Chapter 1

How Attorneys Communicate

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When you are asked to provide a legal analysis to a senior attorney, you will typically provide that analysis in writing, either in an office memorandum or in an e-mail. That analysis must do two things: It must present an objective analysis of the client's legal question and convince the senior attorney that the analysis is sound. This chapter explains what an objective analysis is, how to present that analysis in a memorandum or e-mail, and how to convince an attorney that the analysis is sound. Finally, this chapter will explain a bit more about what happens with your legal analysis after you have submitted it to the senior attorney.

I. What Is an Objective Analysis?

When a senior attorney asks you to get back to her with your analysis, the senior attorney is asking for an “objective analysis.” An “objective analysis” is a neutral assessment of a client’s legal problem. An objective analysis overtly discusses both the strengths and weaknesses of a client’s legal position and predicts the most likely outcome. For that reason, “objective writing” is also referred to as “predictive writing.”
Objective writing is distinct from "persuasive writing." When an attorney writes persuasively, the attorney urges the reader to focus on those arguments that support the client's preferred outcome and minimizes any weaknesses in those arguments. In both objective and persuasive writing, the attorney accurately presents the law, applies the law to the client's case, and makes a recommendation about how to proceed. The difference between the two is in how explicitly the writer explores weaknesses. In objective writing, an attorney specifically and thoroughly explores and evaluates weaknesses.

II. How Do I Present My Analysis?

An objective analysis can be presented to a colleague in either an office memorandum or an e-mail. Of those two methods, an office memorandum is more appropriate if your legal analysis will fill more than one computer screen. Since most of your legal analyses will fill more than one computer screen, this book will look first at how to develop an office memorandum. Later, this book will look at presenting a legal analysis in an e-mail. Once you know how to present your legal analysis in an office memorandum, it is fairly easy to scale back and present a shorter analysis in an e-mail.

A. An Office Memorandum

You can see how you might present an analysis in an office memorandum in Example 1-A. In that memorandum, an attorney answers the question posed in the Introduction: Will a client's statement be admissible at trial? As you read the memorandum, look first at the substance of the memorandum; then look at the form in which it is communicated.

1. The substance of a memorandum

With respect to the substance, the attorney will explain the law and then apply the law to the facts of the client's case. Those two components—an explanation of the law and then an application of the law to the client's facts—are the core components of a legal argument. Look also at the conclusion the attorney reaches. The attorney explains that the client's statement will be admissible. Since the statement, if admitted at trial, will likely send the client to jail, the attorney is predicting an unwelcome outcome. He explains other alternatives, but ultimately he has to acknowledge that a bad outcome is likely.

Honesty assessing and clearly stating the real likelihood of success is critical to providing sound legal advice; an honest assessment is the purpose of writing, will not always work when it does, yet native strategies, the opportunity to vesting thousands of decisions or litigation.

2. The form of

After reading this, every law office has introductory state dresses, (2) concise (4) a discussion that can see each of the

Example 1-A • Memo

TO: Rita Zal
FROM: Theo Thom
DATE: September
RE: Paul Adams

Under Oregon law, the statement was in Adams's statement be parked an unmarked officer he was not yet

Yes. The statement is possible against a that during a stop. I could reasonably believe could not reasonably

Mr. Adams's statement
1. HOW ATTORNEYS COMMUNICATE

purpose of writing an objective legal analysis. Your research and analysis will not always lead you to a result that is bad for your client, but when it does, you must acknowledge the bad news and consider alternative strategies. Doing so allows you, your colleagues, and your client the opportunity to realistically assess the available strategies before investing thousands (and sometimes millions) of dollars on a business decision or litigation.

2. The form of a memorandum

After reading the substance of the memo, consider its form. Although every law office has its own style, a memo typically has five parts: (1) an introductory statement that briefly lays out the questions the memo addresses, (2) concise answers to those questions, (3) a statement of facts, (4) a discussion that analyzes those questions, and (5) a conclusion. You can see each of these parts in Example 1-A.

Example 1-A • Memorandum

MEMORANDUM

TO: Rita Zal
FROM: Theo Thomas
DATE: September 9, 2013
RE: Paul Adams – Admissibility of evidence

QUESTION PRESENTED

Under Oregon law, which allows a defendant's statement into evidence if the statement was made during "mere conversation" with an officer, will Mr. Adams's statement be admissible when it was made after the undercover officer parked an unmarked police car behind Mr. Adams's car and Mr. Adams told the officer he was not yet planning to leave?

BRIEF ANSWER

Yes. The statement will be admissible against Mr. Adams. Evidence is admissible against a defendant if it is gathered during "mere conversation" rather than during a stop. An officer stops another individual only if that individual could reasonably believe that his liberty was being restrained. Mr. Adams could not reasonably believe that his liberty was being restrained. Therefore, Mr. Adams's statement likely will be admissible.
STATEMENT OF FACTS

On August 15, 2008, police officer Ephgrave spoke with Paul Adams, a suspect in a local bank robbery. During that conversation, Paul Adams revealed information that implicated him in the bank robbery.

Earlier that day, Officer Ephgrave saw a white Ford Probe pull into a parking lot. The car looked similar to the car involved in the Davinsk Mutual Bank robbery, and Officer Ephgrave decided to investigate. At the time, Officer Ephgrave was working undercover and was wearing ordinary street clothes and driving an unmarked car.

Officer Ephgrave pulled into the parking lot and parked behind the Ford Probe. As he got out of the car, Mr. Adams yelled at the officer to move his car. Officer Ephgrave walked over to the bench where Mr. Adams was sitting and asked if he was planning to leave. According to the officer, Mr. Adams said, “No, I’m going to sit a little longer.” Officer Ephgrave pointed out that there was nowhere else to park because all the other spaces were full and told Mr. Adams he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams said, “Oh, okay. No problem.”

Officer Ephgrave and Mr. Adams began chatting. Officer Ephgrave steered the conversation to the recent bank robbery. As they spoke, Officer Ephgrave remarked that the bank teller had said that the robber was very polite. Mr. Adams added, “Yeah, I heard he even gave a strawberry lollipop to a kid in the bank.” Officer Ephgrave knew that the media had reported that the bank robber had given a child a lollipop, but not its flavor. Officer Ephgrave then arrested Paul Adams.

Mr. Adams was arraigned on August 20, 2008. He pleaded not guilty to the charges. He is now awaiting trial.

DISCUSSION

Paul Adams’s statement about the flavor of the lollipop will be admissible because the statement was “mere conversation” and not made during a stop. Under Oregon law, citizens can have different kinds of encounters with police officers. State v. Warner, 585 P.2d 681, 689 (Or. 1978). If the encounter is “mere conversation,” evidence acquired during the encounter is admissible against the defendant. State v. Spens, 662 P.2d 5, “stop,” then identified by reasonable Mr. Adams’s sta

Mr. Adams could n encounter with Offi restrained, by physi present in any place 940, 942 (Or. Ct. Ap ual believes that his reasonable. Warner ably believes his lib the circumstances. under the totality of his liberty was restr v. Smith, 698 P.2d 97

A police officer r eity. State v. Gilmore cer requested identif When the defendant tion, the officer saw - firearm. Id. Although therefore, evidence c mitted the gun into e Court of Appeals exp leave, that belief was plained that, although require the defenda dant from leaving. Id

By contrast, a per: f a police officer bloc Wenger, the defendan

Mr. Adams's statement was mere conversation rather than a stop because Mr. Adams could not reasonably believe his liberty was restrained during his encounter with Officer Ephgrave. A "stop" occurs if a person's liberty is restrained, by physical force or a show of authority, by a peace officer lawfully present in any place. *Or. Rev. Stat. § 131.605(6)(2007)*; *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). A person's liberty may be restrained if an individual believes that his liberty has been restrained and that belief is objectively reasonable. *Warner*, 901 P.2d at 942. To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996). If, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained, the encounter is "mere conversation." See, e.g., *State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985).

A police officer may request information without restraining a person's liberty. *State v. Gilmore*, 860 P.2d 882, 883 (Or. Ct. App. 1993). In *Gilmore*, an officer requested identification from three people who were sitting in a truck. Id. When the defendant opened the glove compartment to retrieve his identification, the officer saw a gun and arrested the defendant for illegal possession of a firearm. Id. Although the defendant argued he had been illegally stopped and, therefore, evidence of the gun should be excluded from trial, the trial court admitted the gun into evidence. Id. In upholding the trial court's decision, the Court of Appeals explained that, even if the defendant felt he was not free to leave, that belief was not objectively reasonable. Id. The Court of Appeals explained that, although the officer requested identification, the officer did not require the defendant to alter his course, nor did the officer prevent the defendant from leaving. Id.

By contrast, a person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251-52. In *Wenger*, the defendant was intending to leave a parking lot when uniformed
officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251-52.

In this case, Mr. Adams's encounter with Officer Ephgrave was mere conversation rather than a stop because he could not reasonably believe his liberty was being restrained. Mr. Adams's encounter is similar to the encounter in *Gilmore*. In both cases, an officer approached the defendant seeking information. In *Gilmore*, the officer asked for identification, and in Mr. Adams's case, the officer wanted to learn whether the defendant was involved in the bank robbery.

However, seeking information is not enough to convert their conversation to a stop. In Mr. Adams's case, as in the *Gilmore* case, the officer did not alter the defendant's course or prevent him from leaving. Officer Ephgrave asked Mr. Adams whether he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams agreed, saying “Oh, okay. No problem.” Therefore, Officer Ephgrave did not prevent Mr. Adams from leaving nor did the officer alter Mr. Adams's course. Thus, a court should follow the reasoning in *Gilmore* and conclude that Mr. Adams could not reasonably believe his liberty was restrained.

In fact, a court is likely to conclude that Mr. Adams's encounter with the officer was even less restrictive than the encounter in *Gilmore*. In addition to not altering Mr. Adams's course and not preventing him from leaving, Officer Ephgrave was not in uniform. Because Mr. Adams believed he was talking to a civilian, Mr. Adams should have felt even more free to leave than did the defendant in *Gilmore*, who knew he was talking to a uniformed officer. Thus, a court is likely to hold that Mr. Adams's encounter with the officer was mere conversation and that the evidence is admissible.

Even though Officer Ephgrave's car did block Mr. Adams's car, a court is likely to distinguish Mr. Adams's case from the *Wenger* case. In the *Wenger* case, the court noted that the defendant was intending to leave at the time his car was blocked. By contrast, Mr. Adams told Officer Ephgrave that he was "going to sit a little while longer," suggesting that he was not intending to leave. Because he was not intending to leave, felt his liberty was not restrained.

Because the evidence of pleading guilty

### B. An E-mail

Although Ion random, shorter e-mails are similar.

**Example 1-B • E-mail**

- **From:** Gail Mosse
- **Sent:** Friday, Sep
- **To:** Dina Wong
- **Subject:** Oursine Li

Dina –
You asked whether T Oregon. The answer
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As a result, the Oursins access the correct for does.shtml.
Please let me know if Gail

### 1. The substance

In an inter-office an honest assessment for their client courts will not enfo
not intending to leave, a court is less likely to conclude that Mr. Adams reasonably felt his liberty was restrained. Accordingly, a court will likely determine that Mr. Adams was not stopped and that his statement about the lollipop is admissible.

CONCLUSION

Because the evidence against Mr. Adams is likely to be admissible, we should discuss with Mr. Adams the risks associated with going to trial, the costs and benefits of pleading guilty, and plea bargains he might be willing to make.

B. An E-mail

Although longer analyses should be presented in an office memorandum, shorter analyses can be quickly conveyed in an e-mail. Example 1-B shows a typical inter-office e-mail. In substance and in form, e-mails are similar to office memoranda.

Example 1-B • E-mail

From: Gail Mosse [gmosse@zaalassociates.com]
Sent: Friday, September 8, 2013
To: Dina Wong [dwong@zaalassociates.com]
Subject: Oursine Living Will

Dina—

You asked whether Torr and Kitty Oursine’s living will would be enforceable in Oregon. The answer is that it will not be enforceable.

The Oursines drafted their living will on their computer and signed it themselves without any witnesses. Under Oregon Revised Statutes § 127.531, living wills “must be the same as the form set forth in this section to be valid.” That section also requires that two witnesses sign the form. Id.

As a result, the Oursines will need to re-draft their living will. The Oursines can access the correct form at http://egov.oregon.gov/DCBS/SHIBAadvanced_directives.shtml.

Please let me know if you have any further questions.

Gail

1. The substance of an e-mail

In an inter-office e-mail, as in a memorandum, attorneys seek to give an honest assessment of their legal analysis and provide practical solutions for their clients. In Example 1-B, the attorney explains that Oregon courts will not enforce a living will as the clients have currently written it, but the attorney also explains how to create an enforceable living will.
2. The form of an e-mail

An e-mail will often have the same five parts that are in an office memorandum. If you look closely at the e-mail in Example 1-B, you will see that the first paragraph states (1) the question the e-mail addresses and (2) the answer to that question. The second paragraph (3) states the facts and (4) analyzes the question. The last paragraph (5) concludes and offers practical advice.

III. How Do I Convince an Attorney My Analysis Is Sound?

Whether your analysis is in an office memorandum or an e-mail, you will have to convince another attorney that your analysis is sound. Convincing an attorney that your analysis is sound takes work. Attorneys are skeptical readers. They question. They test each statement as they read. The steps below describe the process you will follow to create that sound analysis.

A. Know Your Client and Your Client’s Question

Your work begins with your client. Law offices maintain files about each client and the legal matters the clients have brought to the office. Even though the senior attorney may have provided you with background about the client, ask for the client’s file. Review it and all the documents in it. Clients’ legal questions typically turn on the facts, so you must have a comprehensive understanding of the facts before you begin researching.

Make sure you understand the question that your client needs answered. Likely, when the senior attorney described the legal question, it seemed clear enough. Sometimes, though, as you learn more about your client, you realize that you actually have questions about the question being asked. Don’t waste time researching if you are unclear about the question. Go back to the senior attorney and ask.

B. Research Thoroughly

Once familiar with your client’s facts and clear about the legal question, you are ready to research. Researching is itself an analytical process that goes beyond merely gathering different legal authorities. You must make choices. You will have to read each authority critically, weed out the irrelevant, and from amongst the relevant, consider how relevant each

C. Organize

When you are reading through documents and files, you will have different stacks of papers. Organize those stacks by legal question. You can create a system of major legal principles that will help you organize the law fit together around legal points.

D. Draft and Revise

Next, you will need to draft your analysis. As you write, your analysis is open to revising extensively, after re-reading and organization.

E. Edit and Polish

After drafting an argument, take a step back from it. After you get an idea of where the points are going to go, your analysis will be better. As you re-evaluate, you will learn more about your client’s legal

F. Finalize

At the end, you will have a finalized discussion of the basic analysis on a lawyer

G. Communicate

After drafting an argument, take a step back from it. After you get an idea of where the points are going to go, your analysis will be better. As you re-evaluate, you will learn more about your client’s legal
that are in an office
table 1-B, you will
the e-mail addresses
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ish (5) concludes and
My Analysis
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Question
maintain files about
brought to the office.
ided you with back-
Review it and all the
turn on the facts, so
facts before you
your client needs an-
legal question, it
learn more about your
- as about the question
are unclear about the
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ly an analytical process
authorities. You must
critically, weed out the
ider how relevant each
will be. As you research and read, you’ll begin developing theories about
your client’s legal question.

C. Organize

When you are done researching, you will likely have a stack of legal
documents and a variety of books piled up around you. From those
stacks, you will have to coax a clear explanation of how the law will re-
pond to your client’s problem.

Creating a clear explanation from a variety of legal authorities is no
easy feat. A clear explanation of the law requires you to see the legal
principles each authority represents. Therefore, you will have to re-or-
ganize those stacks around the legal principles relevant to your client’s
question. You can create a chart and draft an outline to understand the
major legal principles, supporting authorities, and how the pieces of
the law fit together. In whatever form, re-organizing the authorities
around legal points will allow you to see themes in the law, and you will
develop a more nuanced understanding for how the law might affect
your client.

D. Draft and Revise

Next, you will begin writing. Writing involves numerous drafts and
re-drafts. As you write, you should re-read the authorities to ensure that
your analysis is consistent with the law. At this point, you should still be
open to revising everything about your analysis and its organization. Ul-
imately, after re-writing and re-thinking, you will settle on an analysis
and an organization that work.

E. Edit and Polish

After drafting and revising, the editing and polishing begin. You must
take a step back from your work and see it as your reader will. As an at-
torney, you will be dealing with complex ideas. Your job as a writer is to
make those complex ideas easy to understand.

When you edit, you will not simply proofread for typos. Rather, you
will check that the content is complete and logically ordered. Then, you
will tweak transitions and topic sentences so that your discussion flows
well. Finally, you will polish, looking for any words that might cause
confusion and hunting for any errors in punctuation, grammar, citation,
and format.

At the end, you will have a clearly organized, analytically correct, pol-
ished discussion of your client’s legal problem. Table 1-C charts the five
basic stages a lawyer goes through to answer a legal question.
Table 1-C • The legal thinking process

<table>
<thead>
<tr>
<th>Stage of the Process</th>
<th>Steps of the Stage</th>
</tr>
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</table>
| I. Understand your client's problem and the question being asked | 1. Understand your client’s factual situation.  
2. Determine the legal question(s) being asked. |
| II. Research the law | 1. Research  
   • to find the governing rule.  
   • to find legal authorities that interpret the governing rule.  
2. Critically read the relevant authorities. |
| III. Organize | Organize to understand the relationship among the relevant authorities:  
1. Use a case chart or other method  
   • to reconcile cases.  
   • to identify the best cases to illustrate the governing rule.  
2. Outline the legal principles at issue and the legal authorities that will guide your analysis of the client’s legal question. |
| IV. Draft and revise your memorandum | 1. After understanding the law and determining the governing rule(s), draft.  
2. Review the relevant authorities to ensure your analysis is consistent with the law.  
3. Revise the memo to make sure it is organized well (around legal principles). |
| V. Edit and polish | 1. Edit the substance of the draft to ensure your argument is complete and logically ordered.  
2. Polish to weed out words that might confuse and to eliminate errors in grammar, punctuation, and citation.  
3. Reread one last time carefully before submitting to your senior partner. |

F. Think Recursively

Although we have laid out five neat and distinct stages of legal writing, you will likely revisit stages as you work through your project. At each stage, you learn more about the law and how it applies to your client’s problem. Knowing more, you may want to return to an earlier stage and re-think a decision based on the knowledge you’ve gained.

For example, once you begin researching, you may realize that you don’t know a key fact. You’ll have to go back, investigate that fact, and then return to your research. Similarly, as you begin to write, you may identify a gap in your legal analysis. You’ll have to go back and conduct additional legal research to fill that gap.

Especially as you write, stay open-minded to changing earlier decisions. Writing clarifies thoughts. As you write, you will better understand the law and how it will affect discussion; you may find it more pertinent than you thought.

In fact, “legal writing” looks back on itself — who are the legal writers and how do they see their readers see clearly explained.

IV. What Happens

After you submit your outline to the attorney, the attorney will pick up the phone and ask questions about your analysis. Your analysis might be sent to a jury. Dependent on the case, it might also be trusted by the judge, the legal scholar who is an authority, or the legal scholars and attorneys who are their readers see clearly explained.

In all cases, your errors analysis so she of this book will take very much time, if not
and how it will affect your client. You may see better ways to organize your discussion; you may see that a case originally put to the side is more important than you thought. You may even change your conclusion.

In fact, "legal writing" is almost a misnomer. Legal writing is really about committing to paper something much more complex—legal thinking. That legal thinking is the end result of a recursive process that repeatedly looks back on itself and asks whether previous decisions still stand. Expert legal writers allow themselves the time to re-think and revise so that their readers see—not the thinking process—but a complex analysis, clearly explained.

IV. What Happens Next?

After you submit a legal memorandum or send an e-mail to a senior attorney, the attorney may use it in a variety of ways. The attorney might pick up the phone and call the client to advise the client of your analysis. The analysis might be revised and sent to the client. Alternatively, your analysis might be incorporated into a brief that will be submitted to a court. Depending on the law office, your memorandum or e-mail might also be logged into a document retrieval system so that other attorneys who are working on similar legal questions can build from the legal research that you have already conducted. In that case, your analysis becomes a permanent part of the office's legal database.

In all cases, your goal is to provide your supervisor with a thorough legal analysis so she can provide sound legal advice to your client. The rest of this book will take you step-by-step through the process of developing and communicating that objective legal analysis.

Practice Points

- The most basic type of legal analysis, an "objective analysis," allows an attorney to neutrally evaluate the strengths and weaknesses of any legal claim.
- An objective analysis is most typically communicated in one of two ways: a legal memorandum or an e-mail.
- Good attorneys know that revising, editing, and polishing can take as much time, if not more time than, drafting the initial document.