the law—thus the importance of the statement of facts cannot be overstated. There are many techniques that can be employed in order to write a strong statement of facts, and these must be understood and utilized in your writing.

In general, the statement of facts in a legal brief or memorandum of law contains *background facts* and *legally significant facts*. It is important to note that the statement of facts in a legal brief (which is subjective) differs in purpose from the statement of facts in a memorandum of law (which is objective). In a memorandum of law, the statement of facts provides only the minimum facts needed to make sense of a situation and how it applies to the law. They are presented in an unbiased fashion. However, the statement of facts in a legal brief presents the necessary information in a light that is favorable to your client. In addition to background and legally significant facts, the statement of facts in a legal brief should provide *emotionally significant facts*.

2.2.2.1 Selecting Facts

The first step in writing the statement of facts is to select the facts that you will include. In selecting the facts, it is important to consider the purpose of each category of facts, and any court or ethical rules governing what information must be conveyed.

Background facts provide a story of what happened that gave rise to the litigation. They should work to convey your theory of the case. As with all facts, persuasive techniques should be used in their presentation.

Legally significant facts are any facts that are legally relevant to the case. Usually court and/or ethical rules require advocates to provide all legally significant facts, even if they are

unfavorable to your client's position.⁴ Thus, it is necessary to be accurate in deciding which facts have legal relevance. However, an obligation to provide all relevant facts does not equate to an obligation to present them objectively; you must learn to present relevant facts in a manner that supports your client's theory of the case.

Emotionally significant facts are facts which appeal to human emotions such as sympathy, loathing, a sense of fairness, justice, etc. These types of facts can be quite important, and it takes practice in selecting favorable emotional facts, and selecting if and how to include them with unfavorable emotional facts.

2.2.2.2 Selecting an Organizational Scheme

There are generally two types of organizational structures in presenting the facts: chronological or topical. Usually, facts are presented in chronological order. Remember, the statement of facts generally tells a story that reflects your theory of the case. Thus, it makes sense to tell the story by listing events in chronological order. (Note that it is a strategic decision *at what point in the story* you will begin.)

In a topical organizational structure, the writer organizes facts by topic. For example, if the case involves multiple claims, the writer might present the facts that relate to each claim, with a chronological order within each section.

As stated above, the statement of facts in a persuasive legal brief is an opportunity to gain an advantage over your opponent. Attorneys have many techniques at their disposal when achieving this. Many of the techniques discussed at the beginning of this Unit will help you to write a favorable statement of facts. Namely, you should learn to create a favorable context, and tell the story from your client's point of view.

⁴ **ETHICS RULE ?**

2.2.2.2.1 Creating a favorable context

In creating a favorable context, you should keep in mind the persuasive techniques discussed above. [Recall Section 1, above]. Many times, the exact same fact can be written in different ways. Therefore, advocates should be aware of different contexts they create by expressing facts differently.

For example, assume you are working on a criminal assault and battery case. It is an undeniable fact that the defendant (Mr. Peters), while sitting at a bar with his wife, hit the victim (Mr. Strong) in the head with a beer bottle. This fact must be presented to the court, as it is a legally significant fact. But there are extremely different contexts the expression of this fact, and others could create.

The prosecutor might write the following in its statement of facts:

“On the night of April 25, 2007, Mr. Kebede sat at the Abogida Bar. The defendant, while intoxicated, suddenly rose to his feet and grabbed the first weapon he could find (a half-full beer bottle), and smashed it over the head of the unsuspecting Mr. Kebede, causing serious injuries. Mr. Kebede had to immediately seek emergency medical attention.”

First ask yourself, how does this presentation of the scenario make you feel about the defendant or the victim? What is your sense about the appropriate action to be taken by the judge based only on this presentation?

Now consider the following example of what the defendant might write in his statement of facts:

“On the night of April 25, 2007, Mr. Pawlos enjoyed an evening drink with his wife. He was suddenly grabbed by Mr. Kebede, while Mr. Kebede’s dru Or about the victim friend sat down next to the defendant’s wife and began making lewd threats that he was going to take her away in his truck. At the point, Mr.Pawlos rightfully reached for the first thing that he believed could overtake his assailant,

and struck him with it once. He remained in the bar with security while the proprietor called the police.”

Now ask yourself, how does this presentation of a scenario makes you feel about the defendant or the victim? What is your sense about the appropriate action to be taken by the judge based only on this presentation of the scenario?

It is important to notice that *both* the prosecutor’s and the defendant’s presentations of the facts here may technically be truthful, yet they convey quite a different message to the reader. This simple example can be extended to the entire statement of facts. The ‘story’ that the statement of facts tells in its entirety should create an overall favorable context for your client’s case.

2.2.2.2 Telling the Story from your Client’s Point of view

One simple technique that can be subtle yet strong is to tell the story from your client’s point of view. That usually means controlling which party is the actor in each of the statements. Using the examples above, who is the actor in each of the statements?

2.2.3 The Issue Statement

The issues in a legal brief are those questions that the court must answer in order to reach a conclusion about the case. The statement of the issues is the lens in which the adjudicator will view your case. If you can convince the judge of the proper questions that should be asked, you have a much better chance of receiving more favorable answers. When drafting an issue statement, it is important to pay attention to its format, content, and persuasiveness.

2.2.3.1 The Format of an Issue Statement

In general, the content of the issue statement should include reference to legally significant facts along with reference to the rule of law. This should be taken into consideration when selecting the format of the issue statement. There are basically three different formats for an issue statement: the “under-does-when” format, the “whether” format, and the multi-sentence format.

The “under-does-when” format has the following structure:

“Under [the relevant law], should the court [action] when _____.”

For example:

“UNDER ARTICLE OF THE ETHIOPIAN CONSTITUTION, SHOULD THE COURT GRANT THE DEFENDANT’S MOTION TO SUPPRESS THE EVIDENCE OBTAINED WITHOUT A SEARCH WARRANT WHEN THE POLICE OFFICERS SEIZED AN INCRIMINATING ARTICLE AND WISHES TO USE THEM AS EVIDENCE”

An example of the “whether” format might be written as follows:

“WHETHER THE COURT SHOULD GRANT THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE OBTAINED WITHOUT A SEARCH WARRANT WHEN THE POLICE OFFICERS _____?”

The multi-sentence format tells a brief story of the case (in a sentence of two) and then asks the question of what should be done about those facts.

For example:

“TWO OR THREE SENTENCES ABOUT WHAT THE POLICE DID USING THE SAME EXAMPLES IMMEDIATELY ABOVE. THEN, UNDER THESE CIRCUMSTANCES, SHOULD THE COURT...”

You should select the format that you feel best presents the legal questions in a manner favorable to your client. Note that you should usually use the same format throughout your issue statement, if you have multiple issues i.e., if you have selected the “whether” format, you should use it to state each of the issues, if there are more than one.

2.2.3.2 The Persuasiveness of an Issue Statement

Your issue statement should be subtly persuasive. First, it should be drafted in a manner that suggests to your reader the answer you want. For example, if you want a judge to grant a motion to suppress evidence, your issue statement might be:

“Whether the court should grant the motion to suppress evidence when police officers entered the defendant’s home without a warrant.”

In contrast, if you want the court to deny the same motion, you might write:

“Whether the court should deny the motion to suppress evidence when the police officers had reasonable cause to enter the defendant’s home and found contraband hidden inside.”

Notice that the above two statements also include facts that support each position. Those facts should be presented in a favorable light, and suggestive of the merits of your position.

2.2.4 The Arguments

The argument section is where you make your actual legal arguments. Although the issue statement and statement of facts have persuasive elements, the argument section is the most important part of your persuasive writing as it is the place where you will fully explain why your legal position is the correct one.

It is important to note that while the statement of facts and an issue statement *come before* the arguments in the brief, they do not necessarily have to be *written before* in time. In other words, it might be advantageous to draft your argument section first, and then draft your statement of facts and issue statement based on the conclusions you reached in the argument section.

At minimum, it is important to stay flexible on this matter. When considering and drafting your arguments, you may very well find that you notice new, unexpected issues come to mind, or some facts gain more weight than others. Because you want to maximize the persuasive strength of the statement of facts and the issue statement, you should be flexible in editing them to maintain consistency with your arguments.

The first step in drafting a strong argument section is planning how to order the issues (often called “macro-level” organization), and sub-issues (often-called micro-level organization). Macro-level organization will correspond to the broad issues. The broad issues will be the broadest possible questions the court needs to answer. Micro-level organization will correspond to the specific issues or elements of the general rule dealt with at the micro level. Your argument section will be organized first by macro-level issues, then within each macro-level issue, the relevant micro-level issues.

CONSIDER THE FOLLOWING HYPOTHETICAL

This case involves a neighborhood dispute between two adjacent property owners.

Prior to November 28, 1994, Mr. Mulu, the plaintiff, was eager to purchase a home in Mekelle City. Unfortunately, the particular home that he was interested in was without water supply. Despite this fact, Mr. Mulu purchased the home.

The adjacent home was owned and occupied by Mr. Teka, the defendant. Mr. Teka had a water well in his yards which had piping line connected to Mr. Mulu's home. On November 28, 1994, Mr. Mulu and Mr. Teka entered in to a written agreement wherein Mr. Teka promised to supply water to Mr. Mulu's home for ten years or until an earlier date when either water was supplied by the municipality, the well became inadequate, or Mr. Mulu drilled his own well. Mr. Mulu promised to pay birr 100 per month for the water and one-half cost of any future repairs or maintenance that Mr. Teka might require. As part of the transaction but not included in the written agreement, Mr. Mulu gave Mr. Teka birr 1000 to purchase and install a new pump and an additional tank that would increase the capacity of the well.

Initially the relationship between the new neighbors was friendly. With the passing of time, however, their friendship deteriorated and the neighbors actually became hostile. In 1996, the water supply which was controlled by Mr. Teka was intermittently shut off. Mr. Mulu kept a record of the dates and durations that his water supply was not operative. His record showed that the water was shut off on the following occasions:

- 1) March 5, 1994, from 7:10 pm to 7:25 pm
- 2) March 9, 1994, from 3:40 pm to 4:00pm
- 3) June 10, 1994, from 6:00pm to 6:15 pm

The record also discloses that the water was shut off completely or partially for varying lengths of time on June 1, 6, 7, and 17, 1994. Mr. Mulu claimed that Mr. Teka breached their contract by shutting off the water. And following the date when the water was last shut off, Mr. Mulu commenced an action to recover compensatory damage for an alleged violation of the agreement to supply water.

The high court affirmed the judgment of the woreda court which found that Mr. Teka maliciously shut off the Mr. Mulu's water supply. It also affirmed the judgment of the woreda court which requested Mr. Teka to pay birr 300 as damage to Mr. Mulu

What are the broadest questions facing the court from the hypothetical case example above? Within each broad issue, what are the smaller issues facing the court? Organize an outline of the argument section based on these facts.

2.2.4.1 Logically Ordering the Issues

In choosing how to order the issues, it is important to understand that some legal issues must logically precede others. Some issues must be established in order for other issues to have relevance. These are often referred to as "threshold" issues. Thus, when choosing the order of the issues, logic should be the first consideration. Consider the following examples:

- 1) In a defendant's motion to suppress evidence because of an illegal search without a warrant, it would be logical to first address the question of whether the police's conduct was actually a 'search' within the meaning of the criminal procedure code.
- 2) In a civil case of breach of contract, it might be necessary to establish first that the court actually has jurisdiction, or that the statute of limitations has not run.

Once threshold issues have been dealt with and logic has been considered, usually attorneys order their issues by considering the relative strength of their arguments. Generally speaking, a person's attention span when reading is at its peak at the very beginning, then tapers off to a low point, and then increases again when the end is near, although not to the same level as the beginning. This is called the "attention curve". This is generally true when trying to concentrate on anything. Think of any class you have attended-your attention is highest at the beginning, then you may struggle to stay focused for a while, but then you hear words like "finally" or "in conclusion" from your instructor and your attention jumps back up again.

Along these lines, you should always put your best arguments first in order to take advantage of your reader's natural attention patterns, followed by weaker arguments. However, if there are many strong arguments, some attorneys prefer to save one of them for the final argument, in order to leave the judge with a lasting impression of the overall strength of the brief, taking advantage of a natural final "jump" in attention given to the writing.

2.2.4.2 Drafting the Issue Headings

The headings of your brief provide the outline or structure of the argument, and the importance of drafting the headings cannot be overemphasized. When drafted properly, they can serve as a powerful means of advocacy through writing, and a means to remain organized with your ideas and control over your writing. Additionally, solid organizational structure and well-drafted issue headings are necessary to keeping your reader focused on the actual legal arguments you eventually make. Finally, they act as a convenient locating device for a reader who wants to find a specific legal argument, without having to read through the entire brief.

For example Is an employer liable in tort for discharging an at-employee for a reason that violates public policy?

Suppose that the employee had alleged breach of contract and had disputed that the employment contract was terminable at will. Suppose, further, that the employer had disputed that the criminal code reflected a public policy against acting in pornographic movies. In those circumstances, you should add an issue relating to contract law and should divide the tort issue in to two sub issues:

1. Did the employee establish a genuine factual dispute on the question of whether the employer had a binding promise in its personnel manual to give the employee job security, thus entitling the employee to a trial on her contract claim?
2. Even if the employment contract was terminable at will, is the the employer liable to the employee for discharging her for a reason that violates public policy?

- a. Should the court recognize a new cause of action by imposing tort liability for such a discharge?
- b. Does the criminal law provide a provision that prohibit acting in pornographic movies?

TAKE AN EXAMPLE JUST FROM ABOVE

Your issue headings and sub-headings should also be positive statements that affirm, rather than negative statements. For example, when requesting the court to rule on a motion, it is stronger to write:

“The court should *grant* this motion because...”

rather than

“The court should *not deny* this motion because...”

-OR-

“The court should *deny* this motion because...”

-rather than-

“The court should *not grant* this motion because...”

Finally, be practical with how you draft and order the issue headings and sub-headings. For the sake of your reader, they must be conveniently read and understandable. Therefore, keep issue headings and sub-headings short and to the point. The longer the sentence, the more difficult it is to follow.

Also, maintain the conventions of your jurisdiction with regards to numbering and typeface of issue headings and sub-headings. If there are no applicable conventions, at least be consistent. All first-levels of an outline should be the same; all second-levels should be the same; and all third-levels should be the same, etc.

2.2.4.3 Drafting the Arguments

Strong advocacy is both a science and an art. It is a science because it requires one to maintain precise analytical ability (i.e., an appeal to logic). It is an art because the analytical process must

be presented in a creative and insightful fashion (i.e., an appeal to rhetoric or an emotional element). Good advocates must master both of these skills.

Elements of an argument

An argument has two main elements: the assertion and the support. For example, take the following argument: “The court should suppress the witness testimony because it is hearsay.” What is the assertion? What is the support?

Before drafting your arguments, it is important to list out all the assertions you will make. These should correspond to your issue headings and sub-headings. Then you should list out all the support you have for those assertions. Once you have identified your assertions and your support, you are ready to decide the organizational method to present the argument to your reader (such as the IRAC method, discussed in Unit 3 above).

2.2.5 The Prayer for Relief and Signature

The prayer for relief is the final section of the legal brief. It simply serves the purpose of requesting the court to the relief that your client wants. For example:

“For the reasons stated above, the defendant respectfully requests that the court grant this motion to suppress the evidence submitted by the prosecutor.”

In most jurisdictions, the brief must also be signed by an attorney licensed to practice in the jurisdiction. The following is a typical example of the signature line:

“Submitted this _____ day of _____, 200__.

Attorney for the Defendant

Section 4: Revising for Persuasion

Revision is one of the most important activities an attorney undertakes in order to increase persuasive potential. Most importantly, you must keep in mind the basic foundations of persuasive writing: clarity and organization. Thus, when you revise your work, you should concentrate on improving these aspects.

When you revise the content of your brief, you should concentrate on the persuasive techniques discussed above in Section 1 in the three main segments of your brief, i.e., the statement of facts, the issue statement, and the argument. Ideally, you should revise each segment once for each of the above-mentioned techniques.

When you revise the organizational structure of your brief, you should pay attention to what you know about good writing in general, such as sentence structure, paragraph, transitions, etc. Refer to your English for Lawyers I & II course materials for general writing techniques. Do all the law students from all universities of Ethiopia take this two courses in their first year? if not how come they be acquainted with these techniques of writing.

You should also concentrate on the techniques you learned in structuring your statement of facts and argument. For example, does your statement of facts follow a logical order, i.e., is it chronological or topical? Does your legal argument follow the paradigm you practiced in Unit 3? Do your headings and sub-headings represent the macro and micro-level organization discussed above? Does your brief flow smoothly?

There are some other important techniques you should employ when revising for persuasion:

1. Isolate specific segments of your argument from the ‘ground up’: First, in your argument, copy and paste only your headings to a new document. Are they presented in a logical fashion? Have you disposed of threshold issues first? Have you placed your strongest arguments first? Have you ended with a strong argument?

Then copy and paste all your sub-headings appropriately under your headings on the same document. Does each sub-heading relate to a specific element of the law that heading deals with? Are they presented in a logical order?

Finally, copy and paste all your topic statements appropriately under your sub-headings on the document. Do your topic sentences make a strong point to support the sub-headings? Do they represent the logical paradigm you are striving for?

2. Read your entire brief out loud to yourself: Oftentimes, when you have only read your writing as it is written, you may be so accustomed to it that you may miss some obvious logical and grammatical flaws which you might pick up if you hear it read out loud.

3. Have your peers or colleagues revise your work: You should always have a peer or colleague revise any work you write. Ask them to play ‘devil’s advocate,’ and strongly attack your arguments. This will highlight logical flaws in your argument, as well as apprise you to your opponent’s possible arguments.

Employing the above revision techniques will invariably improve the persuasive potential of your brief.

CHAPTER 5

LEGAL PLEADINGS

Introduction:

In this Unit, we will digress from the legal writing paradigms in the previous Units, and focus on a fundamental aspect of an attorney's day-to-day work: the pleadings. While the previous two Units focused on the substantive issues of objective memoranda of law and subjective legal brief, this Unit will cover a more technical issue of legal pleadings.

Objectives:

By the end of this Unit, students are expected to:

- Know the different types of legal pleadings;
- Understand the purposes of legal pleadings;
- Draft a statement of claim, statement of defense with counterclaim, and charge.

1. Introduction

Drafting the pleadings is one of the most important tasks an attorney conducts. Pleadings include the statement of claims, the statement of defense, the counterclaim, the memorandum of appeal, etc... The pleadings serve part of the official record of a civil or criminal case. Pleadings are oftentimes time-sensitive. Therefore, law students should become familiar with drafting different pleadings.

Section 1. Civil Pleadings

Civil pleadings can be defined by reference to Article 80(1) of the Civil Procedure Code of 1965:

“Pleading shall mean a statement of claim, statement of defence, counter-claim, memorandum of appeal, application or petition and any other document originating procedure or filed in reply thereto.”

The purpose of civil pleadings is to formally initiate legal proceedings; to give an official record of the parties’ legal position regarding a cause of action; and to give notice of that legal position and initiation of the cause of action to a litigant’s opponent.

The Civil Procedure Code provides general requirements that are applicable to all pleadings. Read Articles 80—93 in their entirety.⁵ Among other things, Article 80(2) provides that *all* pleadings must be written in “ink, printed or typewritten”. Today, attorneys should refrain from submitting any document to a court that is not printed from a word-processor. The pleadings must also include a concise statement of the material facts on which the party relies for his or her claim or defence. All pleadings must be in a form as near as possible to one of the forms provided in the First Schedule of the Civil Procedure Code.

READ ARTICLE 81? WHAT DOES THIS ARTICLE MEAN?

Also, in response to another’s pleadings, the pleader has the responsibility to raise:

- All matters which show that a claim or counterclaim is not maintainable;
- All matters which show that a transaction is either void or voidable in point of law;
- All such grounds of defense or reply;

If failure to raise these matters would lead to surprise or would raise issues of fact not arising out of the pleadings being responded to. [Article 82].

⁵ The other articles of Book III, Chapter I, relate to more specific situations. Make certain that you have read and understand them.

Denials of facts alleged in an opponent’s pleadings must be specific. In other words, it is insufficient for a pleader to deny generally the grounds alleged by the opponent’s statement of claim or counterclaim. That means that a statement of defense must deal specifically with each allegation of fact asserted by the opponent’s claim or counterclaim. Otherwise, the particular fact will be deemed to be admitted. [Article 83].

1.1 The Statement of Claim

The statement of claim (often called a ‘complaint’) is the document that formally initiates civil proceedings. It serves the purpose of giving notice to the court and to the defendant(s) of the proceedings, and of the causes of action being asserted by the plaintiff.

Read Articles 222—233, which deal specifically with the statement of claim (in addition to the general requirements of Article 80—93). Article 222 provides a list of contents that a statement of claim must have in order to be valid. Among other things, the statement of claim must contain:

- The facts constituting the cause of action;
- The facts showing that the court has jurisdiction;
- The facts showing that the defendant is or claims to be interested in the subject-matter and is liable to be called upon to answer the claim. [Article 222].

If the plaintiff intends to call witnesses, he or she must attach an annex to the statement of claim of a complete list of those witnesses. [Article 223]. Also, the statement of claim must provide a prayer for relief, which states the specific relief sought by the plaintiff. [Article 224].

Please refer to Annex I for a sample statement of claim.

1.2 The Statement of Defense

The statement of defense (often called the ‘answer’ or ‘response’) is the document that answers the plaintiff’s statement of claims. It gives notice to the court and plaintiff of the reasons why the plaintiff’s position cannot be maintained.

Read Civil Procedure Code Articles 234—240 which deal with the statement of defense (in addition to the general requirements of Article 80—93). Article 234 provides a list of contents that a statement of defense must have in order to be valid. Among other things, the statement of defense must contain:

- Any facts showing that the claim is inadmissible for lack of jurisdiction or incapacity, or any facts showing that the claim is inadmissible due to limitation;
- A statement of facts stating the material facts upon which the defendant relies upon for his or her defense;
- Any ground for defense that, if not raised, would likely to cause surprise, or raise issues not arising out of the statement of claim;
- A specific denial of any fact stated in the statement of claim which is not admitted. [Article 234].

The final point above is critical to the defendant's statement of defense. Article 235 prevents defendants from giving evasive denials. In other words, the statement of defense must answer the point of substance of *each and every* fact asserted by the statement of claim. Facts that are not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, will be taken to be admitted (except against persons under disability). [Article 235].

To illustrate this point, consider the following hypothetical example of a statement of facts in a plaintiff's statement of claim:

[Note: The facts given in the pleadings are usually listed in numbered form.]

1. On April 7, 2008, the plaintiff and the defendant attended a football match together.
2. During the match, the defendant struck the plaintiff with his fist.
3. The defendant's blow caused injury to the plaintiff's face.
4. Immediately, the plaintiff went to the hospital. etc...

Here, in addition to giving a statement of facts in the statement of defense, the defendant would need to *specifically deny or refuse to admit* each and every fact given in the statement of claim. For example, the statement of defense may look as follows:

1. The defendant *admits* Fact 1 of the statement of claim.

2. The defendant *denies* Fact 2 of the statement of claim.
3. The defendant *denies* Fact 3 of the statement of claim.
4. The defendant *does not admit* Fact 4 of the statement of claim.

In addition to stating the defendant's position and responding to facts asserted by the plaintiff's statement of claim, the statement of defense should include any counterclaim (if applicable). [See Article 235(1)(f) and 235(2)]. A counterclaim is a claim by the defendant that the *plaintiff* is legally liable to the defendant for harm caused to it. [**A counterclaim may be asserted for matters arising out of the same, or different, series of events that led to the original claim.** **[Article] IS THIS TRUE?.** Presumably, the counterclaim would include the same contents as the statement of claim, although the Civil Code does not explicitly express the requirements of a counterclaim. Please note that if the defendant submits a counterclaim, the plaintiff would have to prepare a statement of defence in response.

c. Questions and Exercises

READ THE FOLLOWING HYPOTHETICAL SCENARIO, AND COMPLETE THE EXERCISES AND QUESTIONS THAT FOLLOW. YOU SHOULD REFER TO THE FIRST SCHEDULE OF THE CIVIL PROCEDURE CODE. YOU MAY ALSO REFER AGAIN TO ANNEXES I AND II FOR A SAMPLE STATEMENT OF CLAIM AND STATEMENT OF DEFENCE WITH COUNTERCLAIM.

Question 1

W/t Meaza V Ato Sisay

Federal first instant court, Case No-520 May, 1998

Plaintif alleges breach of promise

Plaitif, w/t Meaza, is a resident of Mekelle. Defendant, Ato Sisay owns and operates "Delo", a three star hotel in Mekelle. Meaza worked as a waitress at Delo from August 1997 to September 1998.

Aty the time of her discharge on September 24 1998, w/t Meaza had an employment contract with Ato Sisay that included the terms of the employment contract handbook. The employment hand book contains promises of job security, including promises that Ato Sisay will not dismiss any or waitress except for inadequate performance and any waitress recommended for discharge has the right to meet and discus with Ato Sisay.

At all times during her employment, w/t Meaza performed her job in a manner that met the highest standards at the Delo Hotel. Despite the adequacy of w/t Meaza's performance, Ato Sisay discharged w/t Meaza on September 24, 1998. Although w/t Meaza immediately requested a meeting with Ato Sisay to discuss the discharge, Ato Sisay refused to convene such a meeting. As a result of Ato Sisay's breach of promises in the handbook, w/t Meaza has suffered, lost wages and other incidental and consequential losses.

Ato Sisay's breach of promises in the handbook constitutes breach of his employment contract with w/t Meaza.

In discharging W/t Meaza, Ato Sisay was motivated by malice, by an invidiously discriminatory animus, and by concerns unrelated to the successful operation of Delo. Ato Sisay's termination of W/t Meaza's employment therefore violated public policy.

The plaintiff, therefore, requests:

.....
.....
.....

BASED ON THE SCENARIO ABOVE, DESCRIBE THE POSSIBLE STATEMENT OF CLAIM.

Question 2

WHAT IS THE EFFECT IF THE STATEMENT OF CLAIM WAS REJECTED BY THE REGISTRAR?

WHAT IS THE EFFECT IF THE STATEMENT OF CLAIM WAS REJECTED BY THE COURT?

Exercise 1

Re-write the plaintiff's statement of claim in accordance with the provisions of the Civil Procedure Code.

Exercise 2

Write the defendant's statement of defence.

Exercise 3

Write a statement of counterclaim for the defendant.

Section 2. Criminal Pleadings: The Charge

The criminal charge is analogous to the statement of claim in a civil proceeding in that it acts as a formal initiation of criminal proceedings, and informs both the court and the defendant of the

charges being prosecuted. However, the criminal charge has additional procedural requirements. Read Criminal Procedure Code Articles 108—122. In particular, notice that the prosecutor or private prosecutor in some circumstances has a time limit of 15 days of the receipt of the police report or record of a preliminary inquiry to frame the charge.

Among other things, the charge filed by the prosecutor must contain:

- The offence with which the accused is being charged, and its legal and material ingredients;
 - The time and place of the offence;
 - The law and article of the law against which the offence is said to have been committed.
- [Article 111].

In addition, Article 112 states that “Each charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer. Such description shall follow as closely as may be the words of the law creating the offence.”

Please refer to Annex III for a sample charge.

Note: A criminal defendant may make objections to the charge against him or her in writing (for example, pursuant to Article 130 of the Criminal Procedure Code). However, there are no requirements given for such a written objection in the Criminal Procedure Code. In practice, such objections are made in writing only when the defendant is represented by counsel. Should you find yourself making an objection on behalf of a criminal defendant, you should follow the customs of the particular jurisdiction you are practicing in.]

Exercise 4

Read the following hypothetical scenario, and draft a charge in accordance with the provisions of the Criminal Procedure Code. You should refer to the Second Schedule of the Criminal Procedure Code.

Ato Elias Debebe was stopped by police (P) after driving through a red traffic light in Hawzen square, Mekelle city. When the police started writing out a summon, Ato Elias Debebe vehemently uttered “ why don’t you tear that up... please make fortune with 30 birr and let me disappear from the scene. The police wrote a summon and asked Ato Elias Debebe to appear before the city traffic regulation office on 25 April 2009, at 3:00 AM. However, Ato Elias Debebe spat at the police and he had not appeared before the city traffic regulation office on the date fixed under the summon.

CHAPTER 6

ORAL ARGUMENT

Introduction:

In the previous three Units, you have learned the basic paradigms for writing objective memoranda of law, subjective legal briefs, and appellate briefs. In this Unit you will learn the purpose of oral argument, its essential elements, and strategies to become an effective oral advocate. You will then apply these skills in your own oral argument.

Objectives:

By the end of this Unit, students are expected to:

- Know the differences and similarities between persuasive writing and oral advocacy;
- Be able to thoroughly prepare an oral argument;
- Deliver a strong oral argument;
- Effectively deal with typical problems that arise during oral argument.

Introduction

Some people enjoy speaking in front of others; for others, it is a great source of anxiety. But like it or not, the development of effective oral skills is an integral part of becoming a successful lawyer. Strong speaking skills are also transferable to almost all other professions and to daily life as well. Almost always, development of effective oral skills is simply a matter of practice. As you will find below, although oral advocacy has its own subtleties, it is quite similar to persuasive writing. Therefore, even if you are of the camp that grows nervous speaking in front of others, university is an excellent place to improve and gain confidence.

Section 1. Preparation for oral argument

1.1. Preliminary considerations

Like persuasive writing, the first things to consider when preparing an oral argument are the audience and the purposes of oral argument. Keeping these aspects in mind will help you to lay the proper foundation for your oral argument.

Your audience will most likely be a trial level judge or higher, and in some respects, another attorney. In all cases, you should expect your audience possess highly sophisticated legal knowledge. Therefore, although eloquence plays an important role in presenting your argument, you must always be thoroughly knowledgeable of all legal aspects surrounding your case.

Also like persuasive writing, the purposes of your oral argument are to inform and to persuade. First, you must educate your audience as to the relevant law. Then you must persuade your audience that your version of the facts or your interpretation of the law is correct.

Finally, it is important to recognize one key characteristic of oral argument—the characteristic of dialogue. Oral argument should not be thought of as simply supplying information about your position, but it should be considered as a dialogue between you and the court. This is important because the nature of a dialogue is a back-and-forth conversation that brings both sides to a strong conclusion, rather than one side simply dictating information to the other. The former is considered the appropriate way to come to well-reasoned conclusions about the issues at hand.

1.2. Preparing the Argument

Thorough preparation is always the key to effective oral argument (or any other public speaking). Quite simply, if you have not thoroughly prepared, you stand very little chance of presenting a strong oral argument. Thorough preparation will include deciding what to argue, creating a working outline, practicing and re-practicing your delivery, reviewing the facts and the law, and organization of your materials.

What should you argue?

The first thing to note about oral argument is that you will have limited time. Depending on the court, you may have anywhere between five minutes or thirty minutes, or maybe more. Novice oral advocates commonly make the mistake of worrying that they will not have enough material to fill the entire time allotted to them, and that this might reflect a lack of knowledge or under-preparation.

In reality, the time allotted to you will usually be less than enough to make all the points you wish to make. Therefore, it is of vital importance that you pinpoint which arguments are most essential to your case. You do not want to find yourself in a situation where you have used almost all your time to argue minor or unessential points. These should be reserved for situations where you have extra time *after* making all your essential arguments.

Also, you must learn to anticipate both the court's questions and your opponent's arguments (i.e., counterarguments), which may be similar. Most of the time, judges will ask you questions during your oral argument, and you have to take this into consideration during preparation. If you simply prepare a speech you intend to deliver to the court, you will be thrown off course by questions judges have about your case, which will cause you to appear unprepared. Although you should not present your opponent's counterarguments for them, one of the most important oral skills to master is integrating responses to these questions into your own argument. Will discuss this point in more detail below.

Create an outline

All your ideas should first be put into outline form. This serves the same benefits as preparation of an outline in legal writing—it will keep your ideas in order and allow you to remain focused and in control of your presentation.

An outline also serves purpose of avoiding another huge mistake in delivering an oral argument: writing out your argument. While writing out a speech may be appropriate at times, it is rarely

appropriate when giving oral argument to a court. In short, oral arguments are not speeches. If you write out your argument word for word, you will have a tendency to either read from it, or memorize and recite it. Reading or reciting an oral argument is inappropriate because it destroys the fundamental level of dialogue between the court and the attorney that is desirable.

Instead, you should create an outline of your most important points, and be able to navigate those points from your own knowledge, rather than from memorization or reading. One good strategy is to create one long outline to respond to ‘cold’ judges, and create one short outline to respond to ‘hot’ judges. ‘Cold’ judges are those that ask very little questions; ‘hot’ judges are those that ask many questions. As a rule of thumb, these should be one or two pages at most, which will help you avoid too much ‘flipping’ of materials (discussed below).

Secondly, reading or reciting tends to confine you to what you’ve written or memorized, which takes away your ability to be flexible with the direction the judges wish you to go in discussing the case. This lack of flexibility could create the impression that you are unfamiliar with the facts or the law of the case. Furthermore, judges’ questions are hints of what they think are the important aspects of the case, and they should be used to your advantage. This flexibility will be discussed further below.

Practice your oral argument often

As stated above, practice is the most important part of developing an effective oral argument, and thus, becoming a strong oral advocate in general. You should practice your delivery first alone and then with colleagues or peers. Practice your opening, your closing, and your arguments one at a time, until each is finely tuned to how you imagine delivering it. Then practice your transitions between these sections, and between your different arguments. Also list all questions you expect a judge might ask during your presentation, and how you can integrate them into your own arguments.

Next, practice with some of your colleagues (or classmates) acting as judges. You should practice with them acting as both ‘hot’ and ‘cold’ judges. Have them develop their own questions

or counterarguments, and then have them try to push you in directions that you did not initially tend to go. This will help you to appear smooth, knowledgeable, and comfortable. It will help you to ‘read’ the judges, and be confident that you can make adjustments in your delivery while still strongly advocating for your client. This is one of the most important skills an oral advocate can acquire. Therefore, make sure you practice as much as possible, with as many different people as possible, before your real argument.

Review pertinent facts and law

You should always be the foremost expert on the case before you enter the courtroom. This involves a thorough review of the facts of the case, your written brief, your opponent’s written brief, and all the necessary legal research. Read and re-read all relevant material many times, as the relevance of certain facts or law may only become apparent after you’ve read material over and over again. Also keep in mind that many years might have passed since you wrote the brief, therefore, you should update your legal research.

Organize your materials

As discussed above, organization will help you control your oral argument, your body language, and minimize visible and aural distractions. You should keep all important materials easily accessible. This will also signal to the judge that you have come fully prepared. You should avoid wasting time by looking for needed information in the materials you have brought to the court, as this will detract audience from the substance of your argument.

Usually, you should keep all of the most important materials in a three-ring binder. If you have a two-page outline, you should arrange it in the binder so that both pages are open and in front of you. You should also use side tabs to indicate where each of the materials are, in order to avoid flipping.

You should always step to the podium with the outline(s) you have prepared (remember, one or two pages maximum), your brief and your opponent’s brief, the case record, and copies of any

relevant law. If there are other materials that you do not believe hold special significance to your argument, but there is still a chance the judge will question you about them, you may leave them at the counselor's table. Other materials should be left at the counselor's table.

If you receive a less obvious question about a law or particular case that you did not anticipate when preparing your main argument, you may respectfully ask the judge for leave to gather the materials from the counselor's table. This is an appropriate response and can even make you seem even better prepared. However, you do not want to be in a position where you have to ask for leave to find materials you should have readily available, such as your legal brief.

Procedures and Etiquette

Different courtrooms and jurisdictions have their own procedures and etiquette that you must be familiar with. Namely, you must pay attention to seemingly fine details, such as seating arrangements, knowing when to stand, and the appropriate way to address the judge.

In general, you should always stand when the judge enters the courtroom, and remain standing until the judge sits and requests that you be seated. You should also *always* stand as you address the court, whether you are making a motion, responding to a question, or giving oral argument. Also, you should know before entering a courtroom how a judge in your legal system or jurisdiction prefers to be addressed. In most courtrooms, it is appropriate to refer to the judge(s) as "Your honor(s)", or "Your Excellency" or "Your Excellencies." You should refer to the court as "This Court" or "The Court." You should also never address opposing counsel directly. All communications should be made to the court. Violating rules of etiquette could offend the integrity of the courtroom, and the judge's need to control the proceedings. In extreme cases, violations may lead to contempt of court charges.

Finally, you (and your clients) should always dress respectably. For men this means wearing a conservative suit and tie. For women this means wearing a conservative suit or dress. The aim is to appear respectable and respectful, while at the same time not too 'flashy.' After all, the judge should be paying attention to your argument, not your sense of style.

Section 2. Delivering the argument

Like legal writing, oral argument has a prescribed format. Usually, the oral argument is divided into the following sections: the introduction, the opening, the summary of the facts, the argument (including questions-and-answers), the closing, and the rebuttal. Each serve a particular purpose and you should be comfortable delivering each. Please see Annex II for an outline of an oral argument.

3.1. The introductions

The introduction is usually more informal, and serves the purpose of introducing the attorney and the client to the court. Many attorneys use the following format:

“Good morning, your Honor. May it please the Court, my name is _____ , and I represent the [defendant] Mr. Jones.”

In many courts, the introduction is the time when the advocate must set aside time for rebuttal.

3.2. The opening

The opening should be memorable, and should include a roadmap of the issues that will be covered. Because time is limited, advocates usually limit their issues to two or three, with some flexibility. You should state the issues in a favorable light. For example, an advocate might begin his or her opening as follows:

“Your Honor, this case requires this Court to further clarify the meaning of ‘search’ as it is used in the Criminal Procedure Code. I will first address the question of whether a dog sniff is a search. Then I will address whether or not the police had reasonable grounds to search the defendant’s garage. Finally, I will address whether the chemical substance found in the defendant’s garage is, in fact, an illegal substance.”

3.3. The summary of the facts

Before going into your arguments, you may want to provide the court with a summary of the facts. You should avoid spending too much time with this. However, you should stress the important facts for your position, and present them in a favorable light. The responding party may wish to avoid presenting the facts at all, if they are known, or if they have already been fairly stated by the moving party.

3.4. The argument

Following an oral argument is usually more difficult than following a written argument. You should follow the roadmap you provided in your introduction, and you should use clear transitions between arguments.

Essentially, the argument follows the same order and structure of your persuasive brief. Start with your strongest argument, support your position as to why the court should reach the result you are advocating for, then move on to your next argument, etc. In presenting your position, state the law and how your facts relate to that law to lead to your conclusions. Sometimes it may even be necessary to argue an interpretation of the law. In that case, you will provide reasons for your interpretation, and then you will relate your facts to that interpretation.

Also be aware of the amount of time you are using. Be sure that you make your most important points, before moving on to points of less significance.

3.4.1. The questions-and-answers

The judges may interrupt you when they have questions. This is usually a great source of anxiety and frustration with novice oral advocates. Remember, oral argument is simply a dialogue with the judge. Thus, judges' questions should be welcomed. Likewise, when judges are not asking questions it usually means they have already made up their mind.

Questions from judges generally fall into the following categories:

- Requests for information: Judges may simply want to clarify a fact or your position, or may just want to know more than you have provided about a particular fact or law.
- Questions that bring out a particular response: Judges may often agree with you, and want you to argue in the same way. Be careful to recognize these types of questions, as they will guide you toward winning arguments.
- Questions testing the merits of your argument: Other times, judges may disagree with you or may be undecided, and ask questions to test the strength of your argument. Again, these questions should be welcomed as they give you an opportunity to convince the judge or to change the judge's mind.

Whenever the judge interrupts you, you should stop and listen to the question. You should try to pick up on the type of question the judge is asking, and use that information to your advantage. You should always try to answer the questions, rather than explaining that you will get to it later. You should also never argue with the judge, even if you are frustrated.

When giving your response, you should take a second or two to quickly formulate exactly what your answer will be. This short moment of silence may seem like an eternity to you, but it is appropriate. It also helps you provide the 'correct' answer, rather than appearing evasive or providing a damaging incorrect answers.

When you give your answer, you should (as much as possible) begin with one of the following: "Yes, your honor..." or "No your honor..." This answers the questions clearly and directly. After this phrase, you provide your reasons as to why or why not.

After you have answered the question, return smoothly back to your argument. You should avoid staring back at the judge in anticipation of another question, asking the judge if you have answered the question, or asking if he or she has another question.

One of the most difficult, but vitally important, skills in effective oral advocacy is this transition. Experienced oral advocates are able to smoothly oscillate between answers to judges' questions and their own arguments. For example, if a judge asks you a question about a point you are

planning to make later, you might want to immediately continue with the line of argument that you had planned to address later, in order to take advantage of the judge's interest in that point. In this sense, you should remain flexible and knowledgeable of your argument.

3.5. The closing

The closing is very important in making a winning argument. If you have time, you may want to summarize all your main points. Other times, you may want to close with one strong point. It is important to stay flexible with your closing, as it is preferable not to try to rush through a pre-drafted closing. However, you should try to reiterate the relief you are seeking from the judges.

3.6. The rebuttal

In most cases, a rebuttal will be offered to the advocates. Usually, the rebuttal will only last a few minutes, so it is important to make your strongest points. Rebuttals should usually be limited to between 1-3 points. These points should address something the judges have said, or one, two, or three of your opponent's arguments. It is not appropriate to introduce new issues during the rebuttal.

Usually, advocates introduce the points they intend to make during the ensuing rebuttal, like the roadmap given during the opening. They then succinctly state the first point, briefly support it, and then state the second point, etc. Because you are responding to another's argument, you must pay close attention to the judges and the opponent(s) during your opponent's oral argument. Listen carefully and take notes, thinking all the time about preparing your rebuttal.

3.7. Arguing for persuasion

Persuasive oral advocacy is quite similar to persuasive legal writing. Review Unit 4 for solid persuasive techniques, and simply employ them in the oral presentation of your arguments—i.e., word choice, subtly, active versus passive verbs, conclusive versus opinion statements,

affirmative versus negative statements, parallelism and juxtaposition, de-emphasis of negative information, presenting facts and issue statements in a favorable context, controlling emphasis, and logically ordering the issues and arguments. It is important to emphasize that the logical structure of the actual ‘arguments’ segment of your oral argument should follow that in your written brief. For example, if you are using the IRAC structure in your written brief, you should use the IRAC structure in your oral argument.

However, oral argument is naturally different from legal writing, for obvious reasons. Therefore, there are many other unique considerations that you must master in order to become an effective oral advocate. These are discussed in the next section.

3.8 Additional techniques to make for a persuasive delivery

As you have probably gathered from above, two of the most important technical objectives of oral advocacy are to maintain the judge’s attention, and to appear confident in your positions. However, oral advocacy can cause anxiety, which in turn can cause nervous gestures. A judge is likely to interpret nervous gestures as a lack of confidence, or he or she might simply stop paying attention and miss the substance of your arguments. Here are some techniques and tips that will help you make a stronger oral presentation:

- Technique 1: Never read your argument or recite from memory. You should always be comfortable enough with the points you want to make that you can deliver them in a smooth, comfortable fashion. Remember, you are engaged in a dialogue with the judge, not a dictation.
 - **Tip 1:** Try using ‘flash cards.’ On separate, small pieces of paper, try writing the name of each segment of your oral argument, and the keywords of the main points you intend to make. Then place all the pieces of papers in a bowl, and draw one out at a time. Then, with a timer, present that specific segment or point exactly as you intend to in your real argument, while paying attention to the amount of time you have allotted to it.
- Technique 2: Always maintain eye contact. This is important because it helps you maintain the attention of your audience; it helps you read the body language of your

audience (i.e., whether they agree with you or not), and causes you to appear confident in your positions. Many novice oral advocates have difficulty with this point.

- **Tip 2:** One good practical technique to use in your preparation, in addition to delivering your argument alone and to your colleagues or peers, is to deliver your oral argument in front of a full-length mirror. Believe it or not, it is often more uncomfortable to maintain eye contact with yourself as with a judge.
- **Technique 3: Speak loudly enough, enunciate your words, and control the dynamics of your voice.** Strong oral advocates will always make sure that they can be heard by their audience (without speaking so loudly that it becomes a distraction). It is also important to pronounce words clearly and avoid mumbling. Advanced advocates will also change the dynamics (i.e., the speed, volume, and inflection) of their delivery. Some of the biggest mistakes novice oral advocates and public speakers make are to speak much too quickly and monotonously (i.e., with no inflection in their voice). Controlling your dynamics is necessary to capturing the audience's attention, but it also serves as an excellent technique for adding emphasis to a particular point.

Tip 3: Again, a mirror can help you master these techniques. For instance, try practicing your oral argument in front of the mirror, but concentrate on greatly exaggerating your enunciation. (Actors commonly employ this technique as well). Do the same thing but greatly exaggerate a slow speed. Then, when it comes time to deliver your argument to the court, normal and appropriate diction will be natural for you.

- **Technique 4: Maintain confident body language.** Stand up straight, keep your hands at your sides or resting on the podium (but don't lean on the podium!), leave your hands empty, do not rock back and forth, and stand in one place (i.e., do not walk around the courtroom like you see in films unless you find yourself addressing a jury!). But you should appear relaxed instead of rigid. Movements should be limited to hand gestures for emphasis of points. These techniques will help ensure that your audience is focused on your arguments, rather than distracted by your body language.
- **Tip 4:** It is not uncommon for novice oral advocates and public speakers to suffer mild panic attacks, particularly in a hot courtroom environment under scrutiny by a judge. If this happens, speakers have a tendency to lock their knee joints. This in

turn may limit blood circulation to your legs and cause you to faint! If you feel faint, or your mouth is becoming very dry, or you cannot control your breathing or you are sweating. Some good techniques to employ may be: (1) slightly bend your knees to keep blood circulation to your legs, (2) slightly tighten your stomach muscles which will cause your saliva glands to react, or (3) concentrate on taking deep breaths in through your nose and out through your mouth. Remember, it is good to take ten or twenty seconds of silence to collect yourself. You can even mask what you are doing by looking at your notes or appearing to concentrate on forming an answer. To you this may seem like an eternity, but to others it will seem natural, and you just might come off looking totally composed.

3.9 Typical delivery problems and tips on how to handle them

There are a common set of problems that can (and will) arise when you frequently make oral arguments. You can expect these problems to arise at some point, and therefore, you should be prepared to deal with them effectively as they come.

- Problem 1: You or your opponent has misstated facts or law. At times, you might notice that either you or your opponent has misstated a point of law or fact. For instance you or your opponent might mention the wrong case name or statute number. In either case, the mistake should be correct.
 - **Solution 1a:** If it is your mistake, simply explain to the judge as soon as possible that you were mistaken or misspoke, and move on.
 - **Solution 1b:** If it was your opponent's mistake, you should likewise correct the mistake. However, first you should make certain that you are correct. Also, make sure that you are correcting a *mistake* of law, rather than an *interpretation* of the law. For example, it is inappropriate to state to the court that your opponent mistakenly interpreted the meaning of a particular word or phrase in a statute (unless you do so in your own oral argument). However, it is appropriate to correct opposing counsel for incorrectly stating the Proclamation number.
 - **Note:** Any correction you make should be done respectfully. For example, "Your honor, my colleague misstated the Proclamation number. I believe he /she meant

to refer to Proclamation number...” Everyone makes mistakes. Your analysis of the facts and the law should make your case, rather than simple mistakes or misstatements. In the end, attacking opposing counsel for a simple mistake will give an appearance of desperation, and the judge will likely interpret this as weakness. Finally, you should never interrupt your opponent during his or her oral argument. Wait until he or she is finished before making corrections.

- Problem 2: You have run out of time. Sometimes you will be faced with more questions from your audience than you anticipated, or you have simply planned your time poorly. Time constraints should always be respected, and therefore, it is inadvisable to exceed the time allotted to you.
 - **Solution 2a:** The most appropriate response if you have run out of time is to respectfully explain to the court that you have run out time, and you refer them to your legal brief for an explanation of your other points.
 - **Solution 2b:** If you still have a little time left, you may summarize as fully as possible the main points you did not get to, even if this means stating only your conclusions.
 - **Solution 3c:** Depending on courtroom practices, you may also request additional time to make your final points. A court may grant additional time for you, but usually only by subtracting the time from your rebuttal, or granting your opponent an equal amount of additional time.
 - **Note:** Whatever your response to the time constraint you have come across, you should always remain composed.
- Problem 3: You have too much time. Concluding your argument with remaining time is not necessarily a bad thing. It may even make your argument appear straightforward.
 - **Solution 3:** You never have to use all the time allotted to you. If you have made all your main points, and have summarized them in your conclusion, then you may thank the court, request any additional questions, conclude your argument and return to your seat.
- Problem 4: The judge has asked you a question in which you do not know the answer. Occasionally, a judge will ask you a question that you simply do not know the answer to.

- **Solution 4a:** First, do not respond by fabricating an answer. This could lead to disastrous consequences at that moment, or in the future, and could expose you to contempt of court charges in extreme cases.
- **Solution 4b:** If you have time, you may ask for excuse from the court while you look up the answer in your materials. Remember, the time is yours to present your oral argument. It is appropriate to take a minute or two of silence if you think you can find the answer. However, you should communicate your intention to your audience.
- **Solution 4c:** If you cannot find the answer quickly in your materials, it is probably not worth trying. You may simply explain to the judge that you do not know the answer, but that you can provide the answer in a separate brief at a later date.
- **Solution 4d:** Give the best answer you can, while that it is not necessarily accurate.
- Problem 5: You do not understand a question. Sometimes, you will know the answer to a question, but you simply did not understand the question.
 - **Solution 5a:** You may always ask the judge to repeat the question.
 - **Solution 5b:** You may repeat the question in your own words, and ask the judge if you have understood the question correctly.
- Problem 6: You know the answer to a question but you are drawing blank. This will happen to everyone at some point or another.
 - **Solution 6a:** You can stall a few seconds by reviewing your notes, and taking a few deep breaths. Again, it is your time and if you need time to gather your thoughts, you may take them.
 - **Solution 6b:** If, after stalling, the answer still does not come to you, you may employ the solutions to Problem 5 above.
- Problem 7: The judge has directly asked you to concede a point that is unfavorable to your position. Sometimes judges will simply not agree with your argument on a particular point, and ask you openly to concede that point.

- **Solution 7a:** Concede the point if it is not vital to your overall position. You may even respectfully point out the fact that conceding the point does not affect your overall position. If this is true, you might actually gain some advantage.
- **Solution 7b:** If you simply cannot concede the point because it is essential to your position, you may respectfully stand your ground even if the judge disagrees with you.

Outline of oral argument

- A. *Moving party* (party bringing the motion, or an appeal, the appellant)
 - a. Introductions
 - b. Opening
 - c. Statement of the issue(s)
 - d. Brief summary of the significant facts
 - e. Argument
 - f. Conclusion and request for relief
- B. *Responding party* (party opposing the motion or, on appeal, the respondent or appellee)
 - g. Introductions
 - h. Openings
 - i. Statement of position
 - j. Brief summary of significant facts (when appropriate)
 - k. Argument
 - l. Conclusion and request for relief
- C. *Moving party's rebuttal*
- D. *Sur-rebuttal* (when allowed)

CHAPTER 7

PROFESSIONAL SKILLS DEVELOPMENT

Introduction:

In this Unit, you will develop some of the skills that are important to an attorney's career. You will learn three basic types of letters: the client letter, the settlement letter, and the demand letter. Each relates in its own right to either the predictive or persuasive writing discussed in the preceding Units. As much of mastering the skill of letter writing relates to gathering appropriate information from clients, the Unit concludes with a development of the skill of conducting interviews with clients.

Objectives:

In this Unit, students are expected to:

- Understand the basic types of letters that attorneys frequently write;
- Learn the basic format and contents of such letters;
- Learn the fundamentals of interviewing clients;
- Draft a client letter;
- Draft a settlement letter; and
- Conduct a hypothetical client interview.

SECTION 1: LETTER WRITING

1. Letters to Clients

In many instances, attorneys will write letters to clients with more frequency than other types of writing. The client letter serves a similar purpose as the objective memorandum. The client letter is used to inform your client of your legal opinion on a particular question, and offer any advice you have to offer, for the purpose of allowing your client to make an informed legal decision. Therefore, the content and structure is similar. However, unlike the objective memorandum, which is usually written for other attorneys, the client letter is written to non-legal experts. The

tone of such a letter needs to be professional and objective, and cater to this characteristic of the reader.

I. ETHICAL CONSIDERATIONS

ii. Format and Content

As with the objective memorandum, convention dictates the format of the opinion letter. In general, the format should include the following content: heading, introductory paragraph, the statement of the issue, opinion, summary of the facts, explanation, advice, concluding paragraph, and warnings. Notice that the format and content of the client letter is similar to the deductive paradigm of the objective memorandum in that it is ultimately based upon reaching a conclusion upon a careful application of the facts to the law. Thus, when drafting a client letter, you should follow the predictive techniques discussed in Unit 3 above.

i. The Introductory Paragraph and Statement of the Issue

The introductory paragraph is important because it states the issue or objective of the letter. Some substantive information should often be included as well. If the letter is relaying good news, it is also usually stated in the introductory paragraph.

There are two reasons to include the statement of the issue early on. The first is to build a relationship with your client, i.e., to let the client know that you have heard and understand the issue correctly. The second reason is to protect the attorney. Your ultimate conclusion and advice is based on a particular set of facts, and if those facts do not materialize or are somehow different than they were communicated to you, your conclusions and advice may be different.

Consider the following two introductory paragraphs. Which one is stronger?

Example 1:

As you requested, I am writing in response to your previous inquiry. I have concluded my research and have reached a conclusion. As far as the enforceability of the contract you signed with the Joe's BBQ House, it is my belief that the contract is not enforceable.

Example 2:

I have researched the question of the enforceability of the contract you entered into with Joe's BBQ House, and I think you will be pleased with the results. It is my belief that the contract is enforceable because the company's representative that offered and signed the contract possessed apparent authority.

In Example 1 above, the first two sentences could be the opening sentences of an introductory paragraph for *any* letter. They do not give any real information, and the reader is not anywhere closer to understanding what the substance of the subsequent paragraphs is. The third sentence states the issue, but it does not state the issue as accurately as Example 2.

In contrast, the first sentence of Example 2 provides the reader with the issue that the letter will address, and some information about the final conclusion. The second sentence gives the final ultimate conclusion, and a bit of the substance leading to that conclusion. Therefore, the reader of Example 2 has much more information after reading the introductory paragraph than the reader of Example 1. The statement of the issue is also more accurate than in Example 1.

ii. The Opinion

It is essential that you include your legal opinion in your client letter, because that is usually the overall purpose of the letter. It is your duty to give your opinion objectively, even if it is a bad news for the client. When your opinion is positive, you may wish to include it early in the letter (as with the Examples above). When your opinion is negative, you may wish to state it later in the letter, in order to present your reasons to the client so that they may better understand your opinion. In either case, the opinion should not give any absolute guarantees such as, "If you sue Joe's BBQ House, you will definitely prevail."

iii. The Statement of Facts

You should include a short statement of the facts early in your letter for the same reason you include a statement of the issue. It will establish that you have heard and understood your client's issue, and it offers some protection to you in case the facts are not as they were relayed to you, or for some reason of change. Just like the objective memorandum, you should include only those facts which are legally significant or important to the client. The statement of facts in the client

letter should be shorter than the statement of facts in your objective memorandum. In fact, it should be more of a summary. If your client wants a more detailed statement of facts, you may always offer that he or she reads your objective memorandum, or provide a more detailed letter later.

iv. The Explanation

The purpose of the explanation (and of the client letter itself) is to allow your client to make an informed decision. Therefore, you should give not only your opinion, but also the legal basis for your opinion. Again, the explanation is not simply a copy from your objective memorandum, and therefore, it should be more concise. If your client wants a more detailed explanation, you may always offer that he or she reads your objective memorandum, or provide a more detailed letter later.

v. Advice

Again, as your purpose is to advise your client, you should make sure that you are clear with the advice you are giving. Many times, this will be clear from your explanation. However, if there is more than one possible course of action, you may want to include a separate advice section which outlines the pros and cons of each possible course of action, and which one you think is the most advantageous.

vi. The Concluding Paragraph

The concluding paragraph is not simply a reiterate of your conclusions, advice, or explanation. You may also use the concluding paragraph to inform your client of what is to happen next. For example, inform your client what the next step should be, and who is supposed to take it.

vii. Warnings

In order to protect yourself, you may want to include an explicit warning to your client that what you have written represents your legal opinion, based upon the current law, and the facts as you understand them. However, you want to avoid sending the wrong message, i.e., that you are not confident in your advice.

EXERCISE 1: DRAFT A CLIENT LETTER BY STATING YOUR OWN SET OF FACTS.

2. Letters to Adversaries: Demand Letters and Settlement Letters

Letters to adversaries differ from client letters in tone and purpose, but are similar in format. There are two basic types of letters to opponents: the demand letter and the settlement letter. The purpose of the demand letter is to assert your client's legal position and demand that his or her opponent take a particular course of action (e.g., paying rent past due), or cease from a particular action (e.g., refrain from copying protected material). The purpose of the settlement letter is to assert your client's legal position, and offer a settlement or request settlement negotiations.

i. Tone

Before drafting a demand letter or settlement letter, it is important to consider its tone. The proper tone professional and establishes a working relationship. Avoid making two common mistakes that inexperienced writers often make. The first is to appear to 'understand' of your opponent's position, out of a desire to seem fair and reasonable. For example, an attorney should avoid stating that he or she 'understands' or 'sympathizes' with the opponent, or that they can 'see their point of view.' There is no need to pacify the other side in order to establish the proper professional relationship. You are a representative of your client's interests, and your tone should not detract from the fact that your client intends to assert his or her rights.

On the other hand, effective advocacy does not mean all-out war. The tone of the letter should not insult, dismiss, or belittle. For example, attorneys should avoid phrases such as "your position is ridiculous," or the opponent is "playing with fire." **BESIDES, ATTORNEYS HAVE AN ETHICAL OBLIGATION TO** . Making an opponent angry does not advance your client's position because people are less likely to comply (in the case of a demand letter) or compromise (in the case of a settlement letter) if a positive, professional environment is not created. This tone may also come across as overly argumentative and defensive, which will weaken the persuasive strength of your letter.

Instead, effective advocates will strike a balance between these two extremes. Striking this balance requires careful understanding that advocates are most effective when they state their client's position clearly, affirmatively, and professionally. This tone will be much more effective

in convincing your opponent that your client's position is legally sound, and therefore, the opponent's client will be better off with compliance or compromise.

Consider the following three examples of a letter relating to a hypothetical copyright infringement claim. Which example is too soft? Which example is too abrasive? Which strikes the proper balance?

Example 1

Your client has blatantly violated my client's right to prepare derivative works. You should know by now that Ethiopian intellectual property law is similar to other jurisdictions, in letter and in policy. It is incredible that you could somehow ignore those considerations and come to some bizarre conclusion to the contrary. My client is rightly angry, and demands compensation for the injury. Otherwise, we would be happy to see you in court.

Example 2

I can agree that Ethiopian intellectual property law has not been entirely clarified by the courts as to what constitutes a 'derivative work' for the purpose of establishing copyright infringement. However, given the similarity of the Ethiopian copyright law to well-settled definitions in other jurisdictions, and given other policy considerations, I respectfully request that you consider our position. Thus, I believe that you would agree that we are reasonable in requesting that your client be held responsible for his actions that may constitute copyright infringement.

Example 3

Your client is liable to my client for a copyright infringement. Under Ethiopian intellectual property law, the right to prepare derivative works rests on the copyright holder. As my client is the copyright holder, your client has infringed his rights. This infringement resulted in monetary injury to my client, which we expect your client to rectify.

Example 1 is too confrontational. Again, its tone reflects lack of confidence in the client's position. It appears to seek to intimidate the opponent into urging his or her client to alter behavior or compromise. Read the example again, and make a note of all the words or phrases that create this effect.

Example 2 is too deferential. Its tone reflects a lack of confidence in the client's legal position. Furthermore, by attempting to be unduly respectful, it identifies the weakness in the client's position. This letter would not encourage its reader to urge his or her client to either alter behavior or compromise. Read the example again, and make a note of all the words or phrases that create this effect.

Example 3 strikes a proper balance. Its tone is profession, though strong. It is not unduly respectful, which presents the client's position favorably. However, it is not too aggressive, which creates an environment conducive to compromise or agreement.

ii. Format and Content

Demand letters and settlement letters are similar to persuasive briefs in purpose, format and content. They serve the purpose of convincing the reader of the strength of your client's legal position, and persuading him or her to adopt a particular course of action. Thus, the same persuasive techniques discussed in Unit 4 apply. The persuasive nature of these types of letters determines their format and content. Therefore, their format and content is based upon a similar deductive paradigm that has been discussed above and in previous units.

Before discussing the precise format, it is important to highlight the fact that demand and settlement letters are written to opposing counsel. Thus, length and complexity will change depending on a number of considerations, such as the stage of the litigation, the availability of information, the strength of legal position, and the personality or professional relationship of the attorneys involved. If the litigation is still in its early stages, facts are not yet fully unveiled. In this case an attorney may opt for a shorter, less detailed discussion in order to avoid disclosing too much about your client's position. Too much disclosure could actually prove unfavorable by locking your client into a certain position before a full factual investigation. On the other hand, if the factual or legal position of your client is clearly a strong one, a more detailed discussion

might prove a stronger incentive for your opponent to accept your demands or compromise earlier. Finally, an attorney may be more effective in compromising orally than through writing. In that case, he or she might want to write a less detailed letter, relying on oral communication to state clearly the legal position of the client.

Based on the above, accounts it should be clear that a careful determination about the length and complexity of the demand or settlement letter should be considered on a case-by-case basis. However, each demand or settlement letter has common elements, which follow the basic deductive paradigm discussed above in Unit 4. It includes an introductory paragraph summarizing the purpose of the letter and the issue(s) involved, followed by a statement of facts, followed by a discussion of the favorable law and how it relates to the facts, followed by concluding statements and demands or offer of settlement.

i. The Introductory Paragraph

The introductory paragraph in a demand or settlement letter identifies the attorney's representative capacity; states the issue at hand; states the client's demands or offer of settlement; and oftentimes explicitly states that the letter is a confidential communication which cannot be used as evidence. **UNDER ETHIOPIA EVIDENCE LAW, COMMUNICATIONS FOR THE PURPOSE OF SETTLEMENT NEGOTIATIONS ARE CONFIDENTIAL, AND CANNOT BE USED AS EVIDENCE. THEREFORE, ATTORNEYS MAY PROTECT THE CONFIDENTIAL NATURE OF THESE COMMUNICATIONS THROUGH WRITTEN CONFIRMATION.** The following is an example of an introductory paragraph for a settlement letter:

I represent Mr. Mulugeta Fikade in the lawsuit he has recently filed against your client in which he is seeking damages for injuries sustained after your client hit him with his car. Mr. Mulugeta is seeking full recovery from your client. However, in order to avoid potentially costly litigation, he is interested in exploring settlement possibilities. He has authorized me to make the following offer: Mr. Mulugeta will agree to dismiss the lawsuit if your client agrees to pay him 50,000 birr. This offer will remain open until Friday, January 12, 2008, at 5:00 pm. This letter is intended as a confidential settlement communication, and is therefore not admissible into evidence in any legal proceeding.

ii. The Statement of Facts

The statement of facts gives factual support to the situation giving rise to your client's request. It will differ in length and complexity depending upon the stage of the litigation. If extensive discovery has already taken place, you may want to include all significant facts that support your client's position. However, in the early stages of litigation when all the facts have not yet been disclosed, you may want to avoid incorporating too many facts in order to avoid misstatements, or avoid revealing too much about your client's strategy.

As with a persuasive brief, you should include only those facts which are advantageous to your client's position. Unlike other situations, attorneys have no obligation to include all facts, whether supportive or harmful to your client's position, when communicating to opposing counsel in a demand or settlement letter. Of course, it would not be appropriate to write falsehoods. But your purpose is to persuade, and therefore you should usually include favorable facts that support your client's position. However, you may want to include unfavorable facts if your opponent is aware of them and has emphasized their importance. In that case, you would address them with the view to arguing why they are not legally significant.

Consider the following example of a statement of facts:

As you are aware, on the night of December 24, 2007, your client, while talking on his mobile phone, drove his car into Mr. Mulugeta while he walked across the crosswalk. Your client struck Mr. Mulugeta with force enough to break his leg in two places, in addition to causing extensive abrasions on his face and back. Mr. Mulugeta incurred significant hospital costs as a result. In addition, he is unable to work for the three-month recovery period. Even though your client was driving through a green light, he gave his attention to the phone conversation rather than the road. If his attention was on driving, he would have seen Mr. Mulugeta, and the many other pedestrians that were crossing at the same time.

Note: The above example incorporates some of the persuasive techniques discussed in Unit 4. The active, rather than passive voice is mostly used (e.g., "your client...*drove* his car," rather

than “your client’s car *was driven*”; “your client *struck* Mr. Mulugeta,” rather than “Mr. Mulugeta *was struck*”). Conclusion statements, rather than opinion statements are used (e.g., “If his attention was on driving, *he would have seen* Mr. Mulugeta, and the many other pedestrians that were crossing at the same time”, rather than “*It is our belief* that if his attention was on driving, *he might have seen* Mr. Mulugeta”). Notice also how the unfavorable fact that the driver was driving through a green light is de-emphasized, which might lead to a conclusion that Mr. Mulugeta was partially at fault. In that sentence, the unfavorable fact is de-emphasized by comparing it immediately to the important fact that the driver was not paying proper attention to the road. Notice also how the passive voice is used when addressing this unfavorable fact.

iii. The Discussion of the Relevant Law

The extent that you discuss relevant law will depend upon the nature of the claim. At times, it is not appropriate to discuss any law at all. For example, if your client is a landlord seeking payment of a penalty from a tenant because he was late in paying the rent, it would only be appropriate to point out the provision in the lease that calls for such penalty. Other times, you may need to persuade opposing counsel of the strength of your client’s position. In that case you would want to present opposing counsel with a summary of the relevant law and how it applies to your client’s case. It is important that you carefully consider how you will do this. As the case progresses, new facts may come to light. Thus, you should avoid locking yourself into a legal position that could be negated by new facts.

iv. The Concluding Statements

Your conclusion should clearly reiterate your demand or settlement offer. It should also state the consequences if your opponent should refuse your demand or reject your settlement. Consider the following example:

Your client’s liability to Mr. Mulugeta is clear. If this case goes to trial, the judge will focus on the amount of damages to award him. After considering the amount of money my client has lost, in addition to his extensive injuries, I think you can agree that the offer of 50,000 is reasonable. Again, this offer will remain open until Friday, January 12, 2008, at 5:00 pm.

SECTION 2: CLIENT INTERVIEWS

In earlier Units, you have written statements of facts. In your writing, the facts have been provided for you. However, gathering facts is an important skill an attorney must develop. Indeed, possessing solid fact-gathering skills will ultimately improve your writing. Interviewing your client is the first step in gathering facts; but this comes with problems. For instance, clients may misinterpret or omit important facts, describe them in the best light, or give them in a peculiar order. Likewise, unless the attorney is familiar with all the issues relating to a particular legal theory, he or she may not know which facts to draw out of the client. Finally, a client will be more willing to be candid about his or her story if the proper trust relationship exists with the attorney. Thus, effective client interviews require strong listening and questioning skills, and a full understanding of the dimensions of the client's problem.

3. Ethical Considerations

CANDOR & OBLIGATION TO ENTER INTO CONTRACTUAL ARRANGEMENT WITH CLIENT AND DISCUSS FEE ARRANGEMENT

4. Goals of the Interview

A client may approach an attorney to discuss a matter relating to litigation, a transaction, or the client may find him or herself facing criminal charges. Your overall goal is to find out what the client's legal problem is, with the aim of researching the issue to find out what the client's best course of action is.

However, it is important to approach fact-gathering with an open mind. For example, your client may approach you and describe a situation in which he signed a contract for goods that have not yet been delivered. Your first inclination might be to immediately read the contract and suggest suing for damages arising from the failure of delivery. However, your client may have a long-standing relationship with the other party to the contract, which he does not want to jeopardize. If you assumed he simply wanted to litigate the claim, you may not achieve your client's goals. Therefore, you should always remember to ask your client to clearly articulate what his or her goals are.

Gathering facts about potential claims and your client's goals is not the only important goal of the initial client interview. You are also seeking to establish an attorney-client relationship. Your client should feel comfortable knowing that he or she is revealing sensitive information to a professional and trustworthy attorney.

FINALLY, AS MENTIONED ABOVE, YOU MUST BE AWARE OF RULES THAT REQUIRE YOU TO ENTER A CONTRACTUAL ARRANGEMENT WITH YOUR CLIENT ONCE THE RELATIONSHIP IS FORMED.

5. Preparation for the Interview

Interviewing is a skill. You can conduct a better interview if you have some idea of the client's problem before the interview. When the client makes the appointment, you should ask him or her about the basic nature of the problem. This will allow you to conduct some preliminary research about the issue before the interview, which in turn will help you to gather more appropriate information. It will also allow you to consider any documents you will require from the client, so that they may bring them to the interview.

6. The Interview

i. Building rapport

The first thing you should do at the client interview is build a strong rapport, in order to make the client feel comfortable. First introduce yourself, invite the client into your office to sit down, and offer him or her a beverage. You should begin the interview with some non-legal questions: *How are you? What do you do for a living? Did you have difficulty finding the office? etc.* Later in the interview, you may notice that the client may be somewhat nervous, and that he or she is not appearing to be completely candid. At that point, you may want to carefully remind them that the conversation is protected by the attorney-client privilege.

ii. Types of questions

There are a variety of questions you will employ to elicit the information you need to successfully advise your client. You will likely use a combination of open-ended questions, and specific questions such as follow-up questions, and yes or no questions:

Open-ended questions: *Ms. Genet, what brings you here today?* This type of question allows the client to give an uninterrupted narrative of the situation that caused her to visit you. It will also help the client become more comfortable, which is necessary to building the proper rapport. The client may also reveal the goals she has in mind, and it may draw out other non-legal concerns that may affect the client's situation.

Another important consideration is the need to have a chronological narrative of the situation leading to the client's visit. It is important to understand events in the order they occurred. You should ask the client to give details of what they are describing chronologically. *Ms. Genet, would you please give me a step-by-step account of the events that led to your arrest for shoplifting?*

Specific questions: After you have heard the general narrative, specific questions can be used to elicit more details. *Ms. Genet, why were you in the clothing store?* Leading questions can help elicit information that a client may feel uncomfortable relaying to a stranger. They can also be useful in drawing out potentially incriminating information. *Ms. Genet, did you bring enough money with you to purchase the blouse that you were accused of stealing?*

Usually, you will want to ask broad questions early on, followed by more specific questions to gather details.

iii. Body language

Paying attention to body language can help you conduct a successful interview. First, in order to fully understand your client's problem, you need to be cognizant of their attitude and concerns. A client will give you clues through facial expressions, tone of voice, and hand gestures. Also, you must be aware of your own body language. Being an effective listener involves ensuring your client that you are fully engaged in what they are saying. This can be accomplished through eye contact, hand gestures, and certain phrases. *Ok. I see Ms. Genet, please continue.*

iv. Giving advice and the next steps

At times, you may be so familiar with the legal issue that you can provide advice at the interview itself. Oftentimes, however, you will need to research the issue before advising your client. In

that case, you should explain to your client what your initial impressions of the situation are, and exactly what you will be doing in the future. *Ms. Genet, I think your best course of action might be to agree to community service rather than face a trial. However, I need to consider the matter further. I will research the issue, and get back to you.* You should also advise your client of anything he or she should be doing in the meantime. *Ms. Genet, I would like to speak to the friend you were with at the department store. Can you please put me in touch with her?* You should take the opportunity to arrange a future appointment. Finally, if the representation will be suitable for both of you, you should formalize the attorney-client relationship, which will give you the authority to act on your client's behalf, if necessary.

7. The Memo to the File

After a client interview, attorneys usually write a memo to the client's file, which summarizes the interview. The memo to the file should include the following information:

- The identity of the client;
- The client's perception of the problem;
- The client's goals;
- The factual background as the client described it;
- Any information that the attorney gave to the client;
- The next steps, such as the tasks of the attorney and client;
- The attorney's initial impressions of the theory of the case.