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SUGGESTIONS ON WRITING MEMORANDA

Much of what associates do in their first few years of practice is write. At this firm, we particularly pride ourselves on the quality of the written work of our lawyers. In this memorandum, we seek to provide newer associates with suggestions on what your role is in preparing memoranda and on the form such memoranda should take. Attached is a memorandum containing tips on grammar, style and usage.

Your primary responsibility in preparing a memorandum is, of course, to find the applicable law and to apply the law to the facts. You will have been given a set of facts or a question for which legal research is required. In your memorandum, you should first explain the relevant facts and, in doing so, set up the problem.

Next, the law needs to be explicated. There are two basic methods to expound the law. First, in most instances the courts have established a set of legal rules on the subject or a legislature has enacted a statute setting out the governing standard; these can be set forth propositionally. Second, there will be cases relating to the subject that explain or modify the legal propositions; you can use the cases in a case-discussion format to illustrate analogically the application of the legal rules to your facts. In both instances, you must explain how and why the rule applies and what conclusion should be drawn. In general, setting forth the doctrinal rules and using cases to show the rules' application is an effective way to provide the reader with a sense of the texture of the legal regime.

An illustration of the rule and analogy technique taken from a memorandum follows:

Courts have permitted the disclosure of attorney work product without finding a waiver of the immunity where the disclosure is to one with a "community of interest." [cites] There are not, however, strict rules for determining which entities share the requisite community of interest such that disclosure to them does not effect a waiver. A simple case of non-waiver is the disclosure of material to one participating in a joint defense. "Community of interest," however, is not limited to actual co-parties. For example, in Vilastor-Kent, the court did not find a waiver where disclosure was made to a potential co-party before the initiation of the suit. 19 F.R.D. 522. The key to maintaining the immunity is that the disclosure must be to someone "with interests adverse to that of the party seeking discovery." Stix Products, 47 F.R.D. at 338.

Perhaps the most comprehensive analysis of the "community of interest" doctrine is Judge Wilkey's opinion in United States v. American Telephone and Telegraph Co.,642 F.2d 1285 (D.C. Cir. 1980) ("AT&T"). In AT&T, the United States had received certain documents and other explanatory materials from MCI; MCI had previously obtained the documents and prepared the materials in its separate litigation against AT&T involving similar antitrust issues. AT&T sought copies of the explanatory materials furnished to the United States. According to the court, the issue turned on whether MCI "waived any work product privilege it might otherwise have had when it handed the . . . documents to the United States." Id. at 1297.

The AT&T court ruled that MCI had not waived the work-product immunity. The purpose of the work-product doctrine -- "promot[ing] the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of his opponent" -- is not undermined by disclosure to a third party sharing common adversarial interests. Id. at 1299 (emphasis omitted). As the opinion states:

> " ' [C]ommon interests' should not be construed as narrowly limited to co-[parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a

> common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger."
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> Id. at 1299-1300 (emphasis added). Because the disclosure by MCI was to an entity sharing common interests vis-a-vis AT&T and because the government guaranteed that it would preserve the confidentiality of the materials, the D.C. Circuit held that no waiver occurred.
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> Here, disclosure of work-product materials to the insurance companies should not operate to waive the immunity as respects the underlying tort claims. Regarding the underlying tort claimants, XYZ Inc. and the insurers have common interests. Each has an interest in defeating the tort claims. Moreover, ...
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> * * *

Setting forth the law in a memorandum, however, should not simply be an exercise in reportage. Your job is not to summarize each and every case thereby enabling the reader-lawyer to draw his or her own conclusion. Finding the law and clearly stating it is only the first step. It is usually of critical importance that you explain the rule and how and why the rule makes sense. Sometimes it is useful to start from the very broad propositions related to your subject and narrow the focus; other times it is appropriate to analyze the historical development of the rules to provide a deeper understanding of the reasons or polices supporting the rules and the shifts over time. In any event, you must draw conclusions and explain to the reader why you reached them.

The nature of our firm's practice sometimes makes reflection on the development or purpose of the legal regime necessary. Often the problems that you will be asked to analyze

are unique. This requires a sensitive analysis of the law and policies implicated in the circumstances. More important, the dearth of authority requires that you be creative in searching for analogies; you will also need to synthesize the disparate sources into a useful framework. Your goal is to be able to predict the outcome that the court, agency or other decisionmaker will reach when confronted with your facts (or, indeed, any like set of facts). Creating the framework for analysis and prediction is perhaps the most crucial function of written memoranda.

The lawyers with whom you work will be able to assess whether the conclusion you draw or framework you create is sensible or workable. By setting forth the governing rules and illustrating analogous circumstances, you provide other lawyers with a sufficient basis to judge whether the inferences and conclusions you draw are reasonable.

As you proceed in your analysis, you should always state what you are assuming or inferring. Also state any limiting parameters to your analysis; for example, in discussing a question of contract law, is a particular state's law being used or has the choice-of-law question not been resolved and, therefore, general principles of contract law are being discussed.

In addition, having reviewed the case law, you may be able to spot new issues that bear on the client's circumstances. Although these issues may not be within the strict purview of the initial assignment, it is often useful for you to flag the issue in the memorandum (via, e.g., a footnote) or to discuss the matter separately with the other lawyers with whom you are working.

You should also suggest the practical steps that should be taken in the light of your analysis and conclusions. You might suggest how the matter should be implemented or how the client should create a record to bolster its position or to preserve its rights. Clients come to us not only for legal analysis but for practical advice. Memo-writing is a part of the

formulation of that advice.

Finally, the process of preparing a memorandum should be as much an exercise in editing and rewriting as it is research and writing. You will usually discover that, in reviewing and editing, new questions or problems emerge; generally writing a memorandum is more like thinking on paper than it is regurgitating source materials. In your exposition, you should be particularly wary of conclusory terms and question-begging labels (e.g., "XYZ Inc., as a third party, . . . "); these often provide a sense that a question has already been analyzed when no analysis of why use of the label is appropriate has been made. Rereading and rewriting will help you transform your memorandum from conveying the basic idea to expressing clearly what you actually mean. Critical rereading will also reveal analytical fuzziness or omitted logical steps. The process of reading and revising, although time-consuming, results in dramatic improvements in both analysis and presentation. Learning to be your own editor, your own most critical reader, is an important skill that will greatly enhance the quality of your legal work.

SOME TIPS ON WRITING

An easy and effective way to make the transition from discussing general legal rules to the facts with which you are concerned is by use of the word "here," e.g., "Here, as in Doe, the company has for many years. . . ."

In the circumstances -- not under.

In place of the word "indicate," which is ambiguous, use "state" or "suggest," e.g., "the court suggested that," unless what is "indicated" is something indirect in which case use "imply," "intimate," "insinuate," etc. "Indicate" is proper when used to mean "evince" or "signify" where followed by a noun object, e.g., "Smoke indicates fire." Generally, if the word following indicate is "that," use another word.

"That" is a defining pronoun and is more restrictive than "which"; accordingly, if you have a specific item or group in mind, use "that," e.g., "the company that invented the widget." When using "which" as part of an undefining relative clause, commas are necessary to set off the clause. Strunk & White use the following illustration:

> "The lawn mower that is broken is in the garage. (tells which one) The lawn mower, which is broken, is in the garage. (adds a fact about the only mower in question)"

In any event, when in doubt, use "that."

Use "now" or "at this time" in place of "at this point in time." Use "then" or "at that moment" for "at that point in time."

Write facts as if you were telling a story (which, in fact, you are).

"Different from," not "different than."

The proper use of hyphens eliminates ambiguity; use hyphens between any two (or more) words that together modify a third word (unless one modifier ends in "ly"), such as: prior-appropriation doctrine (a water-law doctrine under which the first person to use water secures the better right; without the hyphen, the word "prior" might refer to "appropriation doctrine" and thus the expression would refer to the previous doctrine).

Commas should be used between parallel adjectives that independently modify a noun, e.g., "the well-written, thoughtful brief." If "and" can be substituted for the comma without rendering the sentence completely awkward, use of the comma is appropriate. A comma should not be used when the adjectives are not unrelated, e.g. "five screaming

little children."

Semi-colons are used before independent clauses (clauses with a subject and a verb) joined by conjunctive adverbs such as "however" and "therefore" or to delineate elements in a series following a colon.

The phrase "of the" is frequently unnecessary, e.g., in place of "One of the defendants said" use "One defendant said."

"None" is almost always singular; therefore, use "is" after the expression, e.g., "none of the hundred defendants." In some contexts, however, "none" may have a plural meaning, e.g., "None of these authorities agree with one another;" in such cases, the plural verb is appropriate but rewriting is perhaps the better solution.

Place modifiers near the word they modify so as to avoid expressions like "He only killed her" when what was intended was "He killed only her."

When more than two things or persons are involved, use among, not between.

"Of" is unnecessary between "question" and "whether", e.g., "This case presents the question whether mere adherence to industry custom excuses conduct that is otherwise negligent." (The variation "as to" before the word "whether" is likewise unnecessary.)

The word "claim" means to establish or assert an entitlement; try "contend," "maintain," or "declare" instead.

At the beginning of a sentence, "nevertheless" is better than "however." "However" is more effective in the middle of the sentence.

There is a presumption against splitting infinitives; if you wish to place unusual stress on the adverb or if, without splitting, it is unclear what the adverb is modifying, separating the "to" from the verb is acceptable. Nevertheless, the convention is not to split.

"Less" refers to quantity; "fewer" to number.

The preferred meaning of "while" is "during the time that" and should not be indiscriminately used in place of "although."

When a comma is used to begin a subordinate clause, e.g. an appositive, a comma must be used to close the clause.

When a conjunction introduces an independent clause, place a comma before it: "I like Betty, and Betty likes Frank." Alternatively, use a semi-colon between the clauses and omit the conjunction.

The verb form of the word "error" is "err."

Strunk & White object strenuously to the expression "the fact that" and state that it "should be revised out of every sentence in which it occurs."

When making a conditional statement that is contrary to fact, use the word "were", e.g., "If this were the rule, . . ." or "Were this the rule, ..."

In Wydick's Plain English for Lawyers, the author suggests using the expression on the right in place of the expression on the left:

by means of	by
by reason of	because of
by virtue of	by, under
for the purpose of	to
for the reason that	because
in accordance with	by, under
inasmuch as	since
in connection with	with, about, concerning
in favor of	for
in order to	to
in relation to	about, concerning
in the event that	if
in the nature of	like
prior to	before
subsequent to	after
with a view to	to
with reference to	about, concerning
during the time that	during, while
for the period of	for
until such time as	until

Wydick also suggests avoiding nominalizations of verbs. He writes: "A base verb that has been turned into a noun is called a 'nominalization.' Lawyers and bureaucrats do not act -- they take actions. They do not assume -- they make assumptions. They do not

conclude - they draw conclusions. (p. 23) In general, use of the base verb is sufficient.

The word "but" is used incorrectly where the clause extends the previous idea. Fowler's uses the following example: "In vain the horse kicked and reared, but he could not unseat the rider (if the kicking was in vain, the failure to unseat involves no contrast; either 'in vain' or 'but' must be dropped.)" The word "and" can properly be substituted for "but" in Fowler's example.

Nouns generally should not be converted into verbs.

Use the active voice. Avoid gaps between subjects, verbs and objects. Use short sentences.