



OUTLINING YOUR SCHOLARLY PAPER*

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I. Purpose

A. Guiding Writing

- a. Outlining is an important stage in writing a scholarly paper because it helps writers move from the research-gathering and idea-forming step to the organization step or a preliminary outline can help writers move from a hypothesis to guide research.
- b. This process helps many writers identify gaps in research or arguments.
- c. It also helps some writers work through “writer’s block” or other challenges to moving ideas from mind to paper.

B. Organizing Writing

- a. Once a writer has an outline in place, it can function as a guide to help the writer organize ideas and information before beginning to draft.

II. Procedure

A. The process of outlining is an individual process so every writer will approach outlining differently.

B. Many writers, however, begin this step by brainstorming and writing down all of the issues or arguments they want to cover in their papers.

- a. From here, writers often rearrange these thoughts into an organized form that will present the information in a form designed to make the paper most accessible to the intended reader(s). Organization can mean different things to different writers: some create piles or charts, other color-code information.

C. Alternatives

- a. Writers should be mindful, however, of the possibility of altering a completed outline in response to new ideas and to new ways of presenting initial ideas.
- b. An outline can be a writer-based research summary. One approach a writer can use is to create three different outlines that can then be used to find the best structure for the paper.

III. Form

* By Colin Huntley & Mindy Barry.

- A. Outlines can take many forms:
 - a. Outlines can be long, detailed notes that document the progression the paper will take.
 - b. Outlines can be brief, bullet-points that include only the main points of the paper.
- B. There are several organizational forms that are typical to legal scholarly writing.
 - a. Traditional Casenote or Comment Outline
 - i. Introduction
 - ii. Background
 - iii. Statement of the Case
 - iv. Analysis
 - v. Conclusion
 - b. Comparative Paradigm
 - i. Divided Pattern
 - 1. Introduction
 - 2. Argument 1
 - 3. Counterargument 1
 - 4. Argument 2
 - 5. Counterargument 2
 - 6. Conclusion
 - ii. Alternating Pattern
 - 1. Introduction
 - 2. Arguments 1 & 2
 - 3. Counterarguments 1 & 2
 - 4. Conclusion
 - c. Problem-Solution Paradigm
 - i. Identification of the Problem
 - ii. Explanation of the Solution
 - iii. Explanation of How and Why the Solution Solves the Problem
 - d. Cause and Effect Pattern
 - i. Effect is Announced
 - ii. Possible Causes Announced
 - iii. Evidence on How Causes Lead to Effect
 - e. Historical Analysis
 - i. Introduction of the Problem

- ii. Historical Analysis From the Origination of the Problem to the Present
- iii. Conclusion
- f. Theory Presented, Critiqued, “Sold”
- g. Narrative
 - i. Author’s Personal Story Documents the Problem
 - ii. Author’s Personal Experiences Are Drawn Upon to Offer a Solution
 - iii. Conclusion

IV. Examples

A. Case Comment Outline¹

- a. Introduction
- b. A Hot Topic: Thermal Imagers in Practice
- c. *Katz & Co.*: A Foundation Under Attack
 - i. The Revolution of *Katz*
 - ii. The Promise of *Katz* Denied
 - 1. The First Blow: *Smith v. Maryland*
 - 2. More Restrictions: A Fourth Amendment in Big Brother's Clothing
 - 3. Further Intrusions Allowed: What's All this Garbage?
- d. Thermal Imagery: The Latest Challenge
 - i. *Penny-Feeney* Sets the Stage
 - ii. Criticism of the *Penny-Feeney* Decision
 - 1. The Assumption that FLIRs Are a Nonintrusive Technology
 - 2. The "Heat Waste" Analogy
 - 3. The "Dog Sniff" Analogy
- e. Fourth Amendment Values and the Use of Technology in Law Enforcement: A Double-Edged Sword
- f. Guideposts for the Court: Evaluating Emerging Technologies Under the Court's Privacy Framework
 - i. The Area Subject to Surveillance
 - ii. The Nature of the Information Disclosed to Police
 - iii. Public Awareness of Law Enforcement Technologies
 - iv. The Degree of Intrusion

¹ Comment, *If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment*, 84 Calif. L. Rev. 1437 (1996).

- g. Conclusion
- B. Case Note Outline²
 - a. Introduction
 - b. The Fourth Amendment
 - i. Physical Intrusion
 - ii. "The Fourth Amendment Protects People, not Places"
 - 1. Justice Harlan's Test
 - a. First Prong of *Katz*
 - b. Second Prong of *Katz*
 - 2. Protected... or not?
 - 3. Private Party Searches
 - 4. Luggage
 - 5. Exclusionary Rule
 - c. *Bond v. United States*
 - d. Analysis
 - i. A New Defense Created by *Bond*
 - ii. Confusion Resulting from *Bond*
 - iii. The Hypothetical Luggage
 - 1. Bag One, the Bag Checked onto the Plane
 - 2. Bag Two, a Bag Placed in the Storage Bin Directly Above Larry's Head
 - 3. Bag Three, a Bag Placed in the Overhead Bin Directly Above Larry's Head
 - 4. Bag Four, a[nother] Bag Placed in the Overhead Bin Directly Above Larry's Head
 - 5. Bag Five, a Bag Placed in the Overhead Bin Across the Aisle and Down Two Rows
 - 6. Bag Six, a Bag Taken on the Plane and Held in Larry's Lap
 - e. Conclusion
- C. Scholarly Paper
 - a. Introduction
 - i. The Welcome Mat: My Ploy to Entice the Reader that this Article is Relevant to Legal Practitioners

² Note, *Bond v. United States: What's Protecting Your Luggage? A Look at the Fourth Amendment and How it Applies to Searches of Luggage on Mass Transit Carriers*, 53 Baylor L. Rev. 713 (2001).

1. Theme: The issues implicated by this article are relevant to a legal practitioner practicing in an increasingly interdependent world.
 - a. Private: Arbitration example of parties from different countries, seeking to resolve a dispute before a panel of foreign judges.
 - b. Public: Karadzic example: How do the submissions to the international tribunal dealing with war crimes committed in Bosnia differ from the briefs submitted in U.S. District Court by the law firm of Paul Weiss in the case brought against Bosnian war criminal Karadzic under the Alien Tort Claims Act?
 - c. How should the briefs submitted differ?
 2. After setting the stage, present thesis:
 - a. Thesis: The increased use of international tribunals and arbitral panels for the resolution of both private disputes and questions of public international law necessitates a need for an examination of how international based dispute settlement necessarily effects the legal writing used in terms of audience, stance, and rhetoric.
 - b. The Corner Stone: The roles of international tribunals are gaining in preeminence as state actors look to find judicial resolutions to conflicts that emerge in a global, interdependent world.
 3. And, So? Breaking Down the Foundation: The Private Component: The Shift Towards Arbitration and New Demands on U.S. Litigators
 - a. Firms which deal with foreign clientele are seeking to deal with international disputes in the most efficient way possible and, as a result, arbitration is gaining favor as a means of resolving disputes. This shift towards arbitration facilitates the need for general U.S. litigators to hone their writing to a new, less adversarial audience, to adopt a new stance, and, overall, to adjust rhetoric to better suit foreign arbitrators (if applicable) and a foreign party who has not adopted the U.S. style of litigation and who generally views U.S. litigation style as unduly contentious and adversarial.
 4. Breaking Down the Foundation: The Public Component: Seeking Justice Before International Tribunals
 - a. On the public front, the world looks to international tribunals to bring justice in the wake of genocide, as is the case with the War Crimes Tribunal in Bosnia and the Rwanda War Crimes Tribunal in Tanzania, as well as the Court of International Justice. Are documents/briefs submitted to these tribunals similar to the U.S. discourse style, or is the stance different, or is it tailored to a different audience? Why would it matter to a U.S. legal practitioner?
- ii. Looking Inside the House:
1. The “Comfy” Family Rooms for the U.S. Litigator

- a. The Family Room: Analysis of What is Currently *Familiar* Territory to the U.S. Litigator – Adversarial Legalism
 - i. As an introduction to a general difference in U.S. appellate advocacy, I will present the idea of “adversarial legalism” that necessarily impacts legal writing done within the U.S. system and compare it to submissions to arbitral panels and other international tribunals.
 1. And idea of “adversarial legalism: derived from: Robert A. Kagen, *American Lawyers, Legal Culture, and Adversarial Legalism in LEGAL CULTURE AND THE LEGAL PROFESSION* at 7.
 - a. Notes that the American legal process seems to be characterized by: (1) more complex bodies of legal rules; (2) more formal adversarial procedures for resolving political and scientific disputes; (3) *more costly, litigant dominated forms of legal contestation*; (4) more punitive legal sanctions; (5) more frequent judicial intervention into administrative decision-making; and (7) more legal uncertainty, malleability, and unpredictability.”
 - b. Kagen notes that: “This cluster of legal propensities is what I attempt to capture in the summary concept ‘adversarial legalism’ (1996).”
 - ii. The Well-Worn Furniture in the Family Room: The U.S. Appellate Brief.
 1. The Appellate Brief Analysis: For my appellate brief comparison, I have obtained several law review articles which are proving helpful in identifying what the key elements of legal writing valued in effective appellate writing:
 - a. Wiener, *Essentials of an Effective Appellate Brief*, 17 GEORGE WASHINGTON L. REV. 143 (1949):
 - i. Wiener outlines 9 elements of effective brief writing which include: Compliance with the rules of the court; Effective Statement of Facts; Good, forceful English; Argumentative headings; Appealing statement of the Questions Presented; Sound analysis of the legal problem in argument on the law; Convincing presentation of the evidence in the argument on the facts; Careful attention to all portions of the brief; Impression of conviction which allays the reader’s doubts and satisfies his curiosity.
 - ii. Wiener notes that the structure to be followed is an introductory summary first and THEN details.
 - iii. Wiener places significant emphasis on the Statement of Facts, as a means of arguing the law and a key way to gain advantage through order and presentation. Wiener advises that a persuasive Statement of Facts will be divided up through the

use of headings. Although, Weiner advises that there should be minimum use of headings.

- iv. Headings should be argumentative, rather than topical or assertive. Weiner places great emphasis on avoiding ideological contests, noting that courts do not like to referee ideology contests and those participating in oral argument should avoid being seen as trying to vindicate a principal rather than a substantive legal rights.
- b. Tate, *The Art of Brief Writing: What a Judge Wants to Read*, *Litigation*, v. 4, no. 2, p. 14 (1978): Essential to Analysis of “Audience” in Appellate Briefing
 - i. “As counsel writes the brief, he should visualize the judge, what he thinks he is trying to do in deciding the case, and how he will use the brief. He should keep in mind what the judge’s approach may be to the problem, what will interest him, and what he may disregard as irrelevant or useless. The brief is not to be written to be fed into an impersonal, computerized justice machine, but to be read and studied and weighed by fellow human beings.”
 - c. Wilkins, *The Argument of an Appeal* 33 CORNELL L. J. 40 (1947).
 - d. Rutledge, *The Appellate Brief*, 28 A.B.A. JOURNAL 251 (1942).
 - e. Prettyman, *Some Observations Concerning Appellate Advocacy*, 29 VA. L. REV. 28
 - f. Silberman, *Plain Talk on Appellate Advocacy*, *Litigation*, v. 20, n. 3, p. 3 (1994).
- iii. The New Furniture in the Family Room – Slightly Uncomfortable, but Becoming More Familiar (e.g. the Weird Chair Bought from Brookstone’s): U.S. Alternative Dispute Resolution
 1. Expense and unpredictability about the court system has led many corporations to use Alternative Dispute Resolution (ADR).
 - a. Other Sources (This is a broad area – so I will really need to focus here).
 - i. *The Paths of Civil Litigation*, 113 HARV. L. REV. 1851 (May, 2001).
 - ii. *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL’Y J. 13 (2000).
 - iii. *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999).
 2. Transition to the International, Nouveau, Living Room: Culture in Law and the Impact on Legal Writing Contrastive Rhetoric

- a. Culture in Law and the Impact on Legal Writing
- i. One line of inquiry that I am thinking of pursuing is how the different cultures involved in an arbitration, or the quest for justice before a human rights tribunal, necessarily impact legal writing. **I will be looking to establish that culture necessarily effects audience, rhetoric and stance.** Williams will be integral to this analysis. Just as one needs to adjust legal writing in the transition from college to law school, there are many things that a U.S. litigator will need to re-examine in our increasingly interdependent world. I would begin to emphasize that while the U.S. litigator may be able to carry with her some of what is familiar, there are changes that need to be made and are being made up as practitioners gradually adjust to the international dimension of many areas of law.
 - ii. As part of this analysis, I would explore the fundamental role of culture in law, but particularly when international cultures are brought together for the resolution of a conflict. In my mind, it would be foolhardy to ever broach an international legal conflict without an understanding of the cultural differences at play. In the words of Robert Post: “We have long been accustomed to think of law as something apart. The grand ideals of justice, of impartiality and fairness, have seemed to remove the law from the ordinary, disorganized paths of life. For this reason efforts to unearth connections between the law and culture have appeared vaguely tinged with expose, as though idol were revealed to have merely human feet. In recent years, with a firmer sense of the encompassing inevitability of culture, the scandal has diminished and the enterprise of actually tracing the uneasy relationship of law to culture has begun in earnest.”
 - iii. My idea would be that it is fundamental to trace the uneasy relationship between law and culture in the context of international dispute resolution and how culture impacts writing.
 - iv. Also on the culture issue and potentially instructive:
 1. Robert Post, ed., *Law and the Order of Culture* (Berkeley: University of California Press, 1991).
 2. Edhard Blankenburg, *Civil Litigation Rates as Indicators for Legal Culture*, in *COMPARING LEGAL CULTURES* 43 (David Nelken, ed. 1997).
 - a. Introduces the term “litigation avoidance cultures” as compared to selections which are particularly litigation prone. (This could also be a basis of comparison for me, and a starting point for analyzing the differences in writing).
 - b. (44) As part of litigation avoidance, Blankenburg notes that litigation avoidance often involves private regulation taking the place of legal rules or negotiation and arbitration taking the place of judicial decision-making.

- c. (45) Blankenburg notes: “There are other forms of out of court regulation of conflicts, which we are used to see as less formal “alternatives to litigation.”
- d. “Mediation, informal complaint procedures, consumer tribunals, ombudsmen institution, rent commissions – there are numerous conflict institutions in ... litigation avoidance cultures, while in more litigious legal cultures [of France] and of (West Germany → probably do not want to mention this) their equivalents are difficult to establish, have to work under restrictive conditions or did not get off the ground at all.”
- v. My argument would be that even in the arbitration forum, the difference between these two different cultural backgrounds will be unquestionably present and will need to be taken into consideration. Even if the U.S. litigator is able to employ some familiar legal writing strategies, there will necessarily be adaptations that need to be made.
- b. Looking at the Living Room: Gathering the International Submissions to Analyze: I will choose submissions based on the forums that a U.S. litigator will be most likely to appear before. Therefore, I will focus predominantly on arbitration submissions, where they are available.
 - i. International Adjudication: Procedural Aspects and the Impact on Legal Writing
 - 1. “The principal objective of written proceedings is to formulate in writing the respective claims of the litigant parties and assist the tribunal in proper understand of the principal controverted issues involved in a dispute.” (103)
 - ii. V.S. Mani, INTERNATIONAL ADJUDICATION, PROCEDURAL ASPECTS (1980).
 - 1. (114) “In early nineteenth century arbitration, the general tendency was to refer a dispute to a Head of State for adjudication. Such referrals in fact encouraged presentation of a fairly short and concise pleadings. However, the practice was only short-lived and subsequently gave way to more elaborate pleadings.
 - 2. (114) “Moreover, international tribunals, and more particularly the International Court, have a special responsibility to contribute to progressive development of international law, and, in this regard, elaborate pleadings have an important role to play. The pleadings in an international case are, therefore, necessarily comprehensive. To be easily communicative, each pleading should present a complete and coherent argumentation in elaborating and substantiating the case it seeks to propound.”
 - 3. (115) “To sum up, the main qualities a good pleading in an international proceeding is expected to possess are that the facts are pertinent; its reasoning are cogent; its conclusions are logical.”

- a. A general question, in all arbitrations is whether, arbitration can, in a civilized manner, resolve the differences that arise between parties coming from different legal cultures.
- iii. Sir Michael Kerr, “Concord and Conflict in International Arbitration” in 13 *Arbitration International* 121 (1997).
 - 1. There has been a unification of sorts in procedural methods since the advent of international arbitration “we can only note amongst arbitrators and practitioners alike the increasing awareness of an emerging ‘harmonized procedural pattern’ in international; arbitration.”
- iv. I have secured the submissions for ICSID arbitration in two NAFTA cases, Methanex and Loewen and plan to use this as part of my research.
- v. Arbitrator’s View of Writing Briefs, 47-DEC Arb. J. 58
- vi. Ray Douglas, On Writing the Post-Hearing Arbitration Brief.