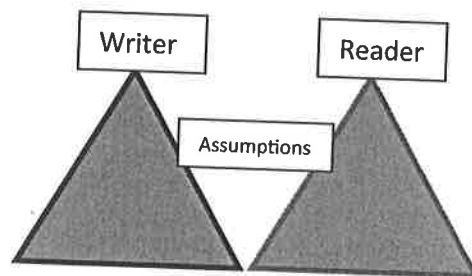




Chapter 14

Locking in Logic and Abolishing Assumptions in Legal Analysis

This chapter focuses on two substantive aspects of objective legal writing that many new legal writers struggle with: (1) structuring a legal analysis so it makes *logical* sense to the reader; and (2) avoiding *assumptions* about the reader's background knowledge that create unfortunate gaps between the author's communication and the reader's comprehension.



I. Examining Logic in Legal Writing

If you look up the word "logic" in a dictionary, you find all kinds of sophisticated intellectual definitions tied to mathematics, philosophy, or computer science. Scholars of logic use highbrow terminology like "inductive reasoning" (general propositions derived from specific examples), "abductive reasoning" (observations leading to a hypothesis), and "deductive reasoning" (specific

examples derived from general propositions). Others discuss the concept of “syllogism”: “a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion.”¹ An example of a commonly used syllogism is:

Major premise: All humans are mortal.
 Minor premise: All Greeks are humans.
 Conclusion: All Greeks are mortal.

Or . . .

Major premise: All law school courses are challenging.
 Minor premise: Legal Writing is a law school course.
 Conclusion: Legal Writing is challenging.

Or . . .

Major premise: All dogs are canines.
 Minor premise: Australian shepherds are a dog breed.
 Conclusion: Australian shepherds are canines.

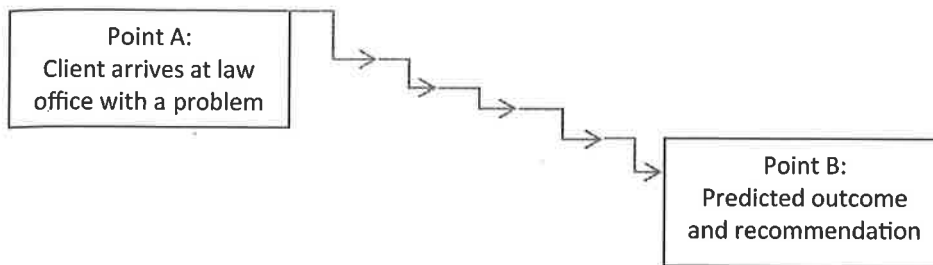
If you find some of the above-referenced high-level definitions of logic confusing, this chapter proposes starting on a more fundamental level, approaching legal writing logic the same way you tackle practical real-life tasks.

In objective/predictive legal writing, you start at point A at which the client comes to the law office with a problem. You solve the problem by locating a rule and applying that rule to determine the predicted outcome and make a recommendation: point B.



Point A is the condition under which you have a dilemma but no solution, and point B is the predicted result and recommended course of action. Your goal in writing about the client’s predicament is to guide the reader from point A to point B such that the reader understands clearly how you arrived at point B and could recreate the analytical stages herself by following your step-by-step analysis.

¹ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/syllogism> (last visited Nov. 25, 2014).



Think about how often people perform logical, step-by-step applications and analyses in daily life. Consider the following tasks involving logical procedures:

- A bartender mixing a rosewater rickey cocktail, which involves cherries brandied overnight, Angostura bitters, and a brulee flame torch
- A party host preparing boneless Buffalo chicken wings, which entails deboning a chicken and then battering and deep-frying the pieces
- A traveler figuring out how to journey from bustling Rome to a small coastal town called Ostuni 336 miles away via a high-speed train, a small regional connecting train, and a local bus
- A roommate assembling an IKEA bureau that arrives in 14 pieces accompanied by a plastic bag of knobs, screws, nails, and other fasteners

Each of these examples requires following incremental instructions in a certain order; otherwise, the end product likely will not end up tasting or looking like the desired product or functioning properly. For instance, a mixologist cannot concoct a rosewater rickey by dumping a jumble of ingredients into a Tom Collins glass and then firing up the flame torch to flambee the cherries now submerged at the bottom of the tumbler. Likewise, it would be impossible to get from Rome to Ostuni by taking the local Ostuni bus first, then a coastal regional train, before the high-speed train that departs from Rome.

Even though these are trivial examples, they illustrate the theme that logic does not have to be a complex concept fraught with intellectual terminology like syllogisms or inductive/deductive reasoning. It can simply mean organizing the paces of a task in a logical order that makes sense to you and your audience, and that can be repeated to achieve similar successful results. In legal writing, lawyers use the legal rule to guide their written logic. If the rule has three required elements, the analysis in the rule application must address each of the three parts. If the client's facts demonstrate that one of the elements is not satisfied, then the particular cause of action (e.g., negligence, breach of contract, car theft, or impersonating an officer) fails entirely. A good legal writer addresses each of the required elements one at a time and then generates a logical conclusion based on the checklist of elements being satisfied or not satisfied.

When a rule involves factors instead of elements, this analysis may seem more complicated at first glance, but the examination follows a similar logic flow.

A good legal writer takes each one of the factors—one at a time—and evaluates the particular factor in light of the facts of the client's case. At the end of the analysis, the legal writer considers how many factors are satisfied and how many are not satisfied. If more factors are fulfilled than not, the legal writer logically can conclude that a court would probably find that the requirements of the rule are met. A factor analysis requires balancing and weighing of factors against one another, but the mechanical approach is still the same. Think of elements as an "all-must-be-satisfied" approach and factors as a "most-must-be-satisfied" approach.

New legal writers lose logic flow, and confuse their readers, when they proceed too quickly or not precisely enough through the rule analysis, skip over steps, jumble steps together, or put the steps outside of a rational order. Sometimes these behaviors stem from a basic confusion about or misunderstanding of the rule in the first place; this can be fixed by slowing down, mindfully approaching the rule,

acknowledging and lingering with any challenging concepts, and taking extra time to diagram and outline the rule to clearly and fully grasp the component parts and how they fit together. Other times, the foregoing writing mishaps occur when a legal writer takes shortcuts to save time, word space, hassle, and so on; resist that shortcut temptation—be thoughtful, methodical, organized, and thorough, and the logic will flow nicely.

Practice Tip

If you are having trouble organizing the logic of your analysis, try to imagine how you would explain the legal problem as a recipe, driving instructions, or directions for building a piece of furniture.

II. Avoiding Erroneous Assumptions

Some new legal writers leave gaps in their work product because they assume that their reader shares equal knowledge about (1) the facts of the client's case, (2) the key players involved, (3) the legal terminology necessary for an evaluation of the legal issue, and (4) the governing law. Especially in the law school environment, where professors and students spend weeks in class mulling over the subject matter of a single memorandum, novice legal writers understandably assume the professor is familiar with shorthand terminology for referring to client names, key events, and rule components, and therefore presume that shortcuts and abbreviations in references and explanations are acceptable. However, from the beginning of your legal writing career, resist making these types of faulty assumptions. Instead, always imagine your reader (a busy supervising attorney) and focus on his mindset. Remember that your supervising attorney will be handling many client matters, not just the one you are working on; so as you prepare your work product, avoid making erroneous assumptions about the depth of

the supervising attorney's knowledge or recollection of the client's case and applicable law. Err on the side of being overly informative in referencing and giving background context to names, persons, nouns, events, and legal terminology. To envision how these types of assumptions impact a reader's understanding, consider the following exercises.



EXERCISE: ASSUMPTIONS

Pretend you are the supervising attorney reading the following umbrella paragraphs in two different memoranda. As you read these introductory paragraphs, highlight or circle places in the text where the writer has *assumed* erroneously that you already know certain facts of the case, aspects of the legal issue, or elements of the governing rule. Circle names, persons, nouns, events, and undefined legal terminology you do not recognize. Do the writer's assumptions inhibit your understanding of the client's case? How? What details would you like the writer to fill in to enhance your understanding?

Example 1: Our client, Dara Torres ("Torres"), seeks legal advice regarding whether she has a viable basis to seek asylum in the United States, on the grounds that she has been persecuted in Mexico on the basis of her sexual orientation. To be eligible for asylum, an alien must demonstrate that she is unable or unwilling to return to her home country because of "past persecution" on a statutorily protected ground. To establish eligibility for asylum based on "past persecution," an applicant must show (1) an incident that rises to the level of persecution and (2) such incident is committed by the government or forces the government is either unable or unwilling to control.

The court likely will grant asylum in this case because (1) Torres and Ramos both identify as homosexuals, satisfying the social group requirement; (2) the death threats and police targeting outside Secreto in Hermosillo constitute persecution on account of her homosexuality; (3) the tire-slashing incident outside her home rises to the level of persecution as defined in the case law; and (4) Miguel Longo and his drug cartel enforcers meet the private and government actor prong.

Example 2: Our clients, Matteo and Alexis Malta (the "Maltas"), seek legal advice regarding whether FlyGreen's decision to remove them was discriminatory. Under 49 U.S.C.A. § 44902(b) (2012), an airline can refuse an individual's transportation when (1) the "inimical to safety" standard is met, and (2) the pilot's decision is not arbitrary and capricious. In this case, in determining if the pilot justifiably deemed Matteo "inimical to safety" on the grounds of his behavior stemming from the disability, courts consider the decision in light of (1) the facts known to the airline at the time of the decision, (2) the pilot's reasonable reliance, (3) the time constraints faced by the pilot, and (4) the general security climate at the time.

The court likely will find that Matteo was "inimical to safety" and, therefore, his removal from the flight was proper because of (1) the flight attendant's statement; (2) Matteo's erratic actions, including his toy, language, and interaction with the passenger; (3) the weather; and (4) the recent security events in the other Louisiana airport. Therefore, the pilot's decision was not arbitrary and capricious.