

# Writing “It” Is a Start; Getting “It” Read Is the Goal

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The “it” in the title of this article is any document worth expending your resources writing. Procrastination, writer’s block, or lack of confidence in one’s own writing are among the many excuses used by the well-meaning writer to forgo the task of creating the written word. Moreover, once the task is undertaken there may be the desired rush to finish “it” so that you may sit back and revel in what must be a well-written document. After all, you wrote it and it must be good. Nevertheless, before you release your latest missive, answer the question, “For whom did I write?”

If the answer to the question, “For whom did I write?”, is that it is a document for your eyes alone, the task is complete and you can continue your day. However, if your answer involves anyone other than yourself, you now must critically reread the document through the eyes of your intended audience. This is no small undertaking and, for the novice writer, it may mean forcing yourself to give up the assumptions you had regarding your audience when you first began to write. For the inexperienced legal writer, this may become a monumental task but, alas, it is the foremost task of all that you do when writing the legal document.

Accept your position as the expert on the subject you address in the document. No one should know your subject any better than you do because you are the most recent person to research the subject. Your

readers will be highly educated and knowledgeable in their own right. If you accept your position as the expert, then you can recognize your obligation to your readers to educate them on your subject. With the quick and easy accessibility of information, your readers may have heard or seen something related to your subject, but they are seeking careful analysis and thoughtful synthesis. Your task is like that of the alchemist who was asked to turn lead into gold; your article should turn the lead of information into the gold of knowledge.

The needs of your intended audience will vary. You should tailor your writing to its specific needs, whether your audience is a judge, partner, client, or law professor. To keep your audience engaged in reading your writing you must keep your audience interested. Ideally, all of your readers will share some points of interest but it is more likely that you will need to revise and edit your writing for each of these intended audiences.

## Judges as Audience

As a litigator, you will need to consider and understand what the judge has asked of you in completing the litigation. Before you get to the judge however, you will recognize that judges are generally assisted by judicial clerks or research attorneys. Well educated and enthusiastic about their positions, many judicial clerks and research attorneys lack legal experience, typically having less than three years on the job. Regardless of other commitments, these bright individuals are loyal to their courts and with that loyalty comes the intrinsic desire to keep their judges well-informed concerning developments in the law and the value of your case. Judicial clerks will complete their own research, distill the rules of law, and digest the facts of your case with the result being a memorandum or a draft opinion. A judge will often read the clerk’s work product prior to indulging the lawyer’s persuasive take on the case.

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You must write for the clerk before you can get to the judge.

Research has shown that judicial clerks favor those writings that exhibit, among others, the following characteristics:

- Clarity and precision in the arguments;
- Use of plain English and the avoidance of legalese;
- Thorough writings that educate while informing;
- Organizational structure that includes effective transitions; and,
- Point headings that assist in focusing the arguments.

In fulfilling the wants and desires of those same clerks, you will need to eliminate or minimize the use of the following traits:

- Legal citations that are incomplete or mistake ridden;
- Uninteresting writings that appear to use a cut-and-paste style;
- Undeveloped or underdeveloped arguments;
- Poorly stated rules of law, and;
- Disorganized and redundant construction.

Your client benefits when the clerk adopts your arguments as being clearly and corrected stated. With your expertise and knowledge in the law, and the judicial clerk's inexperience in the law, you must help the judicial clerk learn the law while advancing your client's arguments. Teach the clerks this new area of law without becoming pedantic in the writing. Look for gaps in your analysis that arise when you believe a point should be "obvious" or "clear" to the clerk. Judicial clerks do not share your comfort in the area of law and any attempt at humor runs the unnecessary risks of insulting the clerk with the result that your document is pushed aside.

Judicial clerks will be impressed with good writing that reflects good analysis. Do not try to impress an inexperienced clerk by using arcane or abstruse language. By clearly presenting the development of the law for the clerk, you may find that your reader adopts more of your points just because he or she understands your analysis better than opposing counsel's. When the clerk feels that you have provided all of the pertinent law, the clerk will be empowered. Once empowered, the judicial clerk may find that your arguments should prevail.

The empowerment felt by the clerk creates a sense of comfort and that comfort will be reflected in the clerk's work product to the judge. Persuasion is a natural by-product of good writing and something that the clerk will value. Remember that the judge has charged his or her clerks with specific requirements. The easier it becomes for the clerk to satisfy his or her judge, the more positive your client's position becomes.

#### Partners as Audience

The firm exists as a business and, to one degree or another, partners will want the essence of a business plan. How many and what type of resources need to be marshaled for a particular claim? With litigation calendars that span months, and sometimes years, the firm must make critical decisions regarding the direction of the firm.

Again, clarity in the writing will expose the strengths and weaknesses of legal issues. Organizing the internal or office memorandum allows the partner to follow the flow of the analysis while providing a sound foundation for your synthesized rule of law. Make use of point headings to maintain the focus of your arguments. The fluidity of the writing creates a comfort zone for the partner, akin to that of the judicial clerk, as your document refreshes and refines an area of law.

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In addition to giving the partner the opportunity to align the firm’s practice profile with the client’s claim, a professional and precise document reflects a good hiring or retention decision. Every writing you present to the partner becomes part of your working relationship within the firm.

This critical reader appreciates the same attributes of good writing that the judicial clerk appreciates. Your credibility, and the firm’s investment in you, increases with each well-thought-out legal argument. Professional pride in your work product is evident through your use of proper grammar and citation form. Seek out a trusted associate who will provide that crucial final critique, the critique done just before you send the document to the partner.

#### **Clients as Audience**

Forget for a moment that you are a well-educated attorney with an expansive lexicon and ask yourself, “Would my [father/sister/aunt] understand what I am writing?” If you can pick up the telephone and call your client, read your document aloud to him or her, and feel comfortable that the client has understood your use of language, you have satisfied the needs of most clients. Your choice of words will vary depending on the nature of the claim and the type of client but the challenge is the same. In this writing paradigm, exclusion of legalese is a must.

The most frequent complaint addressed by state bar disciplinary committees is the failure of lawyers to communicate with the client. This complaint hinges on other factors, such as the lack of returned telephone calls and unanswered letters from clients. Communication has a broader implication when it involves writing. You need to reduce the most complicated of claims and legal defenses to the level at which clients can completely comprehend the message. This does not mean the lawyer should dumb down the communication; it does mean that the lawyer must have an appreciation for the sophistication of his or her client. The lawyer must then adjust, up or down, word choices and organization to meet that level of sophistication.

Clients can become confused by explanations geared for their specific needs in a manner similar

to the layperson’s comprehension of a medical prescription written in the doctor’s hand. Here, too, the use of arcane or obtrusive language rarely will impress the client. Rewrite and edit your document for clear understanding. If your paralegal, staff assistant, or any other person not formally trained in the law can read and understand the document with a single read-through, you most likely have a good document in front of you.

#### **Law Professors as Audience**

Because I hope that some of my students will read this document, I included this point heading to capture their interest. All lawyers receive training in the law and most were exposed to legal writing as a required course in the law school curriculum. Unfortunately, not all law students connect the habits developed in legal writing courses with taking law school exams. The stress of exams can devastate some students’ legal writing skills.

My experience tells me that most students have decent writing skills. For many, these skills have decayed due to disuse. Now, while dealing with all of the other stresses associated with law school, those writing skills must be resurrected, redirected, and polished. These skills must become useful enough, in a short period, to allow first-year students to effectively communicate their analysis when it comes to answering exam questions.

Law professors want clarity in the writing. Students must clearly state the rule of law, identify the relevant issue(s), and organize a correct response that incorporates the key facts from the question’s fact pattern. Legal writing professors will go further, demanding that students demonstrate fundamental writing skills: correct grammar, punctuation, and spelling. While many law professors will comment on deficiencies in these fundamentals when grading exams, most focus on the substance of the response.

Over the years, students have been advised to use an organizational structure when answering exam questions. These structures are known by their acronyms: IRAC, CIRAC, CRuPAC, pre-IRAC, CREAC, and TREAT. The organizational elements are largely the same even if the order varies: identify

the issue, identify the rule, apply the rule, and present a conclusion. In addition, each structure shares a similarity to the classic compositional format, the five-paragraph essay. In assessing a student's exam response, the professor looks for the topic of the essay, identified in legal writing as the issue. To identify the issue effectively, the student must also be able to associate the issue with a synthesized rule of law.

Here my reader will note that I addressed issue spotting before I discussed the need for rule synthesizing. I have purposely addressed issue spotting first to remain true to the primary legal writing paradigm, the "I" in IRAC. However, the issue statement is not completely formed until the writer has devised the rule, the "R" in IRAC. After having synthesized the rule of law and developed the issue statement, the student now enters the realm of legal analysis, the "A" in IRAC. Since our focus is on writing, I leave the discussion of legal analysis to those who have authored the many books and articles on that subject. The analysis section of the law school exam answer is analogous to the three paragraphs in the five-paragraph essay that support and flesh out the topic, the focus of the introductory paragraph.

All good writings must come to an end and so, too, must the law school exam response. The writer must include a conclusion, the "C" in CIRAC, CRuPAC, and IRAC. The conclusion must flow reasonably and logically from the analysis, but a surprising number of students will leave the conclusion out of the response or conclude in contradiction to the analysis. The challenge to the exam response writer is to continue the writing process to its natural end.

### Conclusion

The writer's audience is easily identifiable, or is it? While I included subheadings to cordon four separate but related groups of readers, the reality is that my true audience was the student, the person seeking to improve his or her legal writing skills. I am using student broadly here, to include anyone who is willing to develop and refine his or her legal writing. By keeping the perspective of the reader in focus, the message is not only written, it is also read.

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## Another Perspective

“Writing, even in the often stilted tones of law review articles, is an act of self-definition. What we choose to write about, the voice we employ, the points we choose to make, all are important expressions of self. Few of us have the creativity or genius of the painters, poets, or physicists we most admire, but if we analogize legal scholarship to the creative works of other fields, we see how significant an aspect of self it is to be able to choose what we want to say. That freedom matters particularly when the medium is one that will endure on the shelves of a library and in computer databases, and be used by researchers, long after we are gone. But it matters on a daily basis as well. What we write about determines what we read, what we think, with whom we communicate, and how we are understood by others. The topics we address often have intensely personal significance, whether we write about matters of economic equality, identity, the structure and power of government, or the workings of business transactions. The most pernicious consequence of the argument—whether in Edwards's article or in the promotion and tenure process at a law school—that only some forms of scholarship addressed to only some audiences are worthy, is that it denies the autonomy of those who would choose to write in a different voice for a different reader.”

—Erwin Chemerinsky, *Why Write?*, 107 Mich. L. Rev. 881, 893–894 (2009).