Using Federal Agency Advisory Letters As “Real-World” Writing Samples (and to Validate the Fundamental Legal Writing Principles We Teach)

By Tina Boudreaux

Most legal writing professors have encountered students who are skeptical that “real” attorneys use the organizational paradigms we teach, or that the best legal writing is clear, concise, and free of legal jargon. Perhaps as a result of this skepticism, some students find it difficult to trust the legal writing samples included in their textbook and clamor for more “real-world” examples.

I try to preempt such distrust and dispel some common misperceptions about legal writing in our first class of the semester. I promise students that they will learn about and prepare legal documents that actual attorneys produce, but I explain that my overriding goal is to help them learn the process of legal writing. And although we will have time to cover only a handful of these “real” legal documents, the fundamental skills they will learn and practice in the class will offer a strong foundation for the writing that will be expected of them in practice. As a former transactional lawyer, I am a true believer of this, and I try whenever possible to prove to students that the best attorneys rely on the organizational and other writing conventions we discuss in class.

Some real-world examples that serve this purpose are informal advisory letters produced by federal administrative agencies. I have relied on these letters as models because they are typically written clearly and concisely and follow a general IRAC structure. They fit most logically into a class on legal correspondence but can be used to illustrate good writing and organizational principles, and they may even generate assignment ideas. Unlike other real-world writing samples, which can be difficult to find and dangerous to use without heavy redaction, these informal interpretive documents are available on most agencies’ websites. They also offer students a glimpse into the world of administrative law and agencies, which often gets little attention in the first year of law school.

What Are They?
The letters that I have used in class are those written by agency staff in response to a request for guidance from a member of the public. The initial requests are typically written by an individual or organization subject to the agency’s regulations seeking to clarify how federal regulations or a federal statute affect the unique circumstances of the requesting party. The agency responses fall within the broad category of “informal agency actions” that are “not covered by the formal adjudicatory and rulemaking provisions of the U.S. Administrative Procedure Act (APA).”

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1 Thanks to Erin Donelon for reviewing a draft of this article and to Megan Garton, Tulane Law Library’s Reference Librarian and Instruction Coordinator, for her able assistance.

2 Of course, I also agree with those who have written on the subject that students who hope to become successful deal lawyers should be introduced to the unique analytic skills required of those transactional attorneys. See, e.g., Tina L. Stark, Thinking Like a Deal Lawyer, 54 J. Legal Educ. 223 (2004).

3 See Patricia Grande Montana, Meeting Students’ Demand for Models of Good Legal Writing, 18 Perspectives: Teaching Legal Res. & Writing 154 (2010) (discussing some drawbacks to using models, including the “time-consuming and costly” nature of finding them in practice).

The particular agency letters that I have found most useful are “informal discussion letters” written in response to requests submitted to the Equal Employment Opportunity Commission (EEOC). As the EEOC website states: “Although they do not represent Commission policy or legal opinions, these letters from the EEOC’s Office of Legal Counsel offer technical assistance in response to questions from the public on how the EEO laws may apply in particular fact situations.” The EEOC website includes links to “both informal discussion letters that respond to inquiries from members of the public and letters that respond to other federal agencies’ and departments’ requests for public comment.”

Why They Are Good Models

One reason I find these EEOC letters useful is that they offer guidance on federal statutes that first-year law students often find interesting and easy to understand. The EEOC responses address discrete issues under those federal statutes that the agency enforces, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

Most of these EEOC responses are brief and generally follow the organizational conventions for client letters and email correspondence described in legal writing textbooks. The EEOC responses typically begin with a concise but clear summary of the inquiry or issue, as well as the facts related in the initial request. A clear and brief discussion of the relevant law follows this summary, and most of the letters conclude with an application of that law to the requestor’s particular situation.

To prove the importance of choosing a coherent organization that is tailored to the problem, the purpose of the document, and the reader, I sometimes have students compare one of the EEOC discussion letters addressed to an individual or employer with one of the EEOC responses to another agency’s request for comments on a proposed rule change. We discuss the different goals of the EEOC in writing to each addressee, and the students conclude that the strict CREAC paradigm they have been using in their interoffice memos probably would not work for either response. Students recognize, however, that both types of letters follow an overriding IRAC paradigm we use in class are not rigid formulas that must be followed in all circumstances, but emphasize that a general IRAC organization will offer the most coherent structure in most situations. They also see that practicing attorneys actually rely on it.

By comparing the two kinds of letters, students also see the need to adjust detail and tone to the reader’s level of legal knowledge. Although the letters addressed to other agencies typically include a more comprehensive discussion of technical agency regulations and more citations than those addressed to individual employees or employers, students notice that the writing in both kinds of correspondence is never overcomplicated or muddied by legal jargon. The clear style of these letters shows students that attorneys working at the highest levels write in plain English. I also reinforce the importance of clarity by reminding them that many practicing attorneys are required to write plainly; as one example of this, the Plain Writing Act of 2010 now requires federal agencies to use “plain writing” in most written communications they direct to the public.

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As an added benefit for students, reviewing these letters in class introduces them to some of the writing produced by attorneys who work within federal agencies. If nothing else, even the brief class time we spend on these letters gives them a more practical understanding of administrative agencies’ role within the U.S. legal system.

As an added benefit for legal writing professors, the interpretive letters written to employers and other members of the public may inspire assignment ideas because they often raise interesting legal issues that do not have clear conclusions. Professors might also ask students to write a request for guidance to a federal agency, or even write the agency’s response to such a request, as a creative spin on a legal correspondence or email assignment.

Where You Can Find These Informal Actions

Many federal agencies produce various kinds of informal agency actions, including interpretive guidance similar to the EEOC’s informal discussion letters. The easiest way to find these informal actions for a particular agency is through the agency’s website. The University of Virginia Library provides a research portal that offers links to those agency websites that post “other administrative actions which are outside the scope of the [Code of Federal Regulations] or the [Federal Register].”

Some of these informal interpretive actions may also be available and searchable through a subscription database like Westlaw or Lexis.

A Few Caveats

Although most of the letters posted on the EEOC website are written in clear prose, some will likely include stylistic or organizational choices that instructors may want their students to avoid. Professors should warn students that they should not mimic the model “with a dogged literal-mindedness.” I have found, however, that using these agency letters as models of legal correspondence actually deters thoughtless replication because it helps students focus on the underlying structure and process. If students rely only on a model of a more traditional client letter, they might be tempted to focus too heavily on the “surface features” of the document.

Another potential limitation stems from the nonbinding nature of the agency’s advice and the agency’s need to respond to requests for guidance that are sometimes vague or confusing. Consequently, the application of law to facts in these interpretive letters can seem cursory and equivocal. But this ostensible shortcoming may actually offer a valuable lesson that attorneys should never promise more than they can deliver. Although the EEOC letters state that they do not constitute official opinions of the EEOC, students can identify how the author also uses effective word choice and even occasional passive construction to convey the advisory but ultimately nonbinding nature of the advice, and that the advice is based on the facts the “client” related.

Some may also warn that students might be confused by these guidance documents without a more comprehensive introduction to administrative law. But I have found that students quickly understand the purpose and effect of these letters with only a brief explanation. Exposing students to this different kind of legal correspondence also hints at the vast array of writing that attorneys produce. Perhaps more important, students see how “real attorneys” respond to the concerns of “real clients” by using the same writing and organizational conventions they have been learning throughout the semester.

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9 Helene S. Shapo & Mary S. Lawrence, Surviving Sample Memos, 6 Perspectives: Teaching Legal Res. & Writing 90, 90 (1998).

10 See Laurel Carrie Oates, I Know That I Taught Them How to Do That, 7 Legal Writing 1, 7 (2001) (“Over and over again, researchers have found that transfer is more likely to occur when students have been presented with a number of different examples that have similar underlying structures and problem solutions but different surface features.”).