

Fourth EDITION

LEGAL WRITING

PROCESS, ANALYSIS,
and ORGANIZATION

Linda F. Edwards

ASPEN
PUBLISHERS

253

© 2006 Aspen Publishers, Inc.
a Wolters Kluwer business
<http://lawschool.aspenpublishers.com>

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
111 Eighth Avenue, 7th Floor
New York, NY 10011-5201

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 0-7355-5656-3

Library of Congress Cataloging-in-Publication Data

Edwards, Linda Holdeman, 1948-

Legal writing : process, analysis, and organization / Linda H. Edwards.—4th ed.
p. cm.

ISBN 0-7355-5656-3

1. Legal composition. I. Title.

KF250.E38 2006
808'.06634—dc22

2006004380

About

Aspen Publisher provider for attc preeminent aut information cov full range of for online products

Our proprietary over 11 million Publishers also linked to Loisl timely, and au unmatched cu

To order any A call 1-800-638

To reinstate y

For more inf 1-800-364-25

For Custom 1-800-234-1

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxv</i>
<i>Introduction</i>	<i>xxvii</i>

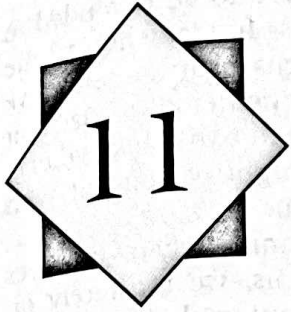
Chapter 1.	First Things First	1
------------	--------------------	---



The Process of Writing Predictively: The Office Memo

STAGE ONE	STRUCTURING FOR ANALYSIS: OUTLINING THE WORKING DRAFT	
Chapter 2.	Outlining a Rule of Law	17
Chapter 3.	Outlining a Rule to Organize Your Analysis of a Legal Issue	29
Chapter 4.	Formulating a Rule from a Case Opinion	39
Chapter 5.	Formulating a Rule from Multiple Authorities	53
Chapter 6.	Using a Rule to Form the Structure: Special Circumstances	69
STAGE TWO	DRAFTING FOR ANALYSIS: WRITING THE WORKING DRAFT	
Chapter 7.	Writing the Analysis of a Single Issue: Rule Explanation	81
Chapter 8.	Writing the Analysis of a Single Issue: Rule Application	103
Chapter 9.	Writing the Analysis of a Single Issue: Organizing and Writing the Discussion of Multiple Authorities	119
Chapter 10.	Writing the Analysis of Multiple Issues	133
STAGE THREE	CONVERTING YOUR WORKING DRAFT TO AN OFFICE MEMO	
Chapter 11.	The Office Memo and the Law-Trained Reader	149
Chapter 12.	Organizing for Your Reader: The Discussion Section	159
Chapter 13.	Completing the Draft of the Office Memo	167

II. Ordering Authorities for an Analysis Primarily Requiring Statutory Construction	128
A. The Text Itself	128
B. The Legislature's Intent	128
C. Canons of Construction	128
D. Policy	129
E. Agency Interpretation	130
F. Commentators and Other Courts	130
Chapter 10. Writing the Analysis of Multiple Issues	131
I. Writing the Analysis of a Single Rule with Subparts	133
A. The Umbrella Section	133
B. The Discussion of Each Subissue	134
C. The Conclusion	136
II. Writing the Analysis When You Have No Umbrella Rule	136
III. Variations of the Multi-Issue Paradigm	137
A. Order of Elements	138
B. Whether to Truncate the Analysis	138
C. Whether to Combine Rule Explanation and Rule Application for All Elements	138
IV. An Example	139
Exercise 1 Identifying the Parts of a Multi-Issue Discussion	141
Exercise 2 Ethical Issues	145
Exercise 3 Writing a Multi-Issue Discussion	145
	146
STAGE THREE CONVERTING YOUR WORKING DRAFT TO AN OFFICE MEMO	
Chapter 11. The Office Memo and the Law-Trained Reader	149
I. Observations About Readers	149
A. Focus on the Reader	149
B. Attention Levels	150
C. Road Maps	152
D. Readers as Commentators	153
E. Law Professors as Readers	153
II. An Overview of the Office Memo	154
A. Function	154
B. Format	155
C. Degree of Formality	157
D. Ethical Requirements	157
Chapter 12. Organizing for Your Reader: The Discussion Section	159
I. The Umbrella Section	160
II. Organizational Choices	162
A. Dispositive Issues	162
B. Important Issues	162
C. Threshold Issues	163



The Office Memo and the Law-Trained Reader

Now that you have done a solid legal analysis of the question you were given, it is time to turn your attention to the document you are going to write and to the reader for whom you will write it.



OBSERVATIONS ABOUT READERS

A. FOCUS ON THE READER

We'll think first about the characteristics of law-trained readers. After all, the goal of writing is to communicate with a reader. A document is actually a conversation (see p. 153), and, as in any conversation, the better we know our partners, the more effectively we can communicate. Knowing the characteristics of the reader governs many of the writer's choices.

This need to know the person to whom we speak is more than a helpful tool; it is a fundamental part of the project of communication. We know this intuitively, just as we know that placing our weight on alternate legs is fundamental to walking. In conversation, we know without conscious thought that we need information about our conversational partner. In spoken conversation where we do not know each other already, we spend the early part of the conversation rapidly gathering information about each other. We pick up both verbal and nonverbal signals about who this other person is and what he or she is thinking. We may do this without realizing it; we often

process the information and act on it without awareness that we have done so. But the fact that we do this automatically and unconsciously simply demonstrates how fundamental to the project is the information.

What about *written* communication, then? If we have to be reminded to focus on an audience, is the need less important? Less fundamental to the project? In reality, we do not have to be reminded to focus on an audience; we all do that just as intuitively in writing as in speaking. Whether we realize it or not, we always write to *someone*. But we are vulnerable in two ways: we may write to the wrong person, or we may write to the right person but with inaccurate or incomplete information about that person.

It is easy to write to the wrong person. Because we cannot rely on our eyes and ears to keep the image of our audience before us, we must rely on imagination instead. The picture is not clear and constant, and often we find that we are writing to ourselves rather than to the real reader. We are having a conversation with ourselves.

Also, it is easy to write with a fuzzy and incomplete picture of the reader in mind. Sometimes this lack of focus is caused by inaccurate information, but more often we simply fail to recognize and evaluate our assumptions. We forget to stop before we write and ask, "Who is this person, and what is she likely to be concerned about?"

When you undertake a legal writing task, you may not know your reader well—perhaps not at all. But you can still write with a fairly accurate focus on this unfamiliar reader because readers, particularly law-trained readers, tend to share certain characteristics. Even in large cities, lawyers and judges live in a legal community which shares certain values, customs, and forms of expression. Legal writing and analysis require you to present your message in a way that makes sense in the context of this legal community.

On the other hand, you may know your reader well. For instance, you may be writing a memo to another lawyer in your firm or to the judge for whom you work. In that case, your specialized knowledge of this particular reader is your best and most reliable source of information, but the observations in this chapter still will help you sharpen your picture of this well-known reader.

The general characteristics of law-trained readers in this and later chapters can only invite you to begin your study of readers. Don't just accept the principles that follow. Notice your own reactions when you read. Try to be a participant-observer of the reading process. Your observations of your own reactions as a reader will be your best writing teacher. Observe too the other law-trained readers you know. This way, as the years of your legal practice go by, your writing will get better and better.

B. ATTENTION LEVELS

Before a speaker can communicate, the audience must be listening. Here is some information about the attention levels of law-trained readers:

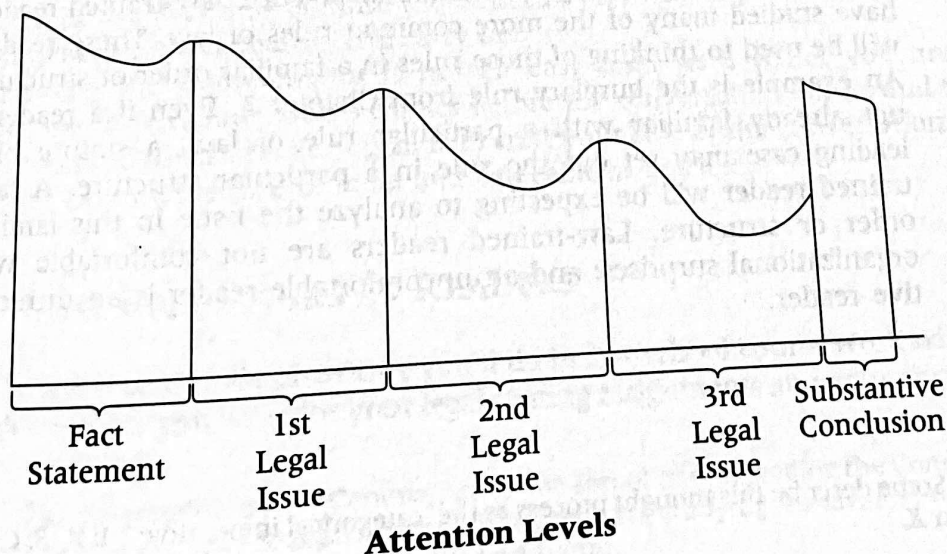
1. A reader's attention is finite. Even the most diligent reader will run low or run out.

I. Observations About Readers

151

2. A reader's investment in the nuances of the topic may not be as great as the writer's. While the law-trained reader will have a particular need to understand the material, these readers are extraordinarily busy. The judge has many other cases and does not have a personal investment in this one. The senior partner has many other obligations and depends on the memo-writer to analyze thoroughly but communicate succinctly.
3. A reader's attention is not evenly distributed. It is greatest in the first several pages, and it decreases rapidly from then on.
4. Readers generally save some attention for the Conclusion. They are willing to invest attention there, but only if they can locate the Conclusion easily and if the Conclusion is clear and compelling enough to warrant the investment.
5. While readers spend more attention on the document's first few pages and on a compelling Conclusion, attention levels revive a bit at internal beginnings and endings, like the start of a new issue or the last few paragraphs of a statement of facts. This revival is more likely if the new issue is marked by a heading or subheading.
6. Stories, especially real life stories, are engrossing. Many readers pay more attention to facts than to abstract legal concepts. This means, for instance, that attention levels are higher in the middle of an effective Statement of Facts than in the middle of the Argument or Discussion section. It also means that, even in the middle of a Discussion or Argument section, a reader's attention level will rise a bit when the material begins to apply law to fact.
7. A reader's attention level is lowest about three-fourths of the way through the Discussion section of an office memo or the Argument section of a brief.

When you combine your thinking about these observations, you realize that *placement of material* is one of the important decisions a writer must make. While a reader will want the analysis to be complete, she also will want the most important parts of the analysis placed where she can find them quickly and give them first priority for her attention.



11. The Office Memo and the Law-Trained Reader

C. ROAD MAPS

Most nonfiction readers want a road map—some sense of where they are and where they are headed. But law-trained readers have an even greater need for an organizational structure. Here's why:

1. A reader's first priority is to understand the law. As you learned in Stage One, a law-trained reader's first step in the process of understanding the law is an "outline." This process of learning and applying law set out in outline form is how most lawyers and judges studied law. It is basic to the way law-trained readers think. In the first few semesters of law school this learning style and thinking process probably came more naturally to some than to others, but by the end of law school virtually all lawyers approach legal analysis by some variation of this method.¹ This process may even be the primary component of that nebulous concept "thinking like a lawyer."
2. Lawyers and judges do not read the law out of intellectual curiosity but because they have a problem to solve. They are looking to your memo or brief to help them solve it. This means that your discussion of the law must be clearly and closely tied to the facts and issues of the case. Your organizational structure serves as the continuing reminder of how your legal discussion relates to the problem to be solved.
3. A law-trained reader reads skeptically, constantly assessing the strength and accuracy of the analysis. The most visible part of the analysis, the part the skeptical reader first evaluates, is its organization. Here the law-trained reader expects to find the "outline" of the law. If a reader doubts the organization of the analysis, the reader wonders whether the content of the analysis is reliable.
4. Along with this skeptical assessment of the analysis itself, the law-trained reader is assessing the ability and credibility of the writer. Doubt about the writer's "outline" translates into doubt about the writer's ability, credibility, or both. This kind of doubt doubles the reader's natural skepticism.
5. At some point in their legal education or practice, law-trained readers have studied many of the more common rules of law. These readers will be used to thinking of those rules in a familiar order or structure. An example is the burglary rule from Chapter 3. Even if a reader is not already familiar with a particular rule of law, a statute or a leading case may set out the rule in a particular structure. A law-trained reader will be expecting to analyze the issue in this familiar order or structure. Law-trained readers are not comfortable with organizational surprises; and an uncomfortable reader is an unreceptive reader.

1. Some describe this thought process as the "categorical imperative": If A, B, C, and D, then X.

E. LAW PROFESSORS AS READERS

The two primary kinds of writing you'll see in the documents you write for your legal

2. If so, be grateful to your Commentator. Inspiring is essential to legal analysis. About it, your own Commentator is your

D. READERS AS COMMENTATORS

We have already seen how the reader's invisibility can cause the writer to forget the reader and unconsciously begin to write to himself. But the abstractness of the image of the reader can mislead the writer in another way as well.

It is easy to assume that writing is a one-way street, with the discourse all flowing in one direction. We tend to think that we, as writers, are the only speakers; we think this because we can't hear anyone else talking. The frightening reality is that the most important party to the conversation, the reader, *is* talking, but we can't hear her.

Think of it this way. Each of us has a little voice in his or her mind—an opinionated, skeptical, and talkative little "Commentator." We've already observed this character at work, because when a writer mistakenly begins writing to himself, it is to the writer's own internal Commentator that the writer is writing.

Well, the reader has such a Commentator too, and that little voice will chatter at every opportunity. The Commentator will be saying things like "No, that's not right, because . . ." or "What in the world do you mean by that?" or "But wait, where is the discussion about . . .?" Think of yourself as a reader. Haven't you been reading this chapter listening to both the written word and to your own Commentator?²

The reader's Commentator will not remain completely silent, and there is nothing the writer can do to change that. The Commentator's participation can even be helpful. Yet each time the Commentator speaks, the reader is trying to listen to two voices at once; the writer must compete with the Commentator for the reader's attention. The writer, then, has two objectives: (1) The writer wants to keep the reader's Commentator relatively quiet, resolving its concerns at the point where they arise, and (2) when the Commentator does speak, the writer wants it to be saying "OK," "right," "yes," point by point by point.

A writer wants to calm the Commentator even from excited agreement. When the Commentator's imagination becomes engaged, even the chatter of agreement is distracting to the reader. More worrisome yet, the writer has lost control of the discourse because the writer has no way to predict where the Commentator's imagination will carry her.

Quieting the Commentator is not an easy task. As a writer you must anticipate the Commentator's chatter before the conversation occurs and try to preempt that chatter. Your goal is to craft your side of the conversation so that the Commentator is as quiet and agreeable as possible.

E. LAW PROFESSORS AS READERS

The two primary kinds of writing you'll do in law school course work will be the documents you write for your legal writing assignments and your answers

2. If so, be grateful to your Commentator. The sort of critical reading the Commentator inspires is essential to legal analysis. When you are studying the law and writing about it, your own Commentator is your best friend.

11. The Office Memo and the Law-Trained Reader

to law school exams. Your primary readers for these documents will be the law professors who drafted the assignments and examination questions. Undoubtedly these professors already understand a great deal about the relevant area of law and about the particular authorities on which your analysis will be based.

Ordinarily a writer should tailor the document to the reader's pre-existing knowledge. If the writer is certain that the reader knows some of the relevant information, the writer would only refer generally to the information when necessary to put new information in context. However, law school writing is a different matter. Unlike most readers, your professor is not reading to learn particular information. Instead, your professor is reading to evaluate what information *you* have learned and how well you can communicate it. If the information is not set out in your document, your professor will not know whether and how well you understand it.

Therefore, in law school writing, assume that you are writing to a law-trained reader who has no particular expertise in the area you are discussing. This assumption will help you strike the right balance between including the information your professor wants to evaluate without explaining more than the assignment requires.

II

AN OVERVIEW OF THE OFFICE MEMO

In addition to knowing as much as possible about your reader, you need to know four more things: (1) your document's function, (2) its format, (3) its degree of formality, and (4) the rules of professional ethics that apply to the lawyerly task of memo-writing. How does the requesting attorney plan to use the document? What format and level of formality does she prefer for it? What are your ethical responsibilities in writing it? Since an understanding of function is necessary to an understanding of form, formality, and ethical requirements, we'll review function first.

A. FUNCTION

Recall from Chapter 1 the primary function of an office memo. An office memo is an internal working document of the firm; it is not designed for outside readers. The function of an office memo is to answer a legal question. The question usually will seek an answer for a particular client in a particular situation. Often it will be the primary basis for making a decision with both legal and nonlegal consequences.

Also, the firm may have a "form file" in which it keeps, for future use, office memos dealing with particular legal questions. The idea is to eliminate the need to repeat research and analysis on topics that may recur. Keep in

...view of the Office
...that your document may
...also that your role is predictive
...from Chapter 1 how easy it can be to
...would be better served by a par
...the answer to the question will
...requesting attorney, better they lea
...it later could be costly for the firm
...accurate prediction, then, is the fun

FORMAT
...of a memo is designed to fit its fu
...is an internal document, law firm
...The firm's preferred format n
...it may place the sections in
...or it may include other section
...reader (your teacher or law firm) ha
...you can use the standard m
...are much less importa
...of the analysis. This chapter wi
...format, and Chapters 12 and 13 v
...each part of the document.
...components of a standard office men

...ing
...Question Presented
...Answer
...Statement
...Conclusion
...Conclusion (when appropriate)

...the sample memo in Appen
...The function of the
...writer, the date, and the p
...Question Presented. The Que
...asked to answer. It all
...the question; it also
...asked you to analyz
...discussion of the
...document