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Write Like a Spy: Using U.S. Intelligence Guidelines to Reinforce the Lessons of Predictive Legal Writing

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I. Introduction

Legal writing professors often turn to non-legal examples to complement the things we teach in our courses. Indeed, legal writing scholars have gleaned writing and teaching lessons everywhere from politicians¹, to painting², to podcasts.³ This Article suggests another helpful—and even more direct—analogy to what we teach: the standards governing how national intelligence reports are prepared. Legal writing faculty can use these guidelines in a number of ways to reinforce key legal writing lessons and to help students reflect on their professional obligations toward their clients.

II. National Intelligence as a Legal Writing Analog

Conducting and communicating objective, predictive analysis is crucial for national intelligence analysts and lawyers alike. Consider the advisor role lawyers play. Whether it's helping a client decide to accept a settlement or take a plea, or counseling a client about a potential business deal, lawyers must frequently analyze the current state of the law and make predictions about future outcomes or consequences.⁴

Now consider the role of the intelligence analyst. A decision-maker—for example, a military or political leader—approaches the analyst with a question about the current state of affairs or the possible consequences of a policy intervention.⁵ The analyst must review various intelligence sources, analyze them to answer the “client’s” question, and then report their analysis and predictions in reports that can be understood and used by others to support future decisions.⁶

Because both lawyers and intelligence analysts rely on thorough, clear, and actionable predictive analysis as a core part of their jobs, we would hope that there would be overlap in how they describe the best practices for doing that work. Fortunately, there is.

III. The Intelligence Community's Guidance for Objective Writing

Just as legal writing texts and articles have summarized the core tenets of good, clear legal writing, the intelligence community has also published best practices for conducting and communicating predictive analysis: Intelligence Community Directive 203 (“Directive 203”).

Joe Fore, “A Court Would Likely (60-75%) Find . . .”: *Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 LEGAL COMM. & RHETORIC 49, 50 (2019) (“Prediction is so central to lawyering that teaching objective, predictive analysis . . . takes up a considerable part of almost all first-year legal writing courses.”).

¹ See Megan Boyd, *Legal Writing Lessons from American Presidents*, 15 LEGAL COMM. & RHETORIC 287 (2018) (reviewing JULIE OSEID, COMMUNICATORS-IN-CHIEF: LESSONS IN PERSUASION FROM FIVE ELOQUENT AMERICAN PRESIDENTS (2017)).

² See Beth D. Cohen & Pat Newcombe, *What Legal Writers Can Learn from Paint Nite*, 25 PERSPS. 35 (2016).

³ See Jessica Durkis-Stokes & Amy Vorenberg, *The Serial Podcast: Bringing the Real World into First-Year Legal Writing*, 29 SECOND DRAFT 10 (Fall 2016).

⁴ See Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. ST. L. REV. 41, 43 (2018);

⁵ Federal law defines national intelligence “customers” as the President, the National Security Council, heads of Executive agencies and departments, senior military commanders, and Congress. See OFFICE OF DIR. OF NAT’L INTELLIGENCE, WHAT IS INTELLIGENCE?, <https://www.dni.gov/index.php/what-we-do/what-is-intelligence> (last visited Apr. 21, 2020).

⁶ See Jeffrey A. Friedman & Richard Zeckhauser, *Analytic Confidence and Political Decision-Making: Theoretical Principles and Experimental Evidence from National Security Professionals*, 37 POL. PSYCHOL. 1069, 1076 (2018) (describing the interactions between President Obama and intelligence officials about Osama bin Laden’s whereabouts before the raid on his compound in Abbottabad, Pakistan).

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“... Directive 203 lays out ... guidance on the contents and format of good analytical writing.”

Promulgated in 2007 after intelligence failures relating to September 11th and Iraqi WMDs⁷ and updated in 2015, Directive 203 established standards “that govern the production and evaluation of analytic products” by the intelligence community.⁸ Thankfully, you won’t need Top Secret clearance to read the document; it’s publicly available from the DNI’s own website and easily accessed with a Google search.

Though it’s just six pages long, Directive 203 lays out both broader themes about the goals of objective intelligence analysis and specific guidance on the contents and format of good analytical writing. Both are relevant to legal writing professors looking to reinforce the communication and professionalism lessons we are already sharing with our students in the classroom. Here are some of the lessons most applicable to legal writing:

Remain Objective and Independent

Lawyers are ethically bound to “exercise independent professional judgment and render candid advice” when counseling clients.⁹ So lawyers must guard against their own limitations, assumptions, or biases.¹⁰ They must also ensure their objective advice isn’t swayed by external pressures from clients. Clients are “entitled to straightforward advice expressing the lawyer’s honest assessment”—even when that means delivering news the client doesn’t want to hear.¹¹ And lawyers must also be willing to change their advice and their strategies when new legal or factual developments undermine their earlier judgments.¹²

⁷ See Jim Marchio, *Analytic Tradecraft and the Intelligence Community: Enduring Value, Intermittent Emphasis*, 29 INTEL. & NAT’L SEC. 159, 182 (2014).

⁸ See INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 203: ANALYTIC STANDARDS (June 21, 2007), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards%20pdf-unclassified.pdf>; INTELLIGENCE COMMUNITY DIRECTIVE 203: ANALYTIC STANDARDS (Jan. 2, 2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>. In this Article, all quotations and references to Directive 203 refer to the updated 2015 version.

⁹ MODEL RULES OF PROF’L CONDUCT 2.1 (AM. BAR ASS’N 2002).

¹⁰ See, e.g., Osbeck, *supra* note 4, at 71 (discussing “cognitive biases [that] may skew a lawyer’s predictions”).

¹¹ MODEL RULES OF PROF’L CONDUCT 2.1 cmt. 1.

¹² For example, under Federal Rule of Civil Procedure 11(b), a lawyer can be

sanctioned for “later advocating” a claim or factual contention when the support for that claim or contention has eroded since the time it was originally made. See also GEORGENE M. VAIRO, RULE 11 SANCTIONS § 5.04 (2004) (noting that, under Rule 11, “once it becomes apparent that the paper lacks a legal or factual basis . . . an attorney may not continue to advocate the positions taken in the paper”).

Be Competent and Accurate

Lawyers have a professional duty of competence; indeed, it’s the very first rule in the ABA Model Rules of Professional Conduct.¹³ When advising clients, “[l]awyers need not be clairvoyant; they’re not liable for well-reasoned predictions that turn out to be wrong.”¹⁴ But lawyers are expected to use their training, experience, and research to seek out all sources of relevant information to render the best advice possible. Intelligence analysts are, likewise, expected to use the information at their disposal to make the best possible judgments. Directive 203 expressly states that intelligence analysts “should apply expertise and logic to make the most accurate judgments and assessments possible, based on the information available and known information gaps.”

Recognize and Convey Uncertainty

Of course, when trying to make predictions and render competent and accurate analysis, both lawyers and intelligence analysts face numerous sources of uncertainty. Lawyers, for example, may be asked to

sanctioned for “later advocating” a claim or factual contention when the support for that claim or contention has eroded since the time it was originally made. See also GEORGENE M. VAIRO, RULE 11 SANCTIONS § 5.04 (2004) (noting that, under Rule 11, “once it becomes apparent that the paper lacks a legal or factual basis . . . an attorney may not continue to advocate the positions taken in the paper”).

¹³ See MODEL RULES OF PROF’L CONDUCT 1.1 (AM. BAR ASS’N 2002).

¹⁴ Fore, *supra* note 4, at 50.

opine on unsettled area of law, or they may need to consider the idiosyncrasies of political actors or judges.¹⁵ To reflect these uncertainties and to indicate the lawyer's best estimate of the likelihood of a given outcome, legal writing guides encourage legal writers to use modifiers like "unlikely," "probably," or "almost certainly" when delivering legal analysis.¹⁶

Directive 203 also recognizes the importance of assessing and conveying uncertainty in intelligence products. Intelligence reports "should indicate and explain the basis for . . . uncertainties," including

(a) the causes of uncertainty (for example, the amount or quality of information available), (b) how the uncertainties affect the analysis, and (c) factors that "would alter the levels of uncertainty." Like lawyers, intelligence analysts use probabilistic language to provide estimates of the likelihood of an event happening—for example, the likelihood that a terrorist is located in a given area. But while these terms lack established meanings in legal contexts, Directive 203 provides a specific vocabulary that ties each probability term to a specific numeric range:

almost no chance	very unlikely	unlikely	roughly even chances	likely	very likely	almost certain(ly)
remote	highly improbable	improbable improbably	roughly even odds	probable probably	highly probable	nearly certain
1–5%	5–20%	20–45%	45–55%	55–80%	80–95%	95–99%

Consider Audience Needs

As legal writing professors and texts routinely preach, good legal writing requires an awareness of the readers' needs and expectations.¹⁷ The kind of in-depth legal analysis—replete with footnotes, citations, and detailed discussions of precedent—that might be needed for an internal office memo may not be helpful in an email to a client who's looking for bottom-line conclusions, recommendations, and actionable next steps. Directive 203 echoes this audience-focused approach, insisting that intelligence products should "[d]emonstrate customer relevance" and "provide information and insight on issues relevant to customers of U.S. intelligence." Lastly, just like lawyers who must adhere to court- or client-imposed deadlines, the Directive recognizes even the best analysis is useless if it's late. "Analysis must be disseminated in time for it to be actionable by customers," and analysts should be aware of "customer activities and schedules, and of intelligence requirements and priorities, in order to provide useful analysis at the right time."

Write in a Clear, Precise Way

As legal writing professors and practitioners preach over and over, legal writing must be clear and precise to convey its message to the reader. And whether we promote IRAC, CREAC, or TREAT, we also know that rigorous legal analysis demands an organized, logical structure. Intelligence officials also prize clarity and precision, and Directive 203 reflects that viewpoint: "[T]he analytic message a customer receives should be the one the analyst intended to send. Therefore, analytic products should express judgments as clearly and precisely as possible." The Directive also echoes legal writing guidance about reasoning and organization by insisting that intelligence products "use [] clear and logical argumentation." Indeed, the Directive gives an edge to those of us who preach the CREAC/CRAC formulation for legal analysis: it urges analysts to "present a clear main analytic message up front." The use of the word "argumentation" is also telling. While intelligence reports are clearly intended to be objective documents—laying out various options for decision-makers—even "objective" analysis needs to take a position about the most likely outcome or state of affairs and then explain (or "argue") why that position is the most probable one. In the same way, objective legal analysis also

“... good legal writing requires an awareness of the readers’ needs and expectations.”

¹⁵ See, e.g., *id.* at 51; Osbeck, *supra* note 4, at 71–72 (discussing the role of “non-doctrinal considerations” on case outcomes).

¹⁶ See Fore, *supra* note 4, at 52 nn.21–22 (collecting sources).

¹⁷ See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 6 (2016) (discussing how lawyers can have multiple audiences with “widely differing needs” and that a key task for a lawyer “is to figure out what your readers want to read”).

“... a legal writing professor could use Directive 203 to help students reflect on the ... lessons they’ve learned in class.”

must take a position to be of use to a client, as mere equivocation is largely useless to readers.¹⁸

Use Visual Aids

Lawyers have long known the power of visual aids; photos, diagrams, and charts can make it easier for a reader to digest complicated concepts or facts.¹⁹ The intelligence community knows, too, that sometimes a picture is worth a thousand words. According to Directive 203, intelligence reports “should incorporate visual information to clarify an analytical message and to complement or enhance the presentation of data and analysis.” The Directive also lists specific situations that might call for visual aids, suggesting that “spatial or temporal relationships” might be conveyed more effectively in “tables, flow charts, [or] images.”

IV. Using Directive 203 in the Legal Writing Classroom

There are numerous ways a legal writing professor could use Directive 203 to help students reflect on the writing, analytical, and professional lessons they’ve learned in class. Here are just a few ideas for incorporating the document into the legal writing classroom:

■ Compare legal memos and intelligence reports.

While legal memos and intelligence reports are both works of objective analysis, they differ in purpose, tone, and stylistic conventions. Most contemporary intelligence reports are—obviously—unavailable for public viewing, but many historical national intelligence estimates have been declassified and are available on the CIA’s own website.²⁰ So students could look at

examples of the two different document types and compare them using a genre-discovery approach.²¹

■ Consider the professional obligations of lawyers and intelligence analysts.

In addition to the documents themselves, students could be asked to compare the professional and ethical obligations faced by intelligence analysts and lawyers. Why are the values of objectivity, candor, and independence so crucial to both lawyers and intelligence analysts? How might the lawyer’s obligations to a client resemble or differ from the obligations faced by an intelligence analyst reporting to a higher-up or to a political actor?

■ Create a “Legal Writing Community Directive 203.”

One of the most interesting aspects of Directive 203 is its ambition: the document purports to summarize the core tenets of good, objective analysis and clear communication in just a few pages. Using the Directive as a starting point, students could be asked to create a similar document summarizing the key features of legal writing. What “guidelines” would they issue to lawyers or to legal writing students for delivering objective and helpful legal analysis to clients?

■ Assess Directive 203 as a work of legal writing.

Directive 203 is, itself, a type of legal document—a set of rules and standards promulgated by a governmental body to dictate future behavior. Students could be asked to assess how well the document does its job. Are there ambiguities in the guidance? Is it easy-to-read? Does the document use elements of effective writing and formatting—such as cohesive paragraphs, headings, and visual aids—to enhance understanding? Are there ways in which it could be improved?

While there are many possible ways to use it in the classroom, Directive 203 and the national intelligence context presents a promising way to reinforce lessons that we are teaching in legal writing courses.

18 See CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 181 (3d ed. 2018) (“[S]imply saying that a court could decide one way or a court could decide another way is not helpful to your colleague who has asked you to research a legal question.”).

19 See, e.g., Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 J. LEGAL WRITING INST. 57, 64 (2015).

20 See, e.g., DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE 92-7: SADDAM HUSAYN: LIKELY TO HANG ON (1992), https://www.cia.gov/library/readingroom/docs/DOC_0000469141.pdf.

21 See CHEW & PRYAL, *supra* note 17, at 3–8; see generally Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 WAYNE L. REV. 351 (2013).