

Legal Writing and Drafting

ATP 103

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Legal Analysis

- Helping people solve problems is the essence of what we as advocates do.
- Legal problem solving — identifying and diagnosing problems and generating strategies and tactics to achieve client objectives — is a legally trained person's most basic function.
- Most legal problem solving activity involves some legal analysis — combining law and facts to generate, justify, and assess a legal problem's merits.

Legal Analysis

First Step

- GATHER FACTS
 - Client interview
 - Five “W’s” — who, what, when, where, why + how
 - identify the client objectives and priorities as part of initial fact gathering
 - Gather documents

Legal Analysis

Second step

- ANALYSE THE FACTS
 - Determining which facts may be legally significant.
 - Do the facts make sense?
 - What are the relevant legal issues arising from the facts?
 - Are there gaps in the facts?
 - How do you address these gaps? – Interviews, Documents, Site Investigation, Formal Discovery
 - Such an analysis serves to focus your research and fact discovery

Legal Analysis

Third step

- SEARCH AND ANALYSE THE LAW
 - Here you deal with the law relevant to the legal issues raised
 - Constitution
 - Statutes – National and County
 - Case law
 - Rules and Regulations
 - International law/standards

Legal Analysis

Third Step

- Legislation
 - Identify elements
 - Identify issues
 - Frame issues
 - Define elements

Legal Analysis

Third Step

- Case Law
 - Brief
 - Compare to client's case
 - Identify trends in application/interpretation

Legal Analysis

Fourth Step

- FORMULATE, EVALUATE and SELECT LEGAL THEORIES
 - A *legal theory* may be defined as how you conceptualize the relationship between law and facts that entitle the client.
 - Formulating legal theories means identifying and organizing arguments and counter-arguments in terms of claims, defences and other legal results to relief.
 - It means including the theories and arguments that the opposition will use
 - Evaluating legal theories involves predicting how the decision maker will decide the case.

Legal Analysis

Fifth Step

- FORMULATE, EVALUATE, SELECT and IMPLEMENT STRATEGIES
 - Strategies include adjudicating the matter before a court or administrative law judge, negotiating a settlement or using other forms of dispute resolution.
 - Strategy implementation may involve writing, drafting, negotiation, and other advocacy skills. Advocacy memoranda —hearing, trial, or other appellate briefs, memoranda of law that accompany motions or orders to show cause — contain the legal theories and arguments that support the client's position, omitting the objective evaluation found in internal memoranda.



Case Analysis



Analysing Cases and Statutes

- Rules are applied to facts
- Rules have three components
 - Set of elements
 - A result that occurs when the elements are present
 - Causal term that determines if the result is mandatory, prohibitory or discretionary

Rules and Facts

- All men are mortal – Rule
- John is a man – fact
- John is mortal – conclusion

Legal Arguments

- Textual arguments – rules found in legal texts
 - focus on texts of constitutions and statutes
- Legislative history and drafters' intent
 - Looking at what the drafters meant
 - Look for evidence of discussions before the constitutional text or statute was passed

Legal Arguments

- Precedent arguments
 - How the courts have interpreted certain legal rules
- Traditional arguments
 - How has the rule been applied by the community

Legal Arguments

- Policy arguments
 - What are the underlying values and interests
 - What interest is the rule designed to serve

Rule Based Analysis

- Establishing and applying the rule of law
 - It is x because law y states...
- Rule based analysis can originate from a case or a statute
- Do the facts prove or disprove elements of the rule?
- Do the circumstances prove or disprove the rule?
- Do facts suggest a counter arguments?

Rule Based Arguments

- If court precedent uses or the statute requires a balancing test to solve a controversy, balance or weigh interest or factors to achieve a fair result

Reasoning by Analogy

- Showing direct factual similarities between governing case law and clients facts
 - X is the answer because the facts are like the facts of A v. B and X was the result there
- Draw parallels between current situation and decided cases

Reasoning by Analogy

- Mostly used in case analysis depending on
 - Facts of the dispute
 - Rules of law applicable to the facts
- Will the court apply same holding in a particular opinion to the facts in the present case
 - Analyse
 - Compare facts

Reasoning by Analogy

- Case law
 - Mandatory authority
 - Persuasive authority

Textual Reasoning and Legislative Intent

- Focus is on statutes exact language
 - Title
 - Preamble or statement of statutory purpose
 - When did the statute become law
 - Definitions section
 - Note mandatory, prohibitory, discretionary or declaratory words
 - Shall – mandate; may – discretion; is – stating a rule

Interpreting Statutes

- Plain meaning rule
 - Clear, unambiguous text, without resort to any outside evidence
- Extrinsic evidence – legislative history and intent
 - Legislative history
 - Documents that aid interpretation
 - Comparison with earlier versions of the statute

Statutory Construction

- Textual canons
 - Excluding other things not mentioned
 - same class and applies to all catch words after a list
 - statutes having a common purpose or common subject matter should be read together

Statutory Construction

- Substantive Cannons
 - Rules that apply in interpreting statutes also apply to regulations
 - Specific statutes control general ones
 - Statutes enacted later control general ones

Policy Based Reasoning

- Which answer would be best for society?
- Reasonable man test
- Why is the rule in place?
- Policy reasoning appeals to future consequences of adopting a certain rule

Traditional Reasoning

- X is the answer since that is the way things have always been done
- Reflection of customs and traditions of the community
 - Uniform Commercial Code



Research Exercises



Case 1

Your client claims to have been unfairly arrested by police during the weekend. He indicates that an 'alco blow' reading was faulty and he was not actually drunk. He also complains of arbitrary search of his vehicle by the police and harassment while he was being transported to the police station. He will be arraigned in court tomorrow.

Case 2

Your client is a multinational company that resells laptops to developing countries. Last month it had won the tender to supply laptops to the government, the tender was however cancelled by the procurement administrative review board. Your client seeks to appeal the decision. They also indicate that the Parliamentary Committee on Education does not want them to get the tender

Case 3

Musa is a resident of Likoni. He was arrested on Sunday on suspicion of being a member of 'Al Shabab'. He has sought your legal services. He claims that after his arrest, he was tortured at Likoni police station. He further claims that he was only going to the shops to buy groceries before he was arrested.

Case 4

An MCA wants to regulate emissions by vehicles in her county. Her aim to stop climate change and she believes all vehicles in her county must reduce harmful emissions