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LEGAL WRITING AND DRAFTING (ATP 103)

FIRM 5

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TASK

Set out the process that an advocate should adopt when drafting to ensure that he/she produces an effective and well written document.

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1.0 INTRODUCTION

While a soldier's main tool for execution is his or her gun, an advocate's main tool for execution is his or her words reduced to legal drafts and submissions. Legal writing is the central medium with which a lawyer communicates his or her work. To a large degree, a lawyer's reputation stands and falls to quite an extent with what he or she produces in writing. Therefore, an advocate must ensure that his or her drafts and submissions are effective to fulfill their intended purpose.¹

Effective writing encompasses various fundamental principles which include;

- a. **Purpose**- a legal writing or draft should have a purpose;
- b. **Clarity and precision**- a legal writing or draft should be clear and precise to enhance the understanding of the reader;
- c. **Communication**- a legal draft or writing should be able to communicate effectively to the reader; and
- d. **Competence**- a legal draft or writing should adhere to the established rules where necessary.

2.0 THE PROCESS OF EFFECTIVE WRITING

Writing effectively entails at least five or six distinct but independent stages. These stages ensure that the principles of effective writing are adhered to strictly. The stages include: prewriting, research, drafting, revising, editing and proofreading.²

2.1 Pre-writing

Pre-writing is the most important stage of drafting a document. As Ms. Aluvale averred, it deals with how you write and not why you write. This is because it is the "generating ideas" part of the writing process where an advocate works to determine the topic and the position or point of view for a target audience. The pre-writing stage could also be dubbed the "talking stage of writing". Researchers have determined that talking plays an important role in literacy. Andrew Wilkinson (1965) coined the phrase '*oracy*', defining it as, "The ability to express oneself coherently and to

¹ Richard C. Wydick *Plain English for Lawyers* (2005, Fifth Edition, UNIVERSITY OF CALIFORNIA, DAVIS) CAROLINA ACADEMIC PRESS ISBN 1-59460-151-8

² Joseph Defazio, Josette Jones, Felisa Tennant & Sara Anne Hook. *Journal of the Scholarship of Teaching and Learning*, (Vol. 10, No. 2, June 2010) pp. 34 - 47. Academic literacy: The importance and impact of writing across the curriculum

communicate freely with others by word of mouth.” Wilkinson explained how oracy leads to increased skill in reading and writing. In other words, talking about a topic will improve the writing.³

Prewriting stage includes a number of methods which include but not limited to;

i. Brainstorming

Brainstorming is a prewriting method that involves coming up with as many ideas as possible about a topic without worrying about the feasibility of the ideas or whether an idea is realistic or not.⁴

ii. Free writing

Free writing is a prewriting method that involves writing whatever comes into the mind of a writer about the topic at hand for a specified amount of time, like ten to fifteen minutes. In this stage, grammar, spellings or punctuation should not be a concern. The intention of this method is to provide an opportunity for multiple ideas to arise before the drafting stage.⁵

iii. Mind maps

Mind mapping is a prewriting method that entails outlining information in visual ways. There are numerous mind maps that can be useful to an advocate in the prewriting stage. Webbing is a great tool that has a writer write a word in the middle of a sheet of paper. Related words or phrases are then connected by lines to the original word in the center.⁶

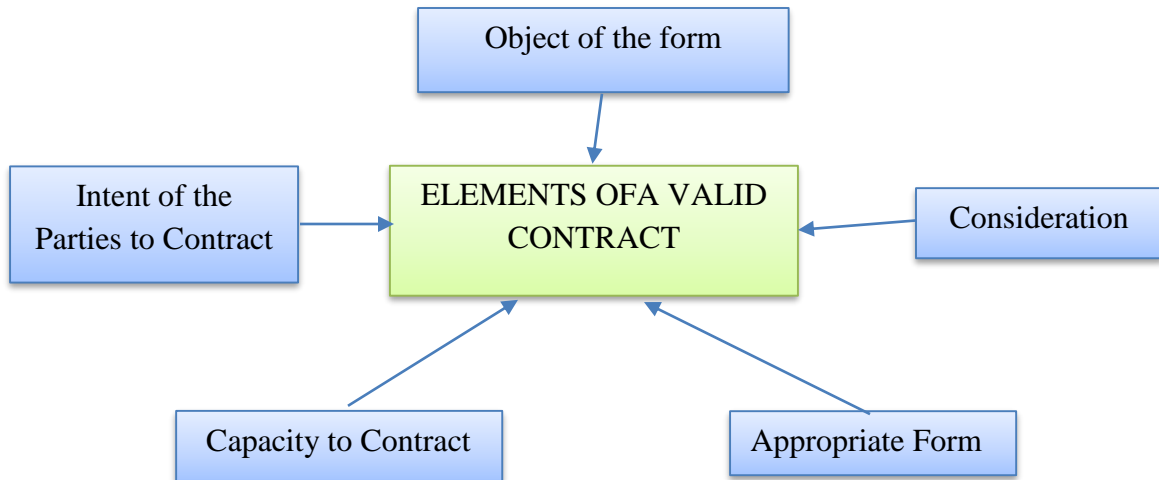
For example, below is an example of webbing highlighting the elements of a contract;

³ Troia, G.A. *Effective writing instruction across the grades: What every educational consultant should know.* (2003) *Journal of Educational and Psychological Consultation*, 14 (1), 75-89.

⁴ Elander, J., Harrington, K., Norton, L., Robinson, H. and Reddy, P. Complex skills and academic writing: a review of evidence about the types of learning required to meet core assessment criteria. *Assessment & Evaluation in Higher Education*, (2006). 31 (1), 71-90.

⁵ *ibid*

⁶ Elander, J., Harrington, K., Norton, L., Robinson, H. and Reddy, P (n4)84



iv. Asking questions

The use of questioning can often assist an advocate in coming up with more creative ideas about a topic.

v. Outlining

An advocate can employ traditional outlines to help him or her to organize his or her thoughts in a logical manner. The advocate can start with the overall topic and then list out the ideas with supporting details. In this stage the writer takes all the ideas encountered and organizes them into an outline. An outline provides a structure that ensures ideas flow logically and clearly. In legal writing there are two common paradigms that are used:

1. **IRAC.** Issue, Rule, Application and Conclusion
2. **CREAC.** Conclusion, Rule, Explanation, Application and Conclusion

For the purpose of this presentation, this firm will use **IRAC** and a moot scenario.

“Mr. Highness had married three wives; Kelline, Penzi & Clover in that order. Kelline was married under African Customary Law, Penzi under the African Christian Marriage and Divorce Act and Clover was his 17-year-long cohabitee. He died intestate on 3rd September 2022 leaving an abundance of wealth. Provide an opinion on the position of the wives’ vis-a-vis the estate.”

Issue

First, one must identify the legal issue in question that he or she will be analyzing. The statement of issue should track the question asked at the end of the assignment. It orients the reader to the precise point you are about to discuss and is typically one sentence. As such, the issue here will be; “*who is a wife for the purpose of succession?*”

Rule

The rule describes which law or test applies to the issue. The rule should be stated as a general principle and not as a conclusion to a particular issue. The advocate should start with the more general rules before proceeding to the specific rules. In our context, we shall find the rule from sections 2 and 3(5) the Law of Succession Act as well as the Marriage Act of 2014 section 6.

Application

The analysis or application is the heart of the discussion. The analysis is the most important and the longest part of the answer. It involves applying the rule to the facts of the question.⁷ Using our example, this is the point where we will examine the inferences/implications raised by the facts in light of the rule captured in the Law of Succession Act. We will simply match up each element we’ve identified in the rule with a fact, using the word “because” to make the connection between rule and fact. For instance, Kelline is validly married to Highness because section 6 of the Marriage Act recognizes Ancestral customary marriage.

Conclusion

The conclusion is your answer to the issue. The writer should state the result of the analysis. If there are multiple issues, there must be multiple conclusions. The conclusion should return the reader to the ‘big picture’ of the overall issue at hand. No new information should be introduced at this stage. Back to our example, we’ve found out that Kelline is validly married to Highness. As such, we reach a conclusion that *she a wife for the purpose of succession.*

⁷ Melissa Kelly The Prewriting Stage of the Writing Process available at <https://www.thoughtco.com/prewriting-stage-of-the-writing-process-8492> accessed May 12, 2022

2.2 Research

This is the second stage of the writing process that entails the general search of information in relation to the topic and how the information may help in the organization of the legal draft or writing. It is at this stage where an advocate lists and evaluates the primary and secondary sources of information relating to the piece of material being drafted.⁸

For example, when an advocate is instructed to draft a contract, the advocate will at first be required to determine the elements of a valid contract. The advocate will rely on statutes, case law and regulations as the primary sources of information relating to the elements of a valid contract. The advocate may also rely on law journals, encyclopedias and treaties as the secondary sources of information relating to the elements of a valid contract.

In our highlighted example here above, we will have to consider the following legislations which we have deemed relevant to giving our opinion of who is a wife for the purpose of succession:

- The Constitution of Kenya 2010
- The Law of Succession Act Chapter 160
- The Marriage Act, no. 4 of 2014
- The Matrimonial Property Act

2.3 Drafting

This is the third stage of the writing process that involves an advocate putting his or her ideas into complete thoughts, such as sentences and paragraphs. The drafting process begins with an analysis of the prewriting and research stages. During drafting, the advocate organizes his or her ideas in a way that allows the reader to understand the message. This is through the advocate using his prewriting and research notes to determine a focus for the piece.

Determining a focus for a piece is achieved through narrowing the focus of the topic and identifying a purpose for the piece. After determination a purpose for the piece of writing, any information that is unrelated to the topic and its purpose should be eliminated from the prewriting.

⁸ Probert Walter, *Law and Persuasion; The Language Behavior of Lawyers* (2009).

During the drafting stage, an advocate will compose an introduction to the piece being drafted and develop a conclusion for the material. The purpose of the introduction to a piece should identify the topic, set the purpose for the writing and suggest how the topic will be developed throughout the piece of writing. The introduction to a piece should be interesting. This is because a solid introduction sets the stage for the best rough draft.⁹

An advocate should begin drafting the piece by organizing his notes in a sequence that will make sense to the intended reader. The focus should be on the logical connections between topics. An advocate should at this point organize his or her writing into paragraphs. A paragraph is a series of sentences that are organized, coherent and are all related to a single topic. There are two types of paragraphs;

- (a) Paragraphs that narrate a series of events; and
- (b) Paragraphs that give examples.

An advocate should at the end of the draft complete it by composing a conclusion. The purpose of the conclusion is to wrap up the piece by connecting all of the related thoughts and ideas. The best conclusions are creative, engaging and leave few questions unanswered in the mind of a reader.

Drawing from our moot example; here is a draft explaining the position of the first wife; Kelline.

To exercise a legal claim over Highness estate, Kelline needs to prove she's validly married to the deceased. From the facts, Kelline is married under Ancestral Customary Law. In Kenya, Customary Marriages have been recognized both by the Constitution under Article 45(4) and in the Part V of the Marriage Act. A customary marriage is one that is conducted in accordance with the customs of communities of either both or one of the parties to the marriage. Section 42(2) of the Marriage act asserts that "the payment of dowry to pursue a marriage under customary law shall be sufficient proof of a customary marriage." As such, Kelline simply needs to prove they had a form of ceremony to confirm the validity of their marriage.

⁹ Mason Catherine & Atkins Rosemary. *The Lawyer's English Language Coursebook (with Answer Key)* (2016 Global English Ltd)

2.4 Revising

The word revise consists of two parts: (a) the prefix re- means again or anew and (b) –vise comes from the same root as vision which means to see. Thus, revising is seeing a paper in a new way. Revision is the fourth stage of the writing process which according to Sommers (1982) involves the process of making changes throughout the writing of a draft. The changes work to make the draft congruent with a writer’s changing intentions. Revising is important because it enables the writer to look at the writing more objectively.¹⁰ Revision often focuses on the big picture elements such as the organization of ideas, arguments and supporting evidence.

Revision entails improving the global structures and content of a piece, its organization and ideas. The methods of revising include;

(i) A.R.R.R

A.R.R.R is the abbreviation of Adding, Rearranging, Removing, and Replacing.

From our draft; the sentence; “Kelline **is** married under Ancestral Customary Law” should read; “Kelline **was** married under Ancestral Customary Law.” The tense matters as Highness is already dead hence the marriage ended.

(ii) R.A.G

R.A.G is the abbreviation of Read Around Group. This involves reading the piece of material before a group of people with similar qualifications. The members in the group are allowed to critique the work when necessary thus necessitating revision of the piece.

Grammar, spelling and punctuation errors are not the focus in the stage of legal writing.

2.5 Editing

Editing is the fifth stage of the writing process where a writer strives to make the piece of draft flawless. The purpose of editing is to ensure that one’s ideas are presented to a reader as clearly as possible. During this process, an advocate prunes away all the unnecessary information to reveal

¹⁰ Troia, G.A. *Effective writing instruction: What every educational consultant should know*. (2003) Journal of Educational and Psychological Consultation, 14 (1), 75-89.

the critical information or winning arguments within your draft. Editing entails correcting errors, making words and sentences clearer, more precise and as effective as possible.

Editing also entails a correction of the organization, paragraph structure and content. While focusing on the organization of the draft, a writer has to ensure;

- (i) That there is a clear introduction and conclusion;
- (ii) That there is a clear transition between paragraphs and that each paragraph has a topic sentence to introduce its central idea;
- (iii) That the central idea is supported by clear evidence;
- (iv) That the central idea and the evidence are defined so as to improve on clarity if the message being conveyed;
- (v) That there is a correct use of technical terms; and
- (vi) That there is avoidance of repetition of words and sentence structure.

An effective editing process should be systematic in nature.¹¹ In order to edit better, it is best to edit in phases. An advocate should divide the work into manageable chunks that can be reflective of the phases of the draft or writing. The various phases include;

- (i) **Phase 1 - Content/ fact Selection.** It is at this phase where all the irrelevant facts relating to the topic at hand are done away with.
- (ii) **Phase 2 - The overall structure.** It is at this phase that the writer perfects the plot, setting, characters and the theme of the writing or draft.
- (iii) **Phase 3 - Structure within paragraphs.** It is at this phase where a writer ensures that his or her paragraphs contain a topic sentence, supporting sentences and a concluding sentence. Furthermore, a writer also has to ensure that each paragraph relates to each other in order to avoid instances of stand-alone paragraphs.
- (iv) **Phase 4 – Style.** There are different types of writing styles which include: expository writing, descriptive writing, persuasive writing and narrative writing. it is at this phase where an advocate can decide on the type of writing style he or she prefers in order to ensure the effective conveyance of the message to the reader.

¹¹ Wes Hendrix, 'From Good to Great: The Four Stages of Effective Self-Editing,' (2013) 14 Journal of Appellate Practice & Process 267; the author proposes that editing should be broken into four stages-reviewing separately for substance, organization, style, and mistakes

(v) **Phase 5 – Citation.** It is as this phase where an advocate ensures that there is proper citation throughout the work. Proper citation is not only a matter of requirement but also a matter of credibility.

Editing is often mistaken for proofreading. However, editing is different from proofreading because while editing it involves questioning and analyzing sentences, proofreading only involves checking the sentences for error.

2.6 Proof-reading

Proofreading is the final stage of the legal writing process. Proofreading entails checking for errors in a text or draft before it is published or shared. While editing involves major changes to the content, proofreading focuses only on minor errors and inconsistencies.

Proofreading of a piece of draft can be carried out in seven distinct steps which include;

(i) Use a checklist

A writer can create a list of important things to check for, such as problem areas like agreement of nouns, verbs and pronouns, style of numbers and antecedents.

(ii) Fast-checking

Fast-checking involves relooking at facts, figures and proper names.

(iii) Spell-checking

In this step, before a writer proofreads a printout, he or she speck-checks the electronic version of the draft to find misspellings, as well as errors that is frequently made. For example, errors like omitting a closing parenthesis or quotation mark.

(iv) Reading-aloud

A writer can read the draft aloud from begin to the end. A change in tone can help the writer identify an error that is hidden.

(v) Focusing on one line at a time

When proofreading print documents, an advocate can use a ruler or another piece of paper to cover the sentence(s) below the line he or she is proofreading, shifting the paper down as he or she goes along. This method helps to curb the instances of missing subtle errors.

(vi) Attending to format

Being that proofreading is the final stage of legal writing; an advocate can focus on the document design. This ensures that the document design adheres to established specifications. Such specifications may include: page numbering, column alignment, relative font sizes, headlines, subheadings, captions and footnotes.

(vii) Proofing again

Once all the revisions are made, an advocate can proofread the document again with some thoroughness rather than simply spot-checking the changes.

From our draft, another tense problem that was identified during proof reading was “Kelline needs to prove **she’s** validly married to the deceased”. It should be “**she was.**”

3.0 CONCLUSION

As noted above, legal writing is the central medium with which a lawyer communicates his or her work. Therefore, a lawyer has to ensure that his or her legal writing is effective. Effective writing encompasses various principles which include purpose, clarity, communication and competence. For these principles to reflect in a legal draft or writing, an advocate should follow the six stage process as discussed above including: prewriting, research, drafting, revising, editing and proofreading.