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TAKE A P.A.S.S. ON YOUR NEXT LEGAL DOCUMENT

by Melissa N. Henke
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You've just received a new client or a new assignment for an existing client, and you are ready to start drafting the necessary legal document. The document may be a letter to the client, a contract, a memorandum in support of a motion, or a request for admissions. The document is either one you've drafted more times than you can count, or perhaps it is one you have never before drafted. Either way, I encourage you to take a P.A.S.S. on the document. Don't worry; I am not suggesting that you take a pass on writing the requested document. Rather, before you put pen to paper or fingers to keyboard, I encourage you to step back and consider the P.A.S.S. of the particular legal document. In other words, ask yourself the following:

What is the PRPOSE of the document?

Who is the AUDIENCE for the document?

What is the SCOPE of the document?

What STANCE should I take in drafting the document?

The questions I have identified are not novel ones. Indeed, legal writing textbooks encourage law students to ask these questions each time they tackle a new writing assignment in a legal research and writing course.¹ But even a busy, seasoned practicing lawyer could benefit from asking these big picture questions before turning to draft a new legal document. Doing so will ensure the lawyer makes good decisions about how to organize the document, what to include or omit from the document, how to best present the arguments, and what legal writing or formatting conventions to apply.²

PURPOSE

First, ask yourself what the purpose of the document is, which will help you make effective decisions about what to include or omit from the document. For example, the primary purpose when drafting an internal office memorandum is to "give the attorneys in your law office the information they need to evaluate a case, advise

a client, or draft another document."³ This means you must provide a frank and neutral assessment of the client's situation, even if that means the client may not like the answer. In contrast, the purpose of a trial or appellate brief is to inform and persuade.⁴ While attorneys usually focus on the second purpose — persuasion — they sometimes forget that the first purpose is to inform the judge of the relevant law and facts in a way that is easy to follow and understand. Attorneys must never assume judges are experts in any given area of law. They must also remember that judges have numerous other cases involving a variety of areas of law. In addition, while the drafting attorney is intimately familiar with the facts of the client's case, the judge is not. Thus, "you can help your cause immeasurably by briefly reorienting the judge to the fundamental principles and authority in your case"⁵ as you simultaneously and subtly persuade.

AUDIENCE

Second, ask yourself who the legal audi-

ence is for the document. This will ensure both the organization and content of the document is effective and appropriate. Legal writing professors and practitioners alike place the utmost emphasis on audience. Correctly so. In a book first published in 2003, *Writing for the Legal Audience*, Wayne Schiess emphasizes the importance of writing with a particular reader in mind. He offers practical advice on how to write to more than a dozen legal audiences, including opposing counsel, trial and appellate court judges, clients, mediators, and consumers.⁶ He correctly counsels that you cannot use the same style for each reader, but instead must "adapt to the needs of ... many different audiences."⁷

For example the primary audience of an office memorandum is other attorneys in the office. Because the document is attorney work product, it will not be seen by the court or the opposing party.⁸ As such, the memo should be "critical and candid."⁹ That said, a secondary audience may well

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be the client, so keep that in mind in terms of how you frame the description of the client's conduct or problem. Another consideration that young lawyers should keep in mind is that when writing internal documents for a boss, the specific preferences of that more senior lawyer, one who may well sign your paycheck, should be kept in mind. In other words, until you have seniority, you should conform to your boss's expectations to the extent possible from a professional and ethical standpoint.¹⁰

Another common audience is the judges with whom you file a motion or brief. As you draft the legal document, always remember that judges are very busy. "They are overburdened, underpaid, and, in general, hate having their time wasted."¹¹ Select among the arguments to make and legal authorities to cite with this in mind. The judge won't appreciate your "everything but the kitchen sink" approach to the document.¹² Lawyers should also keep in mind that important secondary audiences for court documents include the judges' law clerks, the client, opposing counsel,¹³ and sometimes even the general public in high profile cases. This means that all facts should be conveyed accurately yet in the best light for the client, and all authorities relied on should be relevant and good law.

Overall, regardless of the specific legal audience, every legal reader is a busy and critical one. She has expectations about how the arguments are organized and supported with legal authorities. She also appreciates clarity, brevity, and use of "plain English" over legal jargon.¹⁴ Keep these expectations in mind to ensure your legal reader is left with a positive and confident reaction to your writing.

SCOPE

Third, ask yourself what the scope of the document is, and take care to stay within that scope. Otherwise, you may annoy your boss or waste your client's money. If you believe that other issues might affect the outcome of the case, ask the assigning attorney or requesting client if the issues have already been considered or if someone else is handling them.¹⁵ This, in turn, will also save you time. Moreover, staying within the scope of the issue or case in a court document will show you respect the judge's time and perhaps also her jurisdiction.¹⁶

STANCE

Finally, ask yourself what stance is required by the document – formal or informal and objective or persuasive – and stick with that requisite stance throughout.

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While most legal writing is formal, your law office may expect more informal writing for internal documents. This could save you time and show you are aware of the preferences of those you work with. Documents filed with the court should always be more formal, and they should comply with the formatting requirements for the relevant court and perhaps also the specific judge.

When the document's stance is objective, the facts should include both good and bad facts for the client and should be framed neutrally. You must give proper weight to arguments on both sides of the issue.¹⁷ In contrast, court documents should *subtly* persuade, which means including all of the facts yet characterizing them in the light most favorable to the client.

In conclusion, the next time you begin to draft a legal document, remember to take a P.A.S.S. Asking the questions demanded by this acronym will benefit new and experienced lawyers alike. The end product will be better organized and focused, will be appropriately formatted, and will more directly and effectively speak to the specific legal audience to whom it is directed.

¹ E.g., Laura P. Graham & Miriam E. Felsenburg, *The Pre-Writing Handbook*

for *Law Students*, at 20 (Carolina Academic Press, 2013); Diane R. Donahoe, *Experiential Legal Writing: Analysis, Process, & Documents*, at 64-65 (Aspen, 2011); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook*, § 18.2 (Aspen, 5th ed. 2006).

² Enquist & Oates, *supra* note 1, § 18.2.

³ Laurel Currie Oates & Anne Enquist, *Just Memos*, § 6.2 (Aspen, 2d ed. 2007).

⁴ Enquist & Oates, *supra* note 1, § 18.2.2; see also Donahoe, *supra* note 1, at 161.

⁵ Collyn A. Peddie, "The Ten Commandments of Legal Writing," 32 *Houston Lawyer* 36, 37 (July/August 1994).

⁶ Wayne Schiess, *Writing for the Legal Audience* (Carolina Academic Press, 2d ed. 2013) (October 2013).

⁷ *Id.*

⁸ Oates & Enquist, *supra* note 3, § 6.1.

⁹ *Id.* § 6.2.

¹⁰ See Wayne Schiess, "The Five Principles of Legal Writing," 49 *Practical Lawyer* 11, 14 (June 2003).

¹¹ Peddie, *supra* note 5, at 36.

¹² Antonin Scalia & Bryan A. Garner, *Making Your Case: the Art of Persuading Judges*, § 12 (Thomson/West 2008).

¹³ Enquist & Oates, *supra* note 1, § 18.2.1.

¹⁴ E.g., Mark K. Osbeck, "What is 'Good Legal Writing' and Why Does it Matter?" 4 *Drexel L. Rev.* 417, 427-40 (Spring 2012); Richard C. Wydick, *Plain English for Lawyers*, at 3-6 (Carolina Academic Press, 5th ed. 2005).

¹⁵ Donahoe, *supra* note 1, at 65.

¹⁶ Scalia & Garner, *supra* note 12.

¹⁷ Oates, *supra* note 3, § 6.2.