Modern Legal Writing

A "How To" Guide for Writing Assignments in Professor Michael Madison's Copyright Law and Trademark Law Classes

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Changes: Editorial and formatting clarifications.

This document is a guide to legal writing generally, but it is specifically intended for use by students preparing assignments for classes taught by Professor Michael Madison at the University of Pittsburgh School of Law.

Before following the advice that follows in connection with any other legal writing, that is, for any other professor, supervising lawyer, judge, client, or colleague, check with that person first. In other words, the first rule of all legal writing is:

Know your audience. Know your audience's expectations. Don't disappoint your audience.

To students in Professor Madison's classes:

The writing assignments in my classes bear similarities to assignments that you have been given in other classes, but in many ways, these are different. We will talk in class, as a group, about both the similarities and the differences. I have found that oral discussion has its limits. Some of my advice and expectations are worth sharing in writing. That both helps students while preparing their work product, and it also helps students to understand my comments and criticisms on their work. What do I expect on these assignments? Read on, and read carefully. Some of what follows will seem obvious; some will be repetitive. I have found that stating and repeating the obvious is usually necessary, important, and useful.

A note on terminology: For years, I assigned legal memoranda as the work product for these courses. Beginning with the Fall 2017 version of the Trademark Law course, I ask students to prepare work product in a number of different possible formats: memoranda, email messages, presentations, and perhaps others. This document explains why the formats have changed and how the recommendations in this document apply similarly and differently to each one. For the most part, I have edited the contents of this document to refer to "work product" produced by students rather than "memos" produced by students. Historical references still sometimes use "memos."

Grading

Scores: I score each "memo" assignment on a 1-20 point scale, with 20 being the highest score possible.

Grading takes account of the responsiveness of each student's work product to the assignment; the accuracy and thoroughness of the factual and legal analysis that it contains; and the clarity and professionalism associated with its form, format, style, tone, organization, composition (that is, grammar, syntax, spelling, punctuation, and sentence and paragraph construction), and presentation. More comments appear below on each of those things and how they are taken into account.

A scoring "rubric" is posted on the course website, and each student work product is returned not only with comments in the margins but also with a completed rubric. The primary purpose of the rubric is to help me deliver written guidance to students in structured and consistent way. (Many students will read the phrase "written guidance" and read "feedback," which is understandable. But the word "feedback" is too simplistic; it does not capture either the aim or the effect of my comments.) When grading student work product, I do not apply the categories or notations on each rubric rigidly or mechanically.

Curves: Scores are assigned based on a limited curve, rather than on the basis of a certain number of points awarded or deducted for specific features. Work product of the highest overall quality is grouped together at one end and awarded the highest score. Work product of the lowest quality is grouped together at the other end and awarded the lowest score. Work product in between is grouped in terms of comparable overall quality; work product receiving a score of 17 is not as good as work product receiving a score of 18 but is better than work product receiving a score of 16, and so on.

This is, in other words, an interval rating scale. The single point that separates a 15 from a 16 is intended to indicate that a paper with a 16 score is better than a paper with a 15 score by the same increment that separates an 18 score from a 17 score, and so on. The one-point gap represents a measure of overall quality, not a loss of a point.

The scores do not map automatically onto an "A to F" scale, though it is obvious that scores at the higher end flirt with the "A" range and scores at the low end flirt with the "C" range and, in the rare case, below a "C." I do not assign letter grades to each work product.

My courses are not subject to the mandatory curve requirements that apply to many courses at Pitt Law. I do generate a grade distribution for each course using some elementary statistics; my usual expectation is that both straight "A" grades and "C"-range grades should be relatively rare (and "A+:" grades and grades below the "C" range are extraordinarily rare). But I do expect that

each student will receive the grade that they earn rather than a grade that is imposed by virtue of what a mandatory curve might require.

Final grades: Based on years of experience with graded memos in these courses, I can say that it is very difficult not to pass the course. It is also very difficult to receive a straight "A" grade as a final grade. With respect to individual assignments, perfect scores of 20 are rare. In roughly 20 years of assigning these memos, and having read more than 1,000 student memos, I have given a score of 20 no more than 20 memos in total. With respect to "A" and "A+" final grades, on average, in a class of 20 students, 2 to 3 students may receive grades of straight "A" or better. In some semesters, no student does. A slightly larger number of students usually receive "A-" grades. I aim to reserve top-level grades for students who have delivered top-level work, not simply for students who have outperformed the rest of the class.

Students who receive lower scores on early assignments wonder, justifiably, if they may still earn a higher grade for the course overall. The answer is yes. (It is also possible that students who receive higher scores early on may receive a lower grade for the course overall.) My observation over the years is that many students improve their scores significantly from one assignment to the next. I have also observed students doing worse from one assignment to the next.

It has been my experience that the quality of the work product for the class overall generally improves from assignment to assignment. That means that a work product of a given quality for assignment one might receive a lower score for assignment two than it did for assignment one, even if its absolute level of quality remains the same, because its relative level of quality might be lower.

Right answers and wrong answers: I frequently say in class that there are no right answers to the hypotheticals, in the sense that only right answers will be marked highly and that wrong answers will be marked down. Judging from the course evaluations, that statement seems to be unclear. Students persist in believing that there are right answers to these assignments, or that there should be.

So, I will state my position differently. Each hypothetical contains a range of possible topics to address. Each student's goal should be to identify those possible topics that should be addressed, and then to address those topics fully and accurately. Better work product – higher scoring work product – is more persuasive work product. "More persuasive" means that work product addresses the character of the topics chosen more fully and clearly. The rationale for choosing those topics is clearly stated; the nuances of the topics selected are clearly explored. This is the language of judgment. *Importantly, student work is evaluated based on the quality of the legal judgment that the student expresses.*

The quality of legal judgment varies in some well-known ways.

Poor judgment includes relying on a rule that is poorly suited to the context (remember that it is frequently the case that more than one legal rule may apply to a given factual context, so in part, students must select what they believe to be the most suitable rule or rules). *Poor* judgment includes relying on a poor or under-developed weighing of the relevant facts. *Poor* judgment includes not exploring the matter with depth and nuance. Those are reasons for my assigning a low score to student work.

Good judgment includes selecting and applying legal rules that are appropriate to the context and stating the rules clearly and accurately. *Good* judgment includes exploring, identifying, and carefully weighing relevant facts. *Good* judgment includes exercising some imagination in looking past the hypothetical as written to identify, fill, and understand gaps in the fact pattern and to understand the goals and concerns that animate the question(s) being asked. *Good* judgment includes doing more than mechanically applying law to fact; it involves volunteering professionally justified and well-grounded advice and opinion. *Good* judgment includes communicating professional expertise in writing (or orally, or otherwise) clearly and carefully.

All dimensions of a student's judgment, like all dimensions of a lawyer's judgment, do not automatically go together. As a reader, I might not be persuaded that the ultimate conclusion of the analysis is right, but I might nonetheless be persuaded that the judgment is well formed, well expressed, and well suited as a matter of "fit" to the facts of the matter. In that case, a student memo is likely to receive a higher score. I am likely to give a lower score to a student memo that addresses copyright law in the context of a problem that describes symbols and logos. A lower score will go to a student work that discusses the law of infringement by substantial similarity or a likelihood of confusion when the hypothetical problem has asked about the validity of a copyright or a trademark.

Features of strong work product

To sum up, as always, good legal writing scores well; bad legal writing scores poorly. What that statement means is this: the way to do well in these courses is to write *professionally* in terms of form and substance. Students are expected to engage with the hypothetical problems as if they are early career *practicing lawyers* rather than students completing assignments for a teacher. These classes are conceived only partly as vehicles to teach legal substance. They are also conceived largely as means of teaching students how to become lawyers. Learning to be a good legal writer – or a good writer generally - is a big part of becoming a lawyer.

So, this is how I grade student work. In addition to strong legal and factual analysis, I (like any professional colleague, partner, supervisor, employer, or client) look for a number of things that fall generally under the heading, "professionalism." My goal in preparing the assignments is to treat students as if they are junior lawyers. Students' goals in responding to the assignments

should be to write them as if they are junior lawyers. When I read a student work product, I focus on the following topics:

One: Strong work product is composed *carefully*.

Professional work product takes care. It avoids typographical errors; avoids spelling, punctuation, and citation mistakes; avoids awkward or confusing grammar and syntax; and avoids adaptations or paraphrases of relevant legal authority that disguise or mangle the meaning of the law. Professional work product is formatted using a clear and standard system. These considerations fell into sub-categories:

[a] Form.

On their own, spelling errors, punctuation and syntax errors cannot turn a great work product into a poor one, but they can turn a great work product into a merely good one, or a good one into a mediocre one. In the practice of law and in the professional world generally, nothing makes a lawyer look worse than the inability to spell properly and consistently. Learn to do this correctly as a law student, and you will advance in your career farther and faster than your peers and colleagues who don't.

Tip #1	*Tip #2*	*Tip #3*
Better work product has very few form and format problems in addition to better and more thorough legal and factual analysis.	*Fixing form and format is a tedious but simple thing. It is also often the best and easiest route to improving a score on an assignment.*	*These are open assignments. If you lack experience or confidence with respect to spelling, syntax, and punctuation, consult friends, colleagues, and experts.*

[b] Memo, email message, and presentation style and format.

Use the style and format that is appropriate to the type of work product that you have been asked to produce. In all cases, treat your work product as a formal mode of professional communication. Although it is appropriate to treat communications with professional colleagues and clients as confidential, it is also appropriate to assume that your communication to a senior lawyer may be forwarded to a client, even without your knowledge. It is appropriate to assume that your communication to a senior lawyer may be forwarded to a different colleague, even without your knowledge. Because you can't know in advance who will read your work, it is essential that you *always produce your best work.*

Specifically:

Memoranda style and format:

- If the assignment asks for a legal memorandum, then you should use the standard legal research memorandum presentation format, which is some sequence of (a) Issue Presented; (b) Facts; (c) Brief Answer; followed by (d) Discussion, or Analysis. The sequence of (a) through (c) does not matter. In law practice and among law professors, memos may use different sequences. But be sure to use separate headings for each of these sections, and be sure to use headings generally. Readers need maps.
- Better memos treat the first three of these things (Issue, Facts, and Brief Answer) as key elements of a strong presentation, summarizing the entirety of the analysis in not more than a single page (in some cases, less than a single page) that could stand on its own. Ask yourself – as the client may well ask – can the point of the memo be understood clearly if you stop reading before you get to the Discussion? Great memos have that "one page and done, if necessary" character.
- With respect to the Discussion, imagine its organization as a pyramid. That is, if you cut off the base of the pyramid (the end of the memo), then you still have a solid but shorter pyramid (that is, memo). Put your key points and conclusions at the beginning, then use the rest of the Discussion section to explain your thinking and reasoning. Stronger points go first; weaker points go next, on to the weakest at the end. Remember the pyramid structure. Do not start the Discussion section with a general background discussion of the law, expecting to write your way to a conclusion and recommendation that appears only at the end of the memo. As per the preceding bullet point, put the conclusion at the beginning of the Discussion section, not at the end. The reader should be able to understand the essence of your conclusion by reading the first one or two paragraphs of the Discussion.
- Use and work with the facts of the matter, both in understanding the character of the problem presented and in terms of writing the memorandum. Judges and senior lawyers sometimes ask junior lawyers to produce memos that summarize an area of the law. Often, they do not. (Even if they do, use the pyramid structure: lead with the key points.) Most of the time, assigning lawyers want solutions to their problems, which means that they want to know how to deal with the facts. Further discussion of this point appears below.
- You may omit a formal conclusion and signature block, to save space.

Email message style and format:

- In today's professional world, senior lawyers and clients often have neither time nor interest for traditional legal memoranda. Junior lawyers may be asked to submit their work as an email or even by some other online channel or messaging system. If the assignment asks for an email, then the considerations above regarding legal memoranda should be *modified*, as follows.

- Do not use the default (a) Issue Presented; (b) Facts; (c) Brief Answer; (d) Discussion headings or categories.
- Do use brief headings, which you invent yourself, to break up the content and organize it for readability, clarity, and persuasiveness.
- Start the email with a single paragraph that summarizes your conclusions and recommendations in response to the question(s) that have been asked.
- Use the rest of the email to explain and justify your analysis.
- Remember the pyramid format.
- Treat the email as a form of formal professional communication, not as a casual conversation.

Presentations (slides, or slide decks) style and format:

- In many settings at the intersection of law and business, lawyers are expected to deliver advice and counsel via the standard mode of business communication: the slide deck, prepared in PowerPoint or some other slideware program. Modern lawyers need to know how to prepare and deliver effective slide decks. If the assignment asks for a presentation or slide deck, then the considerations above regarding legal memoranda and email messages should be *modified*, as follows.
- Assume that the slide deck will be read and consumed as a standalone textual product. Do not assume that you (or anyone else) will use it to deliver an oral presentation. The slide deck is treated as a shareable "leave behind" product for audiences to read.
- Ignore advice regarding how to deliver an effective oral presentation.
- Follow the guidance above for email messages with respect to organizing the content of the slide deck. Use the pyramid concept. Start with the conclusion(s), then move through reasoning and analysis.
- Visual dimensions of a slide deck matter. Never use unprofessional graphics or animations (clip art, photographs, logos, other images, or videos) in the slides unless they relate directly to the matter at hand. Use text and only text.
- Use complete sentences, as you would for a legal memorandum or email message.
- Use a professional font.
- Balance the use of white space and text so that each slide is readable when printed.
- Bullet points and font size variations are acceptable, so long as they are kept to a minimum and so long as they are used appropriately to communicate dominant and subordinate elements of the analysis.

Tip #4

Plan out your format and organization before you write. That reduces the risk of error and saves time in editing later.

[c] The language of the law. Like every body of law, copyright law and trademark law each has its own vocabulary and syntax. Learning and using that vocabulary and syntax is a big part of learning that area of the law. The best way to learn that vocabulary and syntax is to read well-written judicial opinions, carefully, and to borrow how judges write for purposes of your own writing. Do not paraphrase statutory text; quote it. (Quote it in limited doses. Avoid long quotations, and avoid block quotations.) Paraphrasing runs the risk that you will introduce misleading or ambiguous concepts, and worse, it runs the risk that you will actually rely on those incorrect concepts. A first-rate work product sounds like the work of a practiced lawyer, someone who "speaks" copyright or trademark. A lesser work product sounds like the work of a law student.

Tip #5

Sound like a lawyer. Do not sound like a law student. To borrow a concept introduced by Chevy Chase in the movie "Caddyshack": Be the ball. This is, perhaps, the most difficult "tip" for law students to execute, because in practical purposes "sounding like a lawyer" may mean speculating regarding what a lawyer sounds like. You are not full-time practicing lawyers. Yet.

Tip #7

Students sometimes tell me that my guidance here aligns with expectations regarding writing "voice" and "style" that they receive from mentors and supervisors in their part-time jobs. Is it acceptable to write in that "office" style when completing assignments in my classes? Yes!

Tip #6

The only way to sound like a lawyer is to sound like yourself, practicing law. Your writing should not sound like a well-trained law student, following the rules that law students learn in order to perform well on exams, in law journal exercises, and "ordinary" law school activities. "Getting to maybe" and IRAC exam writing strategies have limited value in the world of real legal writing. So, don't use IRAC. Instead, organize your work as it makes sense to in terms of the problem to be solved. What's the problem? What are the tools that you will use to solve the problem? How do you propose to solve the problem? A work product that clearly but imperfectly expresses the voice of someone who is really trying to solve a problem will always be graded more highly than a work product that perfectly executes "how to succeed in law school" set of guidelines. I have read roughly two thousand student memos, and another couple thousand memos by practicing lawyers. I can tell the difference between the two.

[d] Citations. When citing and discussing the law, always use complete citations. For cases, that means first party's name v. second party's name, abbreviated appropriately, together with volume number, reporter, page number (and pin cite, if applicable), court (if not otherwise indicated by the reporter), and year. For statutes and regulations, that means title number, identity

of the code or other authority (such as United States Code or the Code of Federal Regulations), and the year. I do not require formal Bluebook citations, which means that I do not require that students invest time in searching the Bluebook for rules on italics and spacing and correct abbreviations of courts and party names; in practice, the Bluebook is used mostly by law review editors rather than by practicing lawyers or courts. I do require that students provide citations on a consistent basis. The abbreviations and presentation style that appear on page 1 or 2 should be used again on pages 3 and 4.

Two: Strong work product responds to the assignment, both in terms of the work's content and in terms of the work's audience.

Meet your audience's expectations. *Answer the question*.

Doing this well in your work product begins with making sure that you understand the assignment.

That may be more difficult that it sounds. As the person constructing the assignments, I am never careful to be perfectly clear. Put another way, I am careful never to be perfectly clear.

Why are the assignments unclear and ambiguous? The world of law practice comes to you in messy and incomplete forms, so these assignments come to you in messy and incomplete forms. We take time in class to explore questions and resolve ambiguities. Use that time. Be curious. Ask your own questions. Some ambiguities cannot be resolved, of course. In my courses as in the practice of law, your job sometimes is to provide legal advice when you don't have all of the information that you'd like to have. Often, however, you can obtain more information than you have been given initially.

Some assignments are framed more in terms of "what is the law?" But most assignments ask for your reasoned recommendation rather than for your opinion. Almost all assignments have a clear objective in terms of a specific client, a specific goal (or goals) for that client, and a specific audience. Great work product analyzes the law not in an abstract "how is the rule applied to these facts?" sense but instead in a concrete "how can we help this client?" sense.

These assignments are not issue-spotters. I am not looking for "the answer that the law gives"; I am not looking for an "describe the best arguments of the parties" summary. There is rarely any benefit in the scoring or in the practice of law to hitting extra legal issues or to cleverly incorporating constitutional arguments or policy justifications. So-called policy arguments are almost always out of place in client memos of the sort that I assign in my classes – though not always; sometimes, the assignments *ask* for policy arguments and analysis. Constitutional law is

almost always simply irrelevant unless, of course, there is a constitutional question squarely presented.

Why do I not assign issue spotting questions – things that resemble traditional law school exams? Because clients do not want to know only how the law treats them or their work. They want to know what they can and should do. What the client defines as a question, or the question, may not align with what you believe are relevant but more important questions in an issue spotting sense. If you answer a question, be sure that it is a question that the client asked or, if the client did not ask it, that it is a question that the client needs to have answered.

Again, you may come away from reading an assignment with a lack of clarity regarding your objective as a lawyer. Use the Q & A time in class to try to clear up your uncertainty. Use that time to try to clear up your understanding of the facts. When I advise that you should answer the client's question, you need to understand what the question is (or what the questions are).

It is important that the work product actually comes to a conclusion, or a take-away point that is well supported. As law students, you often learn that a given case might come out this way or that way. You learn to construct arguments for both sides. You may even be asked to predict what a court might do on a particular set of facts. These are useful skills, but in the practice of law, a client will often want more. A client will want your judgment in a more sophisticated form: not just "what do you think a court will do?" but instead, "what should the client do or not do (or what may the client do or not do), given this understanding of what a court might do?"

Work product that concludes that the case might be analyzed this way or might be analyzed another way – and that stops at that point, perhaps offering some speculative suggestions for what might happen next -- scores lower, in almost every instance, than work product that takes a position and defends it persuasively against reasonable objections and counterarguments. Clients pay for you, and they pay for your advice. They do not pay for cold analysis of the law combined with seat-of-the-pants speculation. Great work product gives concrete suggestions ready for implementation, or raises questions that need to be answered before further suggestions may be specified, and then justifies that approach in terms of the legal analysis.

As you present your judgment, style and tone matter. Senior lawyers and clients expect a certain formality in written work, and they expect that junior lawyers will treat their clients with appropriate amounts of respect and deference. Work product scores poorly if it adopts a casual tone or an informality more suited to law school exams than to a law office, or if it does not clearly reflect a strong sense that the client's goals and interests are paramount. On law school exams, students sometimes include jokes or puns; the professor's smile may lead to that student getting the benefit of the occasional doubt. In my courses, jokes and puns are out of place. Clients don't want to be made fun of, even indirectly.

I reiterate here a core and important point: You have an audience. It is an imaginary audience, but you should treat it as if it is real. Usually, in almost all cases, you are working for a

client either directly or indirectly. Understand who your audience is and what your audience wants and needs. Your teacher or professor is not your real audience; your teacher – me – will put himself in the real audience's position when reading your work.

Focusing intently on your audience pays dividends. My experience in teaching my courses is that over the course of the semester, most students do learn to develop and apply forms of professional judgment (I call it their own lawyerly "voice"), and most students are successful in taking their existing knowledge of legal analysis and applying it to understanding and answering the questions that more senior lawyers and clients ask them in real assignments. Students do learn to get analytically sharper.

Fortunately, working in that professional mode usually prompts a higher degree of compositional and organizational proficiency in the writing itself, and a higher degree of polish overall in the work product. My experience is that sharper analysis usually leads to better writing. Conversely, better writing also leads to sharper analysis.

What about ChatGPT, AI, and bots?

If you are tempted to explore the capabilities of ChatGPT or other AI-powered chatbots in the course of writing your papers, feel free to do that. Explore. But all work that you submit for a grade must be your own writing, not that of a machine, a robot, a chatbot, or an AI. If you have any questions or concerns about what that policy means, consult me before turning in your work.

Three: Strong work product describes the relevant law thoroughly, accurately, and concisely.

These are fully "open" assignments, so failure to describe the law thoroughly and accurately is both inexcusable and likely to lead to a low score. But there is an art to doing this effectively, because the work product in these courses is very short. Be accurate, and be concise.

Length is limited in these courses because in the real professional world, your work product is often expected to be brief – even briefer than the relatively few pages or small number of words that I permit. Learn now to be ruthless via effective brevity.

Why the brevity in the professional world? One, clients often do not like to pay for legal research, and two, clients often do not like to read legal research. When summarizing the law, therefore, it is important to be concise and to leave plenty of room for exploring ambiguities in the cases or the statutes and analyzing the facts of the matter. A client does not want a treatise on the

law. A client wants to know that you know the key legal authorities that bear on their problem(s). As always in copyright and trademark law, the right place to start is with the statute. Relevant cases need to be brought in, and they need to be characterized in relevant terms, concisely but clearly.

Concisely. Clearly. I cannot emphasize those two concepts enough.

In sum, great work product does a great job of explaining the relevant law in terms that the client values.

Audience matters here, too. Even if the assignment nominally comes to you from a supervising lawyer in your office or firm, every item of a lawyer's work product should be produced in anticipation of its being reviewed and valued by the client as well as by a supervising lawyer, or a judge, or someone else. If legal jargon is in play, then you should find ways to acknowledge that jargon but also to translate that jargon into concrete terms. Some clients are lawyers, but many are not. Clients who are lawyers are often not IP lawyers. The work product in total should be self-contained.

Given the space constraints that I give you, it is tempting to write something to the effect of, "Given existing case law on trademark infringement, which I assume you are familiar with, then my advice is the following." Do not do that. Do not assume intimate familiarity with existing law, or with existing facts. The client wants to be able to pick up your work product and understand the full landscape of what you characterize as the relevant law.

If there is a bunch of background law that needs to be explained, then a good work product will provide a succinct lead-in or introduction that explains why that law is being reviewed.

Many student works start their "Discussion" or "Analysis" sections with two or three paragraphs, or even a page or two, of basic copyright or trademark law. I have learned that this technique is something that is taught in some other classes; it is sometimes called a "rule proof," because it "proves" the detailed content of the legal rule before the rule is applied to the facts. I do not care for the "rule proof" technique, because I know from my own experience as a practitioner that *clients do not care for "rule proofs." Supervising lawyers do not care for "rule proofs."*

I do not downgrade student works for using the "rule proof" technique – unless the technique jeopardizes my ability (sitting in for the assigning lawyer, or client) to understand clearly what the work product says. Nonetheless, ensuring that you complete a "rule proof" can get you in trouble, both because clients rarely care about such things. Also, "rule proofs" take up valuable space that may be better allocated to other matters, such as assessing the facts of the matter. I practiced law full-time for almost 10 years. During all of that time (plus my time as a law student), I never heard the phrase "rule proof."

However you start your work product, and whatever its organization, I do expect and do look for organizational devices – headings and topic sentences – that explain why the work product starts off this way. Write in a way that serves your client, rather than in a way that tracks your assumptions about "correct" legal writing.

In sum, be flexible about how the material is organized and presented. The key is sensibility and intelligibility to the audience, not to you. Adhering (too) closely to CRAC or IRAC or cousin frameworks can get you in trouble. Those are good techniques for law school exams, for the bar exam, and sometimes for a legal brief, but they are rarely foolproof methods for communicating about legal issues in the real world. I never heard or saw either of those acronyms until I started my career as a law professor – 10 years after I graduated from law school, and almost 15 years after I started law school.

Four: Strong work product is well and clearly organized.

By this I mean not only that the work product uses the typical sections of a legal memorandum (or clearly marked headings for an email message or presentation), but also that each section is organized internally in a clear and logical manner. Each paragraph should stand on its own. Each paragraph should make one point, and only one point. Short, one- or two-line headings, as full sentences, should be used to separate different sections of the discussion or analysis.

Each paragraph should begin with a clear topic sentence that highlights the point of the paragraph. The sentences that follow that topic sentence should support, explain, or justify that topic sentence. Each supporting sentence should follow its predecessor supporting sentence in a clear way.

Each topic sentence should be linked to each other topic sentence in an orderly and logical sequence.

Over the years, I have observed that students in these courses wrestle with organizational challenges, often unsuccessfully. Many memos consist of paragraphs strung together with little apparent thought to their sequence. Many of those paragraphs consist of sentences collected in a single place with little apparent thought given to what they have to do with each other, or with the point of the paragraph.

Use this simple strategy to help keep the overall organization of your work on track. Imagine that your writing has a "pyramid" shape. Sharp and pointed at the top, or at the start, and progressively wider and flatter as it proceeds to its bottom, or end. Key information and points go up top, at the start. That key information is followed by progressively broader but less critical supporting or foundational information. If the reader skips the final paragraph or final page, that

is, cuts the bottom out from under the whole shape, then the pyramid is shorter – but it still rests on a stable footing. If the reader skips several final paragraphs or even more than the final page, again, the pyramid is shorter – but again, it still rests on a stable footing. The sharp end of your thoughtfulness needs to be at the top. Never save your key conclusions for the end. The reader who skips those final paragraphs will miss them, and without those paragraphs, the structure as a whole is unstable.

Imagine further that the key points that you wish to make, as to law, facts, analysis, and recommendations or advice, all need to fit completely within the first page of the work. Imagine, in other words, that your reader might not read past that first page. Does the first page contain all of the critical information that the reader needs from you?

This is harder to pull off than it sounds, at least at first. My best estimate, based on having read a lot of student work, is that students produce work that wanders, organizationally, because they struggle to make sense of the underlying problem and the underlying law. Organizational problems, in other words, are usually linked to conceptual problems. You cannot write effectively about something that you do not understand. Even elementary understanding is better than no understanding; writing from a basis in elementary understanding can help you advance to more detailed understanding. But you must master the basics first.

There are at least two, related remedies for these problems:

One: Take time to puzzle through the problem, the law, and the facts. Then take more time. Then take still more time. Be sure that you have read all of the assigned material for the course to that point, including the relevant statutes. Take full advantage of the Q & A opportunity that I offer during class. (That is difficult to do unless you work on the assignment before coming to the Q & A session. Best practice is to work on the assignment before the Q & A begins.) Often, there is just no substitute for immersing yourself in the problem. You may believe that you are working hard and taking lots of time to produce your work. In truth, you likely should be working harder and taking more time. Of course, there will be exceptions, and I have occasionally heard from students who claimed that they scored well in my class even when they spent only five or seven hours on a memo. For high scores, that has to be the exception, not the rule. Great lawyering takes time.

Two: A piece of legal writing, even a short memo, is an exercise in persuasion. Figure out who are you trying to persuade, and what are you trying to persuade them of. Know your goal. Then plan. Then plan some more. Then write.

Features of good legal writing generally

Several of the themes above are worth exploring further and repeating. And repeating. Some things noted above indirectly are worth framing more directly.

[a] Question the facts.

Know what question has been asked, then answer that question. You might choose to answer additional questions, but never fail to answer the question that has been asked.

Knowing what question has been asked, and knowing how to answer the question, are often not easy. Assignments are ambiguous in part because the world of law practice comes to you in ambiguous forms. Senior associates and partners and judges and clients are almost always vague and unclear when they ask you to do work for them.

That ambiguity means that figuring out the meaning of an assignment – asking questions – is a critical lawyering skill, and something that is part of the program of my courses. I offer somewhat ambiguous assignments, I set aside classroom time for your questions, and I encourage your questions. I will always take as much class time as is necessary to answer your questions. Please take advantage of that opportunity!

[b] Put yourself in the client's shoes: Do I trust this lawyer?

The most important theme for any piece of legal writing (perhaps for any piece of writing in any genre) is: Consider your audience. If you were a client, would you be satisfied with the work product that you prepared? Would you be willing to pay for it? Would you follow that advice? Would you know what that advice means? Would you hire that lawyer again?

Clients are happiest when they win, but often, clients are also satisfied when they believe that they have gotten great value – meaning, that they have gotten good advice from a lawyer that they trust. My own assessment of the assigned situation may not align with yours, or with the assessment of some other copyright or trademark lawyer or intellectual property professor you know. No matter (but see my comments above regarding grading and scoring). What counts is whether your advice earned and justified your client's trust.

Legal writing is not primarily about you or what you think or believe. Legal writing is primarily building an argument that persuades your audience. Your audience in these assignments is not me, the teacher, despite the student-to-student advice that I sometimes catch wind of to the effect that these assignments should be treated as mini-exams. Your audience is your client (or clients). How do you know what your client wants and needs to know? Do not simply guess. Put yourself in your client's shoes. That is where you should start. When I read student works, I grade

them from the perspective of the intended audience. I put myself in the shoes of a senior lawyer who has a pretty good handle on what clients want and need.

When I do that, I do not just guess. I have worked with a lot of clients. I have also been a client myself. To paraphrase another great movie line, this time from the original "*Ghostbusters*" movie, I've worked in the private sector. They expect results.

Finally, use organization effectively to make your argument. What argument, you might say? Every piece of legal writing is a form of advocacy. You are advocating something – that a client should win a case, that a court should accept your argument, that your client should accept your advice and counsel. You are always trying to persuade someone of something.

Organize your sections in a logical sequence. Organize your headings in a logical sequence. In the headings and in the supporting paragraphs, highlight your central points. Put those points in your topic sentences, then use the balance of each paragraph to support and explain those sentences. Do not bury key issues in the middle of sections or paragraphs. Break up the writing into paragraphs of sensible length.

In total, do not make the reader work hard to figure out what you are saying. Use your organization to make things easy for the reader. Specifically, make it easy for the reader to understand and agree with you.

[c] Find your voice.

Cultivating the trust of your audience means that being able to analyze and apply the law is only a small part of understanding copyright or trademark law, or any area of the law. The much more difficult part of understanding the law is developing and applying your own judgment regarding what the law permits and what the law forbids, and then persuading various audiences to accept your judgment.

Your ultimate task is to persuade. Persuasion has formal, explicit elements and informal, implicit, or tacit elements.

Formally, grammar, syntax, and spelling matter because form tells the audience something about content. If you didn't take time to spellcheck the memo, why should I trust your legal reasoning? Formally, a too-rigid and formalistic writing style tells the reader that you are just walking through the elements rather than doing what you should, which is investing deeply in the nuances and flavors of the problem.

Implicitly, indirect signals matter. Using the proper vocabulary of the relevant area of law can make a difference in this. But take care to translate for the benefit of non-experts, where appropriate. You are not some objective "authority" speaking about "the law." You are "you," a lawyer, trying to get people to believe you. When I read student work product, I look for expression of the intangible sense that the author is giving me a genuine piece of well-considered advice. The

work product is trustworthy. I know what it is like to read written work product that enhances that understanding and that trust, because it is written in the language of lawyering – not "the law," but lawyering. A human activity. I know what it is like to read work product that undermines that understanding and that trust.

In other words, courts cannot be relied on always to have internal barometers that lead them to "right" outcomes, and your job as a lawyer is not simply to declare or predict that "this is what the court should (or is likely to) do." Clients will not necessarily follow your advice because you say so. Sometimes we pretend that lawyers merely lay out the arguments, and then courts or clients decide the right thing to do. The reality is that lawyers are asked and expected to tell courts what to do, and lawyers are asked and expected to tell clients what to do, and lawyers have to tell courts and clients why to do those things. This is why legal ethics and professional responsibility are such critical parts of every lawyer's world, no matter what the title of the course is.

The "why" of a case or a strategy might be precedent, or history, or controlling (or superseding) authority, or analogy to comparable situations or cases, or persuasive facts, or justice and equity, or sound public policy (the effect of a ruling for one party or the other, which is useful in many settings if not necessarily in this one), or consistency, or other things. Which of those do you want to invoke? Which of them will be persuasive?

Not every project in your career, and not every assignment in my courses, will require that you develop persuasive arguments to make to a court. The lesson is that you need to develop the confidence to express your own judgment on behalf of your client whatever the setting, and to develop reasons for that judgment, whether you are looking at a lawsuit or a license or something else entirely. Your most important asset as a lawyer is something that you will develop over the course of your career: Your own voice. Law school is the time to begin to develop that voice.

[d] Accept and learn from criticism.

I will load up your work product with comments. Most of those comments are critical; I see my role primarily as helping you improve, and that means taking time to point out where the work could and should be better. I do not celebrate great little things. I will not find something to praise in everyone's work just because everyone likes to be praised. Praise should be earned and deserved. If the work is good, I will tell you so. If the work is lousy, I will tell you that. This is essentially the way that the professional world operates.

On advocacy

The broadest and most important lessons that I have summarized above – notably, *know your audience*, *know your goals (and the client's goals)*, and *find your voice* – apply equally to other kinds of legal writing, such as brief writing, and to other kinds of advocacy, notably oral advocacy.

In some detailed respects, those lessons have different implications for briefs and oral argument, that is, for advocacy before a judge (or panel of judges, or other neutral decisionmaker) or a jury. In particular, when you are arguing to a decisionmaker, it is often the role of the advocate to define the questions to be asked – rather than (or in addition) to respond to questions that come from others. So, when I counsel you to answer the questions that come to you in these assignments, I would give you slightly different advice if you were asked to write a brief, or argue a case. In that context, I would say: You are trying to create a narrative that is consistent with the facts and consistent with the law and that leads to the result that your client wants. Define your questions (and issues) accordingly, answer those questions as you will, and resist efforts by your adversaries and by the decisionmaker(s) to frame questions and issues differently.

This memo continues on the next page.

A legal writing checklist

Atul Gawande, a physician, Harvard Medical School professor, and writer for the New Yorker, published a book titled *The Checklist Manifesto: How to Get Things Right*. The book is about how professionals can both avoid errors and also thrive in complex settings by *making sure that they use what they know*.

Checklists do not guarantee professional success or great outcomes. But checklists can help you avoid what Dr. Gawande calls "errors of ineptitude." Avoid those errors in my courses, and it is likely that you will receive better scores.

So, a checklist follows for my courses. The checklist is directed entirely to form and format, meaning concerns that are comparatively easy to address before turning in work product. These are *necessary* but *not sufficient* for scoring well.

Checklist to be reviewed (and if one wants to, submitted with the final product):

1. ___. The final work product includes appropriate headings.

2. ___. The final work product uses appropriate topic sentences.

3. ___. The final work product builds its analysis by making one key point per paragraph, as indicated by that paragraph's topic sentence.

4. ___. The final work product organizes its paragraphs in a logical sequence, using a pyramidal concept.

5. ___. The final work product has been checked *by hand* for spelling and syntax errors.

6. ___. The final work product has been checked *via spellcheck* or an equivalent automated system for spelling and syntax errors.

7. ___. The final work product complies with all format rules specified on webpages for the course, including:
   - __ file format
   - __ font [if applicable]
   - __ font size [if applicable]
   - __ page margins [if applicable]
   - __ work product length (words and/or pages and/or slides)

8. ___. The final work product both observes relevant length limitations and is not so close to those limitations that it runs the risk of exceeding them because of software incompatibility.

Congratulations: you made it to the end.

Now read this memo a second time.