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## Preface

If variety is the spice of life, then litigation is the international smorgasbord of practicing law. There's endless variety in the types of cases you may handle. One case might involve antitrust claims between corporate giants. Another might involve a collision at an intersection. Yet another might involve a custody dispute. Even if your practice is concentrated in a certain area of law, each case will involve new parties with new stories to tell. For each case, you'll have to learn the facts better than the witnesses and the opinions better than the experts. Litigation is a great field for the constantly curious who never want to stop learning.

(If, someday, you are stuck in a ten-hour-long deposition about insurance annuities, you may believe we've misled you. We're sorry. But note, we're touting variety over the span of your practice, not on an hour-by-hour basis.)

Once you're working on a particular case, the variety will continue. One day you might be interviewing witnesses. The next day you might be reviewing documents in discovery. (Okay, document review might go on for a few days – quite a few days.) The next day you might be sitting at your computer, composing a document for the case.

“Ahh,” you may think, “that's when the monotony will set in.” But even when you're sitting at the computer, if you're writing for litigation, the variety will continue. Over the life of a case, you'll write many types of documents. For each document you write, you'll need to understand:

- the audience for the document,
- the document's purpose,
- the proper components of the document,
- the strategies that should guide your writing, and
- the ethical rules governing the document.

In addition, some considerations will come into play for every document you write. Before writing, you'll need to research the facts and the law that pertain to the document, considering whether artificial intelligence can aid you in the process. You'll need to thoughtfully select appropriate language, considering how to avoid bias and unsupported assumptions. As you write, and especially as you edit, you'll need to follow general principles of good writing, considering whether you are meeting the standards of your new role as a professional writer.

## **1. RESEARCHING AND THE ROLE OF ARTIFICIAL INTELLIGENCE**

Before you write, of course, you must know what you are writing about. That “what” includes both facts and law. The first version of the facts will likely come from your client, but you’ll need to evaluate whether further factual investigation is necessary before you commit those facts to writing. You may know something about the governing law from law school or experience, but to confirm that you know how the law will meet this set of facts, you’ll need to do additional research.

While you should insist on knowing the facts and the law before writing, artificial intelligence tools don’t always employ the same rigor. So you will need to examine when you can ethically and efficiently rely on such tools to assist you.

## **2. AVOID BIAS AND UNFOUNDED ASSUMPTIONS**

The law, of course, relies on precedent. Much of that precedent was written decades or even centuries ago. Its language may reflect biases and outdated cultural presumptions. Court opinions often fail to reflect the diversity of our culture. As you write, you’ll need to select language more appropriate for modern society.

In addition, you will need to dig deeper and consider whether, even if your words don’t reflect bias, the assumptions underlying them do. Your litigation writing should be based on facts and law, not stereotypes you or your predecessors unwittingly default to.

## **3. AUDIENCE AND PURPOSE**

Early in your legal education, you probably studied two types of documents you might write in a litigation practice: legal memoranda and briefs. That study will give you a good foundation for writing in a litigation practice, but it is only a foundation. As the types of documents you write begin to vary, so must your thought processes in preparing the documents.

The audience members for memos and briefs are typically lawyers and judges. The audience for your other litigation documents won’t be so routine. Sure, sometimes you’ll be writing to lawyers. But sometimes you’ll be writing to jurors. Sometimes you’ll be writing to a client. And what might that client be like? It might be an in-house counsel with a J.D. and an M.B.A., or an immigrant who speaks limited English. You might think you’re writing to one lawyer (your opposing counsel) when really you’re writing for another lawyer (the judge). Or you might think you’re writing to the judge when your real audience is the media or an insurance company. For each document you write in litigation, you’ll need to consider your audience members and how best to communicate with them.

Just as the audience for litigation documents varies, so do the documents' purposes. The purpose behind memos and briefs is to explain the law, either objectively or persuasively. You'll explain the law in some other litigation documents, too, such as motions or client advice letters. But sometimes you'll have an entirely different purpose, such as documenting a deal with your opposing counsel or getting your bills paid. The point is that you shouldn't go on autopilot, writing each document the same way you wrote the last one, without considering the purpose of the document and how best to achieve that purpose.

An author should always consider the audience and purpose for each document. That's true for all types of legal writing, but it's particularly critical when writing litigation documents because your audience and purpose are always changing.

#### **4. COMPONENTS, STRATEGY, AND ETHICS**

As audiences and purposes vary, so do the components of litigation documents. Often, the components vary by jurisdiction, by substantive legal area, and by local practice. To aid you in drafting the types of documents you'll create in a litigation practice, we've described typical components for many documents. But you'll also see many cautions to check on and adhere to the local rules and practice where your case is pending. We've tried to generalize about litigation practices, but you won't be practicing law in a hypothetical jurisdiction. You'll be trying real cases in real courts. Read their rules.

The strategic issues that will confront you in each case will also vary. Sometimes your client's goal will be to settle a case as cheaply as possible. Sometimes your client will be more interested in publicizing an injustice than obtaining damages. Sometimes your client's concern will not be one particular case, but the effect on the client's business if copycat litigation were to follow. Thus, we can't tell you the right strategy for every case. But we can—and will—highlight strategic issues you should consider when drafting different documents.

Ethical rules will also play a role in determining what you should—and should not—include in a litigation document. You'll have different ethical duties to different audience members, and those duties will affect what you can put in writing. Of course, you will need to read the rules for your particular jurisdiction, but we'll use the American Bar Association's Model Rules of Professional Conduct to point you in the right direction.

#### **5. PRINCIPLES OF GOOD WRITING**

Audience, purpose, components, strategies, and ethical considerations will vary depending on the document you are writing, but principles of good writing will not. Every document you write should be neat and professional. We also encourage you to write your documents with these goals in mind: make

information accessible, create readable text, organize content to meet reader needs, and write persuasively. And because good writing requires good editing, we'll address principles of good editing in Chapter 14.

## 6. WRITING LIKE A LAWYER

You will need to use your skills as a lawyer for every document you write. Sure, you could find forms for many of the types of documents you'll write in litigation, or you could ask a bot to write them. But the forms and the bots will never know the particulars of your case. For example, they will have no idea whether, given your particular case, the best strategy is to make a document as detailed or as bare bones as possible. You, the lawyer, must determine how best to accomplish your client's goals with each document.

To help you learn to write like a lawyer, we will provide guidance for drafting the variety of documents you'll create in a litigation practice. After addressing research, use of artificial intelligence, and avoiding bias, this text will walk you through many of the documents you are likely to write during the life of a case, from the engagement letter with your client at the beginning to the jury instructions at the end. For each type of document, we'll discuss who your likely audience members will be. We'll talk about the possible purposes of the document, which may not always be the purposes you would initially assume. We'll walk through the components of the document to give you some idea of what your document should contain. We'll suggest some strategic issues you should consider as you write. And we'll highlight ethical rules to bear in mind as you do so. Finally, we'll help you learn writing tools and techniques to polish your documents until they glisten.

Onward, then, to the variety that awaits you as a professional writer.

Kamela Bridges  
Wayne Schiess  
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