STUDY UNIT 1

INTRODUCTION TO LEGAL WRITING

At the end of this study unit you must be able to:

- Demonstrate an understanding of the importance of legal writing within the scope of the legal profession.
- Employ source citations in strict accordance with the instructions as set out by *The Journal of Juridical Science.*
- Employ the proper format and style guidelines for assignments and legal documents.
- Define and describe plagiarism and misconduct within the academic sphere.
- Avoid plagiarism in your academic and legal writing.

THE IMPORTANCE OF LEGAL WRITING

Do you have the goods to make a good lawyer?

It takes many skills to be a good legal practitioner. Perhaps the most essential of all required skills is the art of using words. Words are to the lawyer what the scalpel is to the surgeon. To be a good lawyer, you must be a thorough researcher and a clear, precise writer. Most legal practitioners, especially professional assistants, candidate attorneys and judicial clerks, spend more time on researching and writing than on any other professional task. They research and write letters, memoranda, and briefs. They draft pleadings, contracts, wills, trusts, and numerous other types of documents. Inadequate and imprecise research and writing can lead to lost cases, malpractice claims, and court-imposed sanctions.

Your first priority is to become competent in the use of words. You cannot hope to achieve professional success in the legal sphere without refining your writing skills.[1] Writing skills can be acquired through the careful study of various aspects of language, including vocabulary, grammar and semantics. When these aspects have been mastered, they can then be effectively employed in reasoning, reading, speaking and writing.[2]

Legal writing is a type of technical writing used by legal practitioners, presiding officers, legislators, *etcetera*, to express legal analysis, rights, duties, opinions and advice. Some documents must be drafted in a specific format, like heads of argument, but regardless of the format or type of writing, the *content of legal writing must always be in plain language.*

The objective of legal writing is not to entertain, to be fun or interesting. The objective of legal writing is to fulfil the writer's goal – to *inform or persuade the reader*. It must therefore be **informative and/or persuasive.** When the *purpose* of legal writing is to inform the reader (for instance, by way of memorandum or legal opinion) and it does not, in fact, inform the reader properly, it is simply not good writing. Should the intent of writing be to persuade (for example, heads of argument or letter of demand), and the reader is not persuaded, it cannot be said that the document was well-written.[3]

Other essential requirements that legal writing must always comply with:

- **Proper legal writing is clear**.[4]
  What is written cannot be misunderstood. The reader immediately grasps what the writer intended to say.

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1 Palmer and Crocker 2003:3.
2 Palmer and Crocker 2003:3.
3 Osbeck 2011:10-11.
4 Osbeck 2011:16.

If the reader, whether it is a principle in a law firm, a judge or magistrate, an illiterate client, or another legal practitioner, does not understand or misunderstands the message that the writer wants to convey, the writer's objective has not been fulfilled and good legal writing would not have been achieved.[5]

- **Good legal writing is concise**.[6]

  It is not 'padded' with fancy words and expressions. Sentences are not burdened with unnecessary words, but it is also not merely 'brief'. It is simply *efficient*. It does not mean that the writing is devoid of detail. It means that the detail is not superfluously described.

- **Good legal writing is engaging.**[7]

> No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers – or your readers – will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice. They will listen as if spellbound. They will read you with engrossment.
>
> - Lord Denning 1981[8]

These three vital features of good legal writing will be discussed in later study units.

CITATION, FORMAT AND STYLE – THE FOUNDATIONS OF CREDIBLE WRITING

All typed assignments submitted in fulfilment of the RPK 214 module, as well as typed documents produced in legal practice *must adhere to the following style, format and citation requirements.*

Failure to do this will result in severe mark penalties in assignments and reduced credibility and efficiency in practice.

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5 Osbeck 2011:17.
6 Osbeck 2011:28.
7 Osbeck 2011:34.
8 Osbeck 2011:34.

GENERAL:

- It may be presented in either English or Afrikaans.
- Your work must be typed and printed on side of a page only.
- Use **1,5' line spacing.**
- **Justify** all paragraphs.
- Use **Ariel font and 12 font size *only***. Avoid the use of curly or strange font types, and do not print headings in excessively large fonts.
- Use *bullets* carefully and only when it can enhance your writing product.
- Avoid using abbreviations in your written work. Where you elect to use acronyms (for example, SAPS), write the acronym out completely the first time you use it and follow with the acronym in brackets. Thereafter you can only use the acronym. (For example: The South African Police Service (SAPS) is the entity responsible for law enforcement).
- Never use common abbreviations. Use 'for example' instead of 'e.g.'
- Always add page numbers to your work.
- It is inappropriate to use symbols in your writing instead of actual text. For instance, rather use the word 'or' than to use the symbol '/'.
- When referring to numbers under twenty, it should be typed out in words. Numbers of 21 and higher may be written out in numbers.
- In South Africa, currency is expressed as: R20 000,00. *Not* as R20 000.00 or R20 000-00.

HEADINGS:

Headings can add to the value, structure and persuasive character of your essay. The following rules are important when using headings:

- Only certain punctuation marks may be used in headings, for example, question marks, commas and hyphens. NO full stops.
- Print headings in BOLD font.
- If electing to resize headings to a slightly larger font, do this *consistently.*
- If electing to use capital letters in headings, do so *consistently*.

- Reading a heading must give the reader a hint as to what is to follow. Do not make headings cryptic or too lengthy.

FOOTNOTES:

- Both *source references* and *real footnotes*[9] must be contained in footnotes at the bottom of each page.
- The position of the footnote references must be in the text, in superscript in Arabic numbering.
- The footnote number must preferably be at the end of a sentence, after the full stop. Where it follows a word and comma, it should be right behind the comma, not in front of it.
- Source references should be done in the style according to the *Journal of Juridical Sciences* as indicated below.
- A footnote is used for a number of purposes.
    - Primarily, it indicates the authority for a statement you make in the main text.
    - Secondly, a footnote may be used to elaborate on what is written in the main text (a so-called *real footnote*).
    - Thirdly, a footnote may be used to comment or compare arising issues, also from different authors. The best illustration of how a footnote may be used would be to take any of your textbooks and to read and see how the footnote is employed.

STANDARD FORMS OF USING FOOTNOTES

Standard form: BOOKS AND ARTICLES

1 Coetzee 1977:68-70.

1 X TAB **No space** **Full stop**

[9] Real footnotes refer to additional information, definitions or explanations of words or concepts in your text.

NAME IN TEXT

According to Van der Walt,[2] the correct …

Footnote AFTER comma

TWO AUTHORS

3 Nel and Brink 1987:23.

MORE THAN TWO AUTHORS

4 Mouton *et al*. 1986:51-55.

MORE THAN ONE SOURCE

5 Brink 1978:33; Venter 1970:34.

MORE THAN ONE SOURCE PER AUTHOR

6 Brink 1978a:46; 1978b:57.

COURT CASES IN SOUTH AFRICA AFTER 1947

7 *Standard Bank v Neugarten* 1987 3 SA 695 W:703C-D.

Colon: Indicate page & paragraph

Avoid any unnecessary mention of claimants and defendants such as *Standard Bank of SA Ltd v Neugarten* …. Note the colon after the reference in order to align the page reference system with that in other references. No space follows the colon.

CRIMINAL CASES

For criminal cases, only the last name of the accused or abbreviation is used:

8 *Tsutso* 1962 2 SA 666 SR:668 – 669.

9 *K* 1956 3 SA 353 A:668.

COURT CASES PRIOR TO 1947

For judgments delivered and reported prior to 1947, the traditional English abbreviations are used:

10 *Baker v Baker* 1945 AD 708:710.

SECOND REFERENCE TO COURT CASES

At a second reference to court cases, only the name of the relevant case and the pages are referred to – do not use *ibid* or *supra*:

11 *Standard Bank v Neugarten*:705.

12 *Tsutso*:670.

LEGISLATION

13 Close Corporations Act 69/1984.

If it is material to the discussion, reference may be made to amendments: Close Corporations Act 69/1984 (as amended by Act 21/1997). If reference is made to a particular section, it is done in the following manner:

14 Close Corporations Act 69/1984: sec 55(3)(b).

At a second or further reference in the footnotes to an act, it is not necessary to state the number and year of the act:

15 Close Corporations Act: Sec 56.

If it is evident from the text which act is referred to, it is sufficient to refer only to the relevant section:

16 Sec 58.

PROCLAMATIONS AND GOVERNMENT NOTICES

17 GN 162 *Government Gazette* 1974:103(4157).

18 Procl 147 *Government Gazette* 1976:131(2123).

The reference to the *Government Gazette* must be provided (volume 103 number 4157). A second or further reference may be made in the following manner:

19 GN 162/1974.

OLD WRITERS AND SOURCES

Roman-Dutch authors and old sources are referred to in the bibliography (see below). In footnotes, only the following references are made:

20 Voet 37 6 1.

21 Van der Linden 1914: 1 8 1.

22 Van der Linden 1806: 1 9 10.

23 D 29 2 51.

If there is no more than one source by an author in the bibliography, there is no need to refer to the relevant year.

INTERNET SOURCES

24 MacDonell 2007. http://www.ufs.ac.za/updl/assign_234?.spd. Accessed on 15/02/2009.

[Please note that the complete web address must be written out and that the date on which the website was accessed must also be included.]

General remarks on footnotes:

- Source references to authors must contain only the last name of the author without initial, except if there is more than one author in a given year with the same last name.
- Refer to pages and not to chapters as far as possible.
- Source references should preferably be placed at the end of a sentence or at the end of a quote.
- Avoid excessive references and authority or an excessive number of sources in one reference, BUT REMEMBER THAT EVERY IDEA THAT IS NOT YOUR OWN MUST BE REFERENCED.
- If a reference becomes too long, the text to which it relates should be reconsidered.
- Expressions such as “my emphasis” should only be placed after the page reference.

True footnotes, meaning footnotes containing additional information or explanatory notes to the main text should be kept to a minimum. Comments should preferably be contained in the main text. Inconsequential remarks should be considered for complete elimination. Endnotes and end-remarks should be kept to a minimum.

Cross-references: use English terms (“see”; “see above”; “see below” or ‘’see also’’) and not the Latin terms such as “*vide*” or “*supra*”.
Where any Latin terms are used, they must be typed in *italics.*

BIBLIOGRAPHY:

- The inclusion of *court cases* and *legislation* in the bibliography depends on the purpose of writing, specific requirements and the preferences of the specific reader or audience.

- List all bibliographical sources together without any categorisation, alphabetically, according to author (including institutions). The only exception to this rule is legislation and court cases, which should be categorised under their own headings.
- Use the following format:

STANDARD FORMS OF BIBLIOGRAPHIES:

BOOKS

Bibliographical information on books should be presented in the following manner:

AUTHOR SURNAME, INITIALS

Year of publication. *Title of the book.* Edition (if applicable). Place of publication:Publisher.

For example:

COETZEE JS AND BRINK L

1978. *Writing research papers*. 2nd ed. London:Macmillan.

1 X TAB **Italics** **No space**

DRUCKER PF

1978. *The sociology of law*. New York:Basic Books.

1979. *Excellence in research*. New York:Basic Books.

ARTICLES

Bibliographical information should be presented in the following manner:

AUTHOR INITIALS

Year of publication. Title of the article. *Name of the journal in which it is published* volume (number):pages.

For example:

JOHNSON HJ

1977. On the effectiveness of legal policy. *American Law Journal* 36(2):1-24.

Note that the full name of the journal should be supplied and that upper case or capital letters are used in the name.

Also note that the volume and number of the article must always be included: 36(2).

CONTRIBUTIONS IN COMPILATION WORKS

Contributions that form part of a collection of contributions must be listed separately with a reference to the collective work as such. Refer to the editor/editors as ed/eds.

SNYMAN AL, VILIKAZI X (eds)

1977. The role of human rights in political reform. Van Rensburg 1986:1-34.

VAN RENSBURG CD (ed)

1986. *Human Rights in South Africa*. 2nd ed. Pretoria:HAUM.

DISSERTATIONS AND PAPERS

JAMES AP

1970. *Psychology and law*. Unpublished PhD dissertation. Pretoria:University of Pretoria.

BRINK JL

1986. *The role of human rights in political reform in South Africa.* Unpublished paper. Pretoria:Congress of the Juridical Association of South Africa.

GOVERNMENT PUBLICATIONS

REPUBLIC OF SOUTH AFRICA

1984. *Privatisation and deregulation in South Africa*. Report of the Presidential Council. RP 8/84. Pretoria:Government Press.

OLD WRITERS AND CLASSICAL SOURCES

CUJACIUS J

1758. *Opera omnia*. 10 vol. Naples.

KRUGER P and MOMMSEN T (eds)

1954. *Corpus Iuris Civilis.* Vol 1. Berlin.

VAN DER LINDEN J

1806. *Regtsgeleerd practicaal en koopmans handboek.* Allart:Amsterdam.

VOET J

1698-1704. *Commentarius ad Pandectas.* Vol 1. De Hondt:Den Haag.

When referring to the old sources, Roman numerals may be provided if the author is uncertain. If the publisher is unknown, this may be omitted and only the place of publication provided.

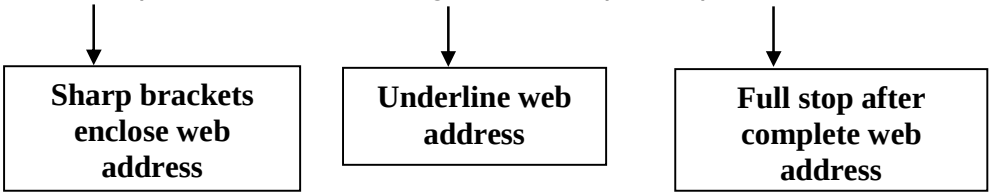
THE INTERNET

Internet sources are cited as follows in lists of reference or bibliographies:

MACDONNELL, H

2007. *The intricacies of scientific evidence.*

<http://www.scievidence.gov.uk/sci/report.asp>. Accessed on 14/03/2009.



QUOTATIONS:

When less than 50 words are quoted in your study, the quoted sentence must simply be enclosed in quotations marks in the normal text and the author cited. For example: **Some authors are of the opinion that "the quality of legal writing is worse today than it has ever been."[34]**

However, when typing a quote of more than 50 words, die paragraph must be quoted as follows:

Thuto[35] delivered strong criticism on the proposed *Secrecy Bill*:

> It is in the best interests of all South Africans that the public, as well as members of the media at large, fiercely object to the proposed Bill that will silence the media on important aspects of national governance. Where state employees insist on conducting themselves in secret and the media has been burdened with censorship, the truth dies and democracy with it. It happened in Apartheid South Africa. It happened in Zimbabwe. It's happening here now.

Thus:

- **NO quotation marks where more than 50 words are quoted.**
- Cite the author. If the author (or presiding officer) is mentioned in the text, the citation must follow the surname of the author (or presiding officer) directly. If no author is stated, the citation must follow the actual quote.
- 1 x TAB before starting the quote.
- Single line spacing.
- 10 Ariel font.

PLAGIARISM

The University of the Free State policy on plagiarism[10] distinguishes between *plagiarism* and *academic writing misconduct*. The following excerpt on the definition of these terms was taken from the UFS policy document:

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[10] Policy on the Prevention of Plagiarism and Dealing with Academic Writing Misconduct. The full policy document is available online at www.ufs.ac.za.

3. Definition

Plagiarism implies direct duplication of the formulation and insights of a source text with the intention of presenting it as one's own work. Plagiarism cannot be confirmed as a result of mere similarities of words between the source text and the borrowed text as in the case of terminology, commonly used phrases and known facts. If plagiarism is suspected it must also be provable. The source text and borrowed text must therefore be placed side by side. The mere suspicion of plagiarism cannot form the basis of an accusation. Plagiarism is distinguished from forms of academic writing misconduct such as:

3.1 cribbing in tests and examinations;
3.2 collusion and fabrication or falsification of data;
3.3 deliberate dishonesty;
3.4 purchasing assignments, dissertations and/or theses on the Internet and presenting such documents as one's own work;
3.5 presenting the same work for more than one course or in consecutive years; and
3.6 the submission of another person's work as one's own original work.[11]

Types of plagiarism[12]

- **Self-plagiarism**

  Arises when an author re-uses his own material without acknowledgement.

- **Literal plagiarism**

  Involves the duplication of whole sections of text without acknowledgment.

- **Citation plagiarism**

  Occurs where credit for sources is not provided or using another's references as shortcut.

- **Wholesale plagiarism ('Piracy')**

  Where an entire article or book has been duplicated.

11 University of the Free State 2010:2.
12 Saunders 2010:279.

What is paraphrasing?

Paraphrasing entails the practice of writing published material in your own words without changing its original meaning. This can be done by either changing words in the original sentence, or by changing the original sentence's structure.[13]

Paraphrasing amounts to plagiarism when you fail to reference the information regardless of the fact that it was rewritten in your own words.

Paraphrasing can be used under the following circumstances:

- Reference the original source.
- The paraphrasing does not dominate your work.
- There is critical analysis of the paraphrased material.

How to avoid plagiarism

1) Whenever referring to another author's ideas or statements, whether directly (quotes) or indirectly, it is vital to cite them in your work as authority for the statement used.

2) When quoting an author in full, word for word, you must enclose the quotation in inverted comas or quotation marks and cite the author (unless the quotation is more than 50 words, then quotation marks are not used). When rephrasing thoughts or statements or ideas of another author, you need not use quotation marks but the author should still be cited.

[13] Study and Learning Centre 2005. https://www.dlsweb.rmit.edu.au/lsu/content/4_writingskills/writing_tuts/paraphrase_ll/index.html. Accessed on 30 November 2011.

3) **Never refer to a source you did not read yourself**. This applies to court cases as well. If you did not read the case, you should not refer to it and discuss it in you text. **Do not use footnotes of another author if you did not read each and every source yourself.**

4) When using strings of words from another author's work, digest the information and rewrite it into your own words. If you do not do this, you should use quotation marks either side of the sentences. In both cases, thorough referencing should be used.

BIBLIOGRAPHY:

OSBECK, MK

2011. What is "good legal writing" and why does it matter? *Public Law and Legal Theory Working Paper Series* No. 252, September.

PALMER, R and CROCKER, A

2011. *Becoming a lawyer: Fundamental skills for law students.* Durban:LexisNexis Butterworths.

SAUNDERS, J

2010. Plagiarism and the Law. *Learned Publishing* 23(4):279-292.

STUDY AND LEARNING CENTRE (RMIT University)

2005. *What is paraphrasing?*
<https://www.dlsweb.rmit.edu.au/lsu/content/4_writingskills/writing_tuts/paraphrase_ll/index.html>.
Accessed on 30 November 2011.

UNIVERSITY OF THE FREE STATE

2010. *Policy on the Prevention of Plagiarism and Dealing with Academic Writing Misconduct.*

STUDY UNIT 2

THE ACHIEVEMENT OF GOOD LEGAL WRITING

At the end of this study unit you must be able to:

- Describe the features of good legal writing.
- Employ proper grammar and spelling when writing.
- Describe *legalese* and the Plain Language Movement.
- Avoid resorting to *legalese* when engaged in legal writing.
- Employ proper sentence and paragraph structure when writing.

WHAT MAKES LEGAL WRITING GOOD?

As previously mentioned, good legal writing exhibits the following features:

- **Clarity**
- **Conciseness**
- **Engaging**[1]

Whether you are an attorney in a firm, an advocate in the Bar, a judge, magistrate, prosecutor, legal advisor, member of the legislator, human rights advocate, estate agent, academic or law student, answering an examination question, you will use words as your primary professional weapon. Your writing therefore has to comply with these requirements to ensure your success.

CLARITY

How is clarity achieved in legal writing?

[1] Osbeck 2011:16,28,34.

📖 **Proper grammar and punctuation.**

In the absence of correct grammar, punctuation and spelling, there will always be the risk that the reader will not share the meaning of your words. The more the writer deviates from rules of grammar and spelling, the less likely the reader is to understand what exactly the writer meant to say.[2] This completely nullifies the objective of legal writing, which is to inform and persuade.

📖 **Proper word choice and sentence structure.**

Using ordinary, uncomplicated words. Simple sentence structures are the best recipe for good legal writing.

📖 **Avoid *legalese*.[3]**

'Legalese' refer to words and phrases that a legal practitioner might use in drafting contracts, pleadings, court documents, letters and opinions, but would not use in a conversation with his family or friends. Some characteristics of *legalese* include:

- *The use of archaic language*

  For example: hereafter, whereby, hereinafter, hereinabove, hereby, hereunder, therein, thereafter, whereas, whereupon, aforementioned, forthwith, henceforth, pursuant to, whence.

- *The use of foreign words*

  While some foreign words are employed so often that it has fallen into common usage, many foreign (most often Latin) words should not be used in legal writing.

  Examples: *sui generis* (unique); *viz* (namely); *prima facie* (at first sight).

- *The use of unnecessary complex words and sentences* (Also knows as **'padding'**)

2 Osbeck 2011:18.
3 Oates and Enquist 2009:49-53.

While not all long sentences are bad sentences, you should always take care that sentences are not clumsy and excessively verbose.

- *The use of the words 'said' and 'such'*

  Never use 'said' in sentences like:
  "The said plaintiff heard a noise as said watermelons rolled to the back of the said trolley."

Legalese is no longer welcome in legal writing. This movement away from old, heavy, unintelligible language in law towards plain, concise and clear expression, is mostly a result of the **'Plain Language Movement'.**[4]

The Plain Language Movement is a group of legal scholars, judges and legal practitioners worldwide that dedicated themselves to the clarification of legal writing by purging it of overly complex sentence constructions and empty legal jargon,[5] and making it accessible to more readers.

This movement is not without its detractors. Critics are of the view that the *precision* of legal writing suffer because of simplified writing, and that the use of technical terms may add increased clarity and precision to a document.[6] When the writer wants to indicate that *estoppel*, for example, would be the appropriate remedy in a specific situation, would it not be in the interest of good legal writing to simply state '*estoppel*' instead of trying to explain what it is in simple language?

It certainly will. This leaves one slightly confused and pondering the question: how simple must simplified legal writing be?

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4 Osbeck 2011:21.
5 Osbeck 2011:21.
6 Osbeck 2011:21.

The rule of thumb is **to use legal writing that would not move a judge to take out his dictionary.**[7] This, of course, is subject to the determination of who your audience is. In the event that you are writing a letter to an illiterate client, for example, it stands to reason that your language should be adjusted for that client. Informing such a client with words he cannot understand would again prevent your goal from being achieved. Your client, too, should not cling to a dictionary when reading a letter from his legal representative.

We can therefore adjust the rule of thumb as follows:

Never use language in your writing that would move the *reader* to take out a dictionary!

NB! STUDY:

Palmer and Crocker[8] describe clarity in writing as '***stating what you mean'.***

Study the following in order to know precisely how to state what you mean, and add clarity to your writing.

PALMER R and CROCKER A

2003. *Becoming a lawyer: Fundamental Skills for Law Students*. Durban: LexisNexis.

7 'Garner and Scalia' in Osbeck 2011:24.

8 Palmer and Crocker 2003:33-45.

5

Writing Skills

5.1 Introduction

We write[1] for many purposes, but the bulk of the lawyer's writing work is writing to *inform* and writing to *persuade*. In this chapter, we are primarily concerned with developing *general* writing skills, not with *legal* writing and drafting (legal 'drafting' is the process of constructing specific legal documents).

These general skills are the foundation upon which all legal drafting skills are built. The methods used to convey information or to attempt to persuade in writing, are numerous: they include memoranda, letters,[2] legal opinions, documents exchanged before a trial commences (pleadings and notices), court documents containing your main points (or 'heads') of argument when appealing to a higher court against the decision of a lower court, and representations (formal requests made in writing to some authority on behalf of clients). Also, as a law student, you will have to write essays and assignments and write answers to examination questions.

Whatever the kind of writing you are doing, and whether your goal is to inform or to persuade, the fundamental skill you have to develop is to *state what you mean* when you write.

5.2 The key writing skill: 'State what you mean'

The ability to express yourself clearly and concisely in writing is one of the most important, and neglected, of all communication skills. Writing, after all, is merely the expression of your thoughts on paper. The reason most people have a problem with expressing themselves on paper is that when writing, they have to be far more disciplined than when speaking. When articulating thoughts orally, people are not forced to economize or choose words that express exactly what they want to say. They know they can keep talking to clarify anything that may be unclear, and that the person to whom they are speaking will ask questions if something is not understood.

When writing, you have to be certain that you are able to express yourself unambiguously. Your watchword must always be to *state what you mean*. If you have written a sentence, reread it and ask yourself if it reflects *exactly* what you want to say. If

1 The use of the term 'write' in this chapter includes keyboard typing – the focus is on how to transmit your thoughts on paper.
2 The use of the term 'letter' includes letters and documents sent by electronic mail (e-mail).

not, rewrite it until it does. Don't be satisfied that 'the reader is bound to get the gist of it'. Submit yourself to a rigorous standard – if a sentence does not reflect exactly what you intend to convey, rewrite it.

5.3 The components of writing: Letters, words, clauses, sentences and paragraphs

5.3.1 Letters: Vowels and consonants

A letter is a symbol that represents a sound. Letters are classified into vowels (a, e, i, o, u) and consonants (b, c, d, f, and the remaining letters of the alphabet, excluding vowels).

5.3.2 Words

A word is a collection of letters that has a meaning, thus: cat; house; eat; run; justice; happy. Abstract words describe general ideas or concepts: for example, 'transport' (a general word that includes concepts of 'moving') and 'proceed' (a general word that means to move from one point to another). Concrete words describe specific actions or things: for example, 'flying in a plane' (a specific method of transport), and 'walk' (a specific method of proceeding).

5.3.3 Clauses

A 'clause' is a small group of words with an independent meaning, which forms part of a sentence, but which is itself not a whole sentence. (In this book, we confine the use of the term 'phrase' to indicate a pithy saying or idiomatic expression that may be in the form of a clause or a whole sentence: for example, 'You can add another string to your bow by ...')

A clause contains both a subject (thing or person) and a predicate (action). For example, in the clause 'John went home', 'John' is the subject, and 'went home' is the predicate.

5.3.4 Sentences

A sentence is a group of words in sequence that conveys information. A complete sentence consists of at least one subject and of at least one verb. For example, 'John went home at 9 o'clock' and 'I do' are complete sentences.

5.3.5 Paragraphs

A paragraph is a sentence or collection of sentences dealing with one issue or topic. It is a distinct section of writing, set apart from other sections of writing in the same document by numbering, indenting or spacing. (For example, the three sentences contained in this paragraph are, taken together, an example of a 'paragraph'.)

5.4 Six rules to apply in order to state what you mean

By applying the following six rules, you will ensure that you always state what you mean in writing:

1. Use the shortest meaningful *word* you can.
2. Avoid using unnecessary *phrases* or *clauses*.
3. Use short *sentences*.
4. Deal with only one issue per *paragraph*.
5. Know how to use *punctuation* marks.
6. Consider the physical *presentation* of your writing.

5.4.1 Rule 1: Use the shortest meaningful word you can

(a) *The word must reflect the exact nuance of meaning required*

When choosing a word to convey your intended meaning, use the shortest word available to convey the exact meaning you intend. For example, let us assume that a

written police report contains the following statement (based on the example in Chapter 3 above):

> I observed the accused proceeding in the direction of the trees, where he obtained a wooden object, and proceeded to assault the complainant.

Consider the meaning conveyed by the word 'observed': did the policeman *carefully watch* because he had been observing the accused for some time; did he merely *happen to see* what the accused did; or did he *see* the accused act suspiciously, and *then* carefully watch him? To convey his exact meaning, he should choose words that exactly match his actions.

For example, if he had merely 'happened to see' the accused, the most appropriate word to reflect this meaning would be 'noticed'. Thus, 'I noticed the accused . . .'. (Although 'saw' is shorter, it does not reflect the exact nuance of meaning required.)

(b) *Use concrete rather than abstract words*

Consider the example above, again: the mental images evoked by abstract words such as 'proceed', 'wooden object', 'obtained' and 'assault' will differ greatly from reader to reader. As your aim is to avoid ambiguity – that is, your chosen words must contain only the meanings you intend – you will have to replace those abstract terms with concrete words. For example, replace 'wooden object' with 'large stick'; 'obtained' with 'picked up'; and 'assault' with 'hit him on the head with the stick'.

Note, however, that sometimes very short words may also lack meaning. For example, if the policeman had said 'where he *got* a wooden stick' instead of 'where he *obtained* a wooden stick', the meaning is not improved: 'got' merely means that it 'came into his possession' – we still do not know *how* it came into his possession.

Be aware, however, that sometimes the abstract word is best suited to your needs: for example, you may use the abstract words 'unreasonable behaviour' because you do not want to confine yourself to certain kinds of unreasonable behaviour only.

(c) *Avoid jargon and 'legalese'*

'Jargon' describes a common language of specialized words used within a specific subject or profession as short-cut words for communication among members of that profession. For example, one lawyer will know what another lawyer means when he says his client acted *mala fide* ('in bad faith'). However, although these words aid communication within the profession, they tend to confuse, intimidate and exclude people outside the profession concerned. When writing for people outside the profession, one must, therefore, ensure that jargon is avoided.

'Legalese' is a reference to words that can be classified as legal jargon: for example, the overuse of words like 'the aforementioned', 'whereas', 'hereinafter', 'the said document', etc. Often, the use of these words is essential to ensure that all possible contingencies are covered in a piece of legal writing (for example, a written contract). In most cases, however, their use is unnecessary and even confusing.

(d) *Avoid tautology*

Tautology is the repetition of different words with the same meaning. For example, 'Please return my book back to me' is tautologous as the word 'return' means 'give back'. Other examples are '*in actual* fact', '*mutual* co-operation', '*forward* planning', '*revert* back' and '*group* together'.

(e) *Beware of qualifying words and overemphasis*

Rylance[3] advises as follows:

> Qualifying words can be overused. When we wish to emphasize a point, words like 'absolutely' 'completely' 'really', 'totally', and even 'very' appear when they are

3 Paul Rylance 1994 *Legal Writing and Drafting* London: Blackstone Press, p 44.

inappropriate. Once identified, you can delete them without losing any meaning. For example:

Counsel's advice *totally* convinced me that a change of tactics was *definitely* needed.

is improved without loss of emphasis by deleting the qualifying words:

Counsel's advice convinced me that a change in tactics was needed.

Similarly, the word 'very' is often best deleted. For example:

My client is *very* determined to appeal this decision

is better as:

My client is determined to appeal this decision.

When you wish to give your writing special emphasis, select a stronger or more descriptive word that needs no qualification, rather than qualifying a neutral or moderate word. For example:

The plaintiff's claim was totally unrealistic

Is better as:

The plaintiff's claim was absurd.

(f) *Qualifying an absolute*

Words such as 'crucial' and 'supreme' are absolute words – 'crucial' means absolutely essential and can, therefore, not be qualified by your saying 'very crucial'. Similarly, 'supreme' means as high 'as you can go' – it cannot be qualified as 'extremely supreme'. Other absolute words like 'unique', 'true' and 'unanimous' can likewise not be qualified: for example, '*very* unique', '*completely* unanimous', and '*absolutely* true'. (Note, however, it is acceptable when speaking colloquially to emphasize the truth of the statement you are making by saying, 'It's *absolutely* true!'.)

(g) *Be consistent in your use of words*

Do not use *different words* intended to mean the same thing in one piece of writing. For example, if you start out by referring to the *agreement* Abel and Ben entered into, don't, later in the same piece of writing, refer to this agreement as a 'contract': the reader may think that the choice of a new word implies a change in intended meaning (this habit is also referred to as 'elegant variation').

(h) *Avoid 'buzz-words'*

Avoid buzz-words that have been popularized by the media, especially as these are often intentionally vague: for example, 'feedback', 'redeploy', 'input', 'interface'. Another favourite is the overuse of the word 'discourse' (which means written or spoken communication).

(i) *Using gender-neutral language*

Try to use gender-neutral language whenever possible. It is preferable to use neutral terms, such as 'manager' (which can denote both a male or female manager), 'firefighter' (rather than 'fireman'), and 'police officer' (rather than 'policeman'). Sometimes, however, a gender-neutral construction can sound artificial: for example, 'waitron' ('waiter' is gender-neutral and perfectly acceptable) and 'home executive' (for 'housewife'). However, relatively new usages such as 'spokesperson' (for 'spokesman') and 'chairperson' (for 'chairman') have become generally acceptable and are not jarring.

A problem that often arises is whether to use, 'he and she' and, 'his and her' rather than just the conventional, 'he' and 'his'. A way to avoid this dilemma is to use the plural ('they') where possible and where it is grammatically correct to do so. (Note that when interpreting parliamentary statutes, the masculine term 'he' must be read to include the feminine 'she'.)[4]

(j) *Know how to use the dictionary and thesaurus*

You must be fully conversant with the use of the dictionary (see Chapter 1). Another useful aid to finding the exact word to fit your intended meaning is a word-finder (or 'thesaurus') of which the best known is *Roget's Thesaurus*.[5]

Be particularly aware of words that are often confused with each other. For instance, don't use 'disinterested' (meaning 'neutral') when you mean "uninterested' (which means 'lacking interest'), and don't use 'refute' (that is, '*prove* an allegation to be false') when you mean 'deny' (that is, '*allege* that an allegation made is not true').

Other words that are often confused with each other are:[6]

- ☐ 'abdicate' (formally renounce an office) *vs* 'abrogate' (repeal or cancel);
- ☐ 'bi-annual' (twice a year) *vs* 'biennial' (once every two years);
- ☐ 'amiable' (good-natured) *vs* 'amicable' (friendly, pleasant);
- ☐ 'compliment' (sincerely praise) *vs* 'complement' (add to; to complete);
- ☐ 'effect' (to cause or bring about) *vs* 'affect' (to influence);
- ☐ 'forego' (go before) *vs* 'forgo' (do without);
- ☐ 'infer' (conclude or deduce) *vs* 'imply' (insinuate);
- ☐ 'principal' (chief – in charge) *vs* 'principle' (general rule);
- ☐ 'license' (verb: to license) *vs* 'licence' (noun: licence document or disc);
- ☐ 'practise' (verb: to practise) *vs* 'practice' (noun: a medical/legal/dental practice);
- ☐ 'rebate' (discount or deduction) *vs* 'refund' (reimbursement); and
- ☐ 'stationary' (not moving) *vs* 'stationery' (writing materials).

Finally, be especially vigilant about words such as 'may', 'shall', 'will', 'must' and 'can', as they may mean different things in different contexts. For example, 'may' could mean any of the following:

(i) That you have a *choice* in whether to do something. For instance, a statute may provide that 'a court *may* order ...' – this wording gives the court the choice (or 'discretion') to make (or not make) a particular order;

(ii) That you are *permitted* to do something: 'Yes, you *may* go to town'; or

(iii) That you *might* do something, if the mood strikes you: 'I *may* go to town later'.

Do not use 'can' (which means something is possible) when you mean 'may' in the sense of 'permit': for example, '*May* I have an apple?' rather than "*Can* I have an apple?'.

5.4.2 Rule 2: Avoid using unnecessary phrases or clauses

We often clutter our writing with meaningless or confusing phrases and sayings which only serve to obscure the meanings we intend and to lengthen sentences. Avoid such 'padding' wherever possible. Be especially careful to avoid clichés (hackneyed phrases that have become virtually meaningless through overuse), for example:

- ☐ 'in actual fact' (all facts are 'actual' – rather say 'in fact');
- ☐ 'it goes without saying' (then don't say it!);
- ☐ 'the bottom line' (the reader can see the bottom line – you need not mention it).

Rylance puts it as follows:[7]

> The danger with clichés is that they provide prefabricated phrases that can become tired substitutes for original thought. They have a nasty habit of suggesting themselves as we write. If you begin to write 'alliance', somehow 'unholy' might slip in or if there is an 'irony', it might easily become a 'bitter irony". Used with care, an occasional cliché will not harm your writing. If you use one, use it because it expresses your meaning clearly and not simply because it is familiar.

---

5 3 ed (Random House, 1998). You may also use *The Oxford Paperback Thesaurus* (Oxford University Press, 2001), which is a companion volume to *The Concise Oxford Dictionary*, the dictionary we recommend in Chapter 1.

6 Rylance *op cit*, p 61.

7 Rylance *ibid*, p 42.

5.4.3 Rule 3: Use short sentences

The longer the sentence, the more difficult it becomes to remember what has been read. Consequently, long sentences frequently result in misunderstandings and confusion, and are best avoided. (Consider how difficult it is to make sense of section 2(7)(a) of the Apportionment of Damages Act, 1956, due to the over-long sentences used: see Chapter 4.7 above.)

In general, the following rules should be applied:

(a) *Each sentence should contain no more than two items of information*

To ensure that meanings contained in a sentence are easy to follow, a general rule is that a sentence should not contain more than two items of information. For example, the sentence, 'Mr Reddy was present when the will was signed, and was still there when Mrs Reddy left the room', contains two items of information:

(1) Mr Reddy was present when the will was signed; and

(2) Mr Reddy was present when Mrs Reddy left the room.

(b) *Use the active rather than the passive voice*

Compare, for example, 'Peter kicked the ball' (active voice) to 'The ball was kicked' (passive voice). We notice that the sentence in the active voice is clear and unambiguous, whilst the sentence in the passive voice is ambiguous, as we do not know *who* kicked the ball.

Although the preference for the active voice is a general rule, Wydick[8] suggests five situations where the use of passive voice is appropriate:

(1) When the *thing* done is important and *who* did it is not: 'The subpoena was served on the 19th of January';

(2) When you don't know who did it: 'The ledgers were mysteriously destroyed';

(3) To place the emphasis at the end of a sentence: 'As he walked through the door, the man was shot';

(4) When a sense of detached abstraction is appropriate: 'In the eyes of the law, all people are equal'; and

(5) When you intentionally want to reduce the emphasis on an aspect. For example, to avoid stating outright that your client knocked out the plaintiff's teeth, you could say, 'The plaintiff's teeth were knocked out'.

(c) *The word-order in a sentence can affect the meaning of a sentence*

In many languages, the sequence of words within a sentence does not affect its meaning. In English, however, meaning *is* affected by the order of the words. Consider the following examples:[9]

- 'The defendant was arrested for fornicating under a little-used municipal ordinance';
- 'My client has discussed your proposal to fill the drainage ditch with his partners';
- 'Beyond any doubt insane, Judge Weldon ordered the applicant's transfer to a mental hospital'.

The word order of these examples will have to be changed to remove ambiguity or absurdity, for example:

- 'The defendant was arrested, in terms of a little-used municipal ordinance, for fornicating';
- 'My client has discussed, with his partners, your proposal to fill the drainage ditch';
- 'Judge Weldon ordered the transfer of the applicant, who was beyond any doubt insane, to a mental hospital'.

8 Wydick RC 1994 *Plain English for Lawyers* 3 ed Durham, NC: Carolina Academic Press, p 30.

9 *Ibid*, p 48.

(d) *Beware of 'squinting' modifiers: 'often' and 'only'*

Wydick[10] explains as follows:

> Beware of the 'squinting' modifier – one that sits mid-sentence and can be read to modify either what precedes it or what follows it: A trustee who steals dividends often cannot be punished.
>
> What does *often* modify? Does the sentence tell us that crime frequently pays? Or that frequent crime pays?
>
> Once discovered, a squinting modifier is easy to cure. Either choose a word that does not squint, or rearrange the sentence to avoid the ambiguity. For example:
>
> 'When workers are injured frequently no compensation is paid'.
>
> If that means that injured workers frequently receive no compensation, the squinting modifier could be moved to the front of the sentence, like this:
>
> 'Frequently, workers who are injured receive no compensation.'
>
> The word *only* is a notorious troublemaker. For example, in the following sentence the word *only* could go in any of seven places and produce a half a dozen different meanings:
>
> 'She said that he shot her.'[11]
>
> To keep *only* under control, put it immediately before the word you want it to modify. If it creates ambiguity in that position, try to isolate it at the beginning or ending of the sentence:

Ambiguous	Not ambiguous
Lessee shall use the vessel only for recreation.	Lessee shall use the vessel for recreation only.
Shares are sold to the public only by the parent corporation.	Only the parent corporation sells shares to the public.

(e) *Master the rules of English grammar*

The correct use of grammar is important for both the presentation and the meaning of your writing. A full discussion about the general rules of English grammar is, however, beyond the scope of this book.[12]

5.4.4 Rule 4: Deal with only one issue per paragraph

A paragraph is a series of sentences dealing with the same issue. The initial sentence of the paragraph usually states your contention or point of view, whilst the remaining sentences usually support, explain or illustrate the contention. (Sometimes this initial sentence is called the *topic sentence*.) Note that a paragraph can also consist of a single sentence if the issue concerned is self-contained.

5.4.5 Rule 5: Know how to use punctuation marks

(a) *The power of punctuation*

How you use punctuation marks in a sentence may drastically affect its meaning. Consider, for example, the effect on meaning caused by the placement of the punctuation marks in the following unpunctuated sentence:

'A woman without her man is nothing'.

Compare: 'A woman without her man, is nothing.'

with: 'A woman: without her, man is nothing'.

---

10 Wydick *op. cit.*, p 48.

11 (1) *Only* she said that he shot her [she, and nobody else said it]. (2) She *only* said that he shot her [she said this, and nothing else]. (3) She said *only* that he shot her [same as (2)]. (4) She said that *only* he shot her [he, and nobody else shot her]. (5) She said that he *only* shot her [he shot her, and did nothing else to her]. (6) She said that he shot *only* her [she was the only one who was shot by him]. (7) She said he shot her *only* [same as (6)].

12 A simple, straightforward introduction to English grammar is contained in Chapter XI of *Mend your English* by Ian Bruton-Simmonds (Ivy Publications: London, 1988).

Even moving a single comma one word along in a sentence may result in exactly the opposite meaning. For instance, a woman, in anticipation of her husband's future death, buys a gravestone and has it inscribed as follows:

HERE LIES JOHN TAKEN TO HEAVEN HE IS NOT NEAR HELL SHALL HE DWELL

Now, when her husband dies, and if she has had a good marriage, she will punctuate the inscription as follows:

HERE LIES JOHN. TAKEN TO HEAVEN HE IS, NOT NEAR HELL. SHALL HE DWELL.

If the marriage has been bad, she could punctuate the gravestone thus:

HERE LIES JOHN. TAKEN TO HEAVEN HE IS NOT. NEAR HELL. SHALL HE DWELL.

(b) *The main functions of punctuation marks*[13]

(1) The comma (,) — The primary function of a comma is to indicate a short pause: for example, 'Justice must be done, and also be seen to be done'. It is also used to separate nouns (especially in lists) and to separate clauses within sentences.

(2) The semi-colon (;) — This indicates a pause longer than a comma, but not as long as a full stop. It is also used to connect two sentences that are closely related: for example, 'The defendant did not intend to break the plaintiff's leg; he was only trying to stop him from fleeing'.

(3) The colon (:) — A colon is usually used to introduce a list or to introduce further clarification of what precedes the colon: for example,

'To prove the crime of Murder, the State must prove the following:

1. An unlawful act;
2. Done with intention;
3. That causes the death;
4. Of a human being.'

Another example:

'The intruder's intention was clear: he wanted to steal the money'.

(4) The full stop (.) — The full stop indicates the end of a sentence.

(5) The ellipsis (. . .) — The ellipsis is a series of three spaced dots used to indicate omissions in quotations. It is also used to indicate an unfinished sentence.

(6) The exclamation mark (!) — The use of an exclamation mark should be avoided unless it is part of a quotation. This is because it is the written equivalent of shouting. It is often misused in attempts to indicate emphasis or excitement (for example, 'Next week, I'm on holiday!')

(7) The question mark (?) — The question mark is self-evident. It indicates that a question is being asked (for example, 'What is the time?').

13 For a full discussion of all the functions of the various punctuation marks, see MB Kay and JJ Ramsfield 1993 *Legal Writing: Getting it Right and Getting it Written* 2 ed West, St Paul.

(8) The dash (–)

The dash is dangerous as it can be used as a substitute for a colon, brackets or a pair of commas, and therefore has the potential to cause confusion (for example, 'Naomi is on a diet of fruit – bananas, pears and apples – and is rapidly losing weight', or 'The doctor's decision – although understandable – was, nevertheless, illegal').

(9) The hyphen (-)

The hyphen is a short dash. Its main purposes are to indicate that one word is modified by another (for example, 'The high-powered executive'), or to prevent confusion (for example, 'At the end of the lease, the flat was re-leased').

(10) Round brackets ( )

(Also called 'parentheses')

Round brackets should only be used to indicate information that may disrupt the flow of the sentence: for example, 'Crimes against persons (murder, rape and robbery) generally carry heavier sentences than crimes against property (theft, fraud and forgery)'. Do not use parentheses to include information in the text that should properly be contained in a footnote.

(11) The apostrophe (')

The apostrophe is used to indicate possession. In the case of a singular noun, append an 's to the end of the noun: "It is James's horse"; "The horse's owner is James". In the case of plural nouns, add just the apostrophe to the end of the word: "The boys' parents". (Remember to make the singular noun plural *before* adding the apostrophe: for example, if referring to two boys named James who are co-owners of the same horse: "It is the Jameses' horse".)[14]

The apostrophe is also used to indicate a contraction of two words: for example, 'don't' for 'do not', 'you're' for 'you are'; 'it's' for 'it is'.

Apostrophes are also used to indicate plurals where confusion would otherwise result: for example, 'He said, "The word 'assassin' has two a's".

(12) Quotation marks (" " or ' ')

(Also called 'inverted commas')

Quotation marks are used to enclose the actual words of others – in other words, when you quote them *verbatim*: for example, 'Queen Victoria said: "We are not amused"'. Quotation marks are also used when referring to a word itself rather than to what the word represents – usually when defining a word: for example, 'Comity' is a reference to the good relations between countries.

Further rules for usage of quotation marks:

- Use single quotation marks (' ') for a quotation within a quotation.
- Quotations of fifty words or more should not be contained within quotation marks but be indented and typed in single-line spacing.

14 When referring to something belonging to more than one person, the rule is to first *pluralise* (eg. The Family of Tim Jackson becomes the Jacksons), then add the apostrophe: The Jacksons' house.).

- If you wish to indicate an error in the item you are quoting (to show that it was not your mistake), put '[*sic*]' immediately after the error: for example, 'Professor Jackson said, "Edwin Aldrin [*sic*] was the first man on the moon"'. (Neil Armstrong, was, of course, the first man to step on the moon)
- If you wish to emphasise part of a quotation, you should underline that section and indicate that the underlining is yours, by adding '(my emphasis)' immediately after the quote. For example, 'It is said that "lawyers have two common failings. One is that they do not write well, and the other is that they think they do"' (my emphasis)'. Note that, if you prefer, you can indicate emphasis by italicising the relevant section instead of underlining it.

5.4.6 Rule 6: Consider the presentation of your writing

(a) *Spelling*

Remember to spell-check your writing before finalizing your draft, as spelling errors can affect the meanings of sentences. Remember that doing a spell-check cannot replace careful proof-reading: the spell-check will not detect words correctly spelt but used in the wrong contexts (for example, 'The first car to arrive was bigger then [instead of 'than'] the second' and 'The frantic children couldn't find there [instead of 'their'] puppies'). Pay particular attention to words that are commonly misspelt: 'liaise' (not 'liase'); 'disappoint' (not 'dissapoint'); 'monies' (not 'moneys'); 'adviser' (not 'advisor'); 'omission' (not 'ommision'); 'fulfil' (not 'fulfill'). Remember to use Standard British spelling and not the American standard: for example, 'behaviour' (not 'behavior'), 'cheque' (not 'check'), and 'sceptical' (not 'skeptical').

(b) *Margins and white space*

Leave generous margins, and do not cram the page with writing. Dense, closely printed text that covers the entire page is intimidating to the reader and is also difficult to read. Don't lose a good message in bad packaging.

(c) *Headings, sub-headings, numbering, indentation and line-spacing*

Headings and sub-headings help provide order and structure, and make the text more readable. Ensure that your numbering and indentation are consistent throughout the piece of writing, to prevent confusion. The standard line-spacing for legal-writing purposes is double-line spacing. This is also recommended for student essays and assignments as it makes marking easier.

(d) *Font choice and size*

The font (shape of the letters used) must be appropriate for the type of writing: for example, do not use Brush Script (which looks like this: *Do not use Brush Script*) for legal-writing purposes. Also, the size of your text must be easily readable in the context of the size of the page: for example, the minimum font-size on an A4 page should not be smaller than 11 points.

(e) *Tabulation*

It is useful to tabulate long and complicated pieces of writing – this will immediately clarify the relationships between the sentences (does one sentence qualify another

15 Carl Felsenfeld 1982 "The Plain English Movement in the United States" *Canadian Business Law Journal* vol 6

or not?), and also help to clarify understanding, as the act of tabulating converts long sentences into shorter ones. (See the example –The 'First Rule of Ethics' – in paragraph 5.5 below).

5.5 Applying the six rules of effective writing to specific examples

(a) *The swimming pool notice*

Reread the section on reading comprehension in Chapter 4. The swimming pool notice reads as follows:

> **NOTICE!**
>
> Children of members using the playground and swimming pool are the responsibility of the parent and if they do not behave or remove or break any equipment they will be held liable for the replacement thereof.

After applying the three comprehension steps, we determined that the intention of the drafters of the notice was to make club-member parents responsible for their children's behaviour and liable for any losses caused by their children. In order to redraft the notice to reflect *exactly* what the drafters intended, we shall apply the six 'State what you mean' rules. In applying these rules, we shall do the following: break up the single sentence used in the notice into two sentences; convert the passive to the active voice; correct the grammar (that is, refer to 'parents' to be consistent with the plural word 'children'); and change the heading to 'Notice to members':

> **NOTICE TO MEMBERS**
>
> Parents are responsible for supervising their children when their children use the playground or the swimming pool. If they break or remove any equipment, the parents concerned will be held legally liable to repair or replace it.

(b) *The 'First Rule of Ethics' example*

Let us assume that the following rule of ethics is contained in the General Code of Ethical Conduct applicable to all legal practitioners in South Africa. You are required to interpret the rule to establish what was intended by the drafters of this rule (see the three steps of reading comprehension in Chapter 4) and thereafter, to apply the six 'State what you mean' rules to improve the rule's expression and presentation. The rule (adapted from an example used by Wydick)[16] reads as follows:

> **THE FIRST RULE OF ETHICS**
>
> It goes without saying that every legal practitioner has a mandatory ethical duty not to disclose what he or she learns in confidence about his or her clients.
>
> Clearly the aforementioned ethical requirement includes information that the client informs his lawyer about on a confidential basis. But of equal importance, the said duty imposed by the rules of ethics encapsulates what third parties relate to the legal practitioner concerning his or her client, in the event that the client has asked that such material be kept secret, or where revealing the third-party-derived, client-related information would cause harm or embarrassment to the client.

16 Wydick *op cit*, p 62.

Comprehension:
To assist us to determine the intended meaning of this rule in the given context, it is useful to construct a block diagram setting out how the various sentences in the rule relate to each other:

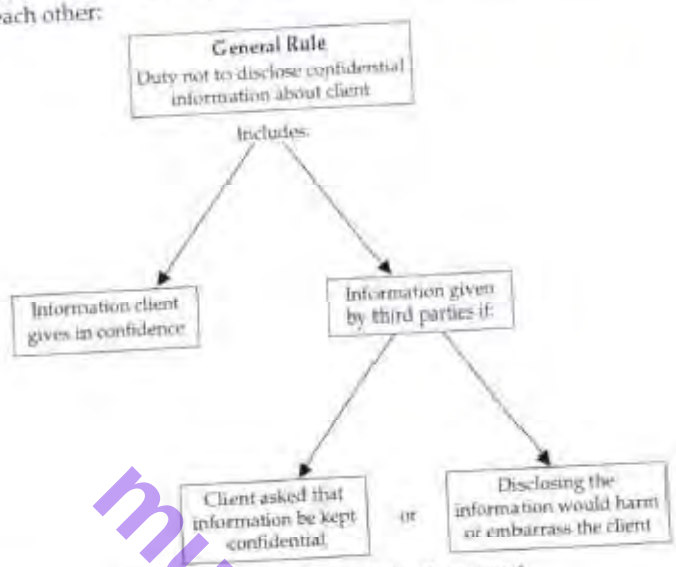

Figure 5.1 *Block diagram illustrating the argument*

Now, apply the six 'State what you mean' rules:

- ☐ All redundant phrases and words that do not affect the meaning of the rule are crossed out (indicated in the text below).
- ☐ All words referring to the same thing or concept are circled and numbered – only one word per concept must be chosen to ensure consistency (that is, avoid elegant variation).
- ☐ Long sentences are shortened by tabulating them: the re-written rule will, therefore, have a similar format to the block diagram above.

THE FIRST RULE OF ETHICS

~~It goes without saying that~~ every legal practitioner has ~~a~~ an ~~mandatory~~ ethical duty not to disclose what he ~~or she~~ learns in confidence about his ~~or her~~ clients.

~~This ethical duty~~
~~Clearly the aforementioned ethical requirement~~ includes the duties: (a) Not to disclose information the ~~information that he~~ client ~~informs his lawyer about on a~~ → gives the legal practitioner ~~in confidence~~ and ~~confidential basis. But of equal importance, the said duty imposed by the rules of ethics encapsulates what~~ (b) Not to disclose information that ~~third parties relate to~~ the legal practitioner, ~~concerning his or her client, in the event that~~ the client has asked that ~~such material~~ this information be kept ~~secret~~ confidential, or ~~third party-derived, client-related~~ information would ~~cause~~ harm or embarrass~~ment to~~ the client.

if:
1)
2) if disclosing this whose revealing the

Figure 5.2 *The edited text of the 'First Rule of Ethics'*

The rewritten rule now reads as follows:

THE FIRST RULE OF ETHICS

Every legal practitioner has an ethical duty not to disclose confidential information about his or her clients. This ethical duty includes the duties:

1 Not to disclose information the client gives the legal practitioner in confidence; and

2 Not to disclose information that third parties give the legal practitioner, if:

2.1 The client has asked that this information be kept confidential, or

2.2 If disclosing this information would harm or embarrass the client.

NB! ALSO STUDY:

Study the following complicated and foreign words or expressions and their simpler, shorter replacements. (You need not know which words are archaic and which are repetitive. Just study the words so that you are able to use it in your writing.)

BAD	GOOD
Difficult words	
Equitable	Fair
Consequently	Then
Remand (a case in court)	Postpone
Finding (of a judge / magistrate)	Decision
Duress	Force / pressure
Albeit	Though / even if
Moreover	Also
Nevertheless	Yet
Provided that	If / but
Accordingly	So
Afforded	Given
Shall (future)	Will
Shall (Imperative)	Must
Archaic words and expressions	
Forthwith	Immediately
Hereinafter	After this
Hence	So
Whosoever	A person who

Repetitive words	
Due and payable	Owing or due
Will and testament	Will
Fit and proper	Suitable
Null and void	Void
Until such time as	Until
Save and except	Except
Unnecessary words / Simplification	
In connection with	About
In the case of	With
In order to	To
At this point in time	Now
In the final analysis	Finally
On a monthly (yearly) basis	Monthly (Yearly)
Enclosed please find	We enclose
For and on behalf of	For
Foreign words	
Bona fide	Good faith / genuine / honest
Mutatis mutandis	With the necessary changes
Prima facie	At first glance
Mens rea	State of mind
Uberrimae fide	Utmost good faith
Res ipsa loquitor	It speaks for itself

CONCISENESS

Writing in a concise manner does not mean writing briefly. It simply means getting to the point you wish to make as quickly as possible.

NB! STUDY:

Study the following extract from **Oates and Enquist**[9] on conciseness in legal writing.

Notes:

_____

_____

_____

_____

_____

[9] Oates and Enquist 2009:60-70.

Chapter 6

Conciseness

No matter what role that you play in the legal system, there is always a temptation to add a few extra paragraphs, a few extra phrases, or even a few extra words. Sometimes, the reasons for adding the extra language are good ones. For example, if you are a magistrate or a judge, you may decide to include facts that, while not legally revelant, are important to one or more of the parties, or you may want to forestall an appeal by responding to all of the parties' arguments. At other times, though, the reasons are not as good: As an advocate, you decide to keep the extra language because you want to increase your cost bill; because you are not sure what does and does not need to be included in the document; or, because you are in a hurry, you do not take the time to edit your writing.

Although in the short run the extra language may seem harmless, in the long run it harms the profession: In a world in which, increasingly, time is money, what is valued are documents that get to the main points quickly and that make those points concisely.

6.1 Get to the main point quickly.

In deciding what information to include, think carefully about your audience and purpose. Given your purpose in drafting the document, is the information information that your reader or readers need?

New members of the profession often include the information that they needed to complete the project. If you are writing to another new member of the profession, by all means include that information. However, if you are writing to someone with more experience, do not start your analysis too far back or state the obvious. For example, if your reader already knows how a coctrine developed or if that development is not relevant to your analysis, leave it out. Similarly, delete sentences that describe your thinking process. For example, in most instances, you can delete sentences like the ones set out below:

ples: Types of information that can, in most instances, be deleted

The rule was first applied in 1925.

The first step is to determine what law applies. After determining what law applies, the court will then apply that law to the facts.

6.2 Delete unnecessary words and phrases.

In preparing the first draft, do not worry about writing concisely. Instead, focus ntent and organization. However, when possible, go back through that initial draft, some or all of the following techniques.

6.2.1 Write most of your sentences using the active voice.

One of the easiest ways to delete unnecessary words is to use the active voice. nore on the active and passive voice, see Section 2.2.1. In each of the following ples, the subject is underlined and the verb is in italics.

mple 1: Passive Voice

Entry on the mining area *may be made* by a holder of the Special Mining Licence, his servant or agent. (20 words)

mple 2: Active Voice

A holder of the Special Mining Licence, his servant and agent *may enter* the mining area. (16 words)

Exercise:

Rewrite the following sentences using the active voice

1. The phones were improperly used by government officials.
2. The children had been abandoned by their parents two months earlier.
3. It was determined that the witness's testimony was not credible and that, therefore, the plaintiff was not entitled to damages.

6.2.2 When possible, use concrete subjects and action verbs.

Similarly, you can sometimes shorten a sentence by using a concrete subject and an action verb. In reviewing your writing, look for **nominalizations** and for **expletive constructions.**

a. Nominalizations

You create a nominalization when you turn a verb into a noun.

verb		noun
apply	→	application
conclude	→	conclusion
decide	→	decision

While there are many times when you will need, and want, to use these nouns, avoid "hiding" the action in a nominalization. Compare the following pairs of sentences. The nominalizations are in boldface type.

Example 1: Nominalization

Action hidden in nominalization	Action in verb
Mr Wante was in **attendance** at each of these meetings. (10 words)	Mr Wante attended each of these meetings. (7 words)

Example 2: Nominalization

Action hidden in nominalization	Action in verb
Worried about inflation, the **decision** of the minister of finance was to raise interest rates. (15 words)	Worried about inflation, the minister of finance decided to raise interest rates. (12 words)

Also note that there is a dangling modifier in the first sentence in Example 2. Who is it that is worred about inflation? As the first sentence is currently drafted, it is the decision, and not the minster of finance, that is worried. The second sentence in Example 2 is both grammatically correct and shorter.

b. Expletive Constructions

Expletive constructions are constructions such as "it is", "it was", "there are" "there were". In these constructions, the subject is "it" or "there", and the verb s", "was", "are" or "were". Although there are times when you will need an letive construction (note the expletive construction in the preceding clause), do overuse such constructions. When you can, rewrite the sentence so that you e a concrete subject and an action verb. In the following examples, the expletive structions are in boldface type.

mple 1: Expletive construction

Expletive construction	Concrete subject and action verb
It is the accused's argument that . . . . (6 words)	The accused argues that . . . (4 words)

mple 2: Expletive construction

Expletive construction	Concrete subject and action verb
There are four arguments that we can make. (8 words)	We can make four arguments. (5 words)

Exercise

Rewrite the following sentences eliminating the nominalizations and expletive constructions.

1. The present case is an illustration of this point. (9 words)
2. The parties reached an agreement about who would pay the cost Of transporting the damaged goods. (17 words)
3. There was a decision by the minister about when the tax increase would go into effect. (17 words)
4. There is evidence that establishes that the accused was at the building site on the night when the copper wire was stolen. (23 words)

6.2.3 Delete Throat-Clearing Expressions

Like speakers who clear their throats before speaking, some writers begin sentences with "throat clearing expressions". Instead of thinking and then writing, these writers fill their thinking time with extra words. In the following example, the throat clearing expression is in boldface type.

Example 1: Throat-clearing expression

Sentence with extra words	Sentence without extra words
It must be remembered that a contract requires both an offer and acceptance. **(13 words)**	A contract requires both an offer and acceptance. (8 words)

Most but not all of these throat-clearing expressions fall into the following pattern:

It is _____ that . . .

It is expected that . . .

It is generally recognized that . . .

It is significant that . . .

It is obvious that . . .

It is essential that . . .

It is crucial that . . .

It is conceivable that . . .

If you need to make the point that is made in the throat-clearing expression, do so in fewer words.

It seems more likely than not that	→	More likely than not	→ Probably
It can be presumed that	→	We can presume	→ Presumably
It may be argued that	→	We can argue	→ Arguably

Exercise

Rewrite the following sentences, eliminating the throat-clearing expressions.

1. It is a known fact that the plaintiff has the burden of proof. (13 words)
2. It should also be noted that the road was not properly maintained. (12 words)

6.2.4 Eliminate Redundancies

When speaking we often include words that are redundant. For example, instead saying "3:00 a.m.", we say "3:00 a.m. in the morning" even though 3:00 a.m. is, by nition, always in the morning. Althoughyou do not need to worry about these undancies in informal speech and writing, in formal writing you should make the essary edits.

The following list is adapted from a list called "Dog Puppies" compiled by writer and or Yvonne Lewis Day.[1] The word or words in parentheses should be deleted.

ample 1: Dog Puppies

3 a.m. (in the morning)
11 p.m. (at night)
red (in colour)
(a distance of) twenty feet
(a period of) six months
(absolute) guarantee
(absolutely) clear
(actual) experience
(advance) planning
at (the) present (time)
(basic) fundamentals
belief (system)
(but) however
(but) nevertheless
(close) scrutiny
combine (together)
(complete) monopoly
(completely) destroyed
consensus (of opinion)
crisis (situation)
(advance) warning
alongside (of)
(and) moreover
appreciate (in value)
(as) for example
ascend (up)
ask (a question)
(as to) whether
(at a) later (date)
emergency (situation)
(empty) space
(end) result
eradicate (completely)
(essential) element
(established) pattern
estimated (roughly) at
(false) pretenses
few (in number)
(foreign) imports
free (of charge)

[1] dapted from Yvonne Lewis Day, "The Economies of Writing".

(current) trend
daily (basis)
depreciate (in value)
descend (down)
(different) kinds
(direct) confrontation
during (the course of)
during (the year of) 2005
each (and every)
each (separate) incident
(many) (different) ways
(mass) media
merged (together)
my (own) opinion
my (personal) opinion
never (at any time)
never (before)
off (of)
(over) exaggerate
(past) experience
(past) history
(past) records
permeate (throughout)
(personal) friendship
plan) ahead
postponed (until later)
(pre-) planned
probed (into)
protest (against)
(rate of) speed
(future) plans
(general) public
healing (process)
(important) essentials
indicted (on a charge)
(integral) part
is (now) pending
join (together)
(local) residents
(major) breakthrough
recur (again)
refer (back)
reflect (back)
reiterate (again)
repeat (again)
reported (to the effect) that
revert (back)
risk (factor)
scrutinize (carefully)
(separate) entities
shooting (incident)
(specific) example
(State's) prosecutor
(subtle) nuance
(sudden) outburst
(suddenly) exploded
(temporary) reprieve
(thorough) investigation
(underlying) (basic) assumption
(unexpected) surprise

While the preceding list sets out redundancies that occur in all types of writing, the law has its own category of redundancies. According to David Mellinkoff,[2] some of these redundancies are a historical accident. During times of transition, members of the legal profession used words from more than one language to make their point.

Example 2: Redundancies resulting from using words from more than one language

buy (Old English) or purchase (French)
own (Old English) or possess (French)
minor (Latin) or child (Old English) or infant (French)
will (Old English) or testament (Latin)
property or chattels (French) or goods (Old English)
pardon (French) or forgive (Old English)

[1] David Mellinkoff, *The Language of the Law* 58 (1963)

constable (French) or sheriff (Old English)
larceny (French) or theft or stealing (Old English)
attorney (French) or lawyer (Old English)

Other redundancies reflect the law's reliance on oral language. By using niques like alliteration, the speakers were able to make their points more erfully. The words were both more memorable and more powerful.

nple 3: Redundancies that reflect law's oral tradition

aid and abet
cease and desist

As a writer, you will sometimes choose to use these legal redundancies either use your reader expects to see them or because, as in times past, they allow you ake your point more powerfully. However, your use of these legal redundancies uld be intentional. If you do not have a good reason for keeping the extra words, te them.

Exercise

Rewrite the following sentences, eliminating the redundancies.

1. There was a consensus of opinion that each and every local resident should cease and desist from burning garbage. (20 words)

2. During the course of the contract, the two companies merged together without any advance notice, which prompted the commission to carefully scrutinize both companies' prior business practices. (27 words)

6.2.5 Clean Out the Clutter

Like individuals who never throw anything away, some legal writers have a hard e deleting extra words.

In writing, one of the most common types of clutter is the unnecessary positional phrase. The following examples illustrate how easily prepositional rases can lengthen a sentence. While in Example 1, the writer makes the point in 7 rds, in Example 2 that 7-word sentence grows to 11 words, and then 16 words and ally, to 28 words. The prepositional phrases are in brackets.

Example 1: Sentence without unnecessary prepositional phrases

The accused's attorney challenges the court's juridiction. (7 words)

Example 2: Sentence with unnecessary prepositional phrases

The attorney [of the accussed] challenges the jurisdiction [of the court.] (11 words)

The attorney [of the accused] is [in the process] [of challenging] the jurisdiction [of the court.] (16 words)

[At this point] [in time], the attorney [of the accused] is [in the process] [of challenging] the jurisdiction [of the court] [by filing a motion] [with the court.] (28 words)

6.2.6 Focus and Combine

Sometimes, some of us ramble. Instead of making the point in one clause or one sentence, we use several; instead of making the point in a phrase, we use a clause; and instead of making the point in a single word, we use a phrase. While for some audiences and in some circumstances, focusing and combining is not appropriate, for other audiences and purposes it is.

For example, two sentences can often be combined into one by changing one of the sentences into a relative clause beginning with "which," "who," "whom," "whose," or "that".

Example 1: Combining two sentences

One of Nelson Mandela's attorneys was Arthur Chaskelson. Arthur Chaskelson has been described as a lawyer's lawyer.

One of Nelson Mandela's attorneys was Arthur Chaskelson, who has been described as a lawyer's lawyer.

Example 2: Combining two sentences

This case is governed by the Land Act. The Land Act was enacted "to regulate the alienation of land in certain circumstances and to provide for matters connected therewith".

This case is governed by the Land Act, which was enacted "to regulate the alienation of land in certain circumstances and to provide for matters connected therewith."

Similarly, you can reduce phrases to words.

Example 3: Reducing phrases to words

because of the fact that	→	because
despite the fact that	→	although, even though
due to the fact that	→	because
except for the fact that	→	except for
in spite of the fact that	→	although, even though
in view of the fact that	→	because, considering that
owing to the fact that	→	because
the fact that he asked	→	his question
in regard(s) to	→	about, concerning
with regard to	→	about, concerning
by means of	→	by
by virtue of	→	by, under
for the purpose of	→	to
has the option of	→	may
in compliance with your request	→	as requested, as you requested

Exercise:

Revise the following sentences, making the same points more concisely.

1. In compliance with your request, we have conducted an investigation of the incident. The incident in question occurred inside the factory.

2. Due to the fact that the purchase agreement was not over the signature of the owner, the fact that the owner made oral statements that indicated that he intended to sign the agreement are irrelevant.

6.3 Do not go too far in deleting extra words and phrases

Although you want to be concise, do not go too far in deleting extra words and phrases. First, in most instances do not delete roadmaps, signposts and other transitions. See Chapter 4. Your readers need those words. Second, do not put too much information into a sentence. In deciding whether to combine sentences or whether to convert a phrase into a single word, think about your reader. How much information is too much information? Finally, read your writing aloud, checking to make sure that your sentences are not choppy and that each sentence "flows" smoothly from the prior sentence. If your writing would be more pleasing if you kept a few extra words, keep those words.

Exercise:

Using the techniques described in this chapter, revise the following paragraph from a letter to opposing counsel, eliminating at least half of the words.

I would wish to make it clear that my presence now or in the future in a meeting will not make the management offer the union what is outside the company's budget, as we believe that for the benefit of the company and the employees, we need to operate within the company's budget in order to stay in business and ensure that the wonderful employees of XYZ LIMITED, who want to continue to do their jobs, have work to do. This is because, if the company is driven out of business by unrealistic demands, or an increment that is beyond budget is imposed on the company by the union, some persons will have to concede their jobs so as to make it possible for the company to be able to pay the increased pay packet to those remaining. It is important that we conclude this CBA negotiation with a realistic budget so that all employees will continue to work, and none will need to concede their position for the company to be able to pay the newly negotiated wages. So, the management team has the mandate of the company based on the budget. This is because any management staff is empowered to make decisions consistent with a mandate. I therefore enjoin the union to extend their hand of comradeship to management in the on going negotiation and indeed future negotiations in the interest of the continued existence of our company. Let us march forward as a team, and look to the future with confidence and faith, and avoid trying to grab everything today, even when it is not available. (269 words)

ENGAGING

Your document may be clear and concise, simplified and to the point. That does not mean that the reader will care to finish your work. *It does not guarantee that you will have any persuasive effect at all.*

So what makes writing engaging?

- **Variety**[10]

  Variety has been said to be the spice of life, and it is no different in legal writing. Variety in sentence construction, for example, can go a long way in keeping the reader's attention.

  Consider the following example:

  > The allegation against my client is that he discriminated unfairly against his employee when he refused her maternity leave. This allegation is not true, since the employee never informed my client that she was pregnant and he could therefore not have granted her any maternity benefits.

  > The allegation against my client is that he discriminated unfairly against his employee when he refused her maternity leave. This is not true. The employee never informed my client she was pregnant.

  When looking at the second paragraph, the sentence 'This is not true' has much greater impact than in the second paragraph. Following a long sentence with a shorter one often adds great emphasis to the information in the shorter sentence. It is therefore wise to keep your important information in the shorter sentence!

  Also remember that variety in words will also avoid frustration and boredom with the reader. Repetition of certain words may become irritating and the

[10] Osbeck 2011:36.

informative and persuasive effect of your writing will be lost. When re-reading your work, make sure words do not repeat themselves too often.

- **Tone of writing**[11]

The tone of a piece of legal writing can either engage the reader throughout the document, or put him off immediately.

When writing a persuasive document, like heads of argument or a letter of demand, legal practitioners often use complicated, lifeless, legal jargon in an attempt to persuade the judge or potential defendant. What results is a document that sounds superficially intelligent, but is dull and crowded and uses a lot of words to say very little.

The best way to avoid this rigid and lifeless tone is to *write with your 'authentic voice'.* It is ultimately *your* words which must inform or persuade. This means that you write in a natural manner that allows the reader to get a peek at your personality, without being silly or attempt to infuse writing with humour or sarcasm. Professionalism must still triumph.

> Law, as you can see, is for me a kind of writing, at its heart less of an interpretive process than a compositional one. The central task of the lawyer from this point of view is to give herself a voice of her own, a voice that at once expresses her own mind at work at its best and as a lawyer, a voice at once individual and professional.[12]

- ***Pathos***[13]

Aristotle described rhetoric as "the faculty of observing in any given case the available means of persuasion." A specific tool of rhetoric that Aristotle might have used is called *pathos*, which refers to a writer's ability to connect with his audience on an emotional level. This greatly increases the reader's engagement to what is being read, as well as the persuasive quality of the writing.

11 Osbeck 2011:37.
12 J.B. White in Osbeck 2011:38.
13 Osbeck 2011:46.

A good legal writer can influence the reader's emotional response to the writing in a number of ways:

- ♥ *Writing style*.
- ♥ *Factual composition*. By deciding which facts to include, exclude, emphasise, de-emphasise and how to arrange the facts, the writer can achieve a greater persuasive effect. More on this in the study unit on persuasive writing.
- ♥ *Emotive words*.

It is wise, however, to keep in mind that a careful balance must always be maintained between *pathos* and professionalism. Guard against overly emotional pleas, as this will serve to irritate the reader, rather than engage.

Thorough discussions on techniques of persuasiveness follow in the study unit on persuasive writing.

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STUDY UNIT 3

PREDICTIVE WRITING

At the end of this study unit you must be able to:

- Distinguish predictive writing from persuasive writing.
- Describe the systematic approach to legal writing.
- Describe the style, format, tone and aim of predictive writing.
- Distinguish between the types of predictive writing.
- Describe the nature, content and purpose of letters of advice, memoranda and legal opinions.
- Adequately draft documents of predictive writing in the context of legal questions.

PREDICTIVE WRITING vs. PERSUASIVE WRITING

Legal writing in the broad sense may be generally divided into **academic writing** (for instance, assignments, assessments, and articles), **legal drafting** (for example, affidavits, contracts, pleadings, wills, *etcetera*) and **legal analysis**, which will form the major focus of this module. Legal analysis can be either **predictive or persuasive**.

PREDICTIVE LEGAL WRITING

- When engaging in predictive legal writing, the writer must **consider legal authority and predict the outcome,** should the matter proceed to court.

- It is an **objective investigation into law**. It does not choose a side but analyses the position on both sides and then renders an opinion on which is most likely to succeed.

- Predictive legal writing is done in the form of a **legal opinion, office memorandum, or letter to clients.**

- Traditionally, **legal opinions** may be drafted by advocates on briefed facts and directed to attorneys. The receiving attorney will then study the opinion and **advise his client in accordance with the opinion.**

- **Memoranda** are more formal than letters to clients but less so than legal opinions. The purpose of this document is as follows:

    - Advising corporate or institutional clients
    - Advocates dealing with matters of procedure
    - Reporting of junior attorneys to seniors

- **Letters to clients** are informal documents aimed at informing the lay client. These documents are set in much less formal tone and format than legal opinions.

PERSUASIVE LEGAL WRITING

- In persuasive writing the writer aims to **persuade the reader** of his client's case.

- Persuasive writing is a **subjective approach to legal writing.** Here, the writer argues for a specific cause and does not consider the other side.

- The most often used types of persuasive legal writing you will encounter in practice are the **letter of demand** and **heads of argument.**

- **Letters of demand are issued prior to the start of litigation**, in other words, before summons is issued to prospective defendants.

Why is it vital to issue a letter of demand before proceeding with civil trial against the defendant?

- Defendant may pay, perform or negotiate on the terms set out in the letter and settlement of the case may be achieved prior to litigation.
- The defendant may raise a valid defence on the allegations in the letter.
- The letter and any response from the defendant may provide your client with tactical advantage.
- Where the defendant was bound in a contract without a performance date, a letter of demand may serve to place the defendant *in mora*.
- Where unliquidated damages to be claimed.
- In some cases it is statutorily required that letters of demand be issued, for example, in any matters brought before the Small Claims Court and where a governmental organ is to be sued.

- **Heads of argument is the document which contains the argument *for* your client. It is the *summary* of main points of counsel's argument and the authorities you relied on in arguing for you client.**

More on persuasive writing in the following study unit.

SYSTEMATIC APPROACH TO LEGAL WRITING

NB! STUDY:

Study the following extract from **Charrow, Erhardt and Charrow**[1] on the systematic approach to legal writing.

[1] 2007:92-93.

FOURTH EDITION

Clear and Effective Legal Writing

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

7

A Systematic Approach to Legal Writing

Part I of this book was designed to help you learn to read and analyze legal writing. Part II is designed to help you develop your own writing style in a careful and systematic way. It presents legal writing as a step-by-step process that can help you build effective writing skills and avoid the pitfalls that can destroy clarity and credibility.

It is valuable to begin any writing task by articulating the steps you plan to take. Carefully thinking through each step will help you to construct a complete, well-formed document. It is also worthwhile to place the steps in a workable order, even though you may have to be flexible in the way you carry out various parts of the writing process. As you write, you may end up moving the steps around, adding one or two, or even omitting some of them.

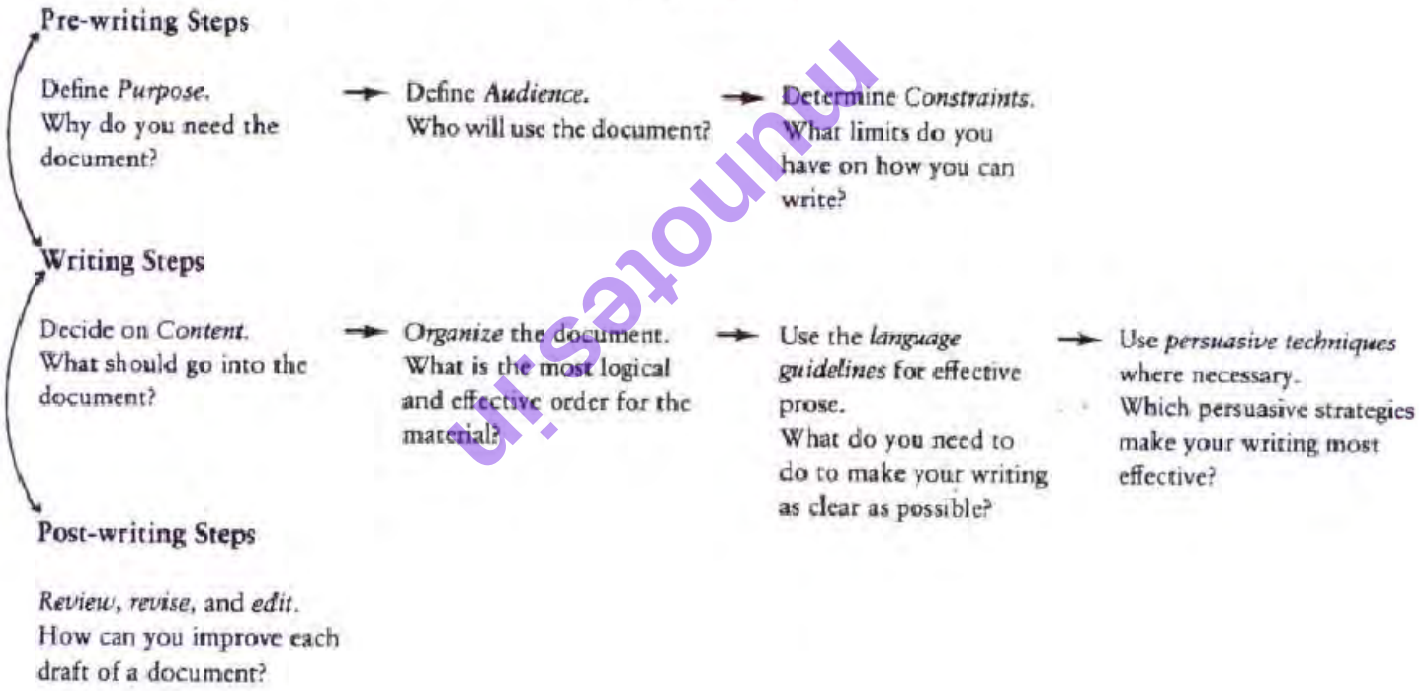
A suggested writing plan, based on the chapters of Part II of this book, appears on page 92. Whether you use this plan, modify it, or create your own, it is important that you have a writing plan and that you are comfortable with it.

A Pre-writing Stage

Before you begin to write any legal document, you need to go through three essential steps. You should clearly ***identify your purpose or purposes*** in writing the document and keep them in mind as you write. You must ***understand your audience:*** What does it know? What does it want to know? How might it react to what you have to say? Finally, you must ***be aware of any constraints*** that circumstances, rules, or customs place on the form or content of your document. Only when you have taken these three steps do you begin to apply your writing skills—writing and rewriting to create a document that does what you want it to do.

Begin by asking yourself what the purpose of the document is: What is it supposed to accomplish? How much material should you include to accomplish your purpose? Is there a risk of conflicting messages in the document because you have several purposes and you have not yet thoroughly thought out how to balance them? Are you confused about whether you are trying to persuade or

FIGURE 7-1



merely to inform? The more you work out these conflicts *before* you write, the easier and faster the writing task will be.

Next, ask yourself who will use the document. A single document may have more than one *audience*: judges, other attorneys, your client, other private citizens. These diverse audiences may have varying degrees of sophistication and varying needs. Finding the proper amount of information and the right level of sophistication to serve these different audiences is not a simple task. Documents should not be so difficult that they seem obscure to some readers nor so simple that they seem patronizing to others. But keep in mind that even highly sophisticated audiences will appreciate a well-organized, clearly written document.

There are usually *constraints* on what you can do when you write a legal document; you should understand your constraints before you begin to write. Time is a major limitation that attorneys must consider, no matter what legal task they are performing. Practicing attorneys must juggle the affairs of many clients and still meet court and filing deadlines. In law school, too, you will have deadlines, and you must tailor your writing plans to meet them.

There are often other constraints to deal with, such as format, paper size, mailing requirements, and reproduction needs. Many times these are dictated by courts or by a law firm or agency.

B Writing Stage

Next you must *organize* your material—arrange what you want to express in a logical sequence. Ask yourself what kind of document you are writing. Is it a basic expository document or something more complex that will require you to present the pros and cons of a particular subject or issue? Once you identify the kind of document you will be producing, you can set up an outline that will help you accomplish your ultimate purpose with the document.

Once you have organized the document and worked out an outline, it is time to begin the actual writing. As you write, you will use sentence structure and style techniques that produce clear and readable prose. Thus, if the purpose of the document is to persuade, there are specific strategies you can use that will make your document more effective. These include using a logical framework to present your reasoning and carefully choosing appropriate vocabulary, grammatical constructions, and forms of discourse that will make your arguments more forceful. In addition, recognizing and avoiding organizational, grammatical, and lexical pitfalls will keep you from inadvertently weakening your arguments.

C Post-writing Stage

At the post-writing stage, you will have a full draft of a document in your hands. This does not mean your job is finished, however. One draft of a document is

rarely enough, especially in legal writing. After you finish a first draft, read through the document critically. This is the time to edit and revise: Check both content and form to make sure that your document is complete, correct, and presented in the best possible way. Also check your citations to make sure they are correct and complete and in the proper form. In the final draft, you will also want to check for typographical errors.

NB! STUDY:

Study the following extracts on predictive legal writing from **Marnewick**[2] and **Palmer and Crocker.**[3]

2 2007:25-37.
3 2011:49-51.

Litigation Skills for South African Lawyers

Second Edition

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2

Advising and counselling clients

2.1 Introduction

Clients approach lawyers for advice and counselling so that they can make informed decisions about their future conduct. The client wants to know, "What can I do?" and "What should I do?" The question, "What can I do?" requires the lawyer to identify and evaluate the available options and the consequences of adopting each of them. It is the lawyer's duty to advise the client of the pros and cons of each option and which option, in the lawyer's view, is the best option. The question, "What should I do?" on the other hand, requires the lawyer to help the client to make the right decision, having regard to those options and consequences. Counselling therefore goes beyond the mere giving of advice. It is the process by means of which the lawyer helps the client to decide what to do. Having received advice and counselling, the client has the responsibility of making the final decision.

Advising and counselling are complementary, but different, skills. The lawyer acts as an objective investigator during the advice stage but takes on the role of a personal advisor during the counselling stage. Advising and counselling occur in virtually every branch of a lawyer's practice, from property transactions to litigation, from the collection of small debts to the conclusion of international shipping or licensing contracts. Whatever the nature of a lawyer's practice, advising and counselling will be part of it. Attorneys may advise and counsel differently from advocates as they have a more direct, and usually a more enduring, relationship with their clients. Advocates are also usually required to advise or counsel in a far more formal setting.

Advising and counselling are also part of litigation. Indeed, advising and counselling continue through every stage of the litigation process. It can start at the first interview and can continue even after a final appeal has been decided. Nevertheless, the underlying processes and skills to be employed are the same for both branches of the profession and for all types of legal work.

2.2 Advising and counselling generally

2.2.1 *Advising the client*

Before you can advise a client, you will have to form an opinion or view on the facts and the law. This may only be possible after an exhaustive fact investigation or extensive legal research. Sometimes lawyers will be able to deal with the problem fairly promptly

because they have encountered it before or because it falls within their special field of expertise.

Where the problem needs to be investigated before an opinion could be formed or the problem can be solved, you would rely on your skills in legal research and fact analysis, which are dealt with in Chapters 13 and 14. After identifying possible solutions by using those skills, you should tell the client what the options are and what you think the best option is.

You could do this according to the following scheme:

Table 2.1 Scheme for advising a client

Stage	Ask yourself . . .
1. Identify the problem and the client's objectives.	What is the problem? What does the client want to achieve?
2. Investigate the facts to ensure you can identify the available options.	Against what factual background does this problem exist?
3. Identify the legal issues and consider their application to the facts.	What legal principles apply to the facts? What is the effect of those legal principles on the problem and on the client's objectives?
4. Identify the consequences of each option by considering the likely legal and non-legal consequences of each option.	What are the options? What are the likely consequences of each of them? Which is the best option? Why do I think so?
5. Discuss the options and their consequences fully with the client.	What can the client do? What are the advantages and disadvantages of each option?
6. Tell the client which option you regard as the best option and why you think so.	What should the client do?

The counselling phase is not entirely separated from this process and is prominent during the next stage when the client, after having received your advice, makes the decision. The different stages of the process should also not be applied in too strict a sequence as it may become necessary to return to prior stages before the whole process is finally completed. For example, when you have identified the legal principles and have considered their effect, it may become necessary to re-investigate the facts or even to reconsider the true nature of the problem. A confident lawyer will move between the different stages effortlessly while the solution to the client's problem becomes ever clearer. Like most processes used for solving legal problems, advising and counselling cannot be confined to a straitjacket. However, it is doubtful whether any of the stages identified earlier can be skipped. Each stage constitutes an essential step towards the finalisation of the process.

2.2.2 *Counselling the client*

The purpose of the counselling process is to empower the client to make an informed and correct decision. This is far easier said than done.

What the counselling process involves can best be explained by an analogy. When a patient who is suffering from a life-threatening disease consults a specialist physician, the physician will conduct various tests and examinations to determine precisely what the problem is and what different treatments are available for the condition diagnosed.

These will all be explained very carefully to the patient so that the patient will know what the options are. The physician will go further than that. It is not enough that the patient knows what different options are available – the physician also has the duty to help the patient to make the right decision. The patient may not know or understand enough to make a correct decision on his or her own. Thus, while the physician has to explain what he or she thinks the appropriate treatment is, the advice to the patient should be given in such a way that the patient is empowered to make the right decision. Lawyers have the same duty.

The process of counselling is both *personal* and *dynamic*. It is personal because the style of counselling depends on the individual personalities of the lawyer and the client. It is dynamic because its course depends on what happens during the counselling process itself. Some clients need more help than others before they are ready to make a decision. Some clients make the right decision; others make the wrong decision and the process then may have to continue for a while longer. Sometimes a decision can be made quickly, while in other cases it may take time. For these reasons one cannot be too dogmatic about the exact process or style to adopt. Vary your style and the procedures you adopt within the counselling process according to the demands of each individual case.

Generally you have to ensure that:

- ☐ the client has a sufficient opportunity to evaluate the advice;
- ☐ the particular client, having regard to his or her individual make-up, is given sufficient help to make the right decision;
- ☐ all the client's questions are answered; and that
- ☐ you intervene when the client makes a mistake or is about to make the wrong decision.

Clients often make mistakes even after receiving the best advice because they do not judge the likely consequences of a proposed decision correctly or choose the option that accords with what they *want to do* rather than with what they *should do*. Their decisions are often based on the wrong "facts" or values. Sometimes their decisions can simply not be reconciled with an understanding of the risks involved or may result in a clash with the ethics of the legal profession. While clients should be allowed to make their own decisions, this cannot be taken too far. In a country like South Africa, for example, there are many clients with worthy causes who are unable to make an informed or correct decision because they are simply incapable of coping with the issues involved. In such cases a lawyer's task to ensure that the right decision is made is more difficult. The client has to be empowered to make the right decision, even if it means that the counselling process has to be extended in time and scope. In some cases the assistance and support of a family member or an elder in the client's community or a shop-steward may be necessary.

2.3 Oral advice and counselling in litigation

Oral advice can be given during a formal interview, over the telephone or even at court during a trial. There are so many different circumstances under which a lawyer would give advice in a face-to-face situation that it is difficult to lay down any specific procedures for doing it. Nevertheless, there are some pitfalls to avoid.

Lawyers are often in a situation where they are expected to give oral advice in circumstances of varying degrees of urgency. Sometimes they do not have all the facts on which

sound advice would ordinarily depend. Furthermore, they may not be given the opportunity to research the facts or the law before they have to advise on the question posed. This is not a healthy situation. On the contrary, it is fraught with danger for both the client and the lawyer as the advice may be based on insufficient or incorrect information or on an incorrect interpretation of the facts or the law. The advice may also be misinterpreted by the client or even be forgotten and a dispute may later arise about what the advice had been.

It is therefore important to remember that it is risky to give oral advice. Take steps to eliminate the dangers that may be present in a particular situation. Advise the client that it is undesirable to make decisions on the strength of advice given as a matter of urgency as the advice may be based on insufficient or incorrect information or an incorrect interpretation of the facts and the law. If the client wishes to proceed, the advice should be qualified and both the advice and the facts upon which it is based should be clearly recorded. Do not be rushed into giving advice you have any doubts about.

If pressed to continue, you would be entitled to require the client to sign a disclaimer absolving you from liability for incorrect or negligent advice.

If advice has to be given under circumstances where it is not feasible to record the facts and your advice, confirm the advice and the facts upon which it was based in writing at the first opportunity.

Advising the client at court under the stress of the trial or hearing should be done with a special degree of circumspection. A common complaint by clients about the litigation process is that they were *forced into a settlement*. Care should be taken that the client does not feel pressured into making any decisions during the hearings. Ask the Judge for time. It will be given if there is a reasonable prospect of a settlement. Go back to the office or counsel's chambers, if necessary. Consider the pros and cons carefully and give the client objective advice on the options. Then make your recommendation. If the client is still uncertain about what he or she should do, start all over again. Make a note of the advice you have given. Advocates often record any advice they give on the brief and ask the client to sign it. It is a practice worth adopting.

There are a few other matters to keep in mind:

- ☐ You should make a concerted effort to maintain your neutrality. Counselling is not advocacy. Here the client is entitled to objective advice. The process should therefore have as its aim that the client, after receiving objective advice, is able to make the decision. Nevertheless, there is an element of persuasion involved because the lawyer has the duty to help the client arrive at the correct decision. That may, in certain cases, require a degree of *persuasion*. The facts, options and consequences may have to be presented in such a way that the client is led to the right decision. However, this approach cannot be taken too far. The client has the ultimate right to make his or her own decision.
- ☐ If the client makes the wrong decision, but still a decision which could reasonably be made on the facts, by all means point out the consequences of that decision, as you see them. You may go as far as advising the client again of the other options and how they compare to the one chosen by the client. Once the client has made a decision, after receiving all the help you can give, accept the decision and implement it. Do not undermine the client's confidence by telling him or her that the decision is wrong. You've done your duty when you advised the client of the consequences and how the decision compared to the other options, provided, of course, that you have made sure that the client has been empowered to make the decision.

- ☐ Don't rush the client, especially at court when things may not have gone according to plan. The client is probably under severe stress already and needs more assistance, not more stress.
- ☐ Keep in mind that the client is an individual, with his or her own levels of intelligence, experience, sophistication, emotional involvement, and support (or lack of it) from family and friends. The problem may range from the simple to the extremely difficult. Adopt an approach to counselling that takes account of these factors.

Let us now revert to our client from Chapter 1, Mrs Smith. During the initial interview we can give Mrs Smith the following advice.

- ☐ There are several potential claims. She and her children may have personal injury and loss of support claims against the RAF depending on whether negligence on the part of the insured driver can be proved. There may be a claim for the damage to the car, also depending on proof of negligence but only if the car belonged to our client. There may also be claims for the proceeds of insurance policies, depending on who the owner and beneficiaries of the policies are.
- ☐ The personal injury and loss of support claims may take between 18 months and 3 years to resolve if they are disputed. The claim for the damage to the car could be resolved in the Magistrate's Court in less than a year if the damage is less than R100 000-00. It is not possible to say how long the insurance policy claims will take to resolve but it could be a relatively short period if the insurers concerned accept the claims and the policies fall outside the deceased estate.
- ☐ It may be possible to make claims for her and the children's maintenance against the deceased estate. This will be investigated immediately. In the meantime, she should provide a list of her weekly or monthly expenses as soon as possible.
- ☐ It may be possible to negotiate an agreement with the hospital to the effect that they would wait for the finalisation of any action against the RAF before they demand payment. The RAF may be persuaded to make interim payments with regard to medical and hospital expenses, funeral expenses and loss of support, depending on whether liability is accepted.
- ☐ It is not possible to advise on the strength of the claims before the facts have been fully investigated.
- ☐ So far as fees are concerned, there are various options available. These include an application for legal aid, an agreement that the case be undertaken on a contingency basis, and an agreement by the firm to carry all disbursements and to defer payment until the RAF claim has been finalised. It may be too soon to make decisions in this regard but the matter can be discussed and a decision taken at the next interview.
- ☐ Give the client an undertaking to supply her with more detailed advice in a letter within a week after you have done some initial research and investigations. (The promise has to be kept!) Advise her not to act until she has had an opportunity to consider the advice you give in the letter and has had a follow-up meeting with you.

2.4 Advising by letter

Attorneys often advise their clients by letter. Even when they have given oral advice, they would usually confirm that advice in a letter. Sometimes the letter confirming the oral advice goes further than the original oral advice, which may have been given in circumstances of some urgency or without an adequate opportunity to gather additional

information or to do legal research. In cases where attorneys have briefed counsel for a written opinion, they frequently convey the substance of counsel's opinion to the client by way of a letter which explains what counsel's opinion is and what the ramifications of the opinion are for the client. In short, they advise the client what he or she can and should do, having regard to counsel's opinion.

However, it is rather unusual for an advocate to give advice by letter. The usual form of counsel's advice, when it is not given face to face during a conference, is by way of a memorandum or a written opinion. Legal advisors employed by concerns such as municipalities, insurers or other companies also give advice to their councils or directors by way of a letter or a memorandum.

Advice given by letter differs from advice by way of a memorandum or written opinion in one crucial aspect: While memoranda and written opinions are usually aimed at another lawyer or more astute clients, the advice given by way of a letter is aimed at the lay client. It is therefore important that the letter be written in such a way (in both style and content) that the lay client is given a clear understanding of his or her options and position. The format of a letter, as well as a memorandum, should allow for the subject-matter to be broken down into paragraphs, each dealing with a distinct aspect:

Table 2.1 Format for a letter (or memorandum) of advice

Subject-matter	Content
Executive summary	This is the initial part of the letter where the client's instructions, the answer to the question or problem and your recommendations are summarised.
Body	The main part of the letter discusses the question or problem in more detail, outlines the conclusion reached and makes a recommendation with regard to further action.
Reasoning or argument	The argument sets out the reasons for the conclusion with reference to the facts and the law applicable to those facts.
Conclusion and practical advice	In the concluding part of the letter the recommendations and advice are repeated and the client is advised with regard to the practical implementation of the recommendation. This includes what further evidence or information may be needed before proceeding any further.

Many lay clients are only interested in the first and last stages. They want to know what they can do and what their lawyer suggests they should do. Some clients may also want to know how their lawyer has arrived at the conclusion and on what grounds the recommendation is based. The result is that even the *technical* part of the letter (where the facts and legal principles are analysed and applied) should be in plain language. That means that jargon, stale Latin phrases and long quotations from textbooks and cases should be avoided.

It is difficult to counsel a lay client effectively in a letter or even in a memorandum. The counselling process is too personal, too important and too dynamic for that type of approach, but advising and counselling by letter cannot be ruled out altogether in every case. One of the advantages of advising by letter is that the client has the opportunity to read and re-read the letter and to reflect upon it, even to take further advice, before finally making a decision. The main disadvantage is that there is no opportunity for the client to ask questions or for the lawyer to determine whether the client understands the advice so as not to make a mistake.

Nowadays advice is often given in an e-mail. When you use that form of communication, you should adopt the same approach as for advice by way of a letter, subject to some additional precautions to ensure that confidential communication between your office and the client does not fall into the wrong hands. If attachments are to be attached, they should be in a format – such as Adobe Acrobat - that does not allow amendments or additions to be made to the attachments.

2.5 Advice per memorandum

Advising by memorandum is more formal than a letter but less formal than a written opinion by counsel. (The same applies to the counselling process.) A memorandum will usually involve some counselling that is more formal and subtle than counselling by way of a letter of advice.

Attorneys usually adopt memoranda as the means to advise corporate or institutional clients like government departments or bodies, municipalities, insurers and public companies. Clients like these often have internal legal departments staffed by trained lawyers to advise them on legal matters, including interpreting and explaining advice received from the client's attorneys and counsel. This enables clients to understand legal advice better than a member of public. They often have problems of the same nature and file the written memoranda and opinions they receive for use in similar cases they encounter.

Advocates also adopt memoranda as a means of giving advice. They usually resort to this method when they deal with matters of procedure, when they record advice given orally in consultation, or when they engage in the counselling process itself. (It is a natural consequence of the divided profession that advocates are somewhat removed from the counselling process and that attorneys usually fulfil that function, even when counsel has been briefed.)

Since advising by way of a memorandum is in some aspects the same as advising by letter and the formal advice of a written opinion, the structure is similar. Advice by memorandum could be given in the following way:

- ☐ You can start, as in a letter of advice, by summarising what the issue is, what your answer is and what you recommend with regard to future steps.
- ☐ You can proceed by setting out the facts in more detail, explaining how the problem arose having regard to those facts, and then deal with the legal principles which can be brought to bear on the problem.
- ☐ You can then analyse the facts and the law in some detail, as in a formal opinion. Ultimately this analysis should lead to a conclusion or an opinion that answers the two basic questions at the heart of most cases, namely "What *can* the client do?" and "What *should* the client do?"
- ☐ The memorandum should conclude with a firm recommendation with regard to what the client is advised he or she should do, including the ramifications of any decision that may be made, whether it is to act on the advice or to go against it. The memorandum should contain practical advice about the way forward.

2.6 Written opinions

While there is no impediment, legal or practical, to attorneys giving advice by way of formal, written opinions, a written opinion is the traditional way in which an advocate gives advice. Some of the most important sources of the Roman-Dutch law as applied in

South Africa are collections of opinions by famous advocates like De Groot. Often a written opinion is in itself a document of such complexity that it needs to be explained to the lay client by another lawyer, usually the attorney who briefed counsel in the first place.

An opinion differs from advocacy. When conducting a trial or any other form of litigation, the advocate makes submissions subjectively, meaning that the submissions which may advance the client's case are put before the court whether the advocate *believes* in them or not. The judge then makes the decision. When giving an opinion, the advocate follows an objective approach, telling the client what he or she (counsel) really thinks of the facts and the law. What the client receives in litigation is advocacy. What the client receives in an opinion is objective advice.

Opinions:

- ☐ are advisory in character, answering some legal or factual question;
- ☐ are not academic even though they may contain an apparently academic discussion of a point of law;
- ☐ deal with real cases, which means that the opinion is *case specific* and is shaped by the facts of the case;
- ☐ require a consideration of the legal principles which are applicable to the facts of the case;
- ☐ are objective to the point of being dispassionate; and
- ☐ are not designed for the process of counselling the client, although the conclusions reached may well be essential considerations in that process.

If the facts change, the answer may change. Counsel must state the true position as they see it. Clients must know exactly where they stand. The counselling should be left to the attorney. If required, an advocate may assist, but this should be done with both the client and the attorney present.

Advocates usually write opinions under circumstances where the investigation of the facts has been done by the attorney. The advocate might ask for clarification of the facts or for additional information to be obtained. Ultimately the opinion has to be given on the facts and instructions given by the attorney. Advocates often expressly record the facts upon which the opinion is based, either by referring to their written instructions or a set of documents or statements, or by listing the facts in the opinion.

In some instances counsel is required to make an assessment of the available evidence and base the opinion on his or her own view of the facts. In some cases, counsel may even be requested to advise what the court is likely to find with regard to the facts. In such cases, he or she needs a sound method for fact analysis, a process described in detail later.

The Inns of Court School of Law suggests the following practical steps as a recipe for a good opinion:

- ☐ read and digest the instructions;
- ☐ determine what the question is which needs to be answered;
- ☐ absorb and organise the facts;
- ☐ construct a legal framework;
- ☐ look at the case as a whole;
- ☐ answer all the questions; and
- ☐ consider the advice you have given.

The writing process follows upon the preparatory stage and may overlap to some extent. A written opinion by an advocate will usually have a framework, for example:

- ☐ introduction;
- ☐ discussion of the facts;
- ☐ analysis of the legal principles involved; and
- ☐ conclusion or opinion.

2.6.1 *Introduction*

An opinion is always required on some aspect of the facts or the law. Take care to make the opinion understandable to the reader, who may not be familiar with the facts and the question to be discussed. For example, the opinion can be started as follows:

- ☐ *I have been asked to advise on the quantum of the consultant's damages in an MVA action.*
- ☐ *I have been asked to advise on the consultant's prospects of success on appeal against the judgment of Mr Justice Wilson, delivered on the 1st April, 2007.*
- ☐ *I have been asked for an opinion on the proper method of valuation to be adopted with regard to the compensation to be paid to the consultant for the expropriation of his farms.*

The introduction will also serve as a reminder of the question to be answered in the final conclusion or opinion section of the opinion. The introduction does not recite the facts but introduces the question to be answered. In some cases the question is put against such a simple set of facts that the question will inevitably refer to some of the facts.

2.6.2 *Discussion*

Since the question to be answered is not raised in a vacuum but in relation to a particular set of facts and circumstances, it is necessary to describe those facts and circumstances. Advocates usually set out the facts in the second part of the opinion. In some cases the pertinent facts and circumstances have to be *found* by evaluating the statements, documents and exhibits provided before arriving at an opinion of the likely findings of fact the court would make. This part of the opinion does not consist of a mere recital of the facts and circumstances but includes an analysis of the evidence to prove them. A detailed fact analysis in the style described in Chapter 14 may be necessary.

A number of questions will have to be answered in the process of weighing up the facts and considering their significance. What are the basic facts? What is the significance of each individual fact? Are the inferences to be drawn from the evidence or the facts sound? Are there facts about which you have some doubts or reservations? Is there more information available? Are all the facts accounted for or are there facts running counter to the general picture painted by the other facts? Can the crucial facts be proved? What would the position be if the facts were different? Does the other side have facts you do not have? What can be done to obtain any missing information?

In litigious matters you may have to consider the burden of proof in relation to the facts. To what standard do the important facts have to be proved? Who bears the onus of proof. (Remember that the onus of proof determines who loses when there is no balance of probability either way on the disputed facts.) Above all, is the available evidence admissible, reliable and sufficient?

The discussion and analytical parts of the opinion often flow into each other so that there is no distinct separation between them.

2.6.3 *Analysis*

The particular facts and circumstances of the case have to be considered in the context of the legal principles applying to those facts. This may also include the contractual provisions between the parties.

It is important to point out at this stage of the opinion what the pertinent legal principles are and how they apply to the particular facts and circumstances of the case. This analysis is an essential component of the argument or process of reasoning which is followed from the introduction of the question to the final conclusion. The client doesn't merely want to know what conclusion the lawyer has reached but also how that conclusion has been arrived at. The opinion has to be *persuasive* in the sense that it has to be convincing in the way it answers the main questions put to counsel and must also accord with the known or assumed facts, the law and the principles of logic.

The starting point will thus be the question: What is the law on the point? This is not always an easy question to answer. The law is not always clear, in fact, the law may even be difficult to find. If the law is found in a statutory provision, you will have to interpret the section. If the section has been considered in prior cases, the law reports may give some assistance. The common law is found in textbooks, new and old, and in case law. In some instances you may have to go to original texts in Latin or High Dutch to find the answer.

Although you start with the law, you end with the facts. The purpose of finding the law is to ensure you apply the correct legal principles to the facts of the case. This is probably the most important part of the opinion. It is here where you have to demonstrate how you came to your conclusion or opinion. The facts and the law are merged in this exercise. The only tools available to you are your legal knowledge, research skills, words and logic. The reader has to be persuaded by what you have written. In demonstrating how you arrived at your opinion, you will rely on analogy, examples, precedents in case law, hypotheses, the probabilities as you see them, presumptions, and even your experience of human behaviour and judicial attitudes. This will assist you in arriving at an answer and will be used to justify the opinion you give the client.

I do not proclaim that this process is easy. In fact, it can be very difficult. You may lie awake many a night wrestling with the facts and the law before you find the answer. You may struggle to find a way to express your opinion so that the client can follow your reasoning. The good news, however, is that it gets easier with practise. You will soon develop a style that works for you. There is often more than one way to arrive at a conclusion. Even if it takes time, all problems can eventually be solved. Sometimes the best thing to do is to write the opinion and then to let it lie on your desk for a while. Let it stew in the subconscious of your mind. It is surprising how often fresh insights into the problem break through while you are engaged on something totally different. When that happens, you can rewrite the opinion to the extent necessary. You don't have to send the opinion out while you are still uncertain about its correctness.

2.6.4 *Conclusion*

The process by which one arrives at the answer cannot be defined nor can it be restricted to a particular model. There are so many different ways to arrive at an opinion after stating the question, setting out the facts and the law, and applying logic and experience in order to *justify* the answer. However, the client asked for an opinion and you have to express an opinion one way or the other. It does not mean that a lawyer is always obliged to have a firm opinion on every question. It may well be that you conclude,

for example, that the outcome of an appeal cannot be predicted. If that is your conclusion, you are entitled to say so but you still have to justify your view like any other (by reference to the facts and the law).

An opinion starts and proceeds almost like an argument. (An argument is a connected series of statements or postulates supporting a particular conclusion or submission.) Therefore, once you have completed the opinion, re-read the document in order to determine whether you have covered all the facts and circumstances and have discussed all the legal principles leading to your conclusion or opinion.

2.6.5 *General comments*

William M Rose *Pleadings without Tears* 5 ed Blackstone Press Ltd (1999) gives some sound tips for opinion writing. It is worth repeating some of them here.

Before you can hope to write a good opinion, you will have to master the skills of legal research (Chapter 13) and fact analysis (Chapter 14). It is not enough to state the facts; you must analyse them. The weight and significance of individual facts should be considered (and explained) very carefully. You should consider (and explain) how the law impacts upon the facts and how a different conclusion may be arrived at if the facts are not as you have them. This is a neglected subject in legal education. No one seems to teach lawyers how to analyse the facts of a case. If you have any difficulty or don't know where to start, try the process described in Chapter 14; its uses are not restricted to preparation for trial.

Although your instructions may ask for an opinion on a narrow or specific question, you should give the client practical advice where it appears appropriate. You can't always do this, for example, where you have been asked to advise on the meaning of a word in a statute. Practical advice supported by good reasons will help the client to decide what to do. Keep in mind that the client wants to know what he or she *can* do and *should* do.

If the facts you have been given are incomplete, insufficient or doubtful, express your view on a hypothetical basis, assuming that different factual findings could be made. Explain how the conclusion may change as different facts are assumed. This should, however, be done as a last resort. Ask for more information or clarification of the facts first. Qualify your opinion, if you have to, but try not to avoid the issue.

Consider the main argument that could be raised against your views and then deal with it. Explain why you think that argument will not prevail over yours. This exercise will not only sharpen your views, it will also expose glaring errors in your opinion or reasoning. It may also come in handy later when the case has gone to a hearing on the subject-matter of your opinion and you have to defend the views you have expressed. You will by then have considered the opposite view and, presumably, found some answers to it. It is good to do this at a stage when your client still has the opportunity to follow a different course.

Use headings and sub-headings where you can to help separate (and clarify) your discussion of various points, for example:

A. Introduction – the question

B. The facts

   1. The background
   2. The disputed facts
   3. The probabilities

C. The law
   1. The first point – Prescription
   2. The second point – Estoppel

D. Conclusion
   1. The answer
   2. The argument against it

E. The way forward – some practical advice

Be careful not to express your views in absolute or arrogant terms. You may have some difficulty explaining to an irate client, who has just lost the case, what you meant when you said the defence had *no merit whatsoever*! It is far better to express your views with some circumspection, for example: *On these facts I am of the view that the court will probably reject that defence.*

When relying on authority for a point you make in the opinion, give the full citation of the case, statute or book, but do not burden the opinion with long quotations from it. Paraphrase, if necessary. Ideally you should tell the client what you think in your own words and only refer to authority when necessary. However, sometimes a point is made so well or so succinctly in a book or judgment that it bears repeating in the exact words of the author. Do not quote reams of authority for obvious or trite points, though. Always acknowledge your sources.

You may test your own opinion by applying the theory of the case methodology advanced in Chapter 1 to it. Ask and answer the following questions:

- ☐ What is the issue or question?
- ☐ What is the conclusion I have reached on that issue or question?
- ☐ What are the strongest points leading to that conclusion?
- ☐ What is the counter-argument?
- ☐ What are the strongest points against the counter-argument?

2.7 Protocol and ethics

- ☐ Guard against the subconscious desire to provide the client with the advice he or she would like to hear. Be objective and if you have to be ruthless in your objectivity in order to advise the client properly, then so be it! Don't sound unsympathetic, however, because the client may lose faith in you and consequently in your opinion.
- ☐ Be very careful to express your views confidently and precisely. Do not be vague or ambivalent. A letter, memorandum and written opinion will remain as a permanent record of your advice.
- ☐ Be sensitive to the client's feelings. Be diplomatic when you have to break bad news. Do not be judgmental. The client wants your opinion, not your judgment.
- ☐ Discuss the advice you want to give informally with a colleague. It has long been the tradition of the Bar that members discuss problems they encounter on an informal and off-the-record basis (which means that you are not allowed to quote that colleague or refer to his or her views in your dealings with your client or anyone else). There is one proviso, however, and it is that you should have exhausted your own research into the matter first. The same practice applies between attorneys.

- When counselling the client, be careful to allow the client to make the decision. It is the client's right and duty to make the decision. It is patronising for a lawyer to assume that the client is not able to make the decision. Nevertheless, there are some decisions a lawyer can make on behalf of the client. Make sure you and the client know precisely what the boundaries are between decisions you can make and decisions only the client can make. When in doubt, leave the decision to the client.
- Once the client has made a decision, respect that decision and implement it. If the decision is one which cannot reasonably be made on the facts and the advice you have given, explain the ramifications of the client's decision to him or her and explain why the option you prefer, is better. Then allow the client to decide.
- Do not contradict or devalue the decision made by the client by your words or conduct, even if you disagree with it.

2.8 Exercises

1 Use Mrs Smith's statement in Appendix 1 as your instructions and write a letter to our client in which you explain what her options are with regard to the policy ceded to her.

2 Write a formal opinion answering the following questions: Do the proceeds of a policy on the deceased's life fall in the deceased estate when that policy has been ceded to our client? If not, what steps could our client take in order to receive early payment of those proceeds?

2.9 Associated skills and techniques

Preparation for trial: Legal research – Chapter 13.

Preparation for trial: Fact analysis and strategy – Chapter 14.

2.10 Further reading

S Blake *A Practical Approach to Effective Litigation* 6 ed Oxford University Press (2005).

D Green, J Holtam, P Sarton, S Scorey, C Shield, and A Thomas *Skills for Lawyers* Jordan Publishing Limited (2000).

Inns of Court School of Law *Opinion Writing 1999/2000* Blackstone Press Limited (1999).

C Maugham and J Webb *Lawyering Skills and the Legal Process* Butterworths (1995).

WM Rose *Pleadings without Tears* 5 ed Blackstone Press Limited (1999).

PALMER & CROCKER

5.8.2 The legal opinion[18]

The first question is whether Abel is likely to win if he takes Ben to court for refusing to pay for the damage to Abel's car.

Cathy may give Abel her oral or written opinion about the prospects of success if legal action is taken against Ben. Her opinion will follow this logical sequence:[19]

Step 1 *The facts*

Cathy will carefully interview Abel to ensure that she has all the necessary information (that is, "facts") on which to base her legal opinion.

Step 2 *The issue*

Cathy will then decide what the central issue is. In other words, she must ask what it is the client (Abel) wants.

Step 3 *The rule of law*

The next step is to research and state rules of law (chapters 12 and 13: Research skills) applicable to the issue – in other words, the legal tests that have to be applied to decide the issue.

Step 4 *Apply the rules of law to the facts*

At this stage, the rules of law are applied to the facts of the case.

Step 5 *Conclusion*

Cathy now reaches a conclusion based on the preceding four stages: is the legal action against Ben likely to be successful?

Now, apply these five steps to the information given in 5.8.1, above:

Step 1 *Facts*

All the necessary information has been obtained from Ben.

Step 2 *Issue*

On the given facts, is Ben liable to compensate Abel for the loss Abel suffered? (Abel's loss would be the amount of R2 600, being the lowest of the three repair quotations obtained.)

---

18 What follows is the basic approach to drafting a legal opinion to provide a basis for understanding the contents of the letters of demand Abel will send to Ben. The actual drafting of legal opinions is beyond the scope of this book.

19 Following the "FIRAC" approach: 1. Facts; 2. Issue; 3. Rule of Law; 4. Apply to facts; 5. Conclusion. This is also the correct approach to answering problem-type questions in law tests and examinations.

Step 3 *Rules of law*

The wrong done to Abel by Ben is a civil wrong called a "delict" (or "tort"). The legal remedy for this kind of delict is the Aquilian action. To succeed in this action, Abel will have to prove four separate things (or "elements"):

(1) Wrongfulness;

(2) Fault (in the form of intention or negligence);

(3) Causation; and

(4) Monetary loss.

Step 4 *Apply the rules of law to the facts*

(1) *Wrongfulness*

That Ben's action (cutting the branch and letting it fall onto Abel's car) was wrongful (that is, wrong in the eyes of the community as a whole, or contrary to the "legal convictions of the community") will be easily proved on the facts (two eye-witnesses).

(2) *Fault*

That Ben was at fault (that is, he acted intentionally or negligently: either he cut the branch to let it fall on Abel's car on purpose [intentionally] or a reasonable person in Ben's position would not have cut the branch in similar circumstances [negligence]) can be inferred from the facts. At the very least, one can infer negligence on Ben's part, in the absence of a reasonable explanation from him.

(3) *Causation*

The falling branch caused the damage to Abel's car. The fact that the sawed branch fell onto Abel's car will also be easy to prove (two eye-witnesses: Abel and the water-meter inspector).

(4) *Monetary loss*

Abel will have to prove the amount of the monetary loss he suffered as a result of the damage caused. In addition to the repair quotations obtained, Abel may have to get an independent expert (mechanical engineer or professional vehicle assessor) to inspect his damaged car. This inspection will confirm which one of the three quotations is reasonable and should be accepted.

Step 5 *Conclusion*

Abel's prospects of succeeding in getting compensation from Ben are very good.

After receiving Cathy's legal opinion, Abel knows that, should he be forced to take Ben to court, he would probably win the case. However, the taking of legal action should always be a last resort as it is expensive, time-consuming and damaging to personal relationships. Abel, therefore, decides that his next step will be to write a friendly note to Ben requesting that Ben pay the R2 600 required to fix his car.

5.8.3 A friendly, handwritten letter to Ben

(a) *Planning the letter*

Step 1 *Objectives*

(1) To inform Ben that Abel insists on compensation for the damage to his car.

(2) To attempt to persuade Ben to pay the amount of R2 600.

(3) To maintain a cordial personal relationship with Ben.

Step 2 *Strategy and tactics*

Overall strategy: To maintain a friendly, chatty tone in the letter, but with a clear message that the payment of the R2 600 must be made.

Tactics: Ensure that the salutation (that is, "Dear Ben"), the body of the letter, and the ending (that is, "Cheers") are consistent in tone. Suggest a follow-up meeting to agree on details, and give a deadline for a positive response from Ben.

Step 3 *REPOV ("Recipient's Point of View")*

Read the draft letter from Ben's point of view before sending the final copy. Make the necessary alterations.

(b) *The final copy of the friendly letter*

1 Devon Road
Berea
Durban
4001

Ben Baxter
3 Devon Road
Berea
Durban
4001

1 September 2001

Hi Ben,

Long time no see! I hope you are keeping well.

I thought I would drop you a short note about the branch incident as I haven't heard from you since our discussion a few weeks ago.

Could we get together soon to sort it out? I have now got three repair quotations which I have attached to this letter.

I would appreciate it if you could get back to me by Monday, as I really need to have my car fixed now.

Look forward to hearing from you.

Cheers,

(Signed)
ABEL

If Ben now ignores this letter, Abel's next option will be to send a more formal letter of demand.

As the amount of Abel's loss is less than R3 000,00, his claim falls within the jurisdiction of the Small Claims Court.[20] Also, in terms of section 29 of the Small Claims Court Act, 1984, Abel is not permitted to serve a Small Claims Court summons on Ben until he has first sent Ben a letter of demand. This letter of demand has to be delivered to Ben by hand, or sent to him by registered post. In addition, the letter must indicate that the recipient (Ben) has a period of 14 days, calculated from the day he receives the letter, in which to settle the claim.[21]

20 Section 15(a) of the Small Claims Court Act (61 of 1984). The purpose of the Small Claims Court is to adjudicate small civil claims – currently the maximum award this court can make is R7 000. Litigants before this court are not permitted to be represented by lawyers.

21 Section 29(1) of the Small Claims Court Act, 1984.

Notes on format of legal opinions

LEGAL OPINION:

S v TAU 2010 (34) SACR (O) 354

1.

1.1 I have been asked to advise on the consultant's prospects of success on appeal against the judgment of Mr Justice Wilson, delivered on 1 April 2007.

BACKGROUND

2.

2.1 Start relating facts as received by client/ attorney.

2.2 What is being claimed?

2.3. What is not in dispute?

2.3.1 Point not in dispute number 1.

2.3.2 Point not in dispute number 2.

2.4. What is in dispute?

3.

3.1 From the facts discussed the following issues are clear:

3.1.1 Whether the court *a quo* sufficiently considered the client's personal circumstances upon sentencing;

3.1.2 Whether the appeal may succeed.

DID THE COURT *A QUO* SUFFICIENTLY CONSIDER THE CLIENT'S PERSONAL CIRCUMSTANCES UPON SENTENCING?

4.

4.1 The court's duty to consider the personal circumstances of an accused upon sentencing has bee solidified in case law.

See: **S v Zinn 1969 (2) SA 537 (A)**

I advice accordingly.

N Louw

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STUDY UNIT 4

PERSUASIVE WRITING

At the end of this study unit you must be able to:

- Describe the style, format and aim of persuasive legal writing.
- Distinguish between the types of persuasive writing.
- Engage in persuasive writing by employment of identified methods of persuasion.

PERSUASION – THE ULTIMATE OBJECTIVE

NB! STUDY:

Study the following extracts on persuasive writing from **Palmer and Crocker**[1] and **Marnewick.**[2]

[1] 2011:45-49,52-53.
[2] 2007:392,463-469.

PALMER & CROCKER

5.6 Planning persuasive legal writing

There are three essential steps in the planning of any type of persuasive writing:

Step 1 *Identify and list your objectives*

What aims are you trying to achieve with the piece of writing? Any subsidiary objectives must also be identified and listed.

Step 2 *Identify and list your strategy and tactics*

Your "strategy" is your overall plan to achieve your objectives, and your "tactics" are the steps within this overall plan.

Step 3 *REPOV – "Recipient's Point of View"*

Finally, read your completed draft from the intended recipient's point of view, in order to see whether your objectives are likely to be achieved. Then make the necessary alterations to your writing.

We shall now illustrate these three steps with examples:

Amy, a 20-year old student, has been going out with Ben, a fellow student, for a year, and now wishes to end their relationship by sending him a "Dear John" letter:

Step 1	*Main objective:*	To end the relationship with Ben.
	Subsidiary objective:	To remain on friendly terms with Ben after the relationship is ended.
Step 2	*Strategy and tactics:*	Strategy: Orally raise her need for "space" with Ben over a period of two weeks, and then hand deliver the "Dear John" letter to him via his sister. Tactics: In the letter, make it absolutely clear that their relationship is ended, but place all blame on herself in order to maintain Ben's self-esteem. Maintain a neutral but friendly tone in the letter. Not to give false hope of the possible resumption of the relationship.
Step 3	*REPOV:*	Read the draft letter from Ben's point of view (that is, "putting herself in Ben's shoes"). Make the necessary alterations.

Note that if Amy's only objective had been to end the relationship she could have done it in a very businesslike way, as follows:

Amy Radebe
Room 471
Women's Residence
Durban

Ben Larkin
Room 174
Men's Residence
Durban

1 September 2001

BEN

ENDING OF RELATIONSHIP BETWEEN A. RADEBE AND B. LARKIN: 20 JULY 2000 TO 1 SEPTEMBER 2001

Please note that this relationship is herewith ended.

Yours faithfully,

(Signed)
AMY RADEBE

This letter will achieve the main objective of ending the relationship, but will certainly not achieve the subsidiary objective of maintaining a cordial relationship with Ben.

A letter that comes closer to achieving the identified objectives is the following:

Amy Radebe
Room 471
Women's Residence
Durban

Ben Larkin
Room 174
Men's Residence
Durban

1 September 2001

Dear Ben

You will have realized by now that, for a while, I have just not been myself. I think I have reached a stage in my life where I need some space to think and discover myself again.

As hard as this is, I think it would be best for both of us if we no longer see each other. I realize that you are not, in any way, to blame for this situation – it is my problem and I have to deal with it.

Although our relationship is at an end, I hope we can still remain on good terms. Thank you for all you've done for me, and for the good times we've had together.

Yours faithfully

(Signed)
AMY RADEBE

5.7 Methods of persuasion: Logic, information and emotion

You may attempt various approaches to persuade the recipient of your writing to accept your point of view. The three most common methods of persuasion are, firstly, ensuring that your argument is logical; secondly, giving the recipient sufficient information to make an informed decision; and thirdly, using emotion as a tool of persuasion. We shall now briefly consider each of these methods in turn:

5.7.1 Logic

Logic is vital to your argument. The various methods of logical persuasion are fully discussed in chapters 2 and 6.

5.7.2 Information: 5 Ws and an H

Always give your reader sufficient information to enable him or her to make an informed decision. Remember to apply the mnemonic "Five Whiskies and a Hotel" (5Ws + H), that stands for:

(i) Who?
(ii) Where?
(iii) When?
(iv) What?
(v) Why?
(vi) How?

to ensure that your piece of writing contains all the information your reader may require to make a decision.

Newspaper reporters are taught to include the 5Ws + H in the first paragraph or two of their reports, thereby ensuring that their readers get the most important information ("Must know") as quickly as possible. Further information ("Should know") and ("Nice to know") may be added thereafter. When this information is edited to fit the available space on a page of a newspaper, the editor will cut from the bottom: thus, the "nice to know" information will be cut first, followed by the "should know". What the reader "must know", however, has to remain. This approach is depicted in the so-called "Reporter's Triangle":

Figure 5.3 *The Reporter's Triangle*

5.7.3 Tone and emotion

The tone of the writing may strengthen or undermine its persuasive force. Tone refers to the writer's attitude towards the reader and the subject-matter of the writing. For example, a rude, aggressive tone may induce anger in your reader, thereby lessening the chances of persuasion. Other emotions that may be deliberately (or unintentionally) evoked by the tone of the writing are sympathy, empathy, irritation, compassion, sadness, amusement and pity. The following reputedly authentic letter,[17] for example, contains an unashamed

17 Origin unknown.

emotional appeal to gain sympathy. It also – unintentionally – evokes amusement. It was written in 1905 by the station master at Londiani, Uganda, to his supervisor at Nairobi, requesting permission to travel to India to get married:

> *Most Honoured and Respected Sir,*
>
> *I have the honour to humbly and urgently require Your Honour's permission to relieve me of my onerous duties at Londiani so as to enable me to visit the land of my nativity, to wit: India, forsooth.*
>
> *This in order that I may take unto wife a damsel of many charms who has long been cherished in the heartbeats of my soul. She is of superfluous beauty and enamoured of the thought of becoming my wife.*
>
> *Said beauteous damsel has long been goal of my manly breast, and I now am fearful of other miscreant deposing me from her lofty affections. Delay in consummation may be ruination most damnable to the romance of both damsel and your humble servant.*
>
> *Therefore I pray Your Honour, allow me to hasten to India and contract marriage forthwith with said beauteous damsel. This being done happily I will return to Londiani to resume my fruitful official duties and perform also my matrimonial functions. It is dead loneliness here without this charmer to solace my empty heart.*
>
> *If Your Honour will so far rejoice my soul to this extent and also as goes equally without saying that of said wife to be I shall pray forever as in duty bound for Your Honour's lifelong prosperity, everlasting happiness, promotion of most startling rapidity and withal the fatherhood of many Godlike children to gambol playfully about Your Honour's knees to heart's content.*
>
> *If, however, for reasons of State or other extreme urgency, the Presence cannot suitably comply with terms of this humble petition, then I pray your most excellent Superiority to grant me this benign favour for Jesus Christ's sake, a gentleman whom your honour very much resembles.*
>
> *I have the honour to be, Sir, Your Honour's most humble and dutiful, but terribly lovesick, mortal withal, servant.*
>
> *(Signed) BA (failed by God's misfortune) Bombay University, and now Station Master, Londiani.*

The request for leave was granted notwithstanding the writer's failure to consider his request from the recipient's point of view ("REPOVI"). For example, the writer makes no mention of any arrangements made to ensure the smooth running of the Londiani railway station in his absence, nor does he stipulate the duration of leave for which he is applying.

Next, we consider a case study in which some of these methods of persuasive writing are illustrated in a legal context.

5.8 Case study: A dispute between neighbours – *Abel Achebe v Ben Baxter*

5.8.1 The facts

Abel Achebe is a 21-year old university student who has been renting a house, situated at 1 Devon Road, Berea in Durban, for two years. One of his neighbours is Ben Baxter, who lives at 3 Devon Road. Ben is a 30-year old car salesman.

Abel had a habit of parking his car, a 1988 Nissan Sentra, in his yard, under the branches of a tree growing in Ben's yard. These branches jutted into Abel's yard and provided welcome shade for Abel's car.

On 4 July 2001, Ben decided to trim this tree. In the course of trimming the tree, he cut a branch that fell onto Abel's car. The branch smashed the windscreen, dented the bonnet and cracked the dashboard. Abel and a water-meter inspector (who happened to be on Abel's property at that time) also saw Ben cut the branch, and saw the branch fall onto Abel's car. Up to that stage, Abel and Ben had been on good terms.

Abel's car was not insured, and he obtained three quotations for the repair of the damage to his car. These were the quotations he received:

- ☐ Ace Panelbeaters: R2 600,00
- ☐ Blake Panelbeaters: R3 000,00
- ☐ Chariot Panelbeaters: R2 850,00.

On 10 July 2001, he went to Ben's house with the quotations to discuss the damage to his car. Ben received him in a friendly fashion, and told Abel to leave the quotes with him as he "wanted to think about the matter".

After two weeks, Abel had still not heard from Ben, and decided to approach his friend, Cathy Chetty, a law student, for advice on what to do next.

5.8.4 The letter of demand

(a) *Planning the letter of demand*

Step 1 *Objectives*

(1) To issue a formal demand for payment in the amount of R2 600 in order to repair Abel's car.

(2) To attempt to persuade Ben to pay this amount.

(3) To ensure that the letter of demand complies with the Small Claims Court Act.

(Note that maintaining a good relationship with Ben is no longer an objective.)

Step 2 *Strategy and tactics*

(1) Ensure that all the elements of the delict committed by Ben are covered in the letter of demand.

(2) Use a formal tone – ensure that the salutation, body of the letter and its ending match in tone.

(3) Give Ben sufficient information to enable him to make a settlement offer.

Note that the letter of demand may become an item of evidence at the Small Claims Court hearing. Ensure, therefore, that the *contents* of the letter are consistent with the contents of the first "friendly" letter, and also ensure that not too much information is divulged (for example, the letter may mention that an independent eye-witness saw the incident, but the name of the witness should not be disclosed – this would be tactically unwise, as Ben may approach this witness prior to the day of the hearing).

Also, do not indicate anywhere on the letter of demand that you intend to proceed in the Small Claims Court[22] – the fear of incurring legal costs in the Magistrate's Court may be sufficient to persuade Ben to pay the R2 600 claimed by Abel.

Step 3 *REPOV*

Read your draft from Ben's point of view to ensure your three objectives have been met.

22 Nothing in the Small Claims Court Act requires you to indicate in your letter of demand that you intend to proceed in the Small Claims Court, should your demand not be complied with.

(b) *The final letter of demand*

BY HAND

1 Devon Road
Berea
Durban
4001

Mr B Baster
3 Devon Road
Berea
Durban
4001

22 September 2001

Dear Sir

DEMAND FOR PAYMENT: R2 600 LOSS INCURRED DUE TO DAMAGE CAUSED TO MOTOR VEHICLE ND 113 189

I refer to the incident that occurred on 4 July 2001, when the branch of a tree you cut fell on my car, ND 113 189, causing extensive damage to it.

The damage caused to my car was entirely your fault, as you were negligent in not taking proper care when cutting the branch.

The branch you cut badly damaged the front of my car, also smashing its windscreen and cracking its dashboard.

On 7 July 2001, I obtained three quotations for the repair of the damage caused by the branch to my car. These quotations are attached to this letter. As you can see, the lowest quotation is for an amount of R2 600 (two thousand six hundred rand). I have also attached to this letter an affidavit from an expert motor assessor, Mr Sello Motlhibe, in which he assessed the pre-collision market value of my car to be R12 000. It is clear that the market value of the car far exceeds the reasonable cost of repair of R2 600.

I, therefore, demand that you pay me the amount of R2 600 (two thousand six hundred rand) within 14 days of receipt of this letter. Should you fail to do so, I shall proceed, without further notice to you, with legal action against you to recover this money.

Yours faithfully,

[Signed]
ABEL ACHEBE

Should Ben still refuse to pay, Abel will take the letter of demand to the Clerk of the Small Claims Court and arrange for a summons commencing legal action to be served on Ben.

Abel will now have to convert the contents of the letter of demand into "particulars of claim". The "particulars of claim" are a new document in which the details of his legal claim are set out in a specific format. The pages containing the particulars of claim will then be attached to the summons form (that contains Ben's address, at which the summons will be served, and the time and date of the hearing), and this document will then be served on Ben (that is, delivered to Ben in terms of section 29(2) of the Small Claims Court Act).

Finally, we shall see how Abel's particulars of claim will look when drafted.

Litigation Skills for South African Lawyers

Second Edition

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21.4.5 *Heads of argument*

There are few things as helpful to a judge in reaching a decision as well-crafted heads of argument. They can be used as a framework for the judgment, even if the judge does not accept every submission counsel has made. They also serve as a handy reminder of the main points of counsel's argument and the authorities relied upon. Yet, too few advocates make full use of this simple device to make their trial advocacy more persuasive. A skeleton argument is an invaluable device for the assistance of counsel in the presentation of a closing argument.

Draft heads or main points of argument should be prepared as the final stage in your trial preparation. By preparing an argument in draft form at that stage, you are able to check that your theory of the case is a tenable one. You can even ask a colleague to consider it and give you constructive criticism. The draft heads can also be updated each day during the trial to accommodate the evidence actually given by the witnesses so that, as soon as the evidence stage of the trial has been completed, you are able to place helpful heads of argument before the court. Every opportunity to be of assistance to the court is an opportunity to sway the court in your client's favour.

Heads should be short. They are not supposed to be a written argument. A written argument proceeds on the basis that there will be no opportunity for oral argument. The heads are not supposed to take the place of your final or closing argument. They are meant to be a summary of the main points of your argument. Points dealt with briefly in the heads are usually elaborated upon in the oral argument. Conversely, points that are covered in detail in the heads may be dealt with more tersely in the oral argument.

The structure for heads of argument differs from case to case, but generally counsel would cover each of the steps set out in Table 21.1. It is also a good idea to ensure that your heads comply with the general principles set out in Supreme Court of Appeal Rule 10(3). (See Chapter 25.)

25.6 Preparing heads of argument

Preparing heads of argument for an appeal inevitably requires counsel to prepare for the appeal itself as the heads of argument are a summary of the argument to be addressed to the appeal court. Preparing an argument is a rather personal process. Every lawyer has his or her own way of doing this. However, there are certain formal requirements for heads of argument that could influence the way counsel prepares the argument and consequently the heads.

The importance of the heads of argument to the process of persuasion should not be underestimated. This is your first opportunity to bring the judges around to your client's side. The heads allow you to bring the issues and the points for oral argument into sharper focus for them. You have an opportunity to direct their attention to the best points in your client's favour and also to any weaknesses in the other side's case. The argument in the heads should therefore be structured so that it is persuasive whether the appeal turns on the facts or points of law. You should arrange the facts and the points of law in such a way that the conclusion in your client's favour is inevitable. In short you must try to make your argument irresistible. Written heads of argument have an intimidating value: they cannot be ignored! The Romans said, "*Literae scriptae manent*", meaning that the written words remain. This is another reason why it is a good idea to provide the court with written heads of argument even in trials where they are not called for by the rules: a written argument is hard to ignore.

Leaving aside the formal requirements for the moment, the process of preparing an argument for an appeal would usually involve the following stages:

- an analysis of the record of the case for the purposes of a complete fact analysis, with the record of the case serving as the sole basis for establishing the facts;
- the identification of the issues as they appear from the record;
- the isolation of the evidence which is relevant to each issue;
- an assessment of the reliability of that evidence for the purpose of determining whether the standard of proof required on each issue has been achieved;
- an examination of the judgment to determine in what respects the judgment is wrong (or, if you act for the respondent, in what respects the judgment can be supported);
- the construction of an argument to support your contentions with regard to the correctness of the judgment; and
- the formulation of appropriate heads of argument to pursue that argument.

The heads of argument will be shaped by a number of factors, including: (a) the test on appeal; (b) any restrictions imposed by the order granting leave to appeal; (c) whether the appeal is directed at findings of fact or law; (d) the general approach of the court to appeals against findings of fact; and (e) the provisions of the rules. The test on appeal is whether the judgment appealed against is wrong; the court will not reverse the judgment if it merely has a reasonable doubt about the correctness of the decision. It must be satisfied that the judge was wrong. The appellant's heads would therefore explain why the judgment is said to be wrong. Nothing short of that will do. The respondent's heads, on the other hand, would concentrate on defending the judgment.

The approach of the court on appeal depends to some extent on the nature of the judgment of the court *a quo*. Courts of appeal do not readily interfere with decisions based on the exercise of a discretion vesting in the court *a quo*. An appeal court may,

however, interfere if it can be demonstrated that the exercise of the discretion was influenced by bias, was arrived at capriciously or without substantial reasons, or was based on a wrong principle. Where the appeal turns on a point of law, the question is simply whether the trial court was right or wrong. Where the appeal turns on a question of fact, however, the appeal court applies the principles known as the "*Dhlumayo* principles", from the case of *R v Dhlumayo* 1948 (2) SA 677 (A). This decision has to be studied very carefully. The main *Dhlumayo principles* are:

- The appeal court is generally reluctant to reverse the judgment of the trial court because the latter has advantages such as observing the witnesses and absorbing the atmosphere of the trial which the appeal court does not have.
- Even in drawing inferences from the evidence, the trial court may be in a better position than the appeal court, but this is not always so; there are some cases where the appeal court is in as good a position to draw inferences from the admitted facts and the facts found proved by the trial court.
- Where there has been no misdirection, the presumption is that the trial court was correct; the appeal court will only interfere if it is convinced the trial court was wrong.
- Where there has been a misdirection of fact, the appeal court may disregard the findings of the trial court and make its own assessment of the facts notwithstanding the difficulties arising from its not having had the opportunity to observe the witnesses.

The form and structure of the heads of argument depend on the case. The principles for heads of argument provided by SCA Rule 10(3) could be applied to appeals to the High Court, appeals to the Full Bench and even to opposed motions, stated cases and trials. The heads of argument in an appeal to the Supreme Court of Appeal have to follow the format and principles set out in SCA Rule 10(3). There are separate provisions in the High Court Rules with regard to the form and content of heads of argument in Magistrate's Court appeals and Full Bench appeals. If the requirements of SCA Rule 10(3) and the practice note are not adhered to, an application for condonation – notice of motion and affidavit – may be required. In *Premier Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) no proper practice note was filed and the heads of argument did not comply with SCA Rule 10(3) (page references were absent, no chronology was attached and copies of subordinate legislation were not attached). The court made a punitive costs order.

What constitutes heads of argument is best explained by reference to the decision in *Caterham Car Sales & Coachwork Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at 955B-C. "*The Rules of this Court require the filing of main heads of argument. The operative words are 'main', 'heads' and 'argument'. 'Main' refers to the most important part of the argument. 'Heads' means 'points', not a dissertation. Lastly, 'argument' involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument.*"

Table 25.5 Heads of argument

What SCA Rule 10(3) requires	How to comply	Comment
(a) *The heads of argument shall be clear, succinct and without unnecessary elaboration.*	1 The points supporting the argument should be arranged in a logical order. 2 Each point should be made separately in a short, clear sentence. 3 Points that do not contribute to make the argument persuasive should be eliminated. 4 Avoid explanations. They can be given during oral argument.	The key concepts are: *argument* – a point or series of points harnessed to prove or disprove a particular conclusion; *clear* – understandable, free from obscurity or ambiguity; and *succinct* – brief.
(b) *The heads of argument shall not contain lengthy quotations from the record or authorities.*	1 Paraphrase what is stated in the authority or record. 2 Use only short, telling quotations.	The idea is to lead the appeal judges to the important principles or passages. During oral argument counsel can elaborate and quote from the authorities and record more freely.
(c) *References to authorities and the record shall not be general but to specific pages and paragraphs.*	1 For authorities, use the standard method of citation (eg. author, title, edition, publisher and year) and give the page and paragraph number. 2 For the record, give the volume, page and line reference, and in the case of evidence, the name of the witness or a description of the exhibit.	Appeal records are bound in separate volumes of about 100 pages each, and carry line numbers, with every tenth line numbered in the margin.
(d)(i) *The heads of argument of the appellant shall, if appropriate to the appeal, be accompanied by a chronology table, duly cross-referenced, without argument.*	1 A chronological table is useful, if not essential, if the appeal turns on the facts. 2 The more complicated the facts and the evidence, the greater the need for a detailed chronological table. 3 Every fact or event in the table should be accompanied by a reference to the record. 4 Where the appeal turns on a point of law, a chronological table may still be illuminating.	Events are best understood if they are recounted in chronological order. It is essential for counsel's own understanding of the facts to have a chronology available. (It should have been done during the preparation for trial already.)
(d)(ii) *If the respondent disputes the correctness of the chronology table in a material respect, the respondent's heads of argument shall be accompanied by the respondent's version of the chronology table.*	1 The disputed facts in the appellant's chronology should be excised and any material facts omitted from it added to create the respondent's own table.	*Material* means important.

continued

What SCA Rule 10(3) requires	How to comply	Comment
(e)(i) *The heads of argument shall be accompanied by a list of the authorities to be quoted in support of the argument and shall indicate the authorities to which particular reference will be made during the course of argument.*	1 There should be some order to the list. 2 Cases should be kept separate from textbooks and statutes and arranged alphabetically. 3 Textbooks should be arranged alphabetically according to the author's surname. 4 Statutes should be arranged according to their year of enactment. 5 There should be a clear indication which authorities of the listed are to be further explored in oral argument.	A key at the head of the list of authorities should do the trick, for example, a note that authorities in bold print will be relied on for particular references during the oral argument. (An asterisk (*) could be used to the same effect.)
(e)(ii) *If any such authority is not readily available, copies of the text relied upon shall accompany the heads of argument.*	1 If there are more than just a few of these, they may be bound separately from the heads of argument.	*Not readily available* in this context means not available in the court's library. In case of doubt, ask the court librarian. Maritime lawyers should take note that the SCA's library is particularly lacking in maritime law authorities.
(f) *The heads of argument shall define the form of order sought from the Court.*	1 The heads of argument should conclude with the order you contend should be made on the appeal. 2 That order should include what the trial court's order should be, if the appeal succeeds. 3 If the costs of two counsel are to be asked for, that should be stated specifically.	
(g) *If reliance is placed on subordinate legislation, a copy of such legislation shall accompany the heads of argument.*	1 Acts of Parliament and Provincial ordinances are original legislation. 2 Attach legible copies. 3 All regulations, whether emanating from the State President, any Minister, Provincial Council or Premier or any local authority should be regarded as subordinate legislation. 4 Care should be taken that all amendments up to the date the cause of action arose (and later, if relevant) should be included.	

The requirements of SCA Rule 10(3) should not be regarded as an unnecessary administrative burden; but as an invaluable guide to help counsel to prepare a coherent and persuasive argument. Compliance with each step of the process brings counsel closer to being prepared and closer to being persuasive. The content of the heads of argument will be a precursor of the argument on the appeal. The points made in the heads may be fully developed at the hearing but in the meantime they should be stated in such a way that the opportunity to persuade is not lost. The heads should serve as a roadmap for counsel and for the judges to follow the argument from beginning to end.

The heads of argument should contain a summary of your argument on the issues of fact and law opened up by the notice of appeal. Issues of fact and issues of law will probably be handled differently by the court of appeal and should therefore be approached differently by counsel. The point should be presented in the heads of argument in such a way that the oral argument can develop the point further.

If there is a cross-appeal, the appellant's heads of argument must deal with both the appeal and the cross-appeal and the respondent's heads of argument must follow the same pattern as the main heads.

Submissions of law

Submissions of law could be set out in a four-step process that could be used in the preparation of the heads and in the presentation of the oral argument.

- ☐ **Step 1:** *Specify* the challenged ruling or finding and locate it in the judgment. Refer to the volume and page numbers, as well as the line reference.
- ☐ **Step 2:** *Indicate*, in the form of a submission, what ruling or finding should have been made instead.
- ☐ **Step 3:** *Formulate* the propositions upon which the submission is based.
- ☐ **Step 4:** *Identify* the authorities relied upon in support of each proposition or submission, giving the full citation with page and margin or line references.

Submissions of fact

Submissions of fact could be made in a similar, stepped process:

- ☐ **Step 1:** *Specify* the challenged finding and locate it in the judgment. Refer to the volume and page numbers, as well as the line reference, where the challenged findings appear.
- ☐ **Step 2:** *Indicate*, in the form of a submission, the basis for the challenge, for example:
  - there was no acceptable evidence to support the finding; or
  - the finding was flawed, based on a misdirection, etc.
- ☐ **Step 3:** *Summarise* the relevant evidence in support of the submission, giving the name of the witness or document, the volume and page numbers, as well as the line references of the evidence.
- ☐ **Step 4:** *Specify* the nature of any misdirection or any principle which was applied incorrectly and deal with it as a submission of law but link it to the evidence.
- ☐ **Step 5:** *Summarise* the relevant evidence (giving the name of the witness or document with the volume and page numbers and line references) in support of the general submission that the ultimate conclusion (guilty, negligent, justified, etc.) of the court was wrong.

An hour can be a very short time when you have to persuade the court to allow an appeal. Your argument has to be compressed as there seems to be time only to make your best points. This is not a bad thing; it allows you to concentrate your effort on the sharp points of your argument. You have to weed out the lesser points and identify the strong ones. The point of a bayonet is more likely to penetrate than a flurry of blows with your fists. When you start your argument you have to introduce the issues in such a way that the court knows exactly what is in issue and what your basic proposition with regard to that issue is going to be.

- ☐ if more than one day is required for argument, the reasons for the request;
- ☐ if the appeal is said to be urgent or is entitled to some precedence on the roll, the reasons;
- ☐ a list reflecting those parts of the record that, in the opinion of counsel, are not relevant to the determination of the appeal;
- ☐ a summary of the argument, not exceeding two pages; and
- ☐ an indication of those authorities to which particular reference will be made during the course of argument.

25.7 Presentation of argument on appeal

In many ways, appellate advocacy relies on the same skills as trial advocacy, but there are important differences nevertheless. In an appeal persuasion is the most important function of counsel while in a trial counsel also has the function of directing the production of the evidence. Counsel influences the findings of fact by examination-in-chief, cross-examination and argument. Counsel's task to persuade is doubly onerous in an appeal for a number of reasons. *Firstly*, the judgment is presumed to be correct. So the appellant's counsel starts with a severe handicap. *Secondly*, appeals are determined quite quickly while trials take a more leisurely stride. "An hour is a long time in the Court of Appeal." And it is usually a very lonely hour too! There are no witnesses to ask some bridging questions to help you through a difficult patch and the instructing attorney is usually sitting a few rows back, unable to help when tough propositions are put by a difficult judge. *Thirdly*, the dynamics of an appeal are different with two, three or even five judges on the bench. Bringing one mind around to one's way of thinking is difficult enough; having to persuade five takes advocacy into another, higher, plane.

Yet, arguing an appeal has a special magic; there is no greater test of counsel's ability and skills. The cases are usually challenging and the stakes are high. The opponents are usually of the highest calibre too. And the game is played for keeps. The winner takes all.

Arguing an appeal could also be a daunting experience. In a trial, the judge usually has no idea what the facts are or will be until the plaintiff's counsel or the prosecutor gives the court some insight during the opening address. Then the evidence slowly unfolds with the judge steadily learning more and more. Counsel, on the other hand, knows exactly what the case is about from the start because he or she will have prepared fully for the trial. Counsel has an advantage over the judge in the early stages of a trial; the power of knowledge! This is not the case in an appeal. The appeal judges will have studied the record of the appeal and the heads of argument for both sides. Add the fact that the judges sitting on the appeal almost invariably have more experience than counsel and their combined knowledge and experience will outweigh that of counsel by far. The advantage is with the judges this time; they have the power of knowledge, experience and numbers!

An hour can be a very short time when you have to persuade the court to allow an appeal. Your argument has to be compressed as there seems to be time only to make your best points. This is not a bad thing; it allows you to concentrate your effort on the sharp points of your argument. You have to weed out the lesser points and identify the strong ones. The point of a bayonet is more likely to penetrate than a flurry of blows with your fists. When you start your argument you have to introduce the issues in such a way that the court knows exactly what is in issue and what your basic proposition with regard to that issue is going to be.

Notes on format of heads of argument

LETTER OF DEMAND – General example

WEBSTER & GOLDSMITH
ATTORNEYS · NOTARIES · CONVEYANCERS

342 LONG STREET
BLOEMFONTEIN
9300

Your Reference: 573/342/03

PER REGISTERED POST / BY HAND

PO Box 3942
BLOEMFONTEIN
9300

5 January 2011

Dear Mr Smith

DEMAND: PAYMENT OF OUTSTANDING SERVICE FEE

I hereby confirm that I am acting on behalf of John Smith of *John Smith Gardening*. It is my instructions that my client rendered services to you in the amount of R500-00 in December 2002, which amount has not been paid / has not been settled / still outstanding.

(**Short** paragraph on details of incident / terms of contract / etc.)

Please take further notice that if the above-mentioned amount is not paid within fourteen days of receipt of this letter, legal action will be instituted against you.

(Account details of attorney)

Yours sincerely,

DHL Webster

Example: Heading of heads of argument

IN THE _____ COURT OF SOUTH AFRICA
(_____COURT, _____)

CASE NUMBER: _____

In the matter between:

_____ APPELLANT / THE STATE /
PLAINTIFF / APPLICANT

and

_____ RESPONDENT / ACCUSED /
DEFENDANT / RESPONDENT

_____'S HEADS OF ARGUMENT

BIBLIOGRAPHY:

CHARROW, VR; ERHARDT, MK and CHARROW, RP

2007. *Clear and effective legal writing.* 4th Ed. New York:Aspen Publishers.

MARNEWICK CG

2007. *Litigation skills for South African lawyers*. 2nd Ed. Durban:LexisNexis Butterworths.

PALMER R and CROCKER, A

2011. *Becoming a lawyer: Fundamental skills for law students*. Durban:LexisNexis Butterworths.

STUDY UNIT 5

LEGAL ANALYSIS AND LOGICAL REASONING

At the end of this study unit you must be able to:

- Read, analyse and summarise a court case effectively.
- Demonstrate logical reasoning skills in addressing legal problems.
- Engage in deductive and inductive logic within the scope of legal issues.

COURT CASES – THE GREAT HEADACHE...

Very few students, if any, enjoy reading and summarising court cases. In fact, few students can be said to actually read entire court cases to begin with! As an unfortunate consequence of this, modern day law graduates possess a disappointing repertoire of knowledge on precedent.

And the dire consequences this has on your prospective legal career cannot be overemphasised.

Already in 1893, the opinion that simply giving students summaries of court cases in law faculties has a detrimental effect on the legal thinking of law graduates, was published.

> The lecturer who, having reduced his matter to set form, dictates it to the students, who write it as nearly as may be verbatim, and thus are enabled to take away with them an exposition of the law on the subject, with citation of cases for subsequent investigation, can hardly claim that he gives to the student very much exercise in legal thinking.[1]

It is vital that law students fall into the habit of reading court cases. There is no better example of law in action than a presiding officer's decision in a case.

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[1] McClain 1892:403.

NB! STUDY:

Study the following extract from **Kok, Nienaber and Viljoen**[2] on reading, understanding and summarising a court case**: *Reading and Understanding a Court Case.***

ACTIVITY:

Read the court case that follows the above-mentioned literature and summarise the core content of the case.

[2] 2011:89-103.

Skills Workbook for Law Students

SECOND EDITION

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2011

JUTA

2. Reading and understanding a court case

As a lawyer you will search for answers in court cases on a regular basis. Making sense of judgments can be a time-consuming exercise. Judges do not always write judgments that are easy to understand. Not all judgments are well-structured. You will only develop the skill to read and understand a judgment if you practice regularly: Go to the library, take any law report from the shelf, search in the index to find interesting cases — and start reading!

Below we set out a method that we suggest you use for reading any court case in any subject. If you can answer all these questions about a given court case, you can confidently accept that you understand the court case.

Example: The Prince case

Read the following extract from a reported case with the citation 1998 8 BCLR 976 (C) and answer the questions that follow.

Prince v President of the Law Society, Cape of Good Hope and Others

High Court, Cape of Good Hope Provincial Division

Judgment date: 23/03/1998

Friedman JP: The **applicant** has a B Juris and an LLB degree. He is employed by the Legal Aid Clinic of the University of Cape Town and is registered for his final year of part-time study for his LLM degree. He wishes to qualify as an attorney. His only outstanding requirement is a period of community service in terms of section 2A(a)(ii) of the Attorneys Act No 53 of 1979. On 9 January 1997 he entered into a contract of community service for one year with his **principal** at the Legal Aid Clinic. The Secretary of the Law Society of Cape of Good Hope ('the Law Society') declined to register his contract in terms of section 5(2) of the Attorneys Act. Her reason for so declining was that the Council of the Law Society was not satisfied in terms of section 4A(*b*) of the Attorneys Act that applicant was a **fit and proper** person. The Council reached this decision because applicant has two previous convictions for the possession of cannabis and has made it clear that he intends to continue to use cannabis in the future.

In the present application applicant seeks an order:

(1) **reviewing** and setting aside the decision of the Law Society to object to the registration of his contract of community service and,

(2) **directing** the Secretary of the Law Society to register his contract with effect from 15 February 1997.

The Minister of Justice and the **Attorney-General** applied for and were both granted leave to intervene as respondents in the application. They were both represented by counsel. Mr *Heunis*, with him Mr *Jaga*, **appeared** for the Minister. Mr *Slabbert* appeared for the Attorney-General. Both the Minister and the Attorney-General oppose the application.

In his **founding affidavit** applicant states that he is a proponent of the Rastafari religion which he says is a continuation of the Judaeo-Christian faith which dates back millennia and has been observed since time immemorial.

Cannabis is regarded by the Rastafari followers as the 'Holy Herb' and forms an **integral** part of the Rastafari religion. It is used *inter alia* for **spiritual**, medicinal and **culinary** purposes and is regarded as the 'tree of life' by Rastafari followers. At religious ceremonies it is burnt as an incense and smoked through a chalice which is a symbol of the Rastafari religion.

Applicant became interested in the Rastafari religion in 1988. In 1989 he adopted the vow of the Nazarene and as a symbol of his conversion to the religion he started to wear his hair in dreadlocks and to observe the dietary commands of the religion. He partakes of the use of cannabis at religious ceremonies. He also used cannabis by 'burning it as incense or smoking, drinking or eating it in private at home as part of [his] religious observance'.

In an answering affidavit the Secretary of the Law Society points out that at a meeting attended by him, applicant confirmed that he would continue to possess and use cannabis in the future. After that meeting the Secretary wrote to applicant explaining the Council's reasons for its decision to

refuse to register his contract. The Council's attitude is that the possession and/or use of cannabis is prohibited by law and that a person who states that his intention is to continue to break the law cannot be regarded as a fit and proper person to have his contract of community service registered as his conduct may bring the profession into disrepute. The Secretary confirms that the Council's decision was —

'based solely on (applicant's) previous convictions for possession of cannabis and his stated intention to continue to use cannabis in spite of the fact that it is a criminal offence to do so.'

The Council's decision is **attacked** in these proceedings on the following two grounds:

(1) Applicant's possession and use of cannabis for purposes of religious worship is constitutionally protected under the right to freedom of religion in terms of sections 15(1) and 31(1)(a) of the 1996 (final) Constitution.

(2) In the alternative, even if the prohibition against the possession and use of cannabis for purposes of religious worship is prohibited, applicant's possession and use of cannabis for those purposes does not render him unfit to be an attorney.

I proceed to deal with each of these grounds of attack ***seriatim***.

1. Freedom of religion

In terms of section 15(1) of the Constitution 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'. Section 31(1) of the Constitution provides that —

> 'Persons belonging to a ... religious ... community may not be denied the right, with other members of that community —
> (a) to ... practice their religion ...'

The concept of freedom of religion has been considered by the Canadian Supreme Court in the leading case of *Regina v Big M Drug Mart Ltd* [1985] 13 CRR 64. Section 1 of the Canadian Charter of Rights and Freedoms provides that everyone has 'the freedom of conscience and religion'. In the *Big M Drug Mart* case the Canadian Supreme Court set aside the Lord's Day Act as being in conflict with the right to freedom of religion. Dickson **CJC**, who delivered the judgment of the court, described the right as follows at page 97:

> 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, the right to manifest religious belief by worship and practice or by teaching and dissemination.'

In *S v Lawrence et al* 1997 (4) SA 1176 (**CC**) at 1208 (paragraph 92) Chaskalson **P**, with reference to this quotation, stated:

'I cannot offer a better definition than this of the main attributes of religious freedom.'

A similar approach to that of the Canadian Supreme Court was followed by the minority in the United States Supreme Court in *Employment Division Department of Human Resources of Oregon, et al v Smith* [1990] 494 US 872; 108L Ed 2(d) 876 ('the Peyote case'). In that case the United States Supreme Court was called upon to decide whether an Oregon state prohibition of the possession and use of the **hallucinogenic** drug, Peyote, by members of the North American Church for sacramental purposes violated the First Amendment to the Constitution which provides that Congress shall make no law prohibiting the free exercise of religion. The majority held that the prohibition was not unconstitutional. In delivering the majority opinion, Scalia J with whom Rehnquist CJ and White, Stevens and Kennedy JJ concurred, **held** that a law violated the guarantee of religious freedom only if that was its purpose; a generally applicable law with a neutral purposes did not violate that guarantee even if its effect was to restrict certain persons in the exercise of their freedom of religious observance.

The minority, however, took a different view. O'Connor J, with whom Brennan, Marshall and Blackmun JJ concurred, held that a generally applicable law may impose a burden on the freedom of religious observance if its effect is to restrict the rights of some subjects in the exercise of that freedom. Such a restriction will, however, be upheld if it is shown to serve 'a compelling state interest' and does so 'by means narrowly tailored to achieve that interest'.

Our Constitutional Court has followed the approach of the Canadian Supreme Court which is similar to that adopted by the minority of the United States Supreme Court in the Peyote case. Thus our Constitutional Court has held that a law infringes the Constitution if either its purpose or effect is to invade a constitutional right. *Sue President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) where Goldstone J at paragraph 42 stated:

'... the *fact* that the President, in good faith, did not *intend* to discriminate unfairly ... is not sufficient to establish that the *impact* of the discrimination ... was not unfair.' (Emphasis supplied.)

Again in *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) Goldstone J at paragraph 51 stated:

'In the final analysis, it is the *impact* of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.' (Emphasis supplied.)

Our Constitution envisages a two-stage enquiry. The first stage of enquiry is to ascertain whether a law, by its intent or impact, infringes a right guaranteed by the Constitution. If it does, the second stage of the enquiry ensues, namely whether the infringement is protected by the limitation sec-

tion of the Constitution, section 36. That section provides that the rights in the Bill of Rights may be **limited** only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those set out in paragraphs (*a*) to (*e*) of the section.

The impact of section 4(*b*) of the Drugs Act is to limit applicant's freedom to practice his religion. Section 4(*b*) will therefore be unconstitutional unless it is protected by the limitation section, section 36 of the Constitution.

Is section 4(*b*) of the Drugs Act **justified** by section 36 of the Constitution?

Section 36(1) of the Constitution reads as follows:

Limitation of rights

36. (1) The rights in the Bill of Rights may be **limited** only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(*a*) the nature of the right;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the relation between the limitation and its purpose; and

(*e*) less restrictive means to achieve the purpose.

(a) As to the nature of the right (of religious freedom)

The Attorney-General has annexed to his application for leave to **intervene**, an affidavit by Brigadier CJD Venter, the National Head of the South African Narcotics Bureau. Brigadier Venter states that the purpose of the Drugs Act was to bring South Africa into line with international norms and in particular with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988). Brigadier Venter points out that the Drugs Act was formulated after careful consideration of the problems imposed by drug trafficking in South Africa and the problems of adequately protecting society from what he described as a **menace**. Brigadier Venter states that in his experience young people begin with dagga (the **colloquial** term for cannabis) and then 'graduate' to other drugs such as mandrax and cocaine. Cannabis is therefore a dangerous 'stepping stone' to other drugs and ultimate abuse and addiction.

Both the Minister and the Attorney-General have annexed to their papers an affidavit deposed to by Dr Tuviah Zabow, an associate professor of psychiatry at the University of Cape Town and head of the **Forensic Psychiatry Unit** at Valkenberg Hospital, Cape Town.

Dr Zabow refers to an article entitled 'Cannabis sativa — "deceptive weed"?' which he wrote for the *South African Medical Journal* (volume 85 no 12 December 1995) in which he spoke of 'the considerable potential hazards of cannabis in its various forms'. The article ends as follows:

> 'Cannabis is a potentially dangerous drug and as such a public health concern, especially with regard to the increased use evident in adolescents.'

Section 39(1)(*b*) of the Constitution enjoins the court, when interpreting the Bill of Rights, to consider international law. That includes both non-binding as well as binding law. See *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 35. Although South Africa is not yet a party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, South Africa is a party to the Single Convention on Narcotic Drugs (1961) and the United National Convention on Psychotropic Substances (1971).

Having regard to these **instruments** it is clear that cannabis is regarded internationally as a drug, the possession and use of which should be strictly regulated and controlled.

Sec 36(1) of the Constitution involves, as Chaskalson P stated in *Makwanyane's* case (*supra*), paragraph 104, 'the weighing up of competing values, and ultimately an assessment based on proportionality'. In the balancing process the relevant considerations will include those enumerated in section 36(1). **Cf** *Makwanyane's* case (***supra***) at paragraphs 104, 105.

Mr Trengove submitted that the rights violated by the prohibition (and in this regard he referred not only to the right to religious freedom, but also the other rights which he contended were violated by the Drugs Act) are rights which lie at the heart of the values underlying the Constitution. Any violation of those rights, he submitted, should be closely scrutinised and not easily justified. He pointed to the fact that freedom of religion, including the practice of religion, was entrenched in all leading international human rights instruments. He referred in this regard to article 18 of the **Universal Declaration** of Human Rights which provides that freedom of religion includes the right to 'manifest his religion or belief in teaching, practice, worship and observance'. He referred further to article 18(1) of the International Covenant of Civil and Political Rights which provides that the right to freedom of religion includes the right 'to manifest his religion or belief in worship, observance, practice and teaching'.

(b) As to the importance of the purpose of the limitation

As far as the importance of the purpose of the Drugs Act is concerned, namely to control the use of dependence-producing substances which include cannabis, Mr *Trengove* very fairly conceded that this was 'an important objective'.

(c) As to the nature and extent of the limitation

With regard to the nature and extent of the limitation Mr *Trengove* submitted that the prohibition constitutes a serious limitation in so far as it criminalises a central feature of Rastafarian religious observance. The prohibition undoubtedly inhibits the use of cannabis, which is internationally recognised as a harmful drug, by Rastafarians in the practice of their religion. However, having regard to the extent to which the eradication of the use of cannabis is in keeping with international standards, the nature and extent of the limitation is in my judgment not unreasonable.

(d) As to the relation between the limitation and its purpose

As far as the relation between the limitation and its purpose is concerned, here again Mr *Trengove* has very fairly conceded that the prohibition advances the purpose sought to be achieved.

(e) As to whether less restrictive means could have achieved the purpose

Mr *Trengove* argued strongly that less restrictive means could have been used to achieve the legislature's purpose. He submitted that the constitutional violation of applicant's right to religious freedom could be avoided by a very limited exemption permitting adherents of the Rastafarian religion to possess and use cannabis for purposes of their ***bona fide*** religious observance. The exemption could also be subject to regulation to prevent abuse. The purpose sought to be achieved by the prohibition would, Mr *Trengove* submitted, not be significantly undermined by a limited exemption along the lines suggested by him.

According to the memorandum on the objects of the Drugs and Drug Trafficking Bill, 1992, the bill emanated from a decision taken by the government in 1990. The government was concerned at the increasing national and international dimension of the scale of the production of, demand for and traffic in drugs which posed a serious threat to the health and welfare of human beings and adversely affected the economic, political and cultural foundations of society. This concern led to the appointment of an interdepartmental task group to examine existing legislation and to advise the government on the signing of the **United Nations** Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The memorandum submitted to the cabinet by this task group led to the introduction of the Drugs Act in 1992.

The documents annexed to the Attorney-General's application for leave to intervene, indicate that the Government's concern was well-founded. The task group reported *inter alia* that there appeared to be a worldwide tendency towards an increase in drug abuse with a concomitant increase in drug **trafficking**. There were also indications of a substantial increase in drug abuse and drug trafficking in South Africa. The statistics supplied by

the task group showed that in 1990/1991 there were 39 796 convictions for cannabis offences.

A document published by the International Criminal Police Organisation (INTERPOL) in 1993 entitled *Trends and patterns of illicit drug traffic* includes the report furnished to the 37th session of the Commission on Narcotic Drugs held in Vienna from 13–22 April 1994. The report states that:

> 'Cannabis is one of the oldest known hallucinogens and is the most widely cultivated and abused drug world wide ... World wide, there has been a steady increase in the number of persons who abuse cannabis in combination with alcohol, organic solvents and pharmaceuticals.'

In his replying affidavit applicant disputes that the use of cannabis results in severe damage to its users. He also denies that cannabis plays a role in the commission of crime and that it is responsible for domestic misery. In support of these averments he refers to the affidavit of Professor Frances Ames, emeritus associate professor of neurology at the University of Cape Town. In a replying affidavit she states that she has since 1958 conducted research on the effects and use of cannabis. She confirms what she wrote in an article entitled *Cannabis sativa — a plea for decriminalisation* which was published in the *South African Medical Journal* in December 1995. In that article she stated that the use of cannabis has been banned in western countries for approximately 60 years 'but it remains the most widely used illicit recreational drug in the world'.

It is not insignificant that although Professor Ames disputes Professor Zabow's views on the serious effects of cannabis, her plea for decriminalisation with which she concluded her article in the *South African Medical Journal*, was a limited one. She urged that South Africa should follow Australia's example which has decriminalised the use of dagga 'for medical use'.

Balancing the right to religious freedom against the evils which the legislature sought to combat through the enactment of section 4 of the Drugs Act, applicant's right to practice his religion must, in my judgment, be subordinate to the provisions of the Drugs Act.

Mr *Trengove*'s argument that less restrictive means could have been used to achieve the purpose of the Drugs Act, namely by excluding Rastafarians from the operation of section 4(*b*), founders, in my view, on two grounds.

Firstly, to allow such an exception would be contrary to South Africa's obligations in terms of international conventions to which it is a party. Secondly, as Mr *Slabbert* argued, allowing an exception along the lines suggested by Mr *Trengove* would place an additional burden on the police and the courts, both of which are operating under heavy pressure because of the general crime situations in this country.

For all these reasons, including the strong body of foreign judicial decisions, the inroad made by section 4(*b*) of the Drugs Act into the exercise by

applicant of his religious observances, is in my judgment justified by section 36(1) of the Constitution.

2. Does the use and the possession of cannabis by applicant for religious purposes render him unfit to be an attorney?

Mr *Trengove* argued that applicant's possession and use of cannabis does not render him unfit to be an attorney even if it should be held that the prohibition in terms of section 4(*b*) of the Drugs Act is a valid one. He submitted that the Law Society does not suggest that the applicant's possession and use of cannabis for religious purposes is in itself morally **reprehensible**; its objection is based solely on applicant's failure to obey the law and his expressed intention to continue to do so in future. Mr *Trengove*'s argument ran as follows: The applicant's dilemma is that he is forced to choose between his deeply felt religious convictions, on the one hand, and obedience to the law, on the other; the decision which he has made does not reflect on his integrity as a human being, on the contrary, it is a manifestation of his integrity.

Section 4(*b*) of the Attorney's Act provides that any person intending to serve an attorney under articles of clerkship, shall submit to the secretary of the society 'proof to the satisfaction of the society that he is a fit and proper person". In terms of section 5(2) of that Act, the secretary shall examine any contract of service lodged with him or her and shall, if satisfied that the contract of service is in order and that the Council has no objection to the registration thereof', register the contract in question.

It follows from these provisions that it is the council of the Law Society which has to make a decision as to whether it is satisfied that the person who applies for his/her contract of service to be registered, is a fit and proper person. The Law Society in the present case came to the conclusion that the applicant was not a fit and proper person. The applicant now seeks to review that decision. As this is a review and not an appeal, the question is whether the Law Society, in coming to the decision which it did, applied its mind to the relevant issues in accordance with the behests of the Attorneys Act and the tenets of natural justice, or whether it acted arbitrarily or **capriciously** or *mala fide* or whether its decision could be regarded as so unreasonable as to **warrant** interference by this Court. See, for example, *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 155A–E and *Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A). In any event the decision is, in my judgment, justifiable in relation to the reasons given by the Law Society as required by the Constitution. See section 33(3) read with Schedule 6, item 23(*2*)(*b*).

The Law Society's reasons for arriving at its decision are that the applicant has committed offences under the Drugs Act and has expressed his intention of continuing to do so, **albeit** that the reason for this is that he

contends that he is doing so in accordance with his religious beliefs. The attitude of the Law Society is that a person who commits offences of this kind and whose expressed intention is to continue to do so, is not a fit and proper person to join the legal profession. On the facts placed before the Court in this application and for the reasons set out above, it cannot, in my judgment, be said that the Law Society has acted in a manner which justifies the conclusion that it has failed to apply its mind properly or that it has acted so unreasonably that the inference is warranted that it did not apply its mind. There is accordingly no basis on which this Court can interfere with the Law Society's decision.

Costs

That leaves the question of costs.

Mr *Slabbert*, on behalf of the Attorney-General did not ask for costs. Mr *Heunis* argued that if the Court found that the Minister's intervention was necessary, he should be awarded his costs. Mr *Breitenbach*, for the Law Society, submitted that costs should follow the result.

As this application is in the nature of a test case, it would, in my judgment, be fair and reasonable that each party should pay his, her or its own costs.

The order

In the result, the application is dismissed. No order is made as to costs.

(Brand, and Hlope JJ concurred)

Now that you have read through the *Prince* case, let's go through it step-by-step. As you will discover, all reported cases are structured in a particular way and contain a number of elements. You need to be able to recognise this structure, identify the different elements and understand the information they contain, and draw conclusions from what you have read and understood.

2.1 Structure

In order to read court decisions you have to understand the different components of the structure of a reported case. A reported case contains the following elements:

- the name of the case
- the court where the case was heard
- the presiding officer(s)
- the dates on which the court sat
- keywords
- headnote
- the nature of the case

- the parties' legal representatives
- an exposition of the facts
- an exposition of the legal position
- the ruling
- the allocation of legal costs

Are you able to identify any of these elements in the extract above? (We have on purpose left out some of these elements in order to make you read the entire judgment.)

The court where the case was heard is of importance because the system of precedent dictates that there is a hierarchy of courts. The specific division that handed down judgment is of importance because a court is bound by decisions of another court in the same division or a court that is higher in status.

The date of a ruling is important in order to trace how the law develops and changes. It is for example more likely that a 2010 Supreme Court of Appeal case will accurately set out the current law than a 1920 Appellate Division case.

Keywords indicate the essence of the matter.

The headnote is a summary of the reported case. It is not necessarily exhaustive or relevant to the specific aspect of the case that interests you.

2.2 Meaning

As a first step, ensure that you understand the meaning of a text (in this instance, the case).

1. Read through the case once. Underline 'difficult' words. Is it important to find out exactly what these words mean? How do you find their meaning?

   Give the meaning of the following words, as they appear in the context of the above extract (the *Prince* case):

   - integral
   - culinary
   - menace
   - colloquial
   - hallucinogenic
   - organic solvents
   - emeritus
   - associate professor
   - founders
   - neurology
   - albeit
   - reprehensible

2. Some words are 'lawyers' language' — words used mainly by lawyers. Where would you find the meaning of legal terminology/language?

   Give the meaning of the following lega.-technical words as they appear in the *Prince* case:

   - founding affidavit
   - replying affidavit
   - decriminalised

3. Some words may look familiar, but the sense in which lawyers use them is different from the way 'ordinary' people use them. The correct meaning of such words often is clear only if read carefully in context.

   Explain the meaning of the following words, as they appear in the context of the *Prince* case:

   - applicant
   - reviewing
   - directing
   - attacked
   - justified
   - limited
   - intervene
   - principal
   - appeared
   - restrictive
   - averments
   - arbitrary
   - held
   - capriciously
   - warrant
   - party
   - instruments
   - trafficking
   - evils

4. A large number of judgments, journal articles and textbooks still contain Latin words and phrases. Other foreign words also find their way into our law reports. These words and phrases are sometimes used in their abbreviated form. Where would you find the meanings for these abbreviations?

   What is the meaning of the following words, phrases or abbreviations that they appear in the *Prince* case?

   - *inter alia*
   - *mala fides*
   - *seriatim*
   - et al

- *supra*
- *circa*
- *cf*
- *bona fide*

For each of the above, consider if the use of Latin is really necessary. Find out if there is an equivalent English word or phrase, and, if there is, why do think Latin is still being used?

5. Some words are often used together — in fixed constructions. Add an appropriate missing verb to each of the following sentences:
   - Section 7 of the Act _____.
   - A judge _____ a judgment.
   - The Constitution _____ certain rights to the individual.
   - An advocate _____ arguments.
   - Counsel _____ document to the application.
   - An application that is successful is _____ by the court.
   - An application that is unsuccessful is _____ by the court.
6. Some words and expressions are used so often that they become almost meaningless. We call these words and expressions *clichés*. For example, the phrase 'At the end of the day' is a common cliché, which we use to mean 'When everything else has been considered'. Can you find any clichés in the *Price* case? What about 'fit and proper'?
7. Some texts demand a high level of general knowledge on the part of the reader. General knowledge refers to the facts, information and ideas a person has acquired across a wide range of subjects. Look at the list of words below. How many do you understand? How would you find out the meaning of the words you don't understand?
   - Vienna
   - United Nations
   - Universal Declaration
   - INTERPOL
8. Lawyers, as writers of formal documents, must obviously pay attention to spelling.

   Note the spelling of the following: *concurred*; *psychiatry*; *peoples' rights*; *assessment*; *controlled*; *defence* (v *defense*); *reprehensible*; *Council* (v *counsel*); *affidavit*; *respondents*; *exercise*; *dependence*; *argument*.

2.3 Legal context

Once you understand the meaning of words in a text, try to understand the legal environment:

In which court was this case heard? Why in this court?

- What is the name of the case? Why is reference made to 'others'? How is 'others' different from 'another'?
- Who are the parties?
- How do we refer to the parties? Why?
- Was this court the court of first instance? Explain.
- Who presided as judges in the case? Is it customary for this number of judges to hear cases? Explain.
- Who were the lawyers representing the parties?
- Explain the following abbreviations:
  - CC
  - CJC
  - P
  - CRR
  - JJ

Reference is made to the Attorney-General. What is this official charged with? What is the new name for this position in the 1996 Constitution?

2.4 Internal structure of the case

You need to subdivide the case into the following components:

- facts
- applicable law
- application of law to facts
- conclusion (result or order).

The decision of the Council of the Law Society is attacked on a main ground and an alternative ground. Explain this distinction. Which of the two grounds do you find more persuasive? Why?

2.5 Authority

Lawyers who argue cases, and judges (and magistrates) who write judgments, rely on authority to substantiate their reasoning or findings.

- To which primary and which secondary sources does the court refer?
- Is the system of precedent at work in this case? Explain.
- The court also refers to the evidence of experts. What weight can be attached to their evidence? Is the same weight attached to the evidence of all experts in this case? Explain the difference if there is one.
- Does the court base its decision on comparative law? Why does the court refer to these specific comparative jurisdictions? What is the source of the court's authority for referring to comparative jurisdictions?

Find and read *Incorporated Law Society, Transvaal v Mandela* 1954(3) SA 102 (T). Is this an analogous or distinguishable case? Explain.

2.6 Philosophical and political implications

Courts decide cases in a social, political, moral and economic context. Law and these factors cannot be separated completely. It therefore often happens that a judge (or magistrate) adopts a particular philosophical stance towards these factors.

What broader philosophical issues are present in the *Prince* case? What does the judgment say about the relationship between law and justice?

2.7 Summary

Summarise the case briefly. Use the headings 'Facts', 'Legal question', 'Short answer' and 'Reasons for the decision'.

2.8 Subsequent events: Does the case still set out the law authoritatively?

Ensure that the case is still authoritative. Consult the *Noter-Up* (Juta) or *Annotations* (LexisNexis) to find subsequent cases in which reference was made to the *Prince* case.

You will find that the case went on appeal to the Supreme Court of Appeal (SCA). Find and read this case and answer the following:

- What was the result of the appeal?
- Is the judgment of Mihlyane AJA a minority or separate judgment? Substantiate.

This case was subsequently taken to the Constitutional Court. What was the final outcome in the case?

Now try to solve the problems on the CD that comes with this *Workbook*.

3. Reading and understanding a journal article

Refer to Chapter 3 and ensure that you know how to find a particular journal article. After you have located a particular article you must of course read and understand it.

Assume that you are looking for a point of view about the decriminalisation of dagga (cannabis). You find the following article:

Lötter S 'The decriminalisation of cannabis: Hallucination or reality' (1999) 12 *SACJ* 184

MINISTER OF SAFETY AND SECURITY AND ANOTHER v GAQA 2002 (1) SACR 654 (C)

Citation	2002 (1) SACR 654 (C)
Court	Cape Provincial Division
Judge	Desai J
Heard	February 7, 2002; February 11, 2002; February 12, 2002
Judgment	February 26, 2002
Counsel	J W Olivier for the applicants. J C Marais for the respondent.
Annotations	Link to Case Annotations

Headnote : Kopnota

The applicants applied for an order compelling the respondent to submit himself to an operation for the removal of a bullet from his leg. The applicants alleged that they had reason to believe that the respondent had been shot and injured in the course of an attempted robbery in which two people were killed. The respondent opposed the application.

The Court, taking a purposive approach, held that s 27 of the Criminal Procedure Act 51 of 1977 which provided for the use of force in order to search a person permitted the granting of the order. The Court held furthermore that s 37(1)*(c)* of the Act which permitted an official to take such steps as he deemed necessary to ascertain whether the body of any person had any mark, characteristic or distinguishing feature also permitted the order even though the bullet was clearly not such mark, characteristic or distinguishing feature. The Court held that the police would be hamstrung in fulfilling their constitutional duty if the order were not granted. The application was accordingly granted.

Case Information

Application for an order compelling the respondent to submit to an operation for the removal of a bullet from his leg.
J W Olivier for the applicants.
J C Marais for the respondent. *Cur adv vult*.
Postea (February 26).

Judgment

Desai J: A bullet is lodged in the respondent's leg and the applicants seek the sanction of this Court to have the bullet surgically removed for 2002 (1) SACR p655

DESAI J
the purpose of ballistic tests. They have reason to believe that the respondent was shot and injured in the course of a botched robbery in which both the victims were killed. The respondent resists the application, and the removal of the bullet, on several grounds.
The circumstances which led to the arrest of the respondent on the charges of murder are set out in the affidavit of the second applicant, Inspector Ivan Jacobus van den Heever, who is the investigating officer in the case. It appears that Mr Mabona Boesman ('Boesman') was the owner of the Helpmekaar Tavern in Khayelitsha, Cape. At about 12:00 on 31 December 2001 he arrived at the First National Bank at Bellville. He was accompanied by a security guard in his employ, one Mr Boxser Bangani ('Bangani'). They were accosted by two other men and shots were fired, resulting in the death of Bangani at the scene and Boesman a short while later at the Tygerberg Hospital.

Second applicant found R90 000 in cash in the boot of Boesman's car. The money was the apparent motive for the attack. An eyewitness told second applicant that one of the assailants had been shot and injured and second applicant also found at the scene a Norico 9 mm pistol and an Astra .38 'special' revolver which was licensed in Boesman's name. Barely two days later on 2 January 2002, second applicant learnt from an informer that the respondent had been involved in the aforementioned incident and had bullet wounds on his thighs. The name of the informer is not mentioned as second applicant believes that the public exposure of his name could expose him to serious harm.

In any event, respondent was detained the next morning at New Crossroads, with both his thighs bandaged. He indicated to the second applicant that he had been involved in a scuffle at the Zama Tavern the previous day when someone interfered with his girlfriend Nosipho and that he had been injured with a screwdriver. He also mentioned that he had received medical treatment at the G F Jooste Hospital. Second applicant and his colleagues thereafter took the respondent to the G F Jooste Hospital. It appeared that the hospital had no record of the respondent receiving any treatment. The owner of the Zama Tavern also denied that the incident described by the respondent had taken place the previous day. Furthermore, Nosipho, in the respondent's presence, denied that he was her boyfriend and had no knowledge of any injuries sustained by him with a screwdriver. Second applicant then arrested the respondent on the two murder charges. On 3 January 2002 the respondent was taken to Dr K N L Linda, the district surgeon, at Goodwood. As both Dr Linda and the respondent are Xhosa speaking, the consultation took place in Xhosa. The respondent reiterated his earlier explanation for his injuries and also told Dr Linda that he had been stabbed with a screwdriver. He described how he was stabbed in his legs while lying on his stomach. The respondent also told Dr Linda that he had been treated at the G F Jooste Hospital but had not been given either a hospital card or a reference number. Dr Linda noted that the respondent's wounds were slightly septic bullet wounds which had not been professionally treated. X-rays were taken and the X-ray of the respondent's left leg showed a clearly visible bullet. Dr Linda pointed this out to the respondent. He did not initially respond. At a later stage, however, he told Dr Linda that he did not want the bullet removed.

The next day the respondent informed the second applicant that he in fact had been shot by an unknown person at Guguletu. The incident had not been reported to the police as the person who had shot him had apologised. He could not furnish either the name or address of the person that had allegedly shot him. The second applicant also arranged for the X-ray to be examined by Captain Frans Maritz of the police forensic laboratory. Captain Maritz is of the opinion that the bullet visible on the X-ray is either a .38 or a .357 calibre bullet. If the bullet is removed from the respondent's leg and made available to him, Captain Maritz is of the opinion that he would be able to ascertain if it was fired from the .38 revolver licensed in the name of Boesman. According to second applicant, none of the eyewitnesses are in a position to properly identify Boesman and Bangani's assailant or assailants. The only available evidence is the bullet which may or may not link the respondent to the murders. An orthopaedic surgeon, Frans Steyn, is of the view that the removal of the bullet will be a relatively simple and safe procedure under general anaesthetic. In the circumstances, the second applicant has obtained a search warrant to secure the bullet but is unable to act in terms thereof without employing reasonable force as the respondent refuses to permit the removal of the bullet from his leg. The respondent denies that he was involved in the attack upon Boesman and Bangani and alleges that the wounds sustained by him are not connected to that incident. He denies that he told second applicant that he sustained the injury at the Zama Tavern. He says that he was involved in a shooting incident at the Strandfontein beach on 1 January 2002. He was treated at the G F Jooste Hospital but does not know whether his friends gave the hospital his correct name. He

was drunk and cannot remember much. He admits that Nosipho is in fact not his girlfriend. He denies telling Dr Linda that he had been injured with a screwdriver. He alleges that the second applicant told Dr Linda that he claimed that he had been injured with a screwdriver. The respondent admits telling Dr Linda that he did not want the bullet in his leg to be removed. He maintains that this is not a strange request. He was told that the bullet is lodged in his flesh and is not endangering any blood vessel or bone structure. It was, he believes, therefore unnecessary for the bullet to be removed. He is of the view that the medical procedure could endanger his life and result in pain, suffering and inconvenience. Furthermore, in his community, it is not strange for people who had been shot to walk around with the bullet in their bodies, especially if it was not life-threatening. He contends that if the relief sought by the applicants is granted, his rights in terms of the Constitution would be violated. The specific rights which would be violated are not mentioned by him.

Mr *J C Marais*, who appeared on behalf of the respondent, vigorously contended that the application should fail. Before dealing with the various arguments raised by him, I note that, simultaneously with the filing of his heads of argument, an application was made for the striking out of certain paragraphs of the affidavits filed by second applicant. These are the paragraphs which relate to the information obtained by the second applicant from the informer. Mr *Marais*, perhaps, inadvertently, did not pursue this application in oral argument but in his heads of argument it is simply contended that the paragraphs should be struck out as they are either hearsay or irrelevant. The information obtained from the informer may be hearsay, but it is neither inadmissible nor irrelevant. Police often obtain this sort of information which is then followed up. In this instance the information led to the respondent and it is his condition and conduct which give rise to the reasonable suspicion that he may be involved in the commission of the murders being investigated by the second applicant. Mr *Marais* argued that the applicants herein seek final relief and such relief should only be granted if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit, justify such an order (see *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235). This general rule is qualified by Corbett J (as he then was) in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 634 (A) at 634H as follows:

> 'In certain circumstances the denial by a respondent of facts alleged by the applicant may not be such as to raise a real genuine or *bona fide* dispute of fact.'

Despite respondent's denial, there is in fact no real dispute with regard to the key aspects of this matter. At about the same time as the attacks upon the deceased, the respondent sustained a bullet injury. He does not readily admit that he had sustained such an injury. The bullet lodged in his leg is possibly from a .38 revolver. One of the deceased had a similar firearm and apparently shot his assailant. The respondent is linked to the attack by an informer and he has the bullet in his leg. The respondent's denials of what transpired at Dr Linda's surgery are both far-fetched and untenable. The circumstances in which he alleges he was shot are equally far-fetched. There is also the undisputed evidence of his unprofessionally treated wounds and the unconvincing and unverified evidence of treatment at the G F Jooste Hospital. Assuming Mr *Marais* is correct and that the so-called *Plascon-Evans* rule is applicable for the purposes of the relief sought herein, the applicants have quite clearly made out a case - and a convincing one - for final relief.

The next issue raised by Mr *Marais*, if I understand him correctly, is the following. He contends that there is no statutory or common-law authorisation for the relief sought. Section 27 of the Criminal Procedure Act 51 of 1977 ('the Act') provides as follows:

'The police official who may lawfully search any person may use such force as may be reasonable and necessary to overcome any resistance against such force.'

It is apparent from this section that the legislation afforded police officers authority to use any reasonable violence to effect the search. The violence itself is not defined. The facts of each case determine the nature of the force required for the search. The purposive approach in interpreting s 27 is probably most appropriate (see in this regard *Levack and Others v The Regional Magistrate, Wynberg and Another* 1999 (4) SA 747 (A) at 751). **2002 (1) SACR p658**

Similarly, s 37(1)*(c)* of the Act permits an official to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance. While a bullet is clearly not a mark, characteristic or distinguishing feature of the respondent's body, a police officer may nevertheless take the necessary steps to determine whether his body shows the bullet - a condition or appearance - which may be linked to *Boesman's* revolver. I am of the view that both the aforementioned sections permit the violence necessary to remove the bullet.

In any event, police are obliged to investigate crimes - in this instance a double murder - in terms of s 205(3) of the Constitution of the Republic of South Africa 1996 ('the Constitution') and, without the bullet, they may be hamstrung in fulfilling this constitutional duty.

Finally, Mr *Marais* argued that the violence envisaged by the applicants would result in several constitutionally guaranteed rights being infringed. He contended that every accused has a right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings. It also includes the right not to be compelled to give self-incriminating evidence (ss 35(3)*(h)* and *(j)* of the Constitution). No further reference was made to the presumption of innocence during the course of oral argument and it is unclear as to how applicant's proposed conduct would impact upon this right. Mr *Marais* referred on a number of occasions to the removal of the bullet resulting in the respondent giving self-incriminating evidence. Somewhat surprisingly, Mr *Marais* did not refer to any authorities in this regard and did not advance any arguments why I should not regard the bullet as real evidence as opposed to the furnishing of oral and testimonial evidence by the accused. In other words, why I should differ from Claasen J in *S v Huma and Another* 1996 (1) SA 232 (W) at 238A. I elect not to do so for the reasons set out in that judgment.

Mr *Marais* also referred to the other rights which are potentially infringed by the relief sought by the applicants. In particular, the right to have one's dignity respected and protected (s 10 of the Constitution); the right to freedom and security of the person and to be free from all forms of violence (ss 12(1)*(c)* of the Constitution); the right to bodily and psychological integrity (s 12(2) of the Constitution).

The proposed surgical intervention to remove the bullet would undoubtedly be a serious affront to the respondent's human dignity and an act of State-sanctioned violence against his bodily - and perhaps also psychological-integrity. The application is unusual, but not without precedent. In *Winston v Lee* 470 US 753 (1985) the United States Supreme Court was confronted with a similar problem. An order was sought for the removal of a bullet which could provide evidence of the suspect's guilt or innocence in an armed robbery. The bullet in that case was lodged in the suspect's chest and there was some dispute with regard to the medical risks involved. There was also, it ultimately appeared, no compelling need for the bullet as there was other evidence against the suspect. Concluding that the search was unreasonable in the circumstances, Brennan J commented: **2002 (1) SACR p659**

DESAI J

> 'The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers.'

The facts of this case are, of course, very different. There is little danger of any harm to the respondent when the bullet is removed. He contends that the operation could endanger his life but there is no medical evidence furnished to support this belief. The orthopaedic surgeon states categorically that it would be an uncomplicated procedure. Furthermore, other than the bullet there is no other evidence against the respondent. This case also relates to more serious crime - namely, a double murder.

The order sought, as I have already indicated, involves the limitation of rights. Rights are not absolute and in terms of the Constitution, more especially s 36(1) thereof, they may be limited if the limitation is reasonable and justifiable in an open and democratic society. As stated by Brand J (as he then was) in *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO and Others* 2000 (4) All SA 128 (C):

> 'The application of s 36 involves a process of the weighing up of competing values and ultimately an assessment based on proportionality which calls for the balancing of different interests. Inherent in this process of weighing up is that it can only be done on a case-by-case basis with reference to the facts and circumstances of the particular case.'

Adopting the aforementioned approach, it is apparent that a refusal to assist the applicant in this case will result in serious crimes remaining unsolved, law enforcement stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crime. Respondent's interests in all the circumstances, are of lesser significance. Though the intrusion is substantial, community interests must prevail in this instance.
In the result I make the following order:

1. Second applicant, in his capacity as a police official, is entitled to use reasonable force, including any necessary surgical procedure performed by duly qualified medical doctors and paramedical personnel in consultation with the superintendent of the Tygerberg Hospital, to remove the object referred to in the search warrant issued on 14 January 2002, a copy whereof is attached to second applicant's supporting affidavit marked '7' ('the object') and to seize same in terms of the provisions of s 20 of the Criminal Procedure Act.
2. The respondent is directed and ordered, within 24 hours of the granting of this order, to subject himself to the necessary surgical procedure for the removal of the object, including the furnishing by him of the necessary consent which by law or otherwise may be required therefor.
3. The Sheriff of the above Honourable Court is hereby directed and ordered to furnish the necessary consent on behalf of the respondent **2002 (1) SACR p660**

   should the respondent fail to comply with the provisions of para [2] above.
4. Leave is granted to the applicants to apply to this Court on the same papers, supplemented where necessary, for an order in terms whereof respondent be committed to prison for such period as this Court may deem fit should he fail or refuse to comply with this order set out in para [2] above. 5. Respondent is

ordered to pay the costs of this application.

Applicant's Attorney: *State Attorney*. Respondent's Attorneys: *Mathewson Gess Inc.*

LOGICAL REASONING

An inability to engage in logical reasoning in any sphere of the law will result in poor legal arguments and deductions, which will of course have a detrimental effect on the outcome of a case. Frequently, law students base arguments on emotions. On what 'feels' right or wrong. A chasm then forms between the facts or circumstances of a case or matter, and the outcome the student thinks should be achieved. In between these two positions should be a strong argument that leads to the outcome, but this is often absent.

Mastering the skills of logical reasoning is the best and most effective manner in which legal problems can be addressed.

NB! STUDY:

Study the following extract from **Palmer and Crocker**[3] on Logical Reasoning Skills, as well as the extract from **Charrow, Erhardt and Charrow**[4]**.**

[3] 2011:9-18.

[4] 2007:203-214.

Becoming a Lawyer

Fundamental Skills for Law Students

Second Edition

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Thinking and Logical Reasoning

2.1 Introduction

The term "thinking" may be used to describe any one of the many thought processes of the brain, including day-dreaming, random reflections, and reasoning to solve problems. It is "thinking" in this last sense that we shall focus on. The logical reasoning skills discussed in this chapter *must* be mastered, as they are essential in all spheres of life – whether you are arguing a point in court, writing a legal opinion, debating an issue at a meeting, or even merely challenging a point of view in informal conversation.

Legal problems, specifically, are nearly always solved through a process of logical reasoning. The rules of logic enable us to test the acceptability of the conclusions we reach. This process of reasoning involves moving from an initial assumption (or *premise*), to a number of interim conclusions (called *inferences*), and then to a final conclusion.

The rules of logic help us to reason accurately, ensuring that the inferences leading to our final conclusions are sound. A conclusion that does not follow from its preceding premises and inferences is said to be a *non sequitur* (meaning, "it does not follow"), and the *non sequitur* renders the argument *invalid* (discussed in 2.2 below). Therefore, persuasive reasoning is the process of starting with acceptable *premises* (or "starting assumptions"); then to draw valid *inferences* (or "interim conclusions") from the starting premises; thereafter to draw further valid inferences from the preceding inferences, to arrive finally at an acceptable *final conclusion*.

In essence, a line of reasoning (or "argument" – see the discussion in chapter 6.4) may be attacked in any one of the following three ways:

1. the *premises* on which the argument rests are shown to be false or unacceptable; or
2. the *process of reasoning* (that is, the inferences drawn) is shown to be invalid; or
3. it is shown that the *final conclusion* does not follow from the series of inferences preceding it.

Conversely, if these three requirements *have* been met, the argument is said to be *sound* (or *cogent*), and the conclusion *must* be accepted.

2.2 "Cogency" and "validity"

An argument (ie, the starting premises, considered with all inferences drawn, including the final conclusion) is said to be *valid* if every inference drawn follows logically

from the starting premises or previous inferences. As discussed above, if it can be shown that any one of these inferences (also called *interim conclusions*) does *not* follow logically from the previous inference or starting premises, the wrongly drawn inference is labelled a *non sequitur*, and this renders the argument *invalid*. (Note that the final conclusion is just another – albeit final – inference, and it must also follow logically from its preceding inferences). However, the mere fact that an argument is *valid* (ie. all inferences and the final conclusion are correctly drawn), does *not* mean that the final conclusion must be accepted: another requirement must first be met. This requirement is that the starting premise (or premises) must be shown to be true, or must be accepted by the person you are trying to persuade. Once these premises have been shown to be true or acceptable, then the whole argument is said to be *cogent* (or *sound*), and once the argument has been shown to be cogent, the final conclusion *must* be accepted.

Therefore: **CA = AP + VR** (Cogent Argument = Accepted Premises + Valid Reasoning).

The *validity* of the argument depends on the *method* of reasoning, whereas the *truth* or *falsity* of the premises is something that has to be proved or accepted. Consider, for example, the following arguments:

Example 1

Premise 1	3 is greater than 2. [True]
Premise 2	2 is greater than 1. [True]
Therefore (Conclusion):	3 is greater than 1. [True]

In this example, both the premises are *true* (3 is greater than 2; and 2 is greater than 1), and the argument is also *valid* (the conclusion that 3 is greater than 1 follows logically from the two premises). Note that as the premises are true, and the argument is valid, it follows that the conclusion must also be true. Therefore, the entire argument is *sound* (or *cogent*), and the conclusion *must* be accepted.

Example 2

Premise 1	Gauteng is a part of South Africa.
Premise 2	South Africa is a part of Africa.
Therefore	Gauteng is a part of Africa.

Here, the premises are true and the argument is valid, therefore, the conclusion must be true and the argument is, therefore, sound.

<u>But consider:</u>

Example 3

Premise 1	2 is greater than 3.
Premise 2	3 is greater than 4.
Therefore:	2 is greater than 4.

This argument is *valid* (if we, for the sake of argument, accept the premises, the conclusion *does* follow from the premises), but we know that the premises are *not* true – we know that 2 is not greater than 3; and we know that 3 is not greater than 4. The argument is not cogent, because the premises are false. Therefore, the conclusion cannot be accepted.

(Note that all the starting premises of an argument, taken together, are called the *basis* of the argument. The basis of the argument in Example 3 above is: P1: 2>3; and P2: 3>4).

If we replace the numbers in Example 3, above, with symbols (in this case, letters of the alphabet), the argument remains valid, but the truth of the premises depends on the numeric value given to each of the symbols, *a*, *b*, and *c*.

If $a > b$ (Premise 1)
and $b > c$ (Premise 2)
then $a > c$ (Conclusion).

2.3 Deductive and inductive reasoning

Deductive reasoning is a process of reasoning that attempts to establish conclusive *inferences*. This means that, provided the process of reasoning is *valid* (see 2.2 above), and the premises are accepted, the final conclusion reached must be accepted without question (that is, the argument is conclusive, or 100% proven).

Sometimes, however, it is not possible to prove that a premise or inference must be accepted as 100% true. In these cases, the argument will have to be made using *inductive reasoning*. Here you try to prove your argument by relying on different starting assumptions (*premises*) to show that your argument is *probably* true, resulting in your argument being proved on a balance of probabilities.

Proving your argument on the basis that your final conclusion is *probably* true (*inductive reasoning*) is, of course, never as persuasive as proving the conclusion to be conclusively true (*deductive reasoning*), but it is preferable to not being able to prove your argument at all.

In law, as in life, you will find that most arguments can be proved on the basis of probabilities only. Therefore, in the case of inductive reasoning the greater the *degree of probability* the more persuasive the argument.

To illustrate the difference between these two methods of reasoning, let us try to prove the proposition: "All South Africans currently alive will die".

Using *deductive reasoning*:

Premise 1 All South Africans are human beings. [True]
Premise 2 All human beings currently alive will die. [True]
Conclusion Therefore, all South Africans currently alive will die.

Although most people will accept the second premise above – "All human beings currently alive will die" – as being true, some people may dispute this premise, and not accept it as being true. In this case, you will be forced to argue *inductively* – to show that it is *probable* that all human beings currently alive will die:

Premise 1 South Africans are human beings. [True]
Premise 2 All human beings who were born before 1800 have died. [True]
Premise 3 Every day, human beings are still dying. [True]
Conclusion It is therefore highly *probable* that all South Africans currently alive will die.

If your opponent is being difficult, and will not accept *Premise 2*, you can force him to accept this premise by giving him the opportunity to try to find a single living person who was born before 1800. (*Premise 3* can, of course, be proved merely by taking a trip to the nearest funeral parlour.)

Note that in many cases it will be difficult to persuade your opponent that the starting premises of his argument are not true (especially in cases where these premises cannot be objectively verified- for example, in arguments about religion). In these cases, it is better to try to show that even if you *accept* your opponent's premises, his argument is not valid and his conclusion must, therefore, be rejected (here you accept his premises "for the sake of argument", and then attack only the validity of the argument).

2.1 Deductive and inductive reasoning: Case studies in law

In the study of law, elements of both deductive and inductive reasoning are used. Consider the following examples.

Example 1

THE RAPE CASE

Abel is charged with the rape of Barbara. He denies the charge, stating that he has never had sexual intercourse with Barbara. The prosecutor calls an expert medical witness who testifies that he found traces of semen in Barbara's vagina (Sample A), and that a DNA analysis of this semen sample exactly matched DNA of a semen sample obtained from Abel (Sample B). The expert evidence further establishes that it is impossible for two strangers to have identical DNA characteristics.

Using deductive reasoning, the court may conclude as follows:

Premise 1 Semen sample A was taken from Barbara's vagina. [True]

Premise 2 Semen Sample B was taken from Abel. [True]

Premise 3 The DNA of Sample A was an exact match of the DNA of Sample B. [True]

Premise 4 It is not possible for two different people to have identical DNA. [True]

Premise 5 Both semen Sample A and semen Sample B came from Abel. [True]

Conclusion Therefore, Abel had sexual intercourse with Barbara.

(Despite Abel's denial that he had had sexual intercourse with Barbara, and given the lack of an alternative explanation as to how his semen could have entered Barbara's vagina, the conclusion that he had had sexual intercourse with Barbara *must* be *conclusively* accepted.)

Example 2

THE BAIL HEARING

Let us assume that Abel was arrested on suspicion of raping Barbara, and now applies to court for bail ("bail" is a court procedure whereby the judge may release an arrested person from custody on payment of a sum of money).

The test the court will use in deciding whether to release Abel on bail is whether it is in the "interests of justice" (meaning the interests of society as a whole) to release him on bail. In deciding whether it is in the "interests of justice", the court will consider factors such as:

- ☐ Will Abel return to court to stand his trial, if released on bail?
- ☐ Will Abel interfere with State witnesses, if released on bail?
- ☐ Will Abel be a danger to the public if released on bail?
- ☐ Will Abel's own life be in danger if he is released on bail? (For example, relatives of Barbara may have threatened to kill him.)

In order to decide whether Abel may be released on bail, the court has to consider the *evidence* supporting each of the above factors. Therefore, the court asks itself, after hearing evidence and argument:

- ☐ If Abel is released on bail, is it *probable* that he will return to stand his trial?
- ☐ If Abel is released on bail, is it *probable* that he will interfere with State witnesses?
- ☐ If Abel is released on bail, is it *probable* that he will be a danger to the public?
- ☐ If Abel is released on bail, is it *probable* that his own life will be in danger?

If, for example, evidence is led at the bail hearing that a mob of 30 armed men is waiting outside the courtroom, threatening to kill Abel as soon as he is released on bail, the court may reason inductively as follows:

Premise 1 A group of 30 armed men is gathered outside the courtroom. [True]

Premise 2 Many members of this group are uttering threats to kill Abel. [True]

Conclusion It is, therefore, *probable* that Abel's life will be in danger if he is released on bail.

Note that the court cannot decide *conclusively* that Abel will be attacked or killed if he is released on bail – only that this outcome is *probable* in the circumstances. It follows that it would not be in the interests of justice to release Abel on bail and bail will, therefore, be refused.

Example 3

THE DIVORCE CASE

Abel and Barbara were married to each other on 1 January 1990 in Cape Town. They were happily married for ten years. Then, in January 2001, Barbara discovered that Abel was having an affair with his secretary, Clarissa. Would Barbara be entitled to a divorce on these facts?

The relevant rule of law, section 4(1) of the Divorce Act (Act 70 of 1979), reads as follows:

> **4. Irretrievable breakdown of marriage as ground of divorce.**—(1) A court may grant a decree of divorce on the ground of irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

Now, convert section 4 into a series of premises and a conclusion:

Premise 1 Abel and Barbara are legally married to each other.

Premise 2 The marriage relationship between Abel and Barbara has disintegrated to the extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

Conclusion The marriage between Abel and Barbara has irretrievably broken down.

Test these premises against the given facts:

Premise 1 Abel and Barbara are, in fact, legally married to each other. Therefore, premise 1 above is true.

Premise 2 On the given facts, Abel committed adultery and Barbara is aware of this fact. However, there is no evidence that, as a result of the adultery, their relationship has disintegrated to the extent that there is no reasonable prospect of restoring a normal marriage relationship between them. Therefore, premise 2 above is *not* acceptable, because the second requirement – "no reasonable prospect of restoration" – cannot be proved.

Therefore It does not follow that the marriage has irretrievably broken down, as this conclusion can follow only if both premises 1 and 2 are acceptable.

(If, however, it could be shown that Barbara could not forgive Abel for his adulterous behaviour, and she absolutely refused to continue with the marriage, the second premise would be acceptable, and she would then be entitled to a decree of divorce.)

2.5 Simple arguments and syllogisms

The simplest form of argument consists of a single premise, followed by a single inference (which also serves as the final conclusion), - for example:

Premise: It is very hot today.

Conclusion: *Therefore*, I will take off my jacket.

The *syllogism* is a slightly more complex form of argument that contains two premises and a conclusion. The syllogism helps us to develop our logical reasoning skills, especially the ability to ensure that our arguments are valid.

The syllogism consists of three components:

1. The proposition you are trying to prove: the *conclusion*.
2. One proposition providing a reason for the truth of the conclusion: the *first premise*.
3. A second proposition providing a reason for the truth of the conclusion: the *second premise*.

For example:

Premise 1 All dogs have tails.

Premise 2 Rover is a dog.

Conclusion Rover has a tail.

Here, the conclusion follows from the two premises and is, therefore, valid.

However, consider the following syllogism:

Premise 1 Rover has a tail.

Premise 2 All dogs have tails.

Conclusion Rover is a dog.

Here, the conclusion does *not* follow from the premises: "Rover" could be the name of *any* animal with a tail – a false assumption has been made in this case that the "Rover" in the first premise is a dog. Assume, for example, that the "Rover" in the first premise is, in fact, the name of your cat. The syllogism would then read as follows:

Premise 1 My cat has a tail.

Premise 2 All dogs have tails.

Conclusion My cat is a dog. [This conclusion is obviously a *non sequitur*, ie, it does not logically follow from the two premises.]

Sometimes, one of the premises may be unstated (or "hidden"). Consider, for example, the statement: "Rover, being a dog, has a tail". The unstated (or "hidden") premise is that all dogs have tails. Thus, the phrase "... being a dog, has a tail", should be made explicit: "All dogs have tails". Thus,

Premise 1 All dogs have tails.

Premise 2 Rover is a dog.

Conclusion Therefore, Rover has a tail.

This syllogism may be analysed in more detail. For instance, the first premise, "All dogs have tails", consists of four parts or elements:

"All" – this is called the *quantifier* (that is, it determines *how many* subjects are being referred to);

"dogs" – the *subject* term (that is, the thing being referred to);

"tails" – the *predicate* term (that is, what is said of the subject – that they have tails);

"have" – the *copula* (the word that connects the subject – "dogs" – to the predicate term – "tails").

The value of the syllogism is that it helps us to expose inferences that are false, and consequently helps us to expose fallacious arguments. Consider the following example:

"Skydiving? They're all crazy! And so are you, John!"

What the speaker is saying here, is that people who go skydiving are foolhardy (in this context, "crazy" is closer to "foolhardy" than it is to "crazy" in the sense of "insane").

Now, convert this sentence into a standard syllogism:

Premise 1	All persons who go skydiving are foolhardy. [persons = subject; foolhardy = predicate]
Premise 2	John goes skydiving.
Conclusion	John is foolhardy.

Note that this argument is *valid* – that is, the conclusion follows from the premises – but does not necessarily amount to a *cogent* (or *sound*) argument. A cogent or sound argument would require persuasive evidence of the *truth* of the first premise, that is, that all people who skydive are, indeed, foolhardy.

2.6 The evidence on which conclusions are based: Logical fallacies

Logical fallacies are merely labels we give to the reasons why premises are sometimes incorrectly accepted as true, or why certain inferences are incorrectly made. It is a short-cut method of identifying the mistakes in logic that are commonly made.

For example, the evidence on which our acceptance or rejection of the premises of an argument depends is often based on personal bias, prejudice or unreliable sources. Thus, unsupported by reliable evidence, conclusions are reached that Scotsmen are tight-fisted (prejudice), that because a life is lost due to a jammed seatbelt in one accident, the wearing of seatbelts is *always* dangerous (personal bias); and a public official is corrupt because a popular newspaper quotes an anonymous source to this effect (unreliable source).

Consider the following examples of fallacious "evidence":

- *Assuming that, because two events occur together, one event causes the other* (known as the "causal" or "causative" fallacy). For example, most washing powders produce bubbles when used. This leads many people to believe that these bubbles break down the dirt, and that a washing powder that does not create bubbles is ineffective. This is untrue, as bubbles are merely a by-product of the washing process and have no bearing on the cleaning properties of the washing powder. (This fallacy explains why an incorrect inference was drawn – the conclusion here is a *non sequitur*.)
- *Selecting evidence to fit in with your preconceived ideas*. For example, selecting one car accident, in which a jammed seatbelt caused a death, as evidence that the wearing of seatbelts is *always* dangerous, while, at the same time, ignoring the numerous accidents in which seatbelts saved lives (again, a fallacy explaining a wrong inference).
- *Appealing to authority*. This occurs whenever one suggests something is true simply because a certain figure in authority says so, without properly examining either that authority figure's credentials as an expert in the field, or the premises upon which the argument rests.
- *Using tautologous arguments* (repeating the same argument in different words). For example, concluding that, "Fred is intelligent because he has a high IQ" is tautologous because intelligence is measured (albeit imperfectly) by means of an IQ test. It is the same as saying, "Fred is intelligent because he is intelligent". Another common example is the explanation that "Johnny can't sit still because he is hyperactive". "Hyperactive" means "far more active than normal". This "explanation" boils down to saying, "Johnny can't sit still because he can't sit still".

It is useful to categorise logical fallacies, as knowing these fallacies will help us to identify, label and respond to them in the arguments of others. The identification of logical fallacies in the reasoning process is considered in more detail in chapter 6.

2.7 The distortion of evidence

Always try to detect distortions in any evidence with which you are presented. For example, a television newsreader reads this item of news:

"Police were today forced to fire teargas at a crowd."

Here, the viewer is not being presented with facts, but with an opinion – that is, the person who compiled the news bulletin is of the opinion that the police were *forced* to fire teargas, and has now presented his *opinion* to the viewers as a fact. The correct approach would be along the following lines:

"Police today fired teargas at a crowd . . ."

"The police say they were forced to fire because . . ."

"A spokesman for the crowd says that . . ."

Here, the incident is stated in neutral terms, and the viewer is given the versions of both parties to enable him to decide for himself whether the police were, in fact, forced to fire.

Other methods of distortion are, for example, to omit, understate or overemphasise facts. Thus, a reporter sympathetic to a particular cause may deliberately omit to mention certain facts, or may play them down or overemphasise them, thus presenting a distorted version of the truth.

Also, be alert to the use of words such as "surely", "clearly" and "obviously": for example, "*Clearly*, it cannot be argued that . . .". These words are often employed as substitutes for real evidence. If you lay a proper foundation of evidence, the use of words such as these should not be necessary.

Sometimes improper juxtapositioning may also result in the creation of a distorted impression. Consider, for example, the decision of a newspaper sub-editor to place a news report of an employer, who is alleged to have indecently assaulted one of his employees, right next to a general news report on statistics revealing an alarming increase in cases of indecent assault in the workplace. This creates the impression of guilt by association.

Finally, keep in mind that the *same* evidence can be interpreted in different ways to reach different conclusions and to support different points of view. For example, it was recently reported that New Zealand has the highest rate of youth suicide in the world. This may be evidence of a dysfunctional society not properly catering for the needs of its youth, or it may be evidence (probably more likely, in this case) of extremely efficient record-keeping and data collection. (Because of the stigma attached to suicide in many societies, youth suicides are often covered up by reporting them as accidents.)

2.8 The importance of definition

Fuzzy thinking often arises from a failure to define words and concepts adequately. Most laws passed by Parliament (called, "Acts of Parliament") contain a *definitions section* in an attempt to remove ambiguities in the text. You will be in a position to understand an author's arguments only if you have a clear idea of the meanings of the key words and concepts used.

For example, in a debate on the topic, "Justice is an unattainable goal", the debaters will first establish what should be understood by the term "justice", before proceeding to develop their arguments.

Clear thinking, therefore, requires a clear understanding of the meanings of words. The faulty understanding of the meaning intended by an author often leads to erroneous conclusions. This is sometimes a problem when interpreting examination questions. The classic example is that of the Philosophy professor who set an examination question consisting of only the word "Why?" His intention was not at all clear: was he

giving his students *carte blanche* to use their imaginations, or did he require a discussion of the views of the great philosophers on, say, the meaning of life? Legend has it that the only student who received full marks answered simply, "Why not?"

2.9 Specific examples of fallacious reasoning: Prejudice and discrimination

Consider the following three statements:

1 "I wouldn't associate with Joe if I were you – he's a Nigerian, and all Nigerians are drug dealers".

2 "We have to emigrate because the Blacks in this country are all criminal barbarians. Every time someone is murdered, raped or robbed, you can be sure that a black man was responsible".

3 "It is well known that white South Africans are racist – they are the ones, after all, who invented *Apartheid*, and that is why they are now leaving the country in droves – they cannot stomach living under a Black government".

We shall now test the soundness of the arguments contained in these statements.

☐ "I wouldn't associate with Joe if I were you – he's a Nigerian, and all Nigerians are drug dealers".

Premise 1 Joe is a Nigerian.
Premise 2 All Nigerians are drug-dealers.
Conclusion Joe is a drug dealer.

This argument is *valid* (the conclusion follows from the premises), but we know that premise 2 is false, as not all Nigerians are drug dealers. Therefore, the conclusion is also false and the argument cannot be accepted. (Note that a full representation of the argument contained in this statement would be as follows:

Premise 1 Joe is a Nigerian.
Premise 2 All Nigerians are drug-dealers.
Interim conclusion Joe is a drug-dealer.
Premise 3 It is bad to associate with drug dealers. [implied – hidden premise]
Final conclusion You should, therefore, not associate with Joe.)

☐ "We have to emigrate because the Blacks in this country are all criminal barbarians. Every time someone is murdered, raped or robbed, you can be sure that a black man was responsible".

Premise 1 All murders, rapes, and robberies in South Africa are committed by black men.
Premise 2 All black people in South Africa are criminals.
Conclusion All people who are not black have to leave the country.

This argument is fundamentally unsound – the argument is not valid (the conclusion does not follow from the premises), and both premises are false (one need find only a single example of a black person who is not a criminal, and a single rape, murder or robbery that was not committed by a black man, to prove the falsity of these premises).

(It is true that *most* criminals in South Africa are black. This is entirely logical: as 90% of the South African population is black, it follows that 90% of all criminals must also be black; just as 90% of the criminals in Sweden are white, because 90% of the population of Sweden is white.)

☐ "It is well known that white South Africans are racist – they are the ones, after all, who invented *Apartheid*, and that is why they are now leaving the country in droves – they cannot stomach living under a Black government".

Premise 1 *Apartheid* was invented by white people.
Inference 1 All white people are racists.

Now, the inference following premise 1 becomes the premise for the second conclusion:

Premise 2 All white people are racists.

Inference 2 All white people cannot stand living under a Black government.

Now, the inference following premise 2 becomes the premise for the final conclusion:

Premise 3 All white people cannot stand living under a Black government.

Final Conclusion Therefore, white people are leaving the country in droves.

Here, while the first premise is true, the first conclusion is invalid as it does not follow from the first premise – and, as the first conclusion also forms the premise of the second conclusion, it follows that the second conclusion is also unacceptable. Likewise, the final conclusion must also be rejected, as conclusion 2 (that has already been shown to be invalid) forms the premise of the final conclusion. (Note that it may, in fact, be true that many white people are leaving the country. The point here is, however, that this conclusion does *not* follow from premises 1, 2 and 3 and is, therefore, not *valid*.)

The tendency to label entire groups of people on the basis of faulty reasoning or unacceptable evidence is called *stereotyping* (that is, typecasting a group of people according to simplistic criteria). Stereotyping, in turn, usually results from the irrational prejudging of people – a state of mind commonly referred to as *prejudice*. In the three examples above, statement 1 is an example of *xenophobia* (prejudice against foreigners), and statements 2 and 3 are examples of *racial prejudice*.

Stereotyping and xenophobia may, in turn, lead to further kinds of illogical behaviours, like *scapegoating* (that is, irrationally blaming others for things of which they are innocent). To illustrate, consider this complaint from an unemployed South African citizen:

"I can't get a job because all our jobs are being taken by *Amakwerekwere*."

(*Amakwerekwere* is a derogatory term used by some black South Africans as a label for non-South African black Africans.)

Finally, *prejudice* (an irrational *state of mind*) usually results in *unfair discrimination*[1] (which is an *action* taken against another person). For example, where a person is barred from joining a golf club solely because of the colour of his skin. (Note, however, that *fair* discrimination is logical and acceptable – there is nothing illogical about prohibiting your child from becoming a member of an organised gang notorious for its criminal activities.)

2.10 Logic and language

The rules of logic are intertwined with the use and study of language. Applying the rules of logic to everyday situations almost always requires a consideration of grammar, word order, and the effect of syntax, semantics and ambiguity. For example, a sentence containing a double negative, such as, "I didn't do nothing", may have been intended by the speaker to mean, "I didn't do anything", but logically means, "I did something".

The interrelationship between language and logic will be a recurring theme in the chapters dealing with speaking, reading and writing that follow.

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1 Unfair discrimination by the State or private persons is prohibited by section 9(3) and (4) of the Constitution of the Republic of South Africa, 1996. These subsections read as follows:

"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No persons may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

FOURTH EDITION

Clear and Effective Legal Writing

11

Writing Effectively

Step One: Developing a Logical Argument

As an attorney, you will be required to convince your audience to accept your point of view in documents ranging from letters to clients to briefs for the court. In this chapter, we present a variety of techniques for constructing and writing persuasive legal documents.

In law you will rarely work with unambiguous situations or rules because most real-life situations are ambiguous. Your job as an advocate is to persuade your readers that your description of the facts is the closest to what occurred, that the law or rule you have chosen to apply to a particular situation is the most appropriate one, that your understanding of the law is the most accurate, and that your overall interpretation of the situation is superior to any other interpretation, especially that of an adversary. To be persuasive, you must

1. Develop a logical argument.
2. Choose the most appropriate and effective information to emphasize in your argument.
3. Use writing techniques that will help you make the most of your position.

When you write a persuasive document, you must give that document a logical structure. For example, the IRAC framework (Issue, Rule, Application, Conclusion) that we discussed in Chapter 9 can help convince your readers that a tight, well-constructed thought process led you from your assertion in the issue statement to your conclusion.

You will probably not start out with a tight, well-constructed body of information when you sit down to compile a legal document. The process of creating a brief, for example, involves researching the facts and the law, thinking about the significance of the research, writing up the research, and then going back to do additional research before writing a final draft. In creating any document, research, thought, and writing are interactive: as you write, you realize that you need more research; as you do more research, you change what you have written.

How do you impose a structure on a process of this sort? Begin with the assumption that you do not want to walk your readers through the twists and

turns you had to take to develop your argument. You want them to follow your reasoning along one straight path — and to think that the path you have chosen is sound and logical.

In order to create a logical structure, think about what you are trying to accomplish when you deal with a problem in law. You will often find that you are trying to establish that a specific set of facts fits within a well-settled rule of law. One way to do this logically and systematically is to use the principles of deductive reasoning to set up the skeleton of your legal analysis.

1. Deductive Reasoning in Law

You are probably familiar with the basic categorical syllogism. For example:

MAJOR PREMISE: All men are mortal.
MINOR PREMISE: Socrates is a man.
CONCLUSION: Socrates is mortal.

Deductive reasoning is the thought process that occurs whenever you set out to show that a minor premise (a specific situation, event, person, or object) fits within the class covered by a major premise (an established rule, principle, or truth) and to prove that, consequently, what applies to the class covered by the major premise must necessarily apply to the specific situation. In short, deductive reasoning allows you to prove that your particular case is covered by an established rule.

Deductive reasoning is a cornerstone of legal thought. Lawyers are often called upon to decide how a rule of law applies to a given case. Since the rule is usually stated in general terms and a client's problem is usually very specific, deductive reasoning can be used to bridge the gap between the general and the specific. For example:

Rule of Law (major premise): Courts have held that any agreement made in jest by one party and reasonably understood to be in jest by the other party will not be enforced as a contract.

Facts of our case (minor premise): Robert agreed to paint Lee's entire house, but both Robert and Lee understood that Robert was only joking.

Conclusion: Robert's agreement is not an enforceable contract.

These basic steps of deductive reasoning form the skeleton of a legal argument. In fact, the rule-application-conclusion sequence of IRAC forms a simple syllogism: The rule contains the major premise, the application contains the particular facts of the minor premise, and the conclusion sums up the information and provides an answer to the issue.

The order in which you present a syllogism may not be the order in which you accumulate the information or think through the problem. Thus, you may work in the order: conclusion, rule, application. If you do that, you begin by deciding what you want to accomplish for your client. Then you go over rules from analogous cases, statutes, or constitutions to find one that will serve as your major premise, or you propose a new rule from the information you have gathered in your research. Finally, you carefully review the facts of your case and present them in a way that fits the rule or law.

For example: What do I want to accomplish for my client? I want my client declared "not guilty." What rule or law can I use? Insanity is a defense—insane people are not guilty. What must I do to make a persuasive argument? I must demonstrate, in the way I present my facts, that my client is insane.[1]

We thought through this process as conclusion, rule, application. In a brief, however, we would present it as rule, application, conclusion: Insane people are not guilty. My client is obviously insane (because . . .). Therefore, my client cannot be considered guilty.

Another way to construct your argument is in the order application, rule, conclusion. You begin with the facts of your case, try to find or construct a rule that accommodates the facts, and then reach the best conclusion you can for your client.

In building your case, you can work on the parts of the syllogism in any order. You work with them interactively until you achieve a logical relationship among the three parts. Moving the parts around can help you to clarify your own thinking, while keeping the basic structure of the syllogism in mind tells you what your argument should look like when you present it to the reader.

No matter how you got to your conclusion, you should present it as rule, application, conclusion—a syllogism. This not only helps your readers to follow your argument, it may help persuade your readers that you reached the conclusion in favor of your client only *after* following the syllogism to its logical conclusion.

2. Expanding the Syllogism into a Legal Argument

The syllogism serves as the skeleton of a legal argument. Once you have created the skeleton, you must flesh it out. For example, once you have the major premise in a particular case, you must present evidence that your specific fact situation does indeed fit within the class covered by the major premise. In the example about painting Lee's house, you would have to show that there was a promise but that both parties knew that it had been made in jest, as "jest" has been interpreted by the courts.

1. Keep in mind that you may *present* facts in the way that will best fit a rule of law and serve your purposes, but you cannot *change* the facts of your case. It is perfectly permissible to interpret the ambiguities that exist in any factual situation in your own favor, but it is unethical to distort or to hide facts.

In the rest of this section, we discuss techniques for expanding the different parts of a syllogism. We present the parts in the order of the standard syllogism, even though you may not always work in this order when you construct your argument.

a. *The Major Premise*

In most cases, your major premise will either be a given (you are told what the rule of law is and you must apply it to a set of facts), or you must extract the rule from legal authorities such as constitutions, statutes, regulations, and reported cases. (See Chapter 6.) You must then draw the appropriate information from these authorities and present the information so that your rule is well substantiated. In addition, you must define the abstract terms in the rule in order to clarify the rule and make it easier to apply the rule to the facts in your case.

Using legal authority effectively. In many of the legal arguments you will make, the link between your assertion and conclusion will depend upon the credibility of the authority you use in your major premise. You will argue that your assertions are valid because your authority says they are, and your authority is worth following. Legal authority can take a number of forms. It can be *enacted law*:

- A constitution or charter
- A treaty
- A statute or ordinance
- An administrative regulation
- A rule of procedure

or it can be *case law*:

- An opinion based on an enacted law
- An opinion based on common law
- An opinion based on principles of equity
- An opinion involving a combination of enacted law, common law, and equity

Under certain circumstances, scholarly works and treatises can also be the legal authorities that you rely on.

You will learn, in time, how much weight is usually given to a certain authority under different circumstances and how authorities relate to one another. Once you understand these principles, you must learn to build them into your documents so that your assertions are well researched and completely substantiated. Here are several guidelines to follow.

1. Make sure that the authority actually supports your position. Do not take information from an authority and use it out of context so that it appears to support a position that it really does not.

2. Quote directly out of your sources of authority if the material you are quoting is effective and well written or if the quoted material is well known. This lends authenticity and directness to your argument which you could not achieve by paraphrasing. However, if the material is poorly written, paraphrase it.[2] Also, be careful not to overquote. Don't create a document that merely repeats what others have said when you should really be presenting legal analysis.
3. Make sure that you are quoting the relevant portions of your source.

Using definitions to clarify terms. Some rules of law include abstract terms that need definition. Sometimes the key to using the authority you want to cite is to define one or more of its terms to show that your case fits into the definition.

For example, Article I §8(1) of the U.S. Constitution states that "The Congress shall have power to . . . lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . . " The term "general welfare" is not defined. It is up to Congress and the courts to determine what specific situations the term covers, and it would be up to you to define this term if you wanted to use it as part of an argument.

Let's say you want to argue that Congress's giving federal money to a private corporation, *X* Auto Company, serves the general welfare of the country. You might begin by constructing a syllogism for this argument.

MAJOR PREMISE:	Congress can spend money for the general welfare.
MINOR PREMISE:	Giving federal money to economically distressed corporations such as the *X* Auto Company serves the general welfare of the country.
CONCLUSION:	The Congress can give federal money to *X* Auto Company.

In order to support your case, you should define "general welfare" so that your use of it in your minor premise fits within the term as it is used in your major premise.

Because legal definitions frequently have several layers, you can use these layers to build the definition you need. For the case of *X* Auto Company, you might argue

1. Congress can exercise broad discretion.
2. This means that Congress can provide revenues to specific groups and individuals as long as these allocations will benefit the entire country and not just a privileged few.
3. These specific groups and individuals can include the elderly, the unemployed, local disaster victims, and so on.

2. Always paraphrase with care so that you do not distort the meaning of the material. In addition, it is seldom a good idea to paraphrase a statute or other enacted laws, since each word may be essential to the meaning of the law.

You can show that your definition is accurate by citing these authorities:

1. In *Helvering v. Davis*, 301 U.S. 619, 640 (1937), the Supreme Court held that "[t]he discretion [regarding what constitutes general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, and not an exercise of judgment." The Court interpreted the phrase "general welfare" very broadly.
2. The Supreme Court has held in a number of cases that Congress's broad discretion extends to legislation affecting specific groups and individuals.
3. This legislation has included the unemployment compensation scheme created by the Social Security Act of 1935, *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), the old-age benefit provisions of the Social Security Act, *Helvering v. Davis*, local disaster victims, and individuals with moral claims against the government.

Note that the first two layers include broad terms such as "welfare" and "discretion." You must continue to define until you have reached the level where the definition is illustrated by concrete facts. Once you have concrete examples, you must make them meaningful to your case. In the next section, we discuss how you can use analogy to tie the examples in your definition to the facts in your case.

Let's look at another example of a definition. Definitions that arise strictly from the common law rather than from a constitution or statute also frequently contain broad terms. For example, the tort of battery has been defined, in part, by the following elements:

1. An *act* by the defendant that *brings about harmful or offensive contact* to the *plaintiff's person*.
2. *Intent* on the part of the defendant to bring about harmful or offensive contact to the plaintiff's person.
3. *Lack of consent* from the plaintiff.

All of the italicized terms are in need of further explication. What behavior on the part of the defendant constitutes "an act"? What is "intent"? What is an "offensive contact"? What constitutes the "plaintiff's person"? How does the plaintiff give (or withhold) "consent"?

Let's pursue the layers of definition for "plaintiff's person."

1. The plaintiff's person has been construed to include the plaintiff's body and *anything that is connected* to the plaintiff's body.
2. In *Fisher v. Carousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), the plaintiff was a black man who was attending a buffet lunch at the defendant's hotel. While the plaintiff was waiting in line to be served, one of the defendant's employees snatched the plaintiff's plate and shouted that the plaintiff would not be served. The court held that the unpermitted and

intentional grabbing of the plate was a battery, even though the plaintiff himself was never touched.

b. *The Minor Premise*

The most important techniques for expanding your major premise are citing authority and defining terms. The most important technique for expanding your minor premise is analogy, either to the facts of other cases or to the policies underlying other decisions.

Arguing by analogy: similarity of facts. When you argue by analogy, you reason that if two or more situations are the same in some significant respect, they are likely to be the same in other significant respects as well, so they ought to be classified together. (If you want to *distinguish* your case from others, you show that it is *not* analogous.)

You could link the major and the minor premises of the general welfare case by using the following analogy: Funding should be provided for X Auto Company because the case is similar to cases in which the Court has approved Congress's funding in the past. Here is a way you might express this.

The facts in the X Auto Company case are very similar to the facts in cases that have already established the scope of "general welfare." In all of these cases, the courts agreed that

1. Private individuals or entities may receive funds from the federal government.
2. Individuals and entities may receive money that they did not personally contribute to the government.
3. Individuals and entities may receive money from the government when it helps them continue to earn money and spend money.

Arguing by analogy: similarity of policy considerations. Another way to link the major and minor premises is to show that the facts of your case are covered by a particular rule because your case furthers the same social goals as other cases already covered by the rule. For example, in the X Auto Company case, you might argue that your case and the previously decided cases all fulfill the following goals, regardless of the similarities or differences in their facts.

1. They keep individuals from turning to the state for support.
2. They keep the economy balanced and functioning.
3. They show people that the government will intervene if a segment of the population is about to experience an economic crisis.

The first step in making a policy argument is to identify what the authors of a rule intended when they created the rule. If you are investigating legislation, try looking at and analyzing legislative history or policy statements in the

legislation itself. If you are investigating an opinion, try comparing your case with other cases that have been decided under the rule and showing that your case will help to further the same goals. You can look at any language in these opinions that sheds light on the objectives of the ruling.

Once you have established the purpose of the rule, i.e., what it was intended to accomplish, you can alter your major premise to include this purpose and emphasize the specific facts in your minor premise that suit the major premise. You would then argue that the authors of the rule intended that the rule cover cases like yours and that the principles behind the rule will be dangerously eroded if the court excludes your case.

If you were arguing that by analogy to the *Steward Machine* case X Auto Company should get federal funds, you might use this analogy on policy considerations:

> The courts have found that federal payments to particular groups or individuals such as the unemployed or the elderly can serve the general welfare because, in the long run, these payments benefit the entire nation. This idea is reflected in the words of Justice Cardozo in *Steward Machine*, 301 U.S. 548, 586-587 (1937):
>
> > During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. . . . The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.
>
> X Auto Company employs hundreds of thousands of employees. In addition, there are thousands of other employees who work in industries that depend on X Auto Company. Even though the problems of X Auto Company are not on the scale of the problems of the Great Depression, the loss of part of a major U.S. industry would have devastating effects on the U.S. economy as a whole. If federal funds can help X Auto Company continue to employ its workers, then thousands of private individuals will continue to earn and spend money. This will help protect the health of the nation's economy.

On the other hand, you could counter an argument based on similarity of policy considerations by showing that giving X Auto Company federal funds would widen the scope of the rule beyond the limits intended by those who derived the rule. This widening would have all kinds of adverse effects or troublesome consequences, such as opening the courts to a flood of frivolous litigation.

Setting up an analogy. To set up an analogy between two cases, using both the facts and the policy issues, begin by making a list of similarities and differences. Here is how you might expand the general welfare example to show that one case that has already been decided involving the old-age benefit provisions of the Social Security Act is or is not analogous to the X Auto Company case.

Similarities	*Differences*
In both situations the recipients may receive money that they only indirectly paid into the system. For example, Social Security recipients may receive funds in excess of the amount they actually put into the fund. The X Auto Company will receive funds that it indirectly paid in the form of taxes, etc.	The recipients of old-age benefits have paid into an insurance fund over the years, while the X Auto Company would be receiving money from a nonspecific tax fund that it has not contributed to. Taxes and insurance are not the same thing.
Many individuals who need support will benefit from the federal funds: employees in the case of X Auto Company, and older members of the population in the case of old-age benefits.	It is quite a different thing for the federal government to provide funds to a private corporation than it is to provide them to individuals. The government is set up to benefit members of the general population. It is not the government's purpose to benefit a large private corporation.
The X Auto Company funds will help keep the economy healthy because it will keep a major industry alive and will keep X's employees (and employees of other companies that depend on X) off of welfare and other forms of state subsidy. Similarly, the old-age benefits of Social Security assure citizens that they will have an opportunity to put money into a fund that they can draw on in their old age, provided they have worked the requisite amount of time to qualify. This keeps older people from having to turn to the state for support.	Giving funds to a private business may actually unbalance the economy, disturbing the free market and fair competition.

In section B of this chapter, we discuss writing techniques that emphasize favorable information and de-emphasize unfavorable information. You can use those techniques to stress either the similarities or differences between cases.

c. *The Conclusion*

After you have established and developed your major and minor premises, you are ready to reach a conclusion that follows logically from them. You may need to use a cause-and-effect argument to show *how* you came to the conclusion.

In law you will often be required to show that there is a cause-and-effect relationship between certain events or actions. For example, causation is an

element of many torts and crimes. We will not go into the subtleties of causation here; however, you should know that when you set up a cause-and-effect relationship, you have to do so logically.

Here is an example of how a cause-and-effect relationship can be established within a deductive argument. First, set up the skeleton of your argument.

> *General rule* (major premise): Under the law of State X, the operator of a motor vehicle is liable for his or her wrongful act, neglect, or default if it causes death or injury to another person.
>
> *Specific facts* (minor premise): The plaintiff was riding in her car on the freeway when the defendant's car hit her from behind. Two days later, the plaintiff suffered severe back pains and headaches.
>
> *Conclusion:* Therefore, the defendant should be liable for the damages the plaintiff has suffered.

If you terminated your argument at this point, it would appear that you had based your conclusion on a faulty premise or assumption: "All pain that occurs within two days of an accident is necessarily caused by that accident." (For more on faulty premises, see subsection 3 below.) Or your conclusion may appear to result from a *post hoc* fallacy, in which you assert that because event *B* follows event *A* in time, event *A* has therefore caused event *B*. To avoid the appearance that your conclusion does not follow logically from the premises, you must articulate the causal link between events. You could do so by beginning your conclusion with the following information.

> There is a good deal of evidence that the plaintiff's injury was caused by the defendant's act of hitting the plaintiff from behind. First of all, the plaintiff's medical records show that the plaintiff did not have a history of back problems or headaches, so there is no possibility that her injuries are part of a recurrent or chronic problem. Also, she has not engaged in any activity or suffered any other injury within the last few years that might have led to back pain or headaches. In addition, Dr. Jones, the plaintiff's physician, has examined the plaintiff and will testify that the pain the plaintiff is experiencing is the kind that the plaintiff would be likely to feel several days after a rear-end collision in an automobile.

You would finish your argument by qualifying your conclusion to reflect the evidence you have presented:

> Because the evidence from medical records and from an expert demonstrates that, in all probability, the plaintiff's injuries were caused by the defendant's conduct, the defendant is liable for the damage the plaintiff has suffered as a result of that conduct.

When you are constructing a cause-and-effect argument, keep the subject matter in mind. If you are working with causation in a complex statistical

argument, you must comply with the generally accepted principles of statistical analysis. For example, you may have to adhere to a scientific definition of causation. However, if you are writing about more common types of problems, try to appeal to your readers' sense of how the world works: Present a cause-and-effect relationship that your readers will recognize from their own experience. You can appeal to your readers' common sense and to the "common wisdom of the community." Remember that judges and other attorneys are part of the community and that they will share this sense of what probably did or did not happen in a given situation.

3. Faulty Logic

Logic can be faulty in a number of ways. We end this discussion by pointing out two of the most common faults.

Faulty premise. An argument can be perfectly logical but invalid. For example, you might have a syllogism like this, in which the major premise is false:

MAJOR PREMISE:	All witnesses are men.
MINOR PREMISE:	Lee is a witness.
CONCLUSION:	Therefore, Lee is a man.

In other words, an argument is sound only if both of its premises are true.

Undistributed middle. If your minor premise can occur outside the bounds of the major premise, it will not necessarily follow from your major premise. For example:

MAJOR PREMISE:	No one has been sentenced to death for murder in California in the last two years.
MINOR PREMISE:	Smith was convicted of murder last year, but he was not sentenced to death.
CONCLUSION:	Therefore, Smith must have been tried in California.

The major premise in this example is not faulty. The problem is that the minor premise can occur outside the bounds of the major premise, that is, Smith could have been tried in another state and still not have been sentenced to death.

EXERCISES

1. Under the equal protection clause of the Fourteenth Amendment, the Supreme Court has held that legislation that contains racially based classifications is subject to very strict review by the courts. However, legislation that

establishes gender based classifications receives a lesser level of review. Compare and contrast the cases of women and blacks in this country in terms of their history of being discriminated against and their present need for protection. Set up your comparison with two columns, one for similarities and one for differences.

2. Read the following excerpt from an appellate opinion and pull the syllogism out of it.

> The contract for the purchase of certain machinery recited that "[n]o representations or warranties, of any sort, express or implied, except warranty of title, have been made by Seller unless specifically set forth in writing in this contract." (There were no warranties set forth elsewhere in the contract.) An action was brought on the contract by the Seller seeking recovery of the balance of the purchase price. The purchaser, in defense thereto, sought to set up the defense that the contract was unconscionable under Code §109A-2-302, which defense was disallowed by the trial judge and the verdict and judgment were rendered in favor of the plaintiff. The defendant appealed. *Held:* The provisions of the contract contended by appellant to be unconscionable under Code §109A-2-302 are provisions which the law itself specifically permits. This contention is without merit.

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Notes:

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STUDY UNIT 6

LEGAL WRITING IN TESTS AND EXAMINATIONS

At the end of this study unit you must be able to:

- Describe what different assessment questions require.
- Answer test and examination questions with success and insight.

DIFFERENT QUESTIONS, DIFFERENT ANSWERS

Assessors do not simply use random verbs in assessments. “Describe” requires a different answer from “compare” and “name”.

NB! STUDY:

Study the following extract from **Kok, Nienaber and Viljoen**[1] on answering test and examination questions.

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Skills Workbook for Law Students

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JUTA
LAW

- Attend lectures. Make notes. Ask the lecturer to clarify those aspects that you do not understand.
- After the lecture, summarise the study material (textbook, court cases, legislation and journal articles) and synthesise these with your notes.
- Review summaries on a periodic basis.

If you follow this approach, you will find that you have very little preparation to do as tests and examinations approach.

You may wish to have a look at old test and exam papers as part of your preparation. This practice is helpful if you use this opportunity to test your knowledge and understanding of a topic and to get a feel for the format that the test or examination is likely to take. Do not use old exam papers to 'spot'. This is a very dangerous tactic and will likely lead to disaster.

9. Writing tests and examinations

Consult the university's timetable and be sure that you know when and where you are to write the test or examination. You will not be allowed a second chance if you missed the scheduled examination because you took down the wrong details.

Also be sure that you arrive at the venue timeously. If your exam/test is in the morning, make sure that you set your alarm clock or that you have arranged for a friend to give you a 'wake-up' call — 'I overslept' is not a valid excuse. Give yourself plenty of time to get ready and to travel to the venue, which means getting up when the alarm clock sounds or your friend calls and not staying in bed for an extra half-hour.

The lecturer sometimes gives an indication of the format that the question paper will take. Keep this in mind when preparing for the examination. Problem-type questions demand a different approach to essay-type questions. (Further on in the chapter, we will look at the types of exam questions there are.)

The lecturer will probably tell you the time allowed to complete the exam, and the maximum possible marks. Do a quick calculation to establish how many minutes per mark you have available in which to complete the examination. Stick to this guideline, no matter what, or you will not finish the exam in time.

Read the question paper before you start writing. A particular question may require a lot of reading for only a few marks. Rather answer the other questions first and come back to the 'time-robber' right at the end. There is seldom a requirement to answer questions in the order set out in the question paper. However, be sure that you identify your answers clearly. (For-

example, if you answer Question 7 first, you would still place 'Question 7' beside or in front of your answer.)

Write legibly. Write in ordinary language that is easy to understand.

Be sure that you follow examination instructions. Different instructions mean different things:

- 'Compare': You must look at the characteristics of two or more 'objects' and identify similarities (and/or differences). 'Compare' implies that you 'contrast' the items as well.
- 'Contrast': You must look at the characteristics of two or more 'objects' and identify the differences. You will not obtain the maximum marks if you merely state or list the concepts. ('State' and 'list' are specific instructions in their own right — see below).
- 'Criticise': Again, it is not sufficient to merely list or describe the concept (see below for 'describe' as a term of instruction). You need to critically discuss the particular concept. If you have to criticise a court case, you need to provide arguments why, in your opinion, the judgment was wrong, citing whatever authoritative sources you can.
- 'Define': You have to describe the essence of a particular concept; to give the meaning of the concept. Simply writing down an example of the concept is not sufficient, although you can, of course, use an example (or examples) to exemplify the definition you offer.
- 'Discuss' or 'Describe': It will be sufficient to answer this type of question without criticising the particular concept, theme or topic. You merely need to set out, in as much detail as time and space allow, how the concept/theme/topic is constructed, operates, and so on.
- 'Evaluate': Although similar to 'criticise', to 'evaluate' denotes a more comprehensive exercise. Here, the student must identify the strengths and weaknesses of the concept and come up with an ultimate, independent judgment.
- 'Illustrate': You are to explain a particular concept with reference to examples. If you do not use examples in your answer, you will not get any marks.
- 'Justify' or 'Substantiate': You provide arguments for your answer and do not merely say 'yes' or 'no'. Evidence and authority that support your answer should be presented.
- 'Name', 'List' or 'Enumerate': In these more straightforward questions, you simply present the study material that the question asks for. You do not have to evaluate, analyse, criticise or expand upon the material you put down. These questions test your ability to memorise particular sections of the coursework; a typical question might be, 'List the characteristics of civil law systems'.

- 'Relate': Show the relationship between various concepts, using examples to illuminate your answer where appropriate.
- 'Summarise': You must provide the information in a brief format. Omit detail and examples from the source text but make sure that you still cover all the important points.

Four types of questions occur most often in tests and examinations: problem-type questions, essay-type questions, multiple-choice questions and cloze-type questions.

9.1 Problem-type questions

Read the following example of a problem-type question.

Example

> Find and read *The Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. Next, read the scenario presented below and answer the questions that follow, based on your understanding of the legislation.
>
> During the perusal time slot for the supplementary exams a female student asks her male lecturer why she did not receive marks for a correct answer. The lecturer examines her answer and compares it with the memorandum. Before replying, he gets up and locks his office door. He then tells her: 'I cannot award the marks to you. But if you come home with me and bring me breakfast in my bed tomorrow morning, I'll make a plan. You help me and I help you. No one knows and no one ever finds out about it because you tell no one and I tell no one.' The young woman is very upset and demands that he unlocks the door and let her go, which he does. As she leaves, he smiles at her. His parting words are 'So I'll see you in my class next year.'
>
> Does the student have a claim in terms of the Act? What relief would be appropriate? Substantiate your answer comprehensively.

This kind of question requires you to read a (substantial) set of facts, analyse them, and answer certain questions relating to these facts. You need to be able to apply the law (legal rules) to the facts and come up with an answer.

Note the difference between problem-type questions and cloze-type questions (see below). With the latter, you simply list, state or enumerate certain facts, conditions, principles, etc., and there is no requirement to investigate the issue in more depth. An example of a cloze-type question would be, 'List the requirements for a valid marriage'. A problem-type question on the same subject would present a series of facts in a scenario like format (as above) and ask the student, for example, to determine whether a

valid marriage had been constituted, according to his understanding of the legal rules relating to marriage.

We suggest you use the following structure when answering problem-type questions:

- identification of the legal question(s) posed by the set of facts
- analysis of the applicable legal position:
  - general legal principles
  - specific legal rules
  - exceptions
  - authority
- application of the law to the facts
- conclusion.

If there are time constraints and/or if the mark allocation is relatively low then this structure may need to be adapted (for example, one or more steps may need to combined, or perhaps eliminated altogether).

How should you approach such a question? We suggest the following:

- Carefully read through the set of facts.
- Identify the essential facts and take note of any 'red herrings', that is, unimportant or irrelevant details that are presented as being significant.
- Identify the issues in dispute.
- Identify the relevant legal principles in the different sources.
- Plan what you are going to commit to paper. Use the structure that we set out above as a guideline and use key words and authority as part of your planning.
- Write down your answer.
- Ensure that in your final answer you apply the legal principles one-by-one to the facts in the problem.
- Suggest remedies.
- Offer a conclusion.

Suggested answer

Identify the problem

The relevant Act must be analysed to ascertain whether the Act identifies a possible cause(s) of action, and whether an appropriate remedy exists.

State the relevant legal principles

The Act prohibits harassment.

List authority

Section 1(xiii) read with section 11 prohibits harassment.

Courts may have interpreted the relevant sections, in which case the student should refer to these cases. Previous cases are either analogous

(comparable) or distinguishable. Regarding the example above, perhaps a case exists that held that harassment was not present because the woman did not suffer harm. The student should compare the facts of the previous case and should argue why previous case(s) constitute good authority, or why a particular case should not be followed.

Apply the relevant principles to the facts

Students generally do not pay nearly enough attention to this aspect of problem-solving. Students invariably do no more than list authority and then 'jump' to the conclusion, usually by merely stating something like 'based on the above cases, X is guilty'. Actual problem- solving is something much more comprehensive — each of the appropriate principles must be applied to the specific facts. As far as possible, lecturers will not rely on existing cases when drafting problem-type questions; they will set original problems that will force students to identify the underlying principles, rather than simply extracting facts from existing cases. A 'problem' question that relies heavily on facts from existing cases constitutes a memory test and does not assess problem-solving skills.

Actual problem-solving involves something like the following:

The definition of harassment in section 1(xiii) of the Act reads as follows:

> '"harassment" means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to—
>
> (a) sex, gender or sexual orientation; or
>
> (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.'

Each of these components must be analysed in the answer:

- 'unwanted conduct': It is reasonably clear from the facts that the lecturer's conduct was unwanted — the student became upset at his suggestion and demanded that the door be unlocked and she be allowed to leave. Maybe cases have been decided in a labour law context that set out which standard should be followed to ascertain if conduct was unwanted — the reasonable person, the reasonable complainant, or the reasonable harasser (if such a test could exist) — these principles should then be applied to the facts.
- 'persistent or serious': According to the facts the lecturer made an inappropriate suggestion once and his conduct cannot be described as 'persistent'. The question of whether the lecturer's conduct was 'serious' again depends upon what standard is invoked. Existing case law may suggest a clear answer; if not, the student must be prepared to make a decision and to substantiate it. (Note: the examiner, using the same facts, may also have chosen to ask the student to argue that harass

ment did take place, in which case the student must identify the facts that tend to show that the conduct was 'serious'.)

- 'demeans or humiliates or creates a hostile or intimidating environment': The conduct is demeaning because the student is in effect objectified — if she satisfies the lecturer's physical needs, she will pass.
- 'or is calculated to induce submission by actual or threatened adverse consequences': It is not clear from the facts whether the student deserved to pass. If she was entitled to the marks but the lecturer was only prepared to award them if she agreed to spend the night with him, it is clear that his conduct was calculated to induce submission, as adverse consequences will follow if she does not accede to his suggestion — she will fail. If she does not deserve the marks, it is not clear that this component of the test is present — which adverse consequences will follow if she does not accede to the lecturer's request? It is in any event not necessary to prove this aspect of the test, since the coordinating conjunction 'or', which introduces this fragment of the sentence, tells us that alternative interpretations and courses of action exist.
- 'which is related to sex, gender or sexual orientation': This part of the test is also present, among others, because the facts relate to an unequal power relationship — between a lecturer and a student — and an unequal gender relationship — between a male and a female.

Remedies: Section 21 of the Act lists an extensive array of remedies. In this case, a prohibitory interdict and an award of an amount of money as satisfaction would most likely constitute the most effective remedies. The university could also be ordered to develop and implement an effective policy on harassment.

Conclusion

The Act lists harassment as a possible cause of action. The female student will most likely succeed with her claim against the lecturer. (Evidentiary aspects are ignored in the answer.)

Memorandums to these kinds of questions should allow for alternative solutions. If a student argues persuasively but arrives at a different conclusion, marks should still be awarded.

9.2 Essay-type questions

Read the following example of an essay-type question.

Example

Critically and comprehensively discuss the application of the *nasciturus* fiction under South African law.

This type of question requires a proper structure. You will generally be expected to synthesise the study material. As with any other essay, start with an introduction in which you set out what you are going to write about. Keep your introduction short and to the point. Each subsequent paragraph should deal with one main thought. Make liberal use of headings and sub-headings to make the essay reader-friendly. Show the lecturer that you understand the work by linking the various diverse paragraphs. Show how the various topics interrelate. If you discuss a number of cases, show clearly how the cases interlink. Why do the outcomes differ? How did a particular case influence other decisions? If you had to read a number of articles concerning a particular case, summarise the views expressed in these articles when discussing the case. Provide your own view, substantiated with clear, structured arguments.

Suggested answer

Introduction

Explain what you will be discussing and how you will do it. In other words, provide a 'roadmap' for the reader.

Definition of the fiction

Provide a definition of the fiction and briefly explain how and when the fiction is applied under South African law.

Application of the fiction in the common law

You may wish to use subheadings to further divide the areas of law to which the fiction has been applied.

Application of the fiction in modern South African law

Explain the development of South African law. You may again wish to use subheadings to distinguish between different areas of law.

Court cases

The initial instruction read that you had to 'comprehensively' discuss the topic. You should therefore refer to most or all of the prescribed court cases. Discuss the facts and finding of each case under a different heading, for example 'the *Finchin* case' and 'the *Christian League* case'.

Critical comment

This is an important section as the initial instruction read that you had to discuss the application of the fiction 'critically'. You may again use sub-headings such as 'Davel and Jordaan's comment' and 'Joubert's comment'. Also give your own viewpoint. Show your lecturer that you understand the topic. Evaluate and compare the different viewpoints and substantiate your own viewpoint on the matter.

9.3 Multiple-choice questions

Read the following example of a multiple-choice question.

Example

South Africa held its first democratic elections in:

(a) 1948
(b) 1961
(c) 1910
(d) 1994
(e) 1996
(f) none of the above.

Multiple-choice questions offer you a range of possible answers to a particular question (see the above example). In most cases only one of the suggested answers is correct (answer (d) in the above example). However, it may happen that the question asks you to select the *incorrect* answer from a range of possible answers, so remember to read the question very carefully. In many multiple-choice questions, it is sometimes quite difficult to choose the correct answer since the choices given differ only slightly. In this case, you need to scrutinise each answer closely until you can identify what it is that makes a superficially true answer actually false. Finally, look out for words such as 'only', 'always' or 'mostly', which should prompt you to consider some options and reject others.

9.4 Cloze-type questions

Look at the following example of a cloze-type question.

Example

The law school of the Glossators was established at _____ in the city of _____.

Cloze-type questions, like the one above, require the student to fill in the blank spaces in a written (but incomplete) answer. If the student enters the correct information, he or she will be awarded the appropriate marks. The marks on offer will vary according to the amount and complexity of information needed. Short blank spaces that invite one or two-word insertions (as in the above example) may be worth only one or two marks, while longer blanks that call for a more detailed response (a phrase or sentence, for example) usually attract a higher mark allocation.

10. Ethical considerations

The legal profession requires the utmost honesty and scrupulousness. This ethical obligation carries through to your university studies. Do not cheat in tests and examinations. When you prepare a written assignment, do not copy answers from a classmate. Do not lie to lecturers and tutors. The consequences are serious. If lawyers act in a dishonest way they are struck from the roll of practitioners and are prohibited from practising law. In serious cases, dishonest law students may be prevented from completing their law studies.

Discuss the reasons for and solutions to the following problems:

- 'striking a blank' in the exam/test
- a question to which you do not know the answer at all
- too little time to complete the exam/test
- illegible handwriting

Revision

After completing this chapter, you should be able to do the following:

- explain what makes law studies different from most other fields of study
- plan your time appropriately
- take down good class notes
- make good summaries
- know how to prepare properly for tests and exams
- know how to write tests and exams in a relatively stress-free way.

LEGAL WRITING IN ASSESSMENTS

Your legal writing skills should not be turned off just because you are answering questions in a test or examination. You will do well to remember the following in tests and examinations:

- ✓ **Rules of clarity, conciseness and engagement apply in assessments too!**
  Answers in tests and examinations must be as clear, concise and engaging as any of your legal writing products.

- ✓ **Consider your audience and purpose for writing**
  Just as in any legal writing product, write for you audience and write with a purpose. Your audience in assessment opportunities are lecturers with the objective of determining whether you understand and know the work that has been dealt with over the course of a semester.

  The purpose of writing will be formulated in accordance with the specific question. For example, should the question read: *Name the requirements for a valid contract*, you will probably not be expected to compare legal systems or motivate an answer. However, if the question gave you a set of facts and requested you to *critically evaluate*, your answer will most likely aim to persuade and you should structure your writing accordingly.

- ✓ **SPELLING!**
  Spelling mistakes in tests and examinations are as unprofessional as it is in practice.

- ✓ **SMS LANGUAGE!**
  Avoid using SMS vernacular altogether. You will not obtain marks for answers given in SMS language.

✓ **Paragraphs, paragraphs, paragraphs**

Frequently, students answer questions in tests in proper paragraphs, but when it comes to the examinations, they write one long paragraph. This is unprofessional and does very little to ease the sometimes tedious task of marking papers.

✓ **Headings**

Headings, along with proper paragraphing, can give structure to your answers if used wisely.

✓ **Repetition does not duplicate marks**

Restating a fact will not win you another mark, even if you reformulated the fact into different words. It merely points to the fact that you do not know what the rest of the answer entails.

✓ **Logical reasoning**

Some assessment questions will require you to reason. It is not appropriate to regurgitate everything that you have memorised on a specific topic. You should integrate the knowledge that is required for the answer and exclude that which will render your answer excessive.