

TERM PAPERS

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This memorandum is meant to highlight suggestions and pitfalls related to writing a major paper for a seminar class, independent study, an externship, law review, or a similar project. It applies whether the paper is technically an “A,” a “B,” or any other major paper. In addition to reviewing this memo, you will find much helpful guidance in EUGENE VOLOKH, *ACADEMIC LEGAL WRITING*. This book is available in both Boley Library and the law school bookstore.

I. Choosing a Topic¹

When choosing or narrowing down the topic of your paper, consider the following:

1. Find a body of material and an intellectual problem you can stand to live with intimately for months on end.
2. Find an issue that lets you show me how good you are. The topic should require more than a report – it should require substantial analysis. This generally means selecting a topic for which some statutes or cases – and some law review articles – exist, but where significant problems or questions still remain. Ideally, your topic should allow you to show that you can:
 - Find the relevant cases, statutes, legislative history, and commentary in the area.
 - Succinctly analyze, explain, and coordinate these sources.
 - Think creatively about an area of law.
 - Explore the dimensions and merits of *all sides* of an issue (even if you end up favoring only one side).
 - Evaluate the legal, social, historical, jurisprudential, and other relevant dimensions of an issue.
 - State a hypothesis; recognize the logical steps necessary to develop it; present each step comprehensively and articulately; and arrive at a defensible and persuasive conclusion.

Note that these skills are also the ones that will enable you to write a competent brief, memorandum, advice letter, or similar document as a practicing attorney.

3. Choose a topic that will not leave you feeling frustrated. Try to avoid these common

¹ See also EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 13-18 (2003) (setting out general considerations in topic selection); *id.* at 28-30 (indicating topics to avoid); *id.* at 44-48 (discussing converting material from the workplace into academic articles).

problems:

- There are too few sources available.
 - There are too many sources to read and digest in the amount of time available.
 - The sources are too difficult to find in the amount of time available.
 - The topic is so focused on non-legal history, sociology, anthropology, economics, or some similar area that the legal aspects are difficult or impossible to explore in the time and space available. (While these other areas are fascinating, this is supposed to be a law-related paper.)
 - The topic has no "tension". For example, it is too descriptive, or there are no significant problems involved, or the problems have already been analyzed to death.
4. Evaluate the risks involved in choosing a topic on which you have a strong political, philosophical, or moral point of view. *I will want you to acknowledge and understand positions contrary to your own and persuade me on the merits that the "other" side is wrong.* You must assume that your reader *is* the opposition, so merely declaring the opposing point of view to be wrong is not enough. If you cannot recognize valid arguments on the other side — if you get angry at hearing another point of view or if your attitude is that there *are* no valid arguments on the other side — you probably will end up writing what I will consider to be a diatribe as opposed to a reasoned analysis of the problem. I will not be happy with your paper, and you will not be happy with my reaction to it.

II. Choosing a Thesis²

A thesis is "a statement or theory put forward and supported by arguments."³ Your thesis is your claim or point of view about the issue under discussion. Writers often do not have a coherent thesis at the beginning of a project. When they do have one, their research and analysis often lead them to change or modify the initial thesis. This is fine. However, by the time you turn in your "draft," you must have a working thesis that you state clearly in your Introduction.

To develop and articulate your thesis, think about the material you have collected and your attitude towards that material. What is your purpose in writing the paper? Normally it will be one of the following⁴

- synthesize a body of law not yet drawn together

² See also VOLOKH, *supra* note 1, at 9-12.

³ OXFORD AMERICAN DICTIONARY 712 (1980).

⁴ Most of this is taken from JILL J. RAMSFIELD, CREATING A GOOD SCHOLARLY PAPER 1 (1991), as taken "almost verbatim" by Chris Wold, *Writing a Law School Paper* (March 12, 1999) (unpublished manuscript, on file with this author).

- criticize or support a recent opinion
- offer a new direction for a specific area of law
- criticize a theory or argument made by another scholar
- foreshadow or predict developments in the law
- suggest changes in the law
- make recommendations for action on a legal issue
- apply an existing area of law to a new problem

When you have concluded your research and thinking about the problem, state your conclusion as a proposition you want your readers to adopt. Your statement of that proposition is your thesis. The following is *not* a thesis:

“This paper is about the Supreme Court’s approach to standing.”

This *is* a thesis:

“The Supreme Court’s approach to standing should be abandoned in favor of a more flexible approach.”

III. **The Structure of the Paper**⁵

The structure of your paper follows logically from your thesis. Assume that your reader is hostile to your thesis (perhaps even holds a view diametrically opposed to yours). Your goal is to convince that hostile reader to have a change of heart and accept your point of view by the end of the paper. The specific organization of the paper will depend upon the logic necessary to prove your thesis.⁶ However, every paper should have the same basic structure:

Your paper should consist of five main parts⁷:

- (1) **The Table of Contents**. This should list the headings for your sections and sub-sections, and it should indicate the page on which each part begins.⁸
- (1) **The Introduction**. This is where you get the reader’s attention and give a *brief* overview of your paper. In under 10 paragraphs state:

⁵ See also VOLOKH, *supra* note 1, at 31-43.

⁶ See section IV, below.

⁷ The report and the analysis could, of course, each be broken into sub-sections if that makes sense for the development of your topic.

⁸ It probably should go without saying that you should number the pages in your draft and final papers.

- the nature of the problem you will consider and why it is important (this may require some brief highlights of the report (see below)
- your thesis
- the steps you will take to convince the reader to accept your thesis — a “roadmap” or “overview” of the rest of the paper. To help orient the reader, it sometimes may be advisable to give a *brief* overview of the main points of your analysis.

Most authors write the Introduction after they have completed writing the rest of the paper.

- (2) The Report. This is where you give the reader the background necessary to understand the problem you are discussing. The report should be as brief as possible to get the job done — normally, it should not be the bulk of your paper. Needless to say, it is important that the report be accurate, comprehensive, and properly attributed. The report may include the following types of information, as required by your thesis:

- factual background
- the existence and content of relevant statutes, constitutional provisions, or judicial decisions
- the existence and content of major commentary in the area⁹

If the area of law on which you are reporting is complicated, your report may also include the analysis necessary to organize or elucidate the law at issue. However, if the area of law is so complex or disorganized that this analysis takes a great deal of space to accomplish, you may want to consider whether this analysis is a paper topic in itself.

- (3) The Analysis. This is *your* part of the paper — the place where you do your own independent, creative work and make an original contribution to the field of law. *It is the focal part of the paper*¹⁰ and will usually be the longest section. It is also the scariest and hardest to write because you are communicating your own, original work rather than reporting on the work of others.

The structure of the analysis should reflect the logical steps necessary to convince

⁹ Choose your secondary sources intelligently. Go beyond hornbooks (and do not even bother with commercial outlines, law dictionaries, legal encyclopedias, and the like). Read all the law review articles you can get your hands on that relate to your topic. Read and consider the ideas of legal philosophers. Read and consider non-legal materials where relevant and useful.

¹⁰ If you give me only a report – no matter how well it is written – I will not give you a grade higher than a “C.”

the reader to accept your thesis. Often, each main step in the logic will be a sub-section of the paper (see below).

- (4) The Conclusion. This is where you summarize the main points of your argument and tie them together in the final bottom line, which is essentially a re-statement of your thesis. *There should be no new information, arguments, or recommendations in the conclusion.*

IV. Organization

A. “Macro” Organization

Development of a thesis requires a logical progression of thoughts. The logic required to prove your thesis should form the organizational structure of your paper. Some thesis development takes place in the “report” section, but most of it occurs in the “analysis” section. It is often most effective to break the “analysis” portion into sub-sections, each of which develops a discrete step in your logic.

Take, for example, the thesis mentioned above: *The Supreme Court’s approach to standing should be abandoned in favor of a more flexible approach*. Development of this thesis might take the following logical steps¹¹:

1. [Report] Describe the Supreme Court’s approach to standing at the end of the twentieth century. Organization of the report will depend upon the nature of the material involved. For example, some material is best organized chronologically, while other material is best organized doctrinally.
2. [Analysis] Persuade the reader that the Court’s approach should be abandoned in favor of a more flexible approach. Organization of the analysis depends upon the logical steps necessary to develop the thesis. The major logical steps might effectively be treated as sub-sections. For example, using the thesis stated above:
 - a. *The Court’s approach is misguided legally.*
In this sub-section, you would show that the approach is not required by article III of the Constitution.
 - b. *The Court’s approach frustrates Congress’s ability to check the Executive branch.*
In this sub-section, you would show that the Court’s approach has negative practical effects.

¹¹ Note that the Introduction is not included in this list. The Introduction is not part of the process of proving the thesis. It gives an overview of the proof that is found in the rest of the paper. Similarly, the Conclusion merely summarizes the proof that has just been presented.

- c. *A more flexible approach is more appropriate.*
You could break this sub-section down into additional sub-sections:
- i. *The Constitution supports a more flexible approach.*
 - ii. *A more flexible approach is preferable from a practical governmental perspective, as it provides more benefits than problems.*

To summarize, each section or sub-section of the paper has its own “thesis” or theme. The section is devoted to “proving” or developing that theme. The sections are placed in logical order.

B. “Micro” Organization

The basic organizational approach just discussed can also be used on the paragraph level. Each paragraph has a “theme,” usually known as a “topic sentence.” The intermediate sentences in the paragraph develop the theme, and the final sentence is either a conclusion or a transition to the next paragraph. The paragraphs are put in order according to the logical progression of the topic sentences.

This approach to organization has many advantages. For one, good organization eases the reader’s ability to understand your argument. However, another advantage is that good organization allows *you* to be sure that there are no holes in your reasoning. You should be able, for example, to write out the topic sentences of each paragraph and see that they add up to a logical, complete development of the thesis of that sub-section of the paper with no holes *and no superfluous material*.¹²

V. Content

To write a better-than-average paper, pay attention to the following suggestions¹³:

- Go beyond a simple approach to the problem. For example, assume that your thesis is that the defendant in a criminal homicide case did not have a legal duty to rescue the victim from death. A simple approach would review the existing categories of legal duty, show that this situation does not fit within one of those categories, and conclude. A

¹² If information or an argument is not relevant to upholding the “thesis” of a paragraph, take it out! If a paragraph is not relevant to upholding the “thesis” of the section, take it out! If a section is not relevant to upholding the thesis of the paper, take it out! At the very most, such irrelevant material is appropriate only for a textual footnote. These rules apply regardless of how much time you have put into researching the material and regardless of how much you love it. See also VOLOKH, *supra* note 1, at 49-51.

¹³ See also VOLOKH, *supra* note 1, at 38-43.

better approach would examine the jurisprudential and historical reasons for the existence of the accepted categories and use these to consider and reject an argument that the law should adopt a new category.

- Read cases and secondary sources critically. Part of your analysis will involve reacting to what courts and commentators have said on the subject. *Do not accept the analysis of a judge or published author as correct just based on that person's status.* Adopt a skeptical attitude. Make writers convince you of their theses just as you will have to convince me of yours. Where are the holes in the writer's logic or facts? Include your criticism as part of your own analysis.
- Use examples. Flesh out your theory with examples. Draw these examples from published cases, news sources, personal interviews,¹⁴ or realistic hypotheticals. Develop these examples early in your writing process, as you may find that the effort to be concrete forces you to re-think your analysis.
- Do not ignore problems in your position. Try to think creatively about problems and find ways to eliminate them. If you can not eliminate problems, acknowledge them and explain why your position, problematic as it is, is still superior to other approaches.

Writing Craft¹⁵

Writing skills are essential to good lawyering. If the judge can not understand what you are saying — or has to work twice as hard to muddle through your brief — you might lose even if your legal position is correct. Thus, I will base your grade on the quality as well as the content of your writing.

I will be paying particular attention to the following:

- **Proper spelling and word usage.** Use your computer's spell check on the former and a dictionary or thesaurus on the latter.
- **Proper punctuation and grammar.** Review grammar and punctuation rules contained in standard writing guides (I have several and am happy to share them.) While reasonable minds can often differ on some punctuation issues, your usage should not be so idiosyncratic as to detract from the content of your discussion.
- **Clarity of writing.** Use the active, not the passive voice. Use several short sentences

¹⁴ Be sure to consult the "Blue Book" or ALWD to see how to cite such interviews. Do this before the interview, so you can be sure to gather the necessary data.

¹⁵ See also VOLOKH, *supra* note 1, at 79-94.

instead of one long, run-on sentence. Do not use obscure, “hundred-dollar” words unless you are sure you know what they mean. Your job is to communicate. Simplify whenever and wherever possible.

- **“Reader friendly” devices.** Part of a writer's job is to lead the reader clearly from point to point in the analysis. The reader should never have to ask, “Why do I need to know this?” The author must tell the reader where the discussion has been, where it is going, how it is getting there, and why. I do not think that it is possible to be too simplistic and careful here, especially when dealing with difficult analysis. You can do much to guide the reader by providing a skillful introduction, clear organization, and informative section headings. In addition, I encourage the use of transitional words, sentences, and even paragraphs.¹⁶
- **Citation form.** Please cite according to A UNIFORM SYSTEM OF CITATION (the “Blue Book”) or the ALWD CITATION MANUAL. I *will* check your cites for style as well as content. I encourage you to use complete citation form in your rough draft so that I can give you feedback. I do not insist on following the rules for their own sake. The bottom line is that I must be able to find your sources easily and know how you expect me to use them.¹⁷ Problems I have frequently encountered include lack or incorrect use of introductory signals; incorrect use of short citation forms; and incomplete citations.

NOTE: In citing to sources, please use "law review" style (cites contained in footnotes) rather than "brief" style (cites contained in the body of the text). If you feel that "brief" style would be better for you, please talk to me.

¹⁶ Readers need guidance whenever you switch from one idea or theme to another. Tell them where you are taking them and why. Let them know how the different parts of the paper relate to one another. You can provide this guidance through mere words and phrases if the changes are relatively obvious. However, use entire sentences if the changes are substantial, and paragraphs if they are really major.

¹⁷ For example, the correct introductory signal will tell me whether the source directly supports what you are saying, is merely an example from a number of supporting sources, merely implies that what you are saying is correct, or serves some other function.

A WORD ABOUT PLAGIARISM¹⁸

Please read the section on “Offenses” in the “Honor Code and Procedure” portion of WHAT’S WHAT. ***Plagiarism is an Honor Code violation.*** Plagiarism involves using the words or ideas of another without adequate attribution to that other source. Plagiarism includes:

- Using the verbatim, essentially verbatim, or paraphrased words of another without citing the source.
- Using the verbatim words of another without putting quotation marks around the borrowed language, even if an appropriate citation is given.
- Using the original ideas of another, even when expressed in your own words, without citing to the source of those ideas.

Warning: Sometimes even well-meaning writers run into plagiarism problems because they are not careful in their note taking. This risk is especially acute if you take notes on a computer, which facilitates writing things down in verbatim or essentially verbatim form. If you have neglected to indicate to yourself that you are quoting, you may neglect to use citations, quotation marks, or both when you use your notes to write your paper. The danger increases, of course, if you are writing your paper or draft in a rush. While this or some other benign explanation may, in fact, account for apparent plagiarism, the traditional approach is to let an Honor Committee sort it all out, not the professor.

Please see me if you have any questions about the issue of plagiarism.

¹⁸ See also VOLOKH, *supra* note 1, at 155-158.

EVALUATION

When I review your final draft, I will take the following into account. (If I am not asking you to submit a rough draft and a re-write, disregard the criteria specific to that requirement.)

Substance

- Difficulty of topic
- Sophistication of treatment
- Accuracy and thoroughness of report
- Quality of analysis
- Quality of rough draft
- Responsiveness to comments on rough draft

Craft

- Time taken to complete the project
- Appropriate length
- Grammar, punctuation, spelling, organization, and clarity.
- "Blue Book" form
- Quality of rough draft
- Responsiveness to comments on rough draft

Paper Length

I do not require the paper to be a specific length. Quality is more important. I would rather read a shorter, well-written paper than slog through pages of unnecessary "filler." Thus, I will evaluate whether the length is appropriate to the topic and the coverage. That being said, I would be surprised if a person could write an intelligent three-credit paper on a challenging topic in less than 20 single-spaced pages. On the other hand, if you think that your paper will be more than 40 single-spaced pages, we need to talk.