# 法律文书写作

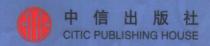
步骤·分析·组织

[美] 琳达·霍尔德曼·爱德华兹 (Linda Holdeman Edwards) /著

第三版

# LEGAL WRITING

Process, Analysis, and Organization



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Process, Analysis,

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中 信 出 版 社 CITIC PUBLISHING HOUSE

#### 图书在版编目(CIP)数据

法律文书写作:步骤·分析·组织(法律研究与文书写作影印系列)/(美)爱德华兹著.影印本.—北京:中信出版社,2003.7 书名原文: Legal Writing: Process, Analysis and Organization ISBN 7-80073-790-X

1. 法··· Ⅱ. 爱··· Ⅲ. 法律文书-写作-英文 Ⅳ. D916.13

中国版本图书馆CIP数据核字(2003)第047446号

This volume of Legal Writing: Process, Analysis and Organization, by Linda Holdeman Edwards, is an English Reprint Edition meant solely for publication in the country of China, published and sold by CITIC PUBLISHING HOUSE, by permission of ASPEN PUBLISHERS, INC., New York, New York, U.S.A., the owner of all rights to publish and sell same.

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#### 法律文书写作: 步骤・分析・组织

FALÜ WENSHU XIEZUO BUZHOU FENXI ZUZHI

者: [美]琳达·霍尔德曼·爱德华兹

责任编辑:张 芳

责任监制:朱磊 王祖力

出版发行: 中信出版社(北京市朝阳区东外大街亮马河南路14号塔园外家外的大楼 邮编 100600)

经 销 者: 中信联合发行有限公司

承 印 者: 北京忠信诚胶印厂

本: 787mm×1092mm 1/16 印

张: 30 25 字 数: 605千字

版 次: 2003年7月第1版 印 **饮**: 2003年7月第1次印刷

京权图字: 01-2003-2653

书 号: ISBN 7-80073-790-X/D·70

定 价: 75.00元

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### 总 序

#### 吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:"为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。"

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等经济发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

伊曼纽尔法律精要(Emanuel Law Outlines)美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

案例与解析(Examples and Explanations)由美国最权威、最富有经验的教授所著,这套丛书历

经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。这次推出的是最新版本,在前几版的基础上精益求精,补充了最新的联邦规则,案例也是选用当今人们所密切关注的问题,有很强的时代感。该丛书强调法律在具体案件中的运用,避免了我国教育只灌输法律的理念与规定,而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度,可准确快捷地了解美国法律的精髓。精心选取的案例,详尽到位的解析,使读者读后对同一问题均有清晰的思路,透彻的理解,能举一反三,灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插,有助于理解与记忆。

案例教程系列(Casebook Series)覆盖了美国法学校院的主流课程,是学习美国法律的代表性图书,美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材,在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例,其中很多案例有重要历史意义。书中摘录案例的重点部分,包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点,而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料,对国内不具备查阅美国原始资料条件的读者来说,本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点,以法院判例作为教学内容,采用苏格拉底式的问答方法,在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识,而且要理解法律判决书。本套丛书结合案例设计的大量思考题,对提高学生理解概念、提高分析和解决问题的能力,非常有益。本书及时补充出版最新的案例和法规汇编,保持四年修订一次的惯例,增补最新案例和最新学术研究成果,保证教材与时代发展同步。本丛书还有配套的教师手册,方便教师备课。

案例举要(Casenote Legal Briefs)美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要,条理清晰,结构科学,便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外,中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源,法律规范机动灵活,随着时代的变迁而对不合时宜的法律规则进行及时改进,以反映最新的时代特征;美国的法律教育同样贯穿了美国法律灵活的特性,采用大量的案例教学,启发学生的逻辑思维,提高其应用法律原则的能力。

从历史上看,我国的法律体系更多地受大陆法系的影响,法律渊源主要是成文法。在法学教育上,与国外法学教科书注重现实问题研究,注重培养学生分析和解决问题的能力相比,我国基本上采用理论教学为主,而用案例教学来解析法理则显得薄弱,在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版,就是试图让法律工作者通过原汁原味的外版书的学习,开阔眼界,取长补短,提升自己的专业水平,培养学生操作法律实际动手能力,特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是,影印出版美国的法学教材,并不是要不加取舍地全盘接收,我们只是希望呈现给读者一部完整的著作,让读者去评判。"取其精华去其糟粕"是我们民族对待外来文化的原则, 我们相信读者的分辨能力。

是为序。

## **Preface**

Like prior editions, the third edition adopts a process-based approach rather than a document-based approach. The difference between a process-based approach and a document-based approach can be expressed using an analogy to cooking. Learning to write using a document-based approach is like learning to cook by reading a description of the finished dish: how it looks, how it tastes, how it smells. The description of the finished dish is important because the cook needs to understand her goal. But the description of the finished dish doesn't always tell her what she needs to do to get there.

Learning to write using a process-based approach is like learning to cook that same dish by reading the recipe. The recipe takes the novice cook through the stages of preparation ("chop the carrots into quarter-inch slices; sauté the onions in one tablespoon of butter"). Often, in those stages, the elements of the dish do not look, taste, and smell the way they will when the cooking process is completed ("cook over low heat, stirring constantly until thickened; then pour into the chicken stock mixture and simmer for one hour"). Those intermediate stages, however, are critical to achieving the end result.

Like a recipe, this book consciously tracks the stages in the writing process. Concepts are introduced at the points where they become relevant to a writer's process of creating and communicating content. The function of a rule structure in creating large-scale organization is still the starting point, and the second edition's expansions in the treatment of analogical reasoning and narrative are maintained. Here are the primary changes in the third edition:

Introduction: The first edition's section on appropriate style is back. This section explains the concept of selecting a level of formality with the reader in mind and points out the difference between the informal style of this book and the more formal style appropriate for briefs and some office memos.

Chapter 1: A new exercise in identifying forms of reasoning is added.

Chapters 2 and 3: The term "conjunctive test" is introduced to provide a name, and therefore an easier form of reference, for a test with mandatory elements. Similarly, the term "disjunctive test" provides a name for a test setting out alternatives. In both chapters, the exercises are slightly simplified and most are converted into prose formats rather than statutory formats.

Chapter 4: The question in Exercise 1 is clarified to eliminate any potential for confusion with cases the students may have read in one or more of their doctrinal courses.

Preface



- Chapter 7: A new section on policy-based reasoning is added.
- Chapter 8: A new section explaining formats for case comparisons is added.
- Chapter 9: A new section on formats for using cases to explain a rule is added.
- Chapter 14: The citation form chapter is revised to include both the ALWD Citation Manual and the seventeenth edition of the Bluebook.
- Chapter 19: The discussion of persuasive policy-based reasoning is significantly expanded.
  - Chapter 21: The discussion of developing a narrative theme is expanded.

Appendices B and C are revised.

Linda Holdeman Edwards

January 2002

## Acknowledgments

No book is the product of the author alone; certainly this one is not. All of my Mercer colleagues have encouraged and supported this book from its inception. Their belief in the importance of legal writing has made all the difference. Mercer legal writing faculty Susan Bay, Jim Hunt, Lenora Ledwon, Gus Lehouck, Adam Milani, Kathy Sampson, Kevin Shelley, Michael Smith, Greg Spicer, David Walter, and Stasia Williams have taught me much and have made the learning fun. Three deans, Phil Shelton, Dick Creswell, and Larry Dessem, have paved the way. Suzanne Cassidy, Sarah McPherson, Cary Gonzalez, Michelle Davis, Jane Burns, and Barbara Blackburn, have worked faithfully and without glory. Special thanks to Jack Sammons for bold ideas, to Hal Lewis and Reynold Kosek for wise counsel, and to Sidney Watson and Joe Claxton for their faith in the project.

Like all teachers of legal writing, I am blessed by being part of the national legal writing community. No list could identify all of the colleagues who have shared generously of their vision, enthusiasm, wisdom, and experience. I am especially indebted to Deirdre Alfred, Jan Armon, Mary Beth Beazley, Joel Cornwell, David Drueding, Alice Dueker, K.K. Duvivier, Neal Feigenson, Dennis Hynes, Steve Jamar, Katie McManus, Phil Meyer, Teresa Phelps, Terry Pollman, Leslie Reed, and the anonymous reviewers who made such perceptive comments on earlier drafts. Particular thanks to Mary Lawrence, Richard Neumann, and Marilyn Walter for their steadfast support of their legal writing colleagues, including me.

I gratefully acknowledge my debt to Emilie and Katie Edwards for their forbearance; to Cathi Reinfelder for redeeming the text from many errors; and to Carol McGeehan for nurturing and enlarging my vision of the book.

I would also like to thank the following copyright holder for permission to reprint the map of the federal judicial circuits:

2000 Winter Judicial Staff Directory 833 (CQ Press 2000). Copyright © 2000 by Congressional Quarterly, Inc. Phone: (202) 729-1817; URL: http://jsd.cq.com.

And finally, heartfelt thanks to Professor Anthony G. Amsterdam, whose example has inspired a generation of lawyers and law teachers.

## Introduction

Writing is a crucial lawyering skill—one that many lawyers find difficult. This book aims to give you a plan to help you master each writing task. It also aims to give you the most help in the shortest number of pages. It is a basic, no-frills instruction manual for developing and organizing your legal analysis, communicating that analysis to a law-trained reader, and persuading a judge that your analysis is correct.

Another goal of the book is to teach you how to teach yourself. Your legal writing teacher will be your coach as you begin your study, but your teacher won't be with you on your first summer clerkship or after you graduate. As you practice using the tools the text introduces you will become your own teacher, and your writing will get better and better each year of your legal practice.



## LEGAL WRITING AS A PROCESS

Legal writing is a process with distinct stages and distinct goals at each stage. Each writing stage serves an important function as you work toward a finished document. This text identifies four main stages of a writing task and invites you to use each stage as your writing tool. As the following paragraphs describe each stage, refer to the table of contents to identify the chapters that fall within each.

Your first job as a writer is working out your analysis of the issue, so the first two writing stages (Chapters 2 through 10) create a "working draft." Your primary purpose in writing a working draft is to use the writing process as an analytical tool. Dean and former Judge Donald Burnett put it this way:

Clear expression, then, is not merely a linguistic art. It is the testing ground for ideas. Through the discipline of putting an argument into words, we find out whether the argument is worth making. . . . The secret . . . is to start verbalizing early—while there is still time to learn from the discipline of forming ideas into words. You must begin by identifying your client's goal and the issues to be resolved. Each issue is defined by a cluster of facts and governing legal

principle. If you cannot articulate this nexus of law and fact, you do not yet have a grasp of the case.1

Your working draft is nothing less than "grasping the case." It guides, deepens, and tests your analysis in a number of ways, but its most important role is in forming your ideas into the kind of structured, linear reasoning that lawyers must master. Legal reasoning applies the relevant legal authorities and policy rationales to the client's facts. This kind of reasoning is not our culture's dominant mode of thought or expression. Many of us come to law school without much prior experience in this sort of reasoning. The discipline of the working draft will help you develop this vital lawyering skill.

After your analysis is solid, stage three converts that analysis into a document designed for your reader. The text first introduces the study of law-trained readers, a study you should pursue during your entire legal career. Then the text shows you how to select an organizational plan that will meet your reader's needs and achieve the document's goal. The third stage is completed by adding the other components of the document, including a statement of the relevant facts about your client's situation. In the fact statement you will use narrative techniques to tell your client's story. Effective and strategic narration requires skills different from the rule-based reasoning process you will be practicing when you write the legal analysis sections of your documents. The text will introduce you to the storytelling skills you'll need for good legal writing.

The final stage turns your attention to the fine points of writing, calling for decisions about style, tone, level of formality, and strategic word choice. It is also the stage for editing to achieve clarity, correct citation form, punctuation, and grammar. These matters may seem like technicalities compared to the importance of accurate analysis, but grammar, style, and citation form are the most easily visible criteria for judging writing. Readers will notice these areas first and draw from them conclusions about the skill and care of the writer. A sloppy document invites a reader to doubt the document's substantive accuracy.

The book takes you through each of these four stages, and it introduces in each stage the information you'll need for that stage. Here are several hints for using this writing process to its greatest advantage:

First, be alert for signs that you need to revisit earlier stages. While the completed document should take the reader on a linear journey toward the document's conclusion, you will find that the *process* of creating the document is far from linear. Rather, the process is recursive; it requires you to circle back to earlier stages again and again as you understand more about your legal issue, your client's facts and goals, and the available legal strategies. The dynamic nature of this process is what makes it alive, challenging, and fun. Your willingness to construct, dismantle, and reconstruct your document will be crucial to achieving a good written product.

Second, experiment with different writing strategies and observe your own writing process. What works well for you at each stage and what doesn't? Do

<sup>1.</sup> Donald L. Burnett, Jr., The Discipline of Clear Expression, 32 The Advocate 8 (June 1989).

you work better if you dictate a draft first? Does free-writing help you? How about charts or colored pens? Each writer's creative and analytical processes are unique. Part of your goal in your first few years of legal writing should be to observe as much as you can about your own process so you can adopt

writing strategies that work for you.

Third, be patient. On your first few writing assignments, take each stage in its turn without trying to combine or compress them. Your goal on these first assignments is to let each stage of the writing process *teach* you some critical skills. Soon you will have developed those skills well enough to speed up each stage. For instance, you may find that you can accomplish the goals of the working draft stage with some other quicker form of prewriting, like a detailed and annotated outline. You will learn to customize each stage to fit your own skill level, the complexity of the assignment, and your own unique creative processes.

Finally, master the general principles before you decide to try something new. Learning legal writing is a little like learning music theory. In college, music students take many courses in music theory and composition. In these courses, they first learn the "rules"—the principles most composers use in most situations. Then after they understand those principles, they learn when

and how to depart from them.

This is an introductory course on legal writing, so it teaches the basic substantive and organizational principles that operate in most situations. Following these organizational principles in your first legal writing assignments will teach you important information about law study and about legal writing. First master the basic substantive and organizational principles covered in this course. Soon you will develop the judgment to know when and how you can depart from them.



First, in keeping with this book's straightforward goals, the text is written in an informal style. It uses contractions, speaks in the second person, uses images and analogies freely, tells stories, and occasionally attempts some humor. This conversational style would be inappropriate for court documents and other formal legal writing. However, this book is not written for judges or senior partners. It is written for new law students who must read and digest complex new material described in unfamiliar terms. The book's informality is designed to make its material as accessible as possible at a time when accessibility is critical.

Second, the book uses both feminine and masculine forms for general reference. Again, the reason relates to the book's goals. The book is designed for new law students, most of whom are encountering the study of law for the first time. For centuries the legal world was entirely male. Our "default" image of a lawyer is of a man. Today's practice of avoiding gender references,



commendable as it is, does nothing to change that default image. It does nothing to remind us that lawyers come in both genders. It does nothing to welcome women to the study of law.

Because this book seeks to welcome both women and men to the study of law, it intentionally makes gender references. And to counteract the "default" image of a lawyer as male, it uses more feminine than masculine forms for general reference. Practitioner writing, however, has other goals. In practitioner writing, gender-neutral references are the appropriate choice. Chapter 15 explains this concept and provides techniques for implementing it.



### LAW STUDY AND IDENTITY

As you have just learned, the practice of law will require skill in linear reasoning, which values rational, analytical thought. However, law practice also requires narrative reasoning, which weaves facts into a story with a coherent theme. Narrative reasoning values creative, intuitive thought and recognizes emotional responses as well as cool logic. The best lawyers learn to integrate linear reasoning and narrative reasoning in order to harness the power of each.<sup>2</sup>

Because narrative reasoning is more dominant in our culture than linear reasoning, however, the traditional law school curriculum concentrates on linear reasoning to the seeming exclusion of narrative. And because thought process is so fundamental to identity, law school's emphasis on rule-based thinking can be disturbing. During the first year of law study, many law students wonder whether they are losing vital parts of themselves. It seems as if the ways they have always thought and reacted are not valued in the law and, indeed, that law study is requiring them to become different people.

If this sounds like your experience, do not be discouraged. Not only will these other parts of yourself survive law school, but they will be vital to practicing law. They will deepen your analysis and strengthen your persuasion. They will serve you in other important lawyering tasks too, such as counseling clients, working with witnesses and other third parties, presenting oral arguments to judges and juries, putting together business transactions, and resolving disputes outside the courtroom.

Perhaps this analogy will help: A tennis player needs both a good forehand and a good backhand. For most beginning players, the backhand stroke feels awkward and weak. It is hard to control and nearly impossible to accomplish with any real power. The stroke feels awkward because it requires a movement not common to the player's pre-tennis way of moving. The only solution is practice, especially concentrated backhand practice. A partner or coach hits to the player's backhand over and over. Surely a beginning player could begin

<sup>2.</sup> You will learn more about these forms of legal reasoning in Chapter 1.

to wonder whether tennis is the sport for her, especially if she had to hit almost entirely with her backhand for months and months.

Law school is a little like that tennis player's experience. Because its primary task is teaching the skills required for basic competence in legal analysis, much of what you do will focus on linear, rule-based thinking. If you have not already developed your skills in that mode, you sometimes may feel as if you are hitting backhand shots day in and day out. You may wonder whether the law is for you. Try to remember that real lawyering will require skill in both the linear and the narrative modes. That way you can practice the one without fear of losing the other.

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