

## **Modality in L2 Legal Writing: A Functional Analysis**

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Although the genre of "legal memorandum" is an area of crucial importance for international students enrolled in graduate-level law degree programs in the U.S., few studies have been conducted to reveal how those advanced learners of English are coping with the challenge of drafting persuasive legal memoranda. As an attempt to narrow this gap, the present study offers an in-depth text analysis of modal expressions by six international students at a U.S. law school from a functional perspective as (epistemic) modality captures the most critical function of a legal memo, namely predicting the "probable" outcome of a legal case with careful examination of its strengths and weaknesses, as assessed against prior case judgments. The study draws on functional systemic linguistics as its conceptual framework and examines how those international students realize modality-related meanings through particular lexicogrammatical resources, including modal verbs.

Law is founded upon layers of coded sociocultural sediments of human experience and is as such fundamentally linguistic in nature. Indeed, many of the core legal concepts that prevail today are "deeply embedded in the fabric of language itself" (Gibbons, 1994, p. 3). Such concepts are linguistically codified in the forms of statutes, regulations, and precedents, while interpretations of various forms of law are subject to dynamic processes of construal within particular language and sociocultural contexts. If law is not a natural phenomenon but is "constructed, interpreted, and negotiated through language" (Candlin et al., 2002, p. 313), then it stands to reason that law does not "travel well" across national and cultural boundaries (Swales, 1982). This constitutive incommensurability, however, creates a perplexing predicament for second language (L2) learners who are studying the law of a different society with a different language and distinct sociocultural practices (cf. Badger, 2003; Bruce, 2002; Feak et al., 2000; Harris, 1992; Langton, 2002). In the context of American legal education for international students from outside the United States, this predicament takes on a particularly intriguing twist as most of those international law students who are enrolled in one-year master's programs called "LL.M (Master of Laws)" at U.S. law schools are already legal professionals in their own countries serving as judges, prosecutors, corporate lawyers, and so forth (Feak et al. 2000, p. 213). They would thus need to learn not only to "think like an American lawyer" but also to write and speak very differently in order to become bona fide apprentices of the U.S. legal community (Lee et al., 1999). While well-versed in the legal conventions of their native countries, such international students are still learners (albeit of an advanced kind) of English—the language through which the U.S. legal system is constituted, construed, and enacted—and they are thus confronted with a number of challenges in course assignments despite their legal expertise. Their difficulty may stem partly from their unfamiliarity with the common law system as opposed to the civil law system, but many of the challenges are linguistically oriented as they grapple with major text types of legal discourse, or genres, and learn how such genres are realized through particular lexicogrammatical resources.

Of primary importance to international LL.M. students, as well as to first-year law students

enrolled in three-year J.D. (Juris Doctor) programs, is the genre of legal memorandum (Minnis, 1994). A legal memorandum, or an office memorandum, is “a written explanation, based on research and analysis, of the drafter’s opinion regarding a legal problem,” usually drafted by a junior member of a law firm for a senior attorney to use in deciding whether to advise a client to bring a suit, or to decide the best manner of proceeding in a client’s case (Block, 1999, p. 166). Writing office memoranda is a type of assignment that comes very early on in a lawyer’s professional life in the United States, and acquiring skills to write an effective memorandum of law is thus crucial for his/her career development. Although a variety of textbooks on legal writing available in the market usually include a section on how to write office memoranda, most of those textbooks are intended for native speakers of English and have no special concern for L2 students of law. To make matters worse, even those few textbooks on legal English that are designed for L2 learners rarely integrate legal content with the language that carries it (Candlin et al., 2002, p 302). Moreover, not many international law students are fortunate enough to have at their schools an ESL program or course tailored to their specific needs that go well beyond general academic writing skills. An obvious corollary of this gap is that such students are often left to their own devices to figure out how particular lexicogrammatical resources of English are recruited to realize certain nuanced meanings in specific genres of U.S. legal discourse, including office memorandum. And it is widely recognized in the second language education literature that modal expressions (i.e., expressions of certainty, doubt, obligation, and permission) are one of the persistent areas of grammar that remains problematic for even advanced learners of English (Allison, 1995; Crompton, 1997; Hyland, 1994; Hyland and Milton, 1997; Langton, 2002; Nielsen & Wichmann, 1994). Given the presumed importance of expressing appropriate levels of confidence in one’s predictions and extrapolations about a client’s case, it is hardly surprising to see how epistemic modality can be a central linguistic concern in drafting an effective office memorandum. It would be useful, then, to investigate how modality is linguistically encoded in legal memoranda. This paper is a preliminary attempt to describe and analyze how such meanings of modality are realized in legal memoranda, one of the major genres in legal discourse, through a qualitative textual analysis of modal expressions in office memoranda written by international law students at a U.S. university. The underlying conceptual framework within which the study will be situated is systemic functional grammar and its characterization of modality as a pivotal element of interpersonal meaning (Halliday & Matthiessen, 2004). The textual analysis is particularly inspired by Schleppegrell’s (2002, 2004) investigation of register features of writing in the disciplinary fields of science and history. In the next section, I will examine how legal memoranda can be defined as a genre, drawing on previous descriptions of the genre, and I will then briefly review how modality is construed in Halliday’s systemic functional grammar, before examining existing studies on modality within the narrower field of second language education. The substantial portion of the study will be presented in the following sections, where a more in-depth textual analysis of the same data, will be reported and discussed.

### **The Genre of Legal Memorandum**

No forms of discourse exist in a vacuum and “texts” are thus always situated in certain sociocultural contexts. One crucial aspect in which texts are “embedded in the situation” is that they serve some specific communicative purposes (Badger, 2003, p. 257). This understanding is fundamentally reflected in the definition of genre by Swales (1990, p. 58) as “a class of communicative events, the members of which share some set of communicative purposes,” and by Cope and Kalantzis (1993, p. 2) as “a category that describes the relation of the social purpose of text to language structure.” The knowledge of lexicogrammatical resources available in a particular language, and genre-specific structures of text realized through that language, are therefore

inseparable for members of discourse communities using that language.

Under this general recognition of the notion of genre, one legitimate question for the current study is: What relevance and significance would legal memoranda have within the “network” or “hierarchy” of genres (Swales, 2004, pp. 12-31) for U.S. legal education? There may be a number of plausible answers to this question but one cogent explanation is that the genre of legal memorandum has tremendous pedagogical utility, in addition to its centrality in the legal profession per se as seen earlier: “Because it engages all the skills required in the other literacy tasks, as well as several additional skills, the task of composing a legal memorandum can be considered the crux of the learning assignment in first-year law” (Minnis, 1994, p. 349). Although Minnis is referring to the pivotal role of legal memoranda from the perspective of regular (L1) American legal education, this observation seems to resonate quite deeply with the concerns of LL.M. programs designed for international students as well. Furthermore, there is no question that the genre of legal memorandum interacts dynamically with other major genres that (international) law students encounter in their curriculum. Indeed, an array of important discourse studies have been conducted in the English for Academic Legal Purposes community, or EALP (Harris, 1992), with wide-ranging focuses (e.g., Bhatia, 1994, on legislative provisions; Feak et al, 2000, on legal research papers; Bruce, 2002, on legal problem answer writing; Bowles, 1995, and Badger, 2003, on newspaper law reports, etc.). As is pointed out by Abbuhl (2005), however, very few comprehensive textual analyses of legal memoranda have been carried out, and the functional aspects of office memos as a genre have not been sufficiently investigated, despite the extensive coverage of formal features of a legal memorandum in many textbooks on legal writing (e.g., Block, 1999; Neumann, 2001). It is worth exploring, then, how a typical legal memorandum is structured to serve particular functions.

A legal memorandum is a comprehensive report commissioned by and addressed to a senior partner in a law firm with the express purpose of explaining the possible legal implications of a factual situation described by a client of the firm who has sought expert advice about that situation (Minnis, 1994). It is usually written by a junior member of the firm for internal use (hence also known as an “office memorandum”) and, therefore, all strengths and weaknesses of the client’s case must be explored “objectively” so that the drafter can make an intelligent and informed prediction as to the success of the case (Block, 1999, p. 166). An office memorandum might be read many times over a period of months or years by several different attorneys, including the drafter, as a basic frame of reference for formulating advice for that particular client (Neumann, 2001, p. 69). Although the formal structure of a memorandum can vary from one law firm to another, the most basic elements should include (Smith, 1997): (1) heading, (2) statement of facts, (3) questions presented, (4) brief answers, (5) discussion, and (6) conclusion. Furthermore, the analysis contained in a legal memo includes: 1) the specification of determinative facts of the client’s situation, 2) identification and interpretation of determinative facts of the client’s situation, 3) identification and interpretation of the relevant rule of law, 4) application through induction, deduction, synthesis, and analogy of the rule of law to the facts of the client’s legal problem; and 5) a conclusion, based on the analysis, as to the predicted outcome of the case (Smith, 1997, pp. 147-148). The drafter of a memo thus needs to incorporate all of these elements into a concise yet comprehensive report. A particularly crucial aspect of drafting a legal memorandum is to use analogy to reason about the similarities and differences between the facts of the client’s case and the facts of prior cases in order to reach persuasive legal conclusions supported by appropriate authority. A legal memorandum is thus inherently of a predictive nature, and the writer must gauge the conceptual distance between the relevant case(s) and decide whether the client’s situation falls within the scope of the rules applied to those prior case(s). This is essentially an interpretive or hermeneutic science of projection that requires very subtle assessments of certainty and probability, which is exactly the province of epistemic modality. In the next section, I will briefly examine how the notion of modality is understood within the

framework of Halliday's systemic functional grammar, and review some of the prior studies of modality in the field of second language education, including legal writing by L2 learners.

## Modality and L2 Learners from Functional Perspectives

### *Modality as Interpersonal Meaning*

In the framework of systemic functional linguistics founded by Halliday, language is seen as "a social process that contributes to the realization of different social contexts" through three contextual dimensions of *field* (what is talked about), *tenor* (the relationship between speaker/hearer), and *mode* (expectations for how particular text types should be organized) (Schleppegrell, 2004, p. 46). The three contextual variables of field, tenor, and mode are thus realized through *ideational*, *interpersonal*, and *textual* resources and choices of language, respectively. Modality belongs to the interpersonal metafunction that essentially regards clauses and other linguistic units as "exchanges" of propositions and proposals, whereby a proposition involves an exchange of information and a proposal involves an exchange of "goods-and-services" (Halliday & Matthiessen, 2004, p. 146-147). When we exchange information as a proposition, we are essentially arguing whether something IS (affirmative) or IS NOT (negative), but in between these two extremes are also intermediate positions that can be realized through what systemic linguists call "modalization", which is one half of the overall concept of modality (Eggs, 1994, pp. 178-179). Modalization is, in other words, a linguistic "resource for presenting propositions noncategorically" (Schleppegrell, 2004, p. 60), enabling the expression of degrees of probability and usuality. Likewise, modality can also be recruited to argue about the obligation or inclination of proposals (Eggs, 1994, p. 179). Modality options in short "construe the area of meaning that lies between yes and no – the intermediate ground between positive and negative polarity" (Hasan & Perrett, 1994, p. 209).

Modalization thus enables the expression of the speaker's noncategorical attitude toward propositions through such lexicogrammatical resources as modal verbs (*can/could, may/might, shall/should, must, etc.*), adjectives (*possible, certain, probable, inevitable, etc.*), adverbs (*probably, likely, perhaps, rarely, etc.*), nouns (*likelihood, possibility, probability, etc.*), and other devices (*in my opinion, in all likelihood, it seems that..., etc.*). Modulation can likewise be realized to express the speaker's sense of obligation or inclination toward proposals through a wide range of linguistic resources, including modal verbs (*must, should, ought to, etc.*), adjectives (*compulsory, mandatory, willing, etc.*), adverbs (*necessarily, willingly, etc.*), and other forms (*be required to, be inclined to, etc.*). Although Halliday and Matthiessen (2004) do not describe in detail the distinction, these two layers of modality can be further subcategorized into four complex dimensions of meaning with respect to what they call "modal responsibility" along the axes of "subjective-objective" and "explicit-implicit" (See Table 1 below for an overview of these different dimensions of modality). In choosing "modulated" obligation, for instance, there exists a choice in the orientation of the speaker's message between subjective and objective: In clauses "you must wait" and "I insist (that) you wait", the orientation is *subjective*, i.e., the speaker is construed as the source of the judgment (Hasan & Perrett, 1994, p. 214). This orientation is indicated *implicitly* in the former example with no linguistic coding of the speaker, while it is expressed *explicitly* in the latter example with the use of the first person pronoun "I". The speaker, on the other hand, can choose to give the judgment of obligation an appearance of being imposed from outside (i.e., "objective") as well, by using such expressions as "it is necessary for you to wait" and "you are required to wait" (ibid). Likewise, these four dimensions of modality (i.e., implicitly subjective, implicitly objective, explicitly subjective, and explicitly objective) can be realized in the realm of modalization as well, as is shown in a more

comprehensive illustration of lexicogrammatical resources used to realize meanings of modality in Table 1 below (see also Schleppegrell, 2004, p. 100, for a more detailed explanation about these four dimensions of modalization). It should be noted here that these different meanings of modality can be realized either congruently or metaphorically just as other facets of meaning (such as a “process” being realized as a noun, not as a verb). When one wants to make the source of “modal responsibility” explicitly subjective, for instance, forms such as *I think* and *I suppose* can be employed metaphorically to convey one’s attitude toward the proposition in the subordinate clause. These forms are metaphorical because a modality that would usually be realized either as a finite modal operator or as an adjunct (i.e., “congruent” realizations) in fact gets realized as a clause (Eggins, 1994, p. 181). One can also go to the other end of the subjective-objective spectrum and indicate one’s degree of commitment to a proposition as if it were something explicitly objective by using such forms as *it is possible that* and *it is inevitable that*. These “metaphors of modality”, particularly those of an objective kind, could have an important role in legal writing because opinions and assessment about legal issues sometimes need to be presented in a very “objective” manner in order to signal an appropriate level of authority. As will be observed in the textual analysis portion of the current study later, a number of such interpersonal metaphors are used in legal memoranda written by L2 learners of English, with varying degrees of appropriateness, along with more congruent realizations of modalization and modulation through modal verbs and modal adjuncts.

### ***Modality in L2 Writing***

In the literature of second language writing, the notion of epistemic modality (or modalization in systemic functional linguistics) is generally taken to refer to two types of linguistic signals, i.e., hedges and boosters, which express the degree of the author’s commitment to a particular proposition (Abbuhl, 2005, p. 90). Hedges mark the writer’s reluctance to present propositional information categorically (Hyland, 2004, p. 139) and, within the systemic framework, can thus be categorized as modalized expressions with “low” values (i.e., low degrees of probability or usuality). Boosters, on the other hand, express certainty and emphasize the force of proposition rather than mitigating it (ibid), and thus can be regarded as “high”-valued modalized expressions in the systemic paradigm. One common thread weaving through studies of second language writing in this area of meaning is the recognition that L2 writers, even those at an advanced level of proficiency, often find it difficult to master appropriate uses of hedges and boosters in academic writing, due largely to their polypragmatic complexity of meanings (Alison, 1995; Hyland & Milton, 1997; Crompton, 1997; Langton, 2002; Hinkel, 2003). Emerging from these studies is one consistent finding that nonnative writers of English tend to resort to more direct and unqualified statements than do their native-speaking counterparts. In Hinkel’s (2003) comparative study of academic essays by native and nonnative writers of English, for instance, the frequency rates of amplifiers and emphatic adverbs, both of which are very common in informal conversations, turned out to be markedly higher in L2 essays, resulting in a colloquial and overstated tone in NNS academic argumentation and expository prose. Studies on Chinese second language learners’ competence in expressing certainty and doubt also show that they use stronger modals, more unqualified expressions, and a more direct, authoritative tone than native speakers (Hyland & Milton 1997; Skelton, 1997, cited in Langton, 2002). They also tend to restrict modalized expressions to modal verbs and adverbs (Hyland & Milton, 1997). This line of findings indicates that more experienced writers tend to produce more “hedged” writing (Abbuhl, 2005, p. 93).

Using these hedges and boosters, as well as other lexicogrammatical resources available in English to realize modalized meanings, is crucial for international students studying law in the

United States as well, and particularly for success in writing effective legal memoranda. As was observed above, writing a legal memorandum calls for making predictions about the most likely outcome of a client's case based on careful research and analysis of the situation presented. It is therefore vitally important that the writer of such a memo present his or her claims to the intended reader (most likely a senior attorney) with appropriate levels of confidence and caution (Abbuhl, 2005, p. 91), while anticipating possible counterarguments from the opposing side for preemptive rebuttals (Smith, 1997; Block, 1999; Neumann, 2001). There are a limited number of studies of modality in legal discourse. Nielsen and Wichmann (1994), in their comparative analysis of expressions of obligation in legal documents in English and German, noted that one modal verb, *shall*, was used remarkably more frequently than the others in the genre of contracts, pointing to the restricted use of *shall* with third person subjects to express legal requirements. Langton (2002), through a three-stage analysis of the range and frequency of expressions of certainty and doubt by Hong Kong law students in answering a legal question, found their tendency to use a limited variety of epistemic modal verbs and other inappropriate expressions of certainty, without effectively employing pragmatic, discursual, and nonlexical epistemic hedging devices and strategies. To my knowledge, however, no in-depth analysis of actual uses of these modal expressions in the specific genre of legal memorandum has been conducted, either in L1 or L2 contexts. The text analysis presented below is intended to narrow this gap.

### **Rationale and Data**

The present study focuses on uses of modal expressions in legal memoranda drafted by a total of six advanced learners of English, who were drawn from two classes of international law students studying full-time in the LL.M. program at Georgetown Law School. One of the two courses, United States Legal Discourse (USLD), taught by a law professor, is designed to familiarize international students (n = 120) with the conventions of American legal discourse, while the English for Lawyers (EL) class (n = 15), taught by a linguistics professor, is an optional, non-credit course shadowing USLD to give self-selected students from the USLD course extra instruction and feedback on their writing primarily from linguistic perspectives. As part of their assignments for the USLD class, all students were required to write two drafts of an intra-office legal memorandum concerning a legal case that revolves around a plan by a cash-strapped fictitious country called Urbania to restructure its long-term bonds through a controversial bond exchange scheme, in order to avert the worst-case scenario of defaulting on the debt. The students were expected to weigh strengths and weaknesses of the case presented by the client, the Urbanian government, and put together a memorandum based on case law research with proper case citations. For this study, six students were selected to represent three levels of proficiency (as measured by their ranks in analytical writing scores under a systematic rubric).

As was described in Section 2, the primary purpose of a legal memorandum is to predict the outcome of a client's case based on the facts of the case and relevant rules of law as applied in comparable prior cases. Once pertinent legal issues (or "Questions") are identified and presented, which pose challenges of their own, the memorandum writer needs to analyze the given situation and draw a conclusion as to how a court with a jurisdiction over the case would decide. One basic formula, or a rule of law, for such legal extrapolations would be: "If A (facts) under B (assumptions/conditions), then C (conclusion)". If it were a law of physics, the answer would be a clear-cut "yes" or "no", but a legal question of this sort calls for an answer that falls somewhere in between, i.e., in the realm of modality, since both A (facts) and B (assumptions/conditions) would be open to interpretation. It is not difficult to see, then, how lexical and grammatical resources that construe modalized meanings of probability and usuality have a crucial "function" to play in a legal memorandum, particularly in the all-important Discussion section. The basic

analytical framework in this study draws upon the functional analyses of academic texts in the disciplines of science and history conducted in Schleppegrell (2002, 2004). The textual analysis is thus aimed at elucidating how writers at different levels of proficiency might differ in recruiting certain lexicogrammatical resources in drafting legal memoranda. It is expected that the drafts by the high-ranked (“High”) writers would exhibit some shared features distinct from those among the drafts by the low- and medium-ranked writers (“Low” and “Mid”). In the following analysis, the selected six students' identities are indicated with abbreviations such as "Low 1" and "High 2."

## Analysis and Discussion

### *Expressing Appropriate Levels of Propositional Commitment*

In making a prediction about the legal outcome of a case and presenting it in the form of a memorandum, the writer is expected to maintain an impersonal stance for “reasoned” presentation that “reflects a value that is placed on arguments that are supported by evidence and presented objectively”, as is the case with academic expository writing (Schleppegrell, 2004, p. 61). Inappropriately high degrees of certainty or confidence (i.e., insufficient “hedging”) regarding the predictions made would cast the writer in a negative light that detracts from the authoritative stance that needs to be projected in a legal memorandum (cf., Hyland & Milton, 1997; Allison, 1995). In the excerpts that follow, low- and medium-ranked writers seem to be exhibiting an infelicitous level of commitment to propositions with the use of high-value modality devices. (Note: All examples are cited directly from the student drafts with no grammatical or typographical corrections.)

(1) The **general** rule in this question is that “*creditors should not rely on a vague sense of implicit intercreditor duties when they enter into multiple lender transactions*”. In other words in **really extraordinary** situation **will** the court interfere with the explicit language of the debt indenture referring to the implicit obligation of the majority to act in the interests of minority. And **it is obvious that** there no such circumstances are presented in Urbania case.

(Mid 1, p. 7, emphasis added)

Here, the writer refers to a “general rule” that applies to multiple lender transactions. Aside from the grammatically anomalous structure of the clause that follows, the use of *will* (a medium-value modal verb in the systemic functional framework) in that (second) clause, combined with the adjectival phrase *really extraordinary*, seems to be dissonant with the delicately measured sense of usuality expressed by *general*. While the writer is referring in essence to the possibility of an exception (“really extraordinary”) to the general rule, a debatable issue in itself, the “unhedged” stance taken with the use of *will* gives the impression that the writer is begging the very question that needs to be answered (i.e., How likely is it that the court would see the need to go beyond the explicit language of the debenture?), without showing enough heed to possible alternative scenarios. Furthermore, *it is obvious that* in the third sentence, as well as the use of the categorically negative determiner *no* in the subordinate clause, indicates that the writer’s assessment of the situation is not sufficiently reasoned against possible counterevidence. Likewise, in the following examples the degree of confidence expressed with a variety of modal expressions seems to be stronger than is warranted by the evidence presented.

(2) It is **certain** from case law that majority doesn’t have the right to impair minority’s and minority bondholders may bring an action of declaratory and injunctive relief seeking to

prevent the Urbanese government from issuing new bonds by amending indenture. (Low 1, p. 2)

(3) This is so **evident** in this case that having not addressed and mitigated such risk in the indenture bondholders accepted it. (Mid 1, p. 5)

(4) And it is **obvious** that there no such circumstances are presented in Urbania case. (Mid 1, p. 7)

(5) In any multi-creditor debt instrument, such as a bond or syndicated loan that permits amendments to nonpayment terms with the consent of less than all of the creditors, it is the possibility that the required majority will in fact use that power to make such amendments provided the provisions don't prohibit them to do so. In this Urbania Case, the majority bond holders which constitute 78% of the total indebtedness under the current bonds are eligible to make such exit amendment. Thus, there is thus **nothing illegal, unusual, unsavory, or ungentlemanly** in a majority using its contractual amendment power in a multi-creditor debt instrument to protect its own interests. (Mid 2, p. 11)

In (5), for instance, the claim that there is “nothing illegal, unusual, unsavory, or ungentlemanly” about majority creditors’ protective use of contractual amendment power in a multi-creditor instrument does not appear to be backed by legal evidence, at least not to the extent to which such bold statements would be licensed. And even if the practice in question turns out to be legal, it does not preclude the possibility of it being at the same time “unusual”, “unsavory”, or “ungentlemanly”. Moreover, it is not clear at all why the majority bondholders in the Urbania case are “eligible” to enforce the proposed exit amendment in the first place because it is an open question whether the amendment entails a change in payment terms or not. This tendency of the lower-ranked writers to use stronger modal expressions and less qualified statements is consistent with the findings of Hyland and Milton (1997).

Another problem that some of the lower-ranked writers seemed to have in expressing epistemic modality in the kind of deductive reasoning typical in legal memoranda was that they sometimes failed to modalize propositions altogether when more hedged statements were in order, thereby presenting derived inferences as presupposed “facts.”

(6) Urbanese might have breached the implied covenant of good faith under New York law because it **did violate** the reasonable expectations of bondholders who did not want bond exchange while Urbanese might have other measure to pay its debt due. (Low 1, p. 11)

(7) Meanwhile, the Majority bond holders **don't violate** an implied duty of good faith and fair dealing forward the minority holders. (Mid 2, p. 2)

In (6) and (7), the act of violating certain expectations or duties is presented as factual without modalization, where the question of whether there was such a violation needs to be addressed. By contrast, the higher-ranked writers tended to use modal expressions, where appropriate, to qualify their commitment to the propositions presented.

(8) Since the elimination of the tax gross-up clause will reduce the amount that the minority bondholders will receive as the interest on the 2005 Bonds, Urbania **will be likely to** violate the express contractual obligation of the 2005 Bonds. (High 1, p. 2)

In (8), the “High 1” writer is avoiding a categorical statement with the use of the modal adjective

*likely* to reflect his/her awareness that the outcome is still subject to some contingencies. The hedged stance exhibited by the higher-ranked writers is consonant with the high value placed on reasoned and persuasive argumentation in the genre of legal memorandum (Smith, 1998; Neumann, 2001; Block, 1999). Moreover, appropriately modalized statements contribute crucially to “the development of the writer-reader relationship, addressing the need for deference and cooperation in gaining reader ratification of claims” (Hyland, 1995, p. 3), while categorical statements “indicate that the arguments need no feedback and relegate the reader to a passive role” (ibid). This point is especially germane to the genre of legal memorandum because the typical reader of a legal memo is a senior attorney who generally possesses a much greater amount of knowledge about law than the junior attorney who drafted the memo. The assumption here is that, although the senior attorney does not know the case itself in any detail at the time of an initial reading, he or she should have an analytical and critical mind that foresees potential counterarguments.

### ***Subjective and Objective Manifestations of Modality***

As was briefly outlined in 3.1, modalization and modulation realized through modal verbs are inherently “subjective” in their orientation because it is ultimately the speaker who is “responsible” for the assessment of probability, usuality, obligation, and inclination (Halliday & Matthiessen, 2004; Eggins, 1994; Martin et al., 1997). This subjectivity is manifested “implicitly” in modal verbs, as the role of the speaker/writer in such modal verb-mediated propositional judgment is left linguistically implicit, with no corresponding surface form realized to encode such an aspect of the speaker. Given the complexity of skills required to write an effective legal memorandum, however, objective manifestations of modality through other lexicogrammatical resources are also essential for maintaining a genre-appropriate authoritative tone in presenting assessments of legal probability and necessity. In this regard, the higher-ranked writers seem to have a richer repertoire of “implicitly objective” modal expressions in their drafts.

(9) Under New York law, **it is generally accepted** that a debenture holder may be owed a fiduciary duty by the issuing corporation once the corporation is insolvent. (High 1, p. 10)

One very common resource for realizing the modality of probability and usuality in an implicitly objective way is the use of adverbs, or modal adjuncts, as is shown with *generally* in (9). This is considered a “congruent” (thus “unmarked”) realization of modality in systemic functional linguistics and is pervasive in evaluative texts (Halliday & Matthiessen, 2004; Eggins, 1994). Although lower-ranked writers also make use of this resource, it appears that they tend to rely more heavily on modal verbs (i.e., implicitly “subjective” modal expressions) than the higher-ranked writers, as is suggested by the greater frequencies of *can*, *could*, *might* in their drafts. This seems to confirm Schleppegrell’s (2004) observation that weaker writers tend to rely on the subjective options for expressing modality (p. 101). In addition to these prototypical manifestations with the use of modal verbs and adverbs, modality can also be realized “objectively” through other lexicogrammatical resources, such as adjectives, and prepositional phrases, as are exemplified in the following cases.

(10) Urbania may contend that since there is no bankruptcy proceeding for a sovereign debtor like Urbania, it will never become insolvent. However, such a contention is **not likely to** succeed for the following reasons. (High 1, p. 10)

(11) Similarly, in sovereign bond issues, sovereign debtors, underwriters, trustees or

institutional investors are **typically** represented by sophisticated law firms and terms and conditions of sovereign bonds are thoroughly negotiated like corporate bond agreements. Therefore, the holding of the New Bank of New England case **seems to be applicable** to our case and the Minority Bondholders are **unlikely to** violate an implied contractual obligation to the minority bondholders. (High 1, p. 13)

(12) The bonds will become due on January 1, 2005 and the Urbanian government **is certain** that it will not **be able to** meet that due date as the country is undergoing an economic recession. (High2, p. 4)

This objective orientation of modal presentation enables an authoritative construal of propositions and proposals by pushing the role of individual writers to the background, whereby the “modal responsibility” for each evaluative comment ceases to be individuated (Schleppegrell, 2004, p. 123). This projection of a less individuated source of modal responsibility is crucial for the genre of legal memorandum because arguments developed and presented by a junior attorney in a legal memo are assumed to derive their validity not from the intellect of the individual writer but from an objectively verifiable body of evidence in the forms of statutes and prior court judgments. In other words, the intended audience (i.e., senior attorneys) is not looking for the “opinion” of the individual writer but rather predictive argumentation based on the facts of the case. While this is evidently a more sophisticated skill than the congruent use of modal verbs, it does not necessarily mean that weaker writers are lacking such linguistic devices. To be sure, the lower-ranked writers in the present study did produce many instances of such objective modalization and modulation. However, it does appear that they tend to have a smaller repertoire of objective modal expressions, according to the rough counts of objective linguistic manifestations of modality. Furthermore, it deserves mention that, as can be observed in the examples above, these objective (and congruent) realizations of modalized and modulated meanings can be combined with a variety of subjective modal manifestations in intricate ways to reflect subtly nuanced interpretations of modality.

### *Metaphors of Modality*

In addition to the pervasive “congruent” (i.e. unmarked) manifestations of modality through modal verbs, adverbs, and other lexical and grammatical resources described above, modality can be realized “metaphorically” as well, where a particular modal meaning that would usually (i.e., congruently) be realized either as a finite modal operator or as a modal adjunct gets realized as a clause (Eggins, 1994, p. 181). Observe the following examples:

(13) Under New York law, **it is** generally **accepted that** a debenture holder may be owed a fiduciary duty by the issuing corporation once the corporation is insolvent. (High 1, p. 10)

(14) **It is unlikely that** the Majority Bondholders Violate an Implied Contractual Obligation. (High 1, p. 12, subtitle)

(15) If nonetheless that was possible, if a complying party had the possibility of being considered in breach despite its observance of the terms of the contract, **it is likely that** said party would be held liable for the irresponsible or careless negotiation and execution of the agreement done by its counter party that was aware of the amendment clause since it had negotiated it and signed it. (High 2, p. 11)

In each of the examples above, what would usually be realized as a modal constituent of a clause

emerges as a clause of its own “masquerading as an adjunct” (Eggins, 1994, p. 181) and hence enabling a grammatically metaphorical extension of a typically subjectively modalized proposition. The “it is ... that” pseudo-clause structure thus allows the writer/speaker to “hide behind an ostensibly objective formulation” (Eggins, 1994, p. 182). Therefore, this metaphorical objectification of modality serves as a device enabling speakers/writers to distance themselves from stated propositions by representing the relevant evidence for such propositions as a projection by someone other than the speakers/writers themselves (Halliday & Matthiessen, 2004, p. 630). Although some legal experts eschew sentences beginning with a “dummy” *it* in favor of projecting the source of modal responsibility more explicitly (Smith, 1997), the usefulness of the metaphorical objectification device in the form of *it is ... that* cannot be underrated in the genre of legal memo, where objective, measured presentation of evidence is highly valued for cogent legal argumentation. Modalization realized through this grammatical metaphor of modality contributes to an objective construal of a proposition by suppressing agency, a phenomenon often observed in academic registers of schooling as well (Schleppegrell, 2004, p. 123).

The metaphorical extension of modal meanings can also take an opposite direction, toward the subjective end of the modality orientation, where (a facet of) the writer is made linguistically explicit with the first person personal pronouns *I* and *we* placed in the subject position as the agent of mental processes, as in *I think that...*, *I reckon that...*, *we believe that...*, *we suspect that...*, etc. These clausal adjuncts have the effect of foregrounding the “ownership” or “source” of the expressed modalization through the pronoun *I* or *we* (Eggins, 1994, p. 182). In other words, these expressions put the writer cognitively “onstage” (Langacker, 1991), thereby accentuating the subjective perspective of the writer toward the proposition presented. As with explicitly objective metaphors of modality, this type of modal manifestation is metaphorical because modality is represented there as a proposition in its own right, rather than as an adjunct to a proposition (Halliday & Matthiessen, 2004, p. 624). It should be noted here that such explicitly subjective expressions of modality are problematic in legal memoranda as they attribute the source of legal assessment explicitly to the writer, resulting in a highly subjective and individuated stance that clashes with the kind of measured propositional commitment generally valued in the genre. In the present data, the high-rated drafts contained only one instance of explicitly subjective modalization with the first-person pronoun *we* in the subject position to represent the agent of a mental processes (*we understand that* in High 2’s draft), while the drafts by the lower-ranked writers included several instances (e.g., *we note that ...*, *we are of the opinion that ...*, *we hold that ...*, *we find that ...*, *we take the opinion that ...*, *we may conclude that ...*, and *we concluded that...*). Although the use of the pronoun *we* instead of *I* does render the source of modal responsibility less individuated, these constructions are still in conflict with the genre-appropriate expectation for greater objectivity in typical presentations of legal assessment. The greater frequency of first-person pronouns in the lower-rated drafts also seems to point to the weaker writers’ tendency for informal, dialogic representations of propositions that may detract from the authoritative interpersonal stance expected in legal memoranda. Such “interactional choices” (Schleppegrell, 2004, p. 102) are generally avoided in legal memoranda (Smith, 1997; Neumann, 2001) to maintain the authoritative tone of the arguments presented.

### ***Alternative Perspectives and (Meta)awareness of Audience through Modality***

In addition to indicating the appropriate extent of conviction in the truth of propositions through modalization, the writer of an office memorandum needs to “convey a suitable degree of deference and modesty” to the intended audience (Hyland & Milton, 1997, p. 183; also see Langton, 2002, p. 16) in order to maintain a persuasive interpersonal tone. While this awareness of the intended audience on the part of the memo author can be signaled through a wide range of lexicogrammatical devices, modal expressions seem to be one of the major resources that

participate in that aspect of interpersonal meaning.

One salient pattern that emerges in the higher-rated in their display of sensitivity to reader expectations is the use of concessive constructions containing adversative conjunctions such as *although* and *however*. What is interesting with such constructions from the viewpoint of the present study is that they often recruit epistemic modals, most notably *may* and *might*, to help build up the reader's expectations for some countervailing arguments or counter-analyses, although other resources do participate as well. Examples abound:

(16) The minority bondholder **may argue** that the Katz case cannot be applied to our case because the debtor in the Katz case was a corporation while Urbania is a sovereign debtor. **However**, the relationship between a debtor and bondholders are the same in a sense that in both cases, agreements between debtors and bondholders are thoroughly negotiated and massively documented. (High 1, p. 9)

(17) Urbania **may contend** that since there is no bankruptcy proceeding for a sovereign debtor like Urbania, it will never become insolvent. **However**, such a contention is not likely to succeed for the following reasons. (High 1, p. 10)

(18) The minority bondholders **may counter-argue** that the facts of the New Bank of New England case are not the same as our case in that our case is related to the relationship between bondholders while the holding of the New Bank of New England case is based upon the relationship among syndicated lenders. In general, it cannot be arguable that syndicated lenders are more sophisticated than individual bondholders and even unsophisticated individual bondholders **may** exist. **However**, the bond agreement among the issuer, the underwriters, trustees, sometimes ultimate investors, are typically thoroughly negotiated and massively documented. (High 1, p. 13)

(19) That is to say, a court will not imply any right or obligation other than the one to which the parties have agreed, if at the time in which the contract was negotiated and drafted, the contingency at issue could have been foreseen and expressly regulated (*Reiss v. Financial Performance Corp.* 97 N.Y. 2d 195 (N.Y. 2001)).

**However**, the implied covenant of good faith **may** be supposed and enforced if at any time any one party's actions have deprived the other party from the benefits of the contract. (High 2, pp. 8-9)

What these constructions accomplish is to show that the writer recognizes the existence of different viewpoints and is addressing them as anticipated counterarguments (Varghese & Abraham, 1998, p. 299), thereby exhibiting due deference and respect for the intended audience's expertise in deductive legal reasoning. The cumulative effect of these instances of modalized concession is a more persuasive construal of the case at hand with all major potential strengths and weaknesses of the client's position accounted for. In this respect, legal writing is similar to academic writing, in which concessive clauses are more commonly found than in other types of prose and in which such clauses perform "the function of hedging devices to show the limitations of facts, evidence, or claims", as Hinkel (2003, p. 1062) pointed out by citing the analysis by Biber et al. (1999). Furthermore, although the lower-rated drafts also contained some instances of modalized concession, there was a stronger tendency in the higher-rated drafts to use such concessive constructions to indicate alternative perspectives and possible counteranalyses, as can be partially inferred from the difference between the two groups in their frequency counts of the adversative conjunctions *although*, *however*, and *but* (see Table B in Appendix 4). This meta-awareness of the audience's presumed awareness of alternative perspectives and arguments,

exhibited through concessive constructions, has important pedagogical implications for legal education, as it is "vital for students to grasp the need to concede any facts which seem to militate against their clients' case, as these will surely be raised by the opposition" (Bruce, 2002, p. 334). In this respect, a solid knowledge of modal expressions and the functions they serve in particular contexts would be an asset for international students in U.S. law schools and help them write persuasive legal memoranda.

### Concluding Remarks

In this genre-based study of modality in legal memoranda written by international law students, a functional textual analysis was carried out in an attempt to identify discernable patterns in the use of modal expressions in L2 legal writing within and between different levels of proficiency (more precisely, the lower and higher ends of advanced proficiency).

The present study was based on the fundamental assumption that "learning to write legal discourse is part of a process of learning to participate in the affairs of the legal community and its disciplinary culture" (Candlin et al., 2002, p. 309). Therefore, it is "not enough to be able to construct legal sentences as part of the mastery of some specialist genres, but also to be aware of the place of such genres in the disciplinary community" (ibid). This meta-awareness of legal genres is crucial for the development of a more coherent curriculum of legal education for international students in U.S. law programs because students would need to know how the skills required to be effective writers in the particular genre of legal memorandum interact dynamically with other privileged genres of legal discourse in order for them to attain the ultimate goal of gaining full membership (or recognition/respect) in the U.S. legal community. The current study was intended as a small contribution to that lofty endeavor. In this context, the study also points to the possibility of treating the knowledge of international law students about the conventions of legal writing in their own countries as important resources for U.S. law schools as well, particularly in building a knowledge base for analyzing how lawyers from different cultures might behave differently from American attorneys in international legislative settings.

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