Contents

	nents
SALL DE CONTROL DE CON	Part 1: Predictive Writing
SALL DE CONTROL DE CON	Section 1: Becoming a Mindful Legal Writer: An Opportunity for Personal and Professional Reinvention
Introducti	on to Part 1
Chapter	1: Putting Legal Writing in Context
A. Pre B. Pre C. Pha 1. 1 2. 3 3. 1 4. 1 5. 1 6. 7	Writing in Dispute Resolution liminary Client Advisory Phase litigation Settlement lises of Litigation Pleadings Scheduling Fact Discovery Expert Discovery Pretrial Prostrial Posttrial Writing in Transactional Lawyering 13 14 15 16 17 18 18 18 19 19 19 19 19 19 19
•	vklist: Types of Legal Writing Attorneys Do

Chapter 2: Pondering Professional Judgment 25
I. Respect Rules26A. Substantive Rules26B. Procedural Rules27II. Beware the Dreaded "Benchslap"28III. Respect Procedural Rules in the Law School Classroom30IV. Consider Professional Judgment When Communicating as a Law Student32Exercise: Developing Your Own Professional JudgmentChecklist34
Chapter 3: Strategies for Starting a New Legal Writing Assignment
I. Creating a Client Case File II. Who Is the Client? III. What Exactly Am I Expected to Write? IV. Who Is My Audience? V. When Is My Work Product Due? VI. Why Am I Being Asked to Write This Document? VII. What Time or Budget Limits Should I Consider? VIII. How Should I Get Started? Section 2: The Mindful Legal Writer's Raw Materials
Chapter 4: Understanding the Sources of Legal Rules45
I. Branches of Federal Government45A. Legislative Branch46B. Executive Branch46C. Judicial Branch46II. Branches of State Government47III. How a Common Law System Works47A. Precedent and Stare Decisis48B. Jurisdiction and Type of Authority481. Federal Court Hierarchy492. State Court Hierarchies51

	Contents	ΧV
3. Determining Which Court Has Jurisdictio	on over a Case	52
4. Determining Mandatory v. Persuasive Aut	thority	53
a. Whether Federal Courts Must Follow S		
Decisions		54
b. Whether State Courts Must Follow Fed Decisions		55
5. Cases of First Impression		
IV. Primary v. Secondary Authority		
Legal Sources Checklist		
Checklist for Beginning to Review Sources of Law in a		
Legal Writing Assignment		57
Chapter 5: Learning How to Read Statu	tes	. 59
I. Deciphering Statutes		59
A. How Federal Statutes Are Enacted		
B. How State Statutes Are Enacted		61
C. Techniques for Parsing and Deciphering Stat	utes	61
II. Understanding the Difference Between Statutory		
and Factors		
A. Examples of Statutes with Required Elements		
B. Examples of Statutes with Factors		
III. Looking for Indicator or Connector Words and I Exercise: Identifying Required Elements in a Statute		
Exercise: Identifying Required Elements in a statute		00
Chapter 6: Learning How to Read and E	3rief	
Cases		. 69
I. Typical Components of a Case Opinion		60
II. Marking Up the Structural Components in a Case		
III. Drafting Useful Case Briefs	•	
Chapter 7: Learning How to Read Regul	lations	. 83
I. Understanding the Rulemaking Process		84
II. Understanding the Structure of Government Age		
Regulations		84
III Tackling Regulations in a Legal Writing Assigni	mant	QQ



Section 3: The Mindful Legal Writer's Framework

	le-Issue Legal Office Memorandum	91
II. N	Functional Context: How Do Supervising Attorneys Use Legal Research Memoranda? Visual Context: What Does a Legal Research Memorandum Look Like? Drafting Context: How the Legal Memo-Writing Process Differs from College-Style Drafting Example of IREAC	92
	Section 4: The Mindful Legal Writer's Work	
_	oter 9: Identifying the Legal Issue, Extracting and Synthesizing the Rule	105
II. U	Narrowing Down the Legal Issue from a Statute Using Case Law to Further Define a Legal Issue and Governing Rule Nonlegal Example of Case Synthesis Case Synthesis Legal Example of Case Synthesis	107 108 110
-	oter 10: Rule Explanation: Explaining Illustrating a Legal Rule Through Case Law	113
]	RE Component 1: Rule Statement A. Using Statutory Language to Write a Rule Statement B. Crafting a Synthesized Rule Statement from Case Law C. Not Too Narrow, Not Too Broad 1. Nonlegal Example 1: Go Bears! 2. Nonlegal Example 2: Let's Dine Out! 3. Legal Example of Too Broad and Too Narrow Pulo Statements	115 116 116 116 117

	Contents	xvii
II. RE Component 2: Case Citation		
III. RE Component 3: Case Facts IV. RE Component 4: Court's Holding on the Relevant		119
Legal Issue		
V. RE Component 5: Court's Rationale for Its Decision		
VI. RE Recap		
Rule Explanation Checklist		
Exhibit 10A: Rule Explanation Template		
Exhibit 10B: Sample Annotated Rule Explanation		
Exhibit 10C: Rule Explanation Annotation Exercise		127
Chapter 11: Basic Legal Citation for Legal		
Memoranda		129
I. Why Is Citation Important?		
II. Citing Statutes		
A. Federal Statutes		
B. State Statutes		
III. Citing Cases		
A. Federal Cases		
1. Federal Trial and Appellate Courts		
2. U.S. Supreme Court Cases		
3. Federal Appendix Cases		
B. State Cases		
C. Unpublished Cases		
D. Short Cites		
 Citing the Same Case Without an Intervening Citing a Case After an Intervening Citation 		
IV. Using Signal Citations		
A. Introductory Signals		
B. Explanatory Parentheticals		
C. String Cites Plus Explanatory Parentheticals		
	5.1	
Chapter 12: Rule Application: Applying the to the Client's Facts		143
I. Crafting an Effective Rule Application		
II. Remembering the Purpose of the Legal Memorandu III. Using Element or Factor Charts to Organize the Ru.		144
Application		146
IV. Transitioning from the Rule Explanation to the Rule		170
Application		146
V. Applying the Rule to the Client's Circumstances		
v. Applying the Rule to the Cheff & Cheunistances		17/

XVIII Contents

VI.	Comparing and Contrasting Case Law to the Client's Facts	148
VII.	Adding Mini-Conclusions to Each Section of the Rule	140
	Application	149
VIII.	Stepping Back and Reviewing the Rule Application	
	for Logic	149
	Adding Policy-Based Reasoning to a Rule Application	
	Application Checklist	
Samp	ble Rule Application	152
	apter 13: Putting the Memorandum Together:	
	oductions, Transitions, Headings,	
and	Conclusions	153
1.	Finishing the Discussion Section Draft: A Worksheet	1 [1
TT	for Putting the Pieces Together Drafting the Umbrella Paragraph	
11.	A. Purpose of an Umbrella Paragraph	
		158
	C. Communicating, and Then Narrowing, the Applicable Rule	100
	and Issue of Focus for the Reader	158
	D. Briefly Predicting the Outcome	159
III.	Crafting Thoughtful Transitions Between Components	
	of a Discussion Section	161
	A. Transitioning from the Umbrella Paragraph to the First Rule	
	Explanation	
	B. Transitioning Between Rule Explanations	162
	C. Transitioning Between the Last Rule Explanation and the Rule Application	162
IV	Drafting Descriptive Headings Within the Discussion Section	
1 4 .	A. Purpose of Descriptive Headings Within the Discussion Section	
	B. Examples of Headings Based on Rule Factors	
	C. Examples of Headings Directly Tying the Factors	
	of a Rule to the Client's Facts	165
V.	Thoughtfully Selecting Cases for Rule Explanations	
	or Signal Cites with Accompanying Explanatory Parentheticals	
	Handling Counterarguments in the Rule Application	167
VII.	Writing a Helpful Informative Conclusion to a Legal	1 (0
	Memorandum	168
Cha	apter 14: Locking in Logic and Abolishing	
	umptions in Legal Analysis	169
	,	

	Contents XIX
I. Examining Logic in Legal WritingII. Avoiding Erroneous AssumptionsExercise: Assumptions	
Chapter 15: Writing the Memorathe Question Presented, and the	
I. Crafting an Informative MemorandoII. Crafting a Helpful Question PresentA. Components of an Effective QueB. "Under": The "Governing Law"	ted
C. "Does/Can/Is/Has": The "Lega Part of the Question Presented D. "When": The "Legally Significa	nt Facts"
 Using Parallel Structure in a I Avoiding Factual Assumption Constructing a Concise, Informative Components of the Short Answer Presenting a One-Word Answer Providing the Rule Formula for Briefly Applying the Rule to the 	181 List 182 as in a List 183 Short Answer 183 + Conclusory Statement 184 the Reader 184 Client Facts 185 ne 185
Chapter 16: Writing a Statement in a Legal Office Memorandum	
I. Purpose of the Statement of Facts II. How to Write a Statement of Facts III. Style Tips for Writing Statements o	
Section 5: Adjustnand Perfection	nent, Refinement,
Chapter 17: Preparing for Lega	ıl Writing Feedback 193
I. What to Expect in a Writing Confe Rather Than an "Answer Key"II. What to Expect in a Writing Confe	

	How to Prepare (Like a Lawyer) for the Writing Conference 196 Processing Legal Writing Feedback 197
	Writing Conference Checklist 197
	<u> </u>
Cha	ntor 19: Recoming an Export Solf Editor
Glia	pter 18: Becoming an Expert Self-Editor 199
I.	Ten-Step Editing Process: Introduction
	Editing Starting Point
III.	Step 1: Cross-Checking the Document Against a Legal
	Memorandum-Drafting Checklists 201
	Step 2: Reading for Overall Structure and Logic 203
V.	Step 3: Reviewing Each Standalone Section and Paragraph
X 7T	for Structure and Clarity
V1.	Step 4: Inspecting Each Sentence for Grammar, Clarity,
	and Concision
	A. Tips for Writing Concisely 205
	 Converting Passive Voice to Active Voice Creating Concise and Useful Lists, Using
	Parallel Grammatical Structure
	3. Eliminating Legalese and Instead Using Your Authentic
	Voice
	4. Deleting Superflous Words 208
	B. Tips for Using Direct Quotations from Legal Sources 208
VII.	Step 5: Reading the Document Word by Word to Catch
	Typographical and Punctuation Errors
VIII.	Step 6: Evaluating the Document for a Professional,
	Respectful Tone and Formal Language
IX.	Step 7: Reviewing the Document for Its
	Audience Interest and Engagement 211
	Step 8: Scanning Each Page for Formatting Glitches 211
	Step 9: Checking Each Legal Citation
XII.	Step 10: Final Review and Double-Checking the Formatting
F.J:+:-	and Submission Guidelines
Editii	ng Exercises
Cha	pter 19: Adding Levels of Sophistication
	Legal Analysis
I.	Brainstorm Different Ways of Organizing a Legal Analysis
	Around the Components of the Rule
II.	Be Strategic in Choosing Case Law for the Memorandum 216
III.	Construct Helpful Headings and Smooth Transitions Between
	Parts of the Memorandum 216

	•	Contents	xxi
About V. Honing VI. Check	Applying the Rule to Your Client's Facts, Thin the Underlying Societal Purpose of the Law g Your Prose for Logic Gaps and Faulty Assumptions Cdit, Edit		217 217
SALIN DESCRIPTION OF THE PROPERTY OF THE PROPE	Section 6: Expanding and Cor IREAC/CREAC to Fit an Audience's Needs	ntracting	
	20: Tackling a Multi-Issue Legal morandum Assignment	2	221
-	21: Drafting Shorter Memoranda il Communications		225
II. Short b Results	Memoranda Answering a Discrete Legal Questic out Professional E-mails Communicating Resear s	ch 	225229231
	Part 2: Persuasive Writing		
O SOLUTION OF THE PROPERTY OF	Section 7: Context		
	on to Part 2: Transitioning from Presive Legal Writing		239
Classroom Ex	xercise #1xercise #2xercise #3		

XXII Contents

Chapter 22: Types of Legal Documents Lawyers	
Use to Persuade	245
Persuasive Legal Writing in the Transactional Context Persuasive Legal Writing in the Dispute Resolution Context Prelitigation Persuasive Demand Letters, Settlement Letters, and	246 246
Persuasive Pleadings Persuasive Motions and Briefs	
Pretrial Phase: Persuasive Motions for Summary Judgment and	253
Motions in Limine Trial Phase: Persuasive Trial Motions Posttrial Phase: Persuasive Posttrial Motions and Appellate Briefs ADR: Mediation and Arbitration Papers	256
Checklist of Types of Persuasive Legal Writing	
Section 8: Writing Persuasive Letters in the Litigation Context	
Chapter 23: Writing Persuasive Letters to an Opposing Party or Counsel	265
5	267 269
Persuasive Letters During Litigation to Resolve Evidentiary Disputes Writing Persuasive Letters to Settle a Dispute After Discovery	273279281
Pathos and Ethos in Letter Writing	



Section 9: Writing Persuasive Pleadings in the Litigation Context

Chapter 24: Draπing a Persuasive Complaint	289
Jurisdiction	289
Case Caption	291
Title	291
Introduction	291
Numbered Paragraphs	
Jurisdiction and Venue	
Parties	
Facts	
Counts/Causes of Action (Elements, Factors)	
Damages or Other Remedies/Relief Sought	
Signature (Fed. R. Civ. P. 11) and Verification (if Required)	
Exhibits Finalizing the Complaint and Filing and Serving It	301
Persuasive Complaint-Writing Checklist	
Chapter 25: Drafting a Persuasive Answer	
Caption, Title, and Introduction Using Numbered Paragraphs to Admit or Deny the Allegations	
in the Complaint	
Lacking Knowledge or Information to Admit or Deny an Allegation	
Example of Numbered Paragraphs in an Answer to a Complaint	
Defenses and Affirmative Defenses	
Pleading Alternative Defenses Prayer for Relief	
Counterclaims and Third-Party Claims	
Signature Block and Certificate of Service	
Persuasive Answer-Writing Checklist	
resolutive ranswer writing encernist	012
Chapter 26: Drafting a Persuasive Counterclaim,	
Third-Party Claim, or Cross-Claim	315



Section 10: Persuasion in the Scheduling Phase of Litigation

Chapter 27: Persuasively Negotiating a Case Schedule	. 319
Persuasive Case Scheduling Negotiation Checklist	325
Section 11: Writing Persuasive Motio and Briefs in the Litigation Context	ns
Chapter 28: Types of Persuasive Motions Written by Lawyers	. 329
Motions to Dismiss Discovery Motions Evidentiary Motions Motions for Summary Judgment Trial Motions Posttrial Motions Appellate Briefs Chapter 29: Drafting a Persuasive Trial-Level Brief	333 335 336 339 340
Logos, Pathos, and Ethos in a Persuasive Brief Components of a Single-Issue Trial-Level Brief Avoiding the Dreaded "Benchslap" Substantive Brief-Writing Rules Formatting and Procedural Rules Professionalism Counts Where to Find Courts' Legal Writing Rules The Brief-Writing Process Identifying and Narrowing the Issue in a Brief Identifying and Describing the Rule Governing the Issue in a Brief Identifying a Rule in a Brief Supporting a Discovery Motion Identifying a Rule in a Brief Supporting an Evidentiary Motion Identifying a Rule in a Brief Supporting a Dispositive Motion Explaining the Rule in a Brief (Rule Explanation or RE)	343 345 346 347 348 350 351 352 355 355 355

	Contents	XXV
Drafting Logical RE Paragraphs		360
Transitions Between REs		
Signal Cites Plus Explanatory Parentheticals		365
Choosing the Proper Signal		
Citing the Case		367
Crafting a Helpful Parenthetical		367
Expanding a Signal Cite to a String Cite		369
Choosing Cases for REs and Signal or String Cites		369
Organizing the E Part of IREAC or CREAC		370
Applying the Rule in a Brief (Rule Application or RA)		372
Rule-Based Reasoning		372
Analogical Reasoning		374
Policy-Based Reasoning		374
Structuring an RA		375
Using Language to Persuade in an RA		377
Language Choices in a Brief Supporting a Discovery Motion	on	377
Language Choices in a Brief Supporting an Evidentiary Mo	otion	378
Language Choices in a Brief Supporting a Dispositive Moti	ion	
(i.e., Motion to Dismiss or Motion for Summary Judgment	.)	379
Bringing a Brief to Life Through Language Choices		379
Drafting the Conclusion in a Brief		382
Date and Signature Block		384
Drafting the Introduction to a Brief		385
First Sentence of the Introduction		385
Theme Sentence		386
Issue Sentence		389
Rule Framework		390
Concise List of Reasons the Filing Party Should Prevail		391
Examples of Reasons in Sentence Form		391
Examples of Reasons in Numbered-List Form		391
Statement of the Exact Result Sought		392
Writing a Persuasive Statement of Facts in a Brief		
Putting the Parts of the Brief Together		395
Caption and Title		395
Smoothing Transitions		397
Drafting Persuasive Substantive Headings		398
Weaving the Case Theme Throughout the Brief		399
Twelve-Step Editing and Proofreading Process		400
Attachments and Exhibits		403
Preparing a Certificate of Service		404
Drafting a Proposed Order		405
Requesting Oral Argument		
Single-IREAC/CREAC Versus Multi-IREAC/CREAC B	riefs	406
Drafting a Motion to Be Supported by a Brief		
Brief-Writing Checklist		413

XXVI Contents

Chapter 30: Drafting Persuasive Opposition		
and Reply Briefs	423	
Following Court Rules	423	
Identifying Issues in an Initial Brief Warranting Response in an		
Opposition or Reply	424	
Checking the Law		
Checking the Facts		
Single-Issue Versus Multiple-Issue Opposition/Reply Briefs		
The R and E Sections of IREAC or CREAC in an Opposition Brief		
The A Section of IREAC or CREAC in an Opposition Brief	429	
Drafting Persuasive Conclusions and Requests for Relief	120	
in an Opposition Brief		
Caption, Title, and Introduction in an Opposition Brief		
Statements of Facts in an Opposition Brief		
Drafting Persuasive Headings in an Opposition Brief Language Choices in a Responsive Brief	434	
Special Tips for Reply Briefs		
Editing and Proofreading an Opposition or Reply Brief		
Checklist for Drafting Opposition Briefs		
Chapter 31: Drafting an Appellate Brief	445	
Substantive Sections of an Appellate Brief That Differ from a	4.4.6	
Trial-Level Brief Table of Contents		
Table of Authorities		
Jurisdictional Statement (If Required)		
Statement of the Issues or Questions Involved in an Appeal		
Statement of the Case		
Summary of the Argument (If Required)		
Standards of Review		
The De Novo Standard of Review		
The Arbitrary and Capricious Standard of Review	453	
The Clearly Erroneous Standard of Review		
The No Substantial Evidence Standard of Review		
The Abuse of Discretion Standard of Review		
The Argument Section of an Appellate Brief		
The Appellate Record		
Drafting Opposition and Reply Briefs in the Appellate Context	457	



Section 12: Persuasion Through Oral Argument

Chapter 32: Preparing for and Delivering an Oral Argument
Purpose of Oral Argument 461 Logistics of an Oral Argument in the Law School Setting 462 Logistics of an Oral Argument in a Courtroom Setting 462 Substantive Preparation for Oral Argument 463 Drafting the Argument Outline 463 Case Law Prompt Sheet 464 Judges' Questions Prompt Sheet 465 Logistical Preparation for an Oral Argument 465 What Else to Bring to an Oral Argument 466 Rebuttal 466 Handling Challenging Aspects of an Oral Argument 467 Mind Going Blank 467 Periodic Stumbles 468 Difficult Questions from the Judges 468 Pausing to Think 469 Ending the Argument Tips 469 Other Oral Argument Tips
Section 13: Drafting Persuasive Mediation/Arbitration Papers
Chapter 33: What Is Mediation?
Chapter 34: What Is Arbitration?



Section 14: Persuasive Writing in the Transactional Context

Chapter 35: Persuasion in Transactional Lawyering 481
Term Sheet 482 Contract Drafts 483 Negotiation Matrix 483 Negotiation Letter 484
Appendices
Appendix A: Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context
Appendix B: Sample Single-Issue Legal Office Memorandum
Appendix C: Sample Multi-Issue Legal Office Memorandum 517
Appendix D: Legal Office Memorandum-Drafting Checklist
Appendix E: "Bring It, Socrates!": Conquering Anxiety About the Socratic Method and Public Speaking in Law School 529
Appendix F: Six Tips for Converting a Law School Writing Assignment Into a Job Search Writing Sample

	Contents	xxix
Appendix G: Sample Complaint		543
Appendix H: Sample Answer		551
Appendix I: Sample Motion to Compel and Accompanying Memorandum of Points and Authorities		555
Appendix J: Sample Opposition to Motion to Compel		565
Appendix K: Sample Motion to Dismiss and Accompanying Memorandum of Points and Authorities		573
Appendix L: Sample Appellate Brief		587
Appendix M: Sample Mediation Brief		605
Appendix N: Sample Settlement Agreement	t	613
Appendix O: Sample Oral Argument Outline	.	617
Index		623