THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

HOW TO BE A GREAT LITIGATION JUNIOR
PAPER 2.1

Effective Legal Writing

These materials were prepared by Christopher M. Rusnak of Harper Grey LLP, Vancouver, BC for the Continuing Legal Education Society of British Columbia, May 2019.

EFFECTIVE LEGAL WRITING

I. Introduction

While much legal lore has been shared about battles won and lost through oral advocacy, the mightiest weapon in the civil advocate's arsenal is effective legal writing.

Clear and concise writing builds client trust, enhances a lawyer's reputation and is the foundation of persuasive advocacy.

Civil litigation requires a lawyer to write. Every aspect of the civil litigation process requires written communication, e.g., opinion letters to clients, pleadings, correspondence between counsel and submissions to the court.

Writing effectively means creating a document that achieves its purpose, whether to inform, advise, or persuade, in a manner that is easily understandable to the person who will read it.

As stated by Justice Laskin (of the Ontario Court of Appeal):

> I firmly believe that though what we say is obviously important, so too is how we say it. You cannot divorce content from language and style. Dull, dense, difficult to read prose will detract from what otherwise may be a strong legal point. Writing well is hard work – at least it is hard work for me. Legal writing is difficult because what we write about usually is complicated. And we all have time constraints – too much to do and too little time to do it in. Writing concisely is harder than writing at length. But taking the time and trouble to write better will make you a much better advocate for your clients and will enhance your reputation with the court.[1]

This paper discusses legal writing in the context of three of the most important types of communications required of a junior civil litigator: (i) legal memoranda to senior counsel; (ii) opinion letters to clients; and (iii) submissions to the court. The paper will present a number of pitfalls commonly seen in ineffective legal writing and provide guidelines on writing clearly, concisely and with purpose.

---

1 Justice John I. Laskin, *Forget The Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums,* The Advocates' Society Journal, Vol. 18, No. 2, August, 1999.

II. Writing to Senior Lawyers (the Legal Memorandum)

You have immersed yourself in the case law, considered its idiosyncrasies, and analyzed how the cases fit together to reach your conclusions; senior counsel has not. How do you effectively explain your work and analysis - including all its complexities and subtleties - to senior counsel in simple, clear terms?

Senior counsel are busy (or at least we think we are). If junior counsel are assigned by senior counsel the task of researching a legal issue and preparing a memorandum, junior counsel must not only research the law thoroughly, but present their written analysis in a way that allows senior counsel to easily understand the key conclusions and the reasoning underlying those conclusions. There is nothing more frustrating for senior counsel than to receive a memorandum from junior counsel that discusses many cases that appear to be relevant to the issue, but fails to push further to analyze the case law in a manner that draws out the key principles and how those principles apply to the issue at hand. It is the willingness and ability to apply effectively the case law to the matter at hand that distinguishes valued junior counsel from others.

The following are some guidelines to assist you with impressing, rather than frustrating, senior counsel in your firm.

(a) The Two Minute Rule

Before finalizing a memorandum to senior counsel, you should put yourself in senior counsel's shoes and ask yourself the following question:

> Q: If I received this memorandum (without having read all the cases that I have read and spent the time that I have spent considering the issues), would I understand within two minutes of reading this memorandum my key conclusions and my rationale for reaching them?

If the answer to this question is "no", then the memorandum needs to be re-drafted. The pointers found in the following sections may assist you in getting to "yes".

(b) Defining the issue(s) and presenting a short answer

In order to satisfy the Two Minute Rule, your efforts defining the issues and presenting a "short answer" are crucial.

The first thing senior counsel needs to see in your memorandum are the issues. Defining the issues is critical to providing senior counsel with the information they require. If you have misunderstood or mischaracterized the issues, then your research and analysis, no matter how impressive, may be useless. Often defining the issue is a straightforward task that can be outlined at the commencement of your work in a note from, or conversation with, senior counsel. Other times, however, the issue can be elusive, making it is necessary (and recommended) for you to follow up with senior counsel as your analysis evolves to ensure your work addresses exactly what senior counsel needs you to address.

Equally important to defining the issues for senior counsel, is presentation of a "short answer". This is the first thing senior counsel looks for when they pick up your memorandum. Frustration for senior counsel is defined as receiving a memorandum with ten pages of case summaries and legal analysis with no indication of where to find your key conclusions.

The short answers synthesize your analysis and provide senior counsel with the crucial information required. They need to be concise. They should be no longer than three or four paragraphs (and shorter if possible). This is often not easy. As stated by Marshall Rothstein, Q.C., (former Justice of the Supreme Court of Canada):

> Concise does not mean superficial. Concise means brief but comprehensive. Therefore writing concisely is harder than writing at length.[2]

The preparation of your short answers should be done only after you have completed the rest of your memorandum. After you have completed your legal analysis you should return to the issues and explain to senior counsel in a page or less the substance of your conclusions and the rationale underlying them.

(c) The legal analysis

A certain amount of guidance from senior counsel and judgment by junior counsel is required to decide upon the extent of legal analysis required. At times, senior counsel may only want a brief analysis that addresses the seminal case authorities; other circumstances may call for a comprehensive analysis of the law, its historical context and its underlying policy. If there is any question in your mind about what is required, seek out guidance from senior counsel. That said, regardless of the scope of research required, your analysis of the cases and issues must be comprehensive. Instructions that focus your legal research on only a few seminal case authorities is not an excuse to provide a superficial analysis.

The following pointers should assist with the clear organization and presentation of your comprehensive analysis:

1. *Explain succinctly the facts of each case on which your analysis is based*: Senior counsel have not read the cases and it is your job to provide enough factual context so that it is not necessary for senior counsel to do so in order to understand your memorandum. It is rarely helpful in a memorandum to set out only a case name and the legal principle for which it stands without any explanation of the factual context. In order to understand the relevance of any particular case to your analysis, senior counsel needs to know something about its facts.
2. S*etting out the facts and findings from a case is not enough*: Your job is not to simply set out the facts of a case and a few relevant quotes. That is the easy part. Your job is to go further and explain how the findings in the case apply to the issue you are researching. Senior counsel are impressed by junior counsel that can present thoughtful reasoning that applies the case law to the matter at hand.
3. *Group and analyze common cases together*: Common themes or principles can often been seen in the case authorities. Rather than interspersing throughout your memorandum cases that support similar legal propositions, group them together, discuss their similarities (and differences if important) and apply to the issue you are analyzing the common principle(s) for which they stand.

---

2 Marshall Rothstein, Q.C., "It's English, But What's Your Point," Keynote Lecture at the 6th Annual Course on Written Advocacy, Osgoode Hall Law School and The Advocates Society, published in Justice Thomas A. Cromwell, ed., *Effective Written Advocacy* (Aurora, ON: Canada Law Book, 2008).

4. *Use Headings*: It is always useful to a reader to break up prose (particularly prose that addresses technical and complex concepts) with headings and sub-headings. As your analysis develops, you should begin to see themes and common issues. You should seek to define these for the reader with headings. For example, your analysis may identify two competing lines of authority or distinguishing features of the case law in a particular area. Headings can be used to clearly define and introduce each to the reader.
5. *Write clearly and simply*: Even though you are writing to another lawyer, that does not give you license to use dense, archaic and convoluted writing. Senior counsel are human beings too. They enjoy reading the newspaper, novels and magazines. They do not enjoy reading turgid, dense prose. While the topics you are writing about in a legal memorandum are specialized and technical, they can (and should) be presented in a manner that is easily accessible to the reader. After completing your memorandum and before providing it to senior counsel, read it through out loud to yourself. As you do so, listen for run-on sentences, unclear terms, concepts that require further explanation and any other issue that can be re-drafted to make the memorandum easier to understand.

III. Writing to Clients (the Opinion Letter)

The two most important considerations that guide the content and language of an opinion letter are: (i) the letter's audience and (ii) the letter's purpose.

Once a legal memorandum is complete, it is not uncommon for senior counsel to ask junior counsel to prepare a first draft of the opinion letter to the client. There is a common misconception amongst junior lawyers that an opinion letter to a client is simply a slightly revised version of the legal memorandum prepared for senior counsel. It is not. Do not fall into this trap.

(a) Before you pick up your pen

Before you even pick up your pen (or turn on your Dictaphone or open a new Word document), you need to know to whom you are writing and the purpose of your letter.

The characteristics of the person who will be receiving your letter (your audience) define the nature of the language that you will use. Therefore, identifying your audience should be the first piece of information you seek from senior counsel. You need to understand your audience's legal sophistication and involvement in the case. This information will guide the level at which to address your analysis and the nature of the language you will use. For example, a letter drafted for in-house counsel with extensive litigation experience may look quite different from one prepared for a client with no legal knowledge or experience.

You need to know why you are writing the letter. Every letter has a purpose. Before starting to draft an opinion letter, ensure you understand from senior counsel what the letter is intended to achieve, e.g., provide an update, seek instructions or establish an action plan. The purpose of the letter provides you with direction for your analysis and discussion. For example, if the purpose of the letter is to seek instructions from the client on a settlement offer, then all aspects of your analysis can drafted in a manner that explains your justification for making that offer.

Information unrelated to the purpose of the letter should be discarded as it will only distract (or potentially confuse) the client.

Once you have determined to whom you are writing and why, you can start to write your letter.

(b) The process of drafting the letter

Your goal is to create a letter the client will understand and appreciate. To achieve this goal your letter must have two fundamental characteristics: (i) logical coherence and (ii) clear language.

Too often junior counsel focus solely on the logical coherence of their legal analysis and fail to spend the time necessary to make their analysis clear and understandable to the client. If your explanation is not clear and understandable, then regardless of how brilliant your legal analysis, it is of little value to the client. Logical coherence and clear language are the "yin and yang" of legal writing – one without the other renders both ineffectual.

Opinion letters can be structured in a manner that assists with achieving logical coherence and clear language. The basic structure for an opinion letter should include the following:

1. *The introduction*: Put yourself (this time) in the client's shoes. The client will receive your letter without the benefit of having read the case law or undertaken the legal analysis. You cannot plunge immediately into the legal analysis. This is the equivalent of asking your client to jump into a vehicle already moving at full speed. The letter needs to introduce your work to the client slowly and in "bite-size" pieces. The introduction should do no more and no less than introduce the purpose of the letter and provide an outline of what you are going to tell the client in the letter. For example:

   > I am writing with our assessment of the liability and damages issues and to seek your instructions to make a settlement offer to the plaintiff in the amount of $100,000.

   With the purpose and outline identified, the client is then mentally prepared to read further.

2. *Background*: Providing some background information near the beginning of your letter can be an effective way to continue to "warm-up" your client to the legal analysis that is coming later in your letter. Subject to the purpose of the letter and the knowledge of your client, the background information could include a recitation of the basic facts that are the foundation for the claim and a summary of the most recent activity in the litigation, e.g., discussions with opposing counsel about settlement.

3. *The analysis*: The heart and soul of the opinion letter is the analysis section. Assuming you have completed your legal research and prepared a memorandum for senior counsel (in the helpful manner discussed earlier), there are three further steps to the preparation of the analysis section of an opinion letter:

   a. *Prepare an outline of how to best explain your reasoning and conclusions:* This is a brain storming exercise. Issues you need to consider are:

      1. What is the best way to structure the explanation?

      2. What headings and sub-headings should I use?

3. Is an illustration or example useful?
4. Which cases and quotes are most effective?
5. What is the most troublesome aspect of the opinion? How and where should I address it?

b. *Prepare a first draft that focuses on achieving logical coherence:* With an outline prepared, sit down and write a first draft. Do not worry about detailed wordsmithing. Focus on ensuring logical coherence. In other words, the purpose of the first draft should be to set out your opinion from beginning to end in a manner that makes good logical sense. The wordsmithing required to make your letter easily understandable can be addressed later, as a part of the re-drafting.

c. *Use cases appropriately:* The following guidelines should assist. When referring to a case make it clear to the client why you are talking about the case. In other words, clearly explain how the case is tied directly to your analysis. Do not refer to too many cases. Generally, case law should be used to: (i) identify guiding principles; (ii) show how courts have handled similar circumstances; and (ii) if there is an "outlier" or counter-authority, to discuss it and how it might impact the result.

d. *Re-draft, re-draft, re-draft:* There is no substitute for editing a draft letter at least a few times. It is not uncommon in my own practice to edit a lengthy and complex opinion letter ten or more times before it is finalized. If possible, have a colleague with no understanding of the file review your draft letter. This will test whether your opinion is accessible. Through the editing process clarity of language can be greatly enhanced. As I edit a letter, I look for the following: open and accessible language; clear, simple sentences; limited use of technical legal terms (and if such terms are used, whether an explanation is required); and, if I need to read a sentence more than once to understand it, then it needs to be re-written.

e. *Recommendations:* Ultimately, the results of your legal analysis need to be translated into some form of recommendation for the client. For example:

> In light of our opinion that a court will probably find you liable to the plaintiff for an amount of approximately $250,000, we recommend commencing settlement negotiations with plaintiff's counsel at this time. We recommend making an initial a settlement offer of $100,000.

Again, your recommendations need to be set out clearly so that the client knows the decision it needs to make and the basis for your opinion regarding that decision.

IV. Writing to the Court (the Written Submission)

There are many excellent resources that discuss characteristics of effective written submissions. It is too ambitious a task to attempt to better the insights provided by those authors. Rather, I

have provided references and urge you to read them. The discussion below will highlight five points common to those articles that, in my view, are foundational to effective written submissions.

(a) Write for your audience

On the importance of your audience, Justice Laskin stated:

> …before you write a single word put yourself in the position of your reader, the judge. This is …called "the cardinal rule" of advocacy. In your imagination, trade places with the judge. You are immersed in the case, the judge knows nothing of it.[3]

This is excellent advice. Too often written submissions by junior counsel are prepared in a manner that only counsel (with their intimate knowledge of the case) can fully appreciate or are oversimplified and fail to address fully the nuances and complexities of the case.

The greatest gift of a skilled advocate is the ability to make their written submissions not only clear and understandable to someone unfamiliar with the case, but to do so without compromising the robust analytical reasoning that underlies the substance of the argument.

This is hard work. However, the time you spend honing your submission to make it readable for the judge, without sacrificing the comprehensiveness of your argument, will increase substantially the persuasiveness of your presentation.

(b) Know how to persuade

The purpose of a written submission is to persuade.

The concept of persuasive legal writing has been effectively reduced to the following two simple propositions: make the court want to decide in your favour; then show it how to do so.[4]

How do you accomplish these two goals?

1. *Make the court want to decide in your favour*: You need to determine what it is about your case that will attract a judge at a "gut level" to want to decide in your favour. This is the moral high ground. Will an injustice result? Are there strong policy reasons to support your position? Are there sympathetic facts? Judges (like senior counsel) are human. They will want to see a fair and just result from their decision. If you can characterize your position as achieving such a result, your chances of success are enhanced.
2. *Show the court how to decide in your favour*: This is the legal component of your argument. The judge must be given a logical legal pathway to your position.

(c) Use point first writing

Point first writing means stating your point or proposition before you develop or discuss it.

---

3 Justice John I. Laskin, Forget The Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums.

4 Justice John I. Laskin, *What Persuades (or What's Going on Inside the Judge's Mind)*, The Advocates' Society Journal, Vol. 23, No. 1, June 2004.

For each paragraph and section of your written submission, decide the point you want the judge to understand and state that point first. Many junior counsel believe they need to show the judge how they arrived at a conclusion before stating it. A written submission is not a mystery novel. While an explanation of your analysis is necessary, the judge needs to know where you are going before you start to explain how to get there:

> Unfortunately, too many factums contain either last point writing or no-point-writing-at-all. Lawyers seem to resist giving their conclusion upfront. They think that readers need to understand how the argument develops, or that readers will not appreciate their points until they are familiar with the relevant facts or that an anticipated conclusion will make the ultimate conclusion repetitive. As valid as these concerns may be, they do not outweigh the desirability of point first writing. We absorb and remember information best when we know why it is important and how it is relevant. If we are forced to read a lot details before we know why they matter we will skim and skip them. Practise point first writing. The persuasiveness of your factums will increase immeasurably.[5]

You should need no further motivation to adopt this approach to your written submissions. To get you started, an excellent resource is the book *Style: Toward Clarity and Grace* authored by Joseph Williams (an English professor at the University of Chicago).[6]

(d) Make your written submission "easy on the eyes"

The "look" of your written submissions also makes a significant impact on the judge.

Form matters:

> Form is important because it is impossible to concentrate on the substance of any written document when one is constantly jolted by repetitive errors in form.[7]

Your written submissions should look clean, accessible and easy to read. There should be lots of "white space" on each page. Never use single spacing, small font size or reduced margins to achieve the prescribed page limit. A written argument that has headings followed by well-spaced paragraphs with generous margins will make your argument easier for the judge to read and therefore easier to understand.

(e) Edit, edit, edit

You must edit your written submissions. A first draft of an argument is just that, a first draft. Effective submissions can only be obtained with significant editing. This point is made, tongue in cheek, by Justice Marvin Catzman and Justice Stephen Goudge (of the Ontario Court of Appeal):

> To succeed in writing a truly bad factum, it is important to take the proper approach. To begin with, be sure that you leave it to the very last minute. That is the purpose of filing deadlines. If you prepare the factum too early,

---

5 Justice John I. Laskin "Why Are Yoy Telling Me All This?" in Justice Thomas A. Cromwell, ed., *Effective Written Advocacy* (Aurora, ON: Canada Law Book, 2008).

6 Joseph M. Williams, *Style: Toward Clarity and Grace* (Chicago: The University of Chicago Press, 1990).

7 Allan Thackray, Q.C., "A Matter of Form," *The Advocate*, Vol. 66, Part 4, July 2008.

> particularly with time to revise and edit, you will almost always ensure that you peak too soon.[8]

After your first draft is complete, you should work your way through the document looking for these common pitfalls that I often catch in my own first drafts:

- Overstating your position: Remove terms such as "very", "egregious", "completely wrong", "clearly", "absolutely unfounded". These are false intensifiers. If you have a strong point to make, use of these terms will weaken rather than strength it.
- Quotes that are too long: Quotes from cases or transcripts should be short and address only what is essential. Provide context for the quote. There should be no need to bold or underline a portion of the quote because the importance of the quote should be obvious.
- Unnecessary words, sentences and paragraphs: Make your submissions as short as possible. Edit away all extraneous language, issues, cases, and facts. The most effective submission is one that says what needs to be said and nothing more.
- Run-on sentences and overly long paragraphs: Information is more understandable to the reader if it is presented in bite-sized pieces rather than long impenetrable sentences and paragraphs.
- Lists: Lists provide a way to emphasize certain points and often provide a more effective alternative to long paragraphs or sentences.
- Flow: As you proof-read your submissions, ask yourself whether it flows smoothly. For example, does one sentence or paragraph flow logically into the next? To assist with flow, you can:
    - Use "connector" words such as "also, "next", "in addition", "first", "second", and "third". These words show the reader how your argument is progressing.
    - Repeat something from the prior sentence or paragraph at the beginning the next sentence or paragraph. This technique supports the reader as you move along with the progression of your argument.

If possible, let your draft written submissions sit for a day or two and come back to them fresh. After spending a lot of time with a document, you start to lose perspective. You will be surprised by the improvements that can be made after a good night's sleep!

---

8 Justice Marvin Catzman and Justice Stephen Goudge "The Wrong Stuff – How to Write a Truly Bad Factum" in Justice Thomas A. Cromwell, ed., *Effective Written Advocacy* (Aurora, ON: Canada Law Book, 2008).