# Diary of An American Lawyer

Principles and Exercises
for Understanding
How the American Legal System Really Works

Steven Riess

The logic & legal analysis normally follows a recognizable structure. Experienced lawyers and judges are intuitively familiar with this structure and expect legal documents to conform to it. Documents which do not follow it seem awkward, [illegible], and unreliable.

# 美国律师手记

## 律政新人必读

史蒂文·瑞斯 著　王文蔚 译

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美国律师手记
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# 读者指南

法律语言及历史传统与法律功能紧密相关。学习以非母语为载体的外国法律不仅可以强化外语水平，而且可以深层次地洞察译文所无法表达的内容。这样学习的意义很大程度取决于读者的外语水平，外语水平很高的读者将从阅读原版法律教材中受益匪浅。然而，许多读者因为外语能力欠佳，只好对法律教材囫囵吞枣，结果整个阅读过程变得冗长、耗时且令人灰心。如果能够对法律教材的内容有所了解，同时对外语又稍有研究，那么将有助于提高阅读原文的效率且减少上述的阅读困难。读者应该首先阅读一段译文，这样就可以加深对原文内容的理解，接着再阅读对应的原文，这并不是让读者一句对一句或者一页对一页的对照阅读原文和译文，而是先读一段译文，大概 20 到 30 页，然后继续阅读原文。如果读者先阅读译文，就会对原文的结构和内容形成一个综合且详细的认识，由于已奠定了理解法律原文的基础，所以能够更好地领会原文大意。另外，通过阅读译文可以更加准确地猜测原文中生词的意思，而无需中断阅读查字典。因此，对照阅读原文和译文可以带来很大收获。

本书专为对美国普通法制度感兴趣的中国读者而编写的，它不仅洞察了美国律师执业的现状，而且介绍了执业的原则。本书由三个部分组成，建议读者先阅读第一部分的中文译文，然后阅读对应的英文原文；第二部分可以采用同样的步骤；第三部分让读者运用前面介绍的技巧处理一个更加复杂的法律问题：埃克诉恩斯特一案，该案件的背景材料及其他的练习资料都收录于 DVD 光盘中，如有兴趣，可以直接向本书作者索取，同时书

后的附录部分也提供了 DVD 录像的中文译稿。

作者曾将本书作为德国多所法学院的教科书，以配合法律推理和写作课程的讲授。本书首次出版以《法律推理及写作：德国学生学习普通法原理和实务》命名，同时也被美国多所法学院成功地采纳和使用。

本书没有被逐字逐句地翻译，中文译本旨在引导读者如何在中国法律背景下理解书中的内容。

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# 序　言

19世纪中叶，美国法律教育主要包括进修法律课程和阅读法律课本。虽然一些学校聘用了全职法学教授，但是大部分教师还是兼职律师和法官，这些教师自然从法律实务的角度来探讨法律问题，而不是讲解抽象的法律理论。经典的法律课本和法律评论归纳了源自权威判例的法律原则。那时的法学院学生基本上是被动地学习法律课本，被动地听教师讲课。他们花大量的时间学习法律知识的目的就是为将来从事法律职业做好准备，这种职业化的法律教育导致法学院在大学体系中处于二流地位。

哈佛法学院院长克里斯多佛·兰德尔于1870年发起了一项针对法律教育的根本性变革，希望将法律教育提升到与传统学科，例如物理和化学同等的学术地位。于是他提议将成功的自然科学教学方法应用到法律教学中，正如研究员通过观察试验样本来确定其结构和工作原理一样，法学院学生也可以通过剖析判例来理清其中的组成要素，并且分析适用的法律原则，在这种“判例教学法”中，上诉判例是供法律研究的原始资料。一旦学生能够运用法律分析的技巧来学习法律原则，那么法律评论和法律概要将是多余的。总之，学生可以运用法律分析的技巧揭示任何实体法领域的法律原则。

兰德尔认为学生只需通过研究判例来学习法律的方法，通过分析法律来理解法律原则。苏格拉底式问答法提供了一种教学手段来配合判例教学的需要，激发学生用个案的法律分析思路来研究其他案件。学生在课前阅读和分析有关某个法律问题的判例，教师在课堂上向学生点名提问，对

学生的回答不是简单的肯定或否定，而是深入发问。

判例教学法相对于以前死记硬背法律条文的方法而言，是一次实质性的进步。深入地理解法官在判案时采用的分析方法可以让新律师更好地处理执业中所遇到的问题。这种教学方法还有助于学生发现哪些社会因素会影响法官的判决；如何在挑战性的提问压力下思考问题和表达想法；如何深入地进行法律分析，而不是仅仅学习现成的法律条文。随着时间的推移，这种教学方法还带来一个额外的好处，那就是将法律教育提升到与传统学科同样的学术地位。

判例教学法成为美国法律教育的主导模式已有一个多世纪了。苏格拉底式教学手段成就了几代法学教授，他们在教学中自然地延续年轻时在法学院所接受的这种教学手段。然而，现在的法学教授已经越来越少地采用过去这种对学生进行挑战性发问的教学手段。在学生成为法律教育消费者的情况下，电影《力争上游》中所描述的教师挑战性提问学生的戏剧化场景将不可能再现。学生现在可以对教学效果进行评估，评估结果与教师的聘用及晋升挂钩，这种做法引起了争议，并影响了教师的教学方法。目前一些教师只是借助判例教学法单纯地讲解法律原理，这类似于已遭摈弃的19世纪中期的法律教学方法；相反地，有些教师却逐渐地采用以问题为导向的方法，将法律教学从强调抽象理论转移到强调运用法律原理和法律分析来解决实际的问题。

虽然大部分学校严格控制法律实务课程，但是每个法学院都开设了法律写作这门课，其中的原因是毋庸置疑的，如果不具备这项最基本的律师技巧，法学院毕业生在竞争激烈的就业市场上必然处于极其不利的地位。尽管对法律实务课程的需求不断增加，同时也开设了大量的课程，但是许多新律师仍然缺乏一些执业的必备技巧，大多数法学院学生甚至在最后一学期都很难详细描述律师是如何开展工作的。

本书以栩栩如生的手法向学生描述了一位新律师第一年在一家虚构

的综合性律师事务所的工作体验。虽然法学院学生学习了一些法律原理和判例，但是他们对律师执业的认识仍然模糊不清。本书第一部分以不同寻常的手记形式来叙述，目的是提供一个个性化视角，同时使得开场白更加贴切和逼真。

传授技巧的标准步骤首先是向学生示范技巧，紧接着让学生模仿技巧，随后向学生解释相关的技巧原理，最后重要的是让学生运用新的技巧反复实践，这也是本书所遵循的步骤。本书第一部分介绍了六种基本的法律技巧，一个名为科迪·史密斯的虚构人物通过自己第一年在虚构的哥伦比亚特区从事律师业务的经历，向学生现身示范了这六种技巧。书中所提及的哥伦比亚特区成文法和上诉判例，例如：哥伦比亚特区《刑法典》第1231条，或*哥伦比亚特区诉米可西*案（1983年）（《哥伦比亚特区上诉法院判例汇编》第3辑第12卷第345页）皆是虚构的，现实中根本不存在，然而这些虚构的法律在结构和内容上都紧密仿效某个典型的州法，尽管法律语言已被适当简化以便更好地阐述法律概念。每篇手记之后都附上相关法律技巧的主要特征一览表。书后的问题练习旨在让学生有机会实践书中所介绍的技巧。DVD光盘中的两个客户面谈录像以供练习之用，第一个录像是*加利福尼亚州诉加斯*案，作为本书第一部分的补充材料，第二个录像是*埃克诉恩斯特*案，作为本书第三部分的补充材料。客户面谈录像现有DVD，CD-Rom、VHS、PAL几种版本，若想获取DVD光盘及其他的教学材料，例如讲稿和幻灯片，请随时和我联系，我的电子邮件地址是 stevenriess@stevenriess. com。

本书第二部分更加详细地阐述了法律分析的原理和基本法律文书（内部案件分析摘要）写作的必备技巧。当阅读第二部分的时候，学生将重温到第一部分的许多知识点，这部分同样详细说明了如何分析、研究和写作内部案件分析摘要的步骤。本书第三部分让学生运用前面两部分所介绍的技巧，起草一份高难度的内部案件分析摘要。本书希望按照这种示范技

巧、模仿技巧、解释原理和重复练习的步骤，向学生全面地介绍批判性思考、阅读和写作所需的技巧，这些正是律师执业的基础。

模仿是恭维别人的一种形式，说明别人的做法值得借鉴。学习如何从事法律业务需要一定程度上模仿其他律师。法学院学生既通过观察和模仿有经验的律师，也通过大量的自学来学习法律词汇、法律原理、法律程序和法律技巧。年轻律师在执业后仍然会继续观察学习，并且有选择地模仿其他律师的技巧。律师在整个执业生涯中会根据需要沿用或摒弃法律技巧。在执业多年之后，律师的工作风格体现了个人的嗜好、借鉴的技巧及改进的模仿。我的写作经历也不例外，书中的内容同样是借鉴得来，参考了许多在法律领域辛勤工作的专家经验、想法和技巧，同时反映了我在法律学习和执业中的研究成果。我在此感谢其他无数的作者和律师，不管是同事还是对手，因为他们都在不知情的情况下成为了我的老师。

史蒂文·瑞斯

2005 年 8 月 27 日

美国律师手记

*Diary of An American Lawyer*

# Instructions for Using This Book

The language of a legal system and the historical tradition it reflects are closely intertwined with the functions of the system's institutions. Studying a foreign legal system in its host language — while further developing foreign language competency — also provides a depth of insight which cannot be obtained through translation. On the other hand, the value of such study depends largely upon the level of the student's foreign language competency. Students whose foreign language competency is at a very high level will clearly profit from reading a text in its host language. However, for the many students who are less than fully fluent in the foreign language, it can result in a shallow appreciation of the material and is almost always strenuous, time-consuming and frustrating. To maximize productivity and to reduce these difficulties, a measure of substantive understanding may profitably be combined with a measure of foreign language immersion. To accomplish this, students should ideally first read a segment of text in translation so that their understanding of the material is maximized; students should then read the same text in it natural context, that is, in the language of the host system. This is not to suggest that students should read translations of text sentence-for-sentence, or even page-for-page. Rather, students should read a segment of translated text, perhaps 20 to 30 pages, before

attempting to read the text in its host language. By first reading the text in translation, students develop a complex and detailed mental map of the structure and content of the material. Students are then better equipped to appreciate the significance of the foreign language text because they have established a foundation for the material. Unfamiliar vocabulary often becomes decipherable without the disruption caused by reference to a dictionary, and students may make better predictions about interpretation based upon their earlier reading of the translation. Simply reading the text twice can also provide substantial benefits.

This text is specifically designed for Chinese speakers interested in the common law legal system as practiced in the United States. Its purpose is to provide realistic insight into the typical activities of the practice of law in the United States, as well as to provide an introduction to the principles which underlie such practice. The text is divided into three parts. It is recommended that students first read all of Part 1 in Chinese. Students should then re-read Part 1 in English. This approach should be repeated for Part 2. Part 3 provides students with the opportunity to practice the skills introduced earlier by working with a more challenging problem: *Ekel v. Ernst*. All of the materials needed for this, and for the other exercises in the text, are found on a DVD, which may be obtained by contacting the author. The Chinese translation contains a transcript of the material contained in the DVD.

This text was originally created to accompany legal reasoning and writing courses taught by the author at several law schools in Germany and was first published under the title *Legal Reasoning and Writing: Principles and Exercises for the German Student of the Common Law*.

However, it has since been used with success at law schools in the United States as well.

The reader should appreciate that the original text has not been here translated word-for-word. Rather, the Chinese version of the text attempts to render the material meaningful within the context of the Chinese legal system.

美国律师手记
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# Foreword

During the mid-nineteenth century, legal education in the United States was accomplished primarily by lecture and textbook. While a few institutions employed full-time law professors, most lecturers were practicing lawyers and judges. These instructors naturally approached the subject from the perspective of practical application rather than theoretical analysis. Classic textbooks and commentaries provided summaries of the law derived from leading historic cases. The relationship of the student to the material and to the instructor was essentially passive; the student spent long hours attempting to absorb doctrine in preparation for a career in the law. As a result of this vocational approach to the study of law, these programs suffered from a second-class status in the university hierarchy.

In 1870, Christopher Langdell, dean of Harvard Law School, instituted a radical change in the approach to legal education. Langdell wished to elevate the study of law to the status enjoyed by more traditional disciplines such as physics and chemistry. He proposed that the methods used so successfully in the sciences be applied to the study of law. Just as a researcher might examine a specimen to determine its structure and learn how it works, a law student might dissect a case to identify its component parts and determine how the law works. In this "case method" approach

to the study of law, the appellate opinion became the raw material of the law laboratory. Commentaries and summaries would be superfluous as the student would learn doctrine through the application of the legal method. Thus, facility with legal analysis would permit a student to uncover the rules in any substantive area of the law.

Langdell believed that a student need only study cases to learn method, and through legal analysis, appreciate doctrine. A form of Socratic dialogue, tailored to the needs of the law curriculum, provided a teaching tool by which students were compelled to apply legal analysis from a particular case to novel circumstances. Students prepared for class by reading and analyzing cases relating to a particular topic. Classroom discussion consisted primarily of the instructor directing questions to selected students. Student responses were greeted with further questions rather than with affirmation or explanation.

The case law method was a substantial improvement over the older method of memorizing doctrine. A deeper understanding of the analytic method employed by judges in deciding cases better prepared new lawyers for the tasks of problem solving necessary to practice law. Students learned to distill the policy considerations which influenced judges in deciding cases, to think and express themselves under the pressure of intense questioning, and to delve deeper into legal analysis than the mere acquisition of doctrine permitted. Over time, it had the added benefit of elevating the status of law programs to the scholarly level enjoyed by more traditional studies.

The case law method of legal education has now been the dominant model for legal instruction in the United States for more than a century.

Generations of law professors educated in the crucible of the Socratic method naturally continued the tradition to which they had been exposed as young law students. However, over the past generation, it has become less acceptable for law professors to subject students to the intense questioning used in the past. Perhaps fortunately, the relationship of professor to student so dramatically depicted in the movie the "Paper Chase" may no longer be viable in an environment where the student is regarded as a consumer of legal education. Student evaluations of the effectiveness of instructors, and the effect of such evaluations on hiring and promotion, have arguably influenced teaching methods. Today, some instructors again use the case method merely as a vehicle for teaching the rules of law, much like the abandoned approach of the mid-nineteenth century. Others have developed a more problem oriented approach to teaching law by shifting focus from the theoretical and abstract to the application of analysis and doctrine to realistic practical problems.

Most academics bridle at a curriculum which overemphasizes a skills approach to teaching law. Nevertheless, legal writing courses have become an accepted feature of every law program, undoubtedly because graduates who lack this most basic of lawyer skills are unquestionably at a distinct disadvantage in a competitive job market. Notwithstanding the increasing demand for and availability of practice courses, it is clear that many, if not most, new lawyers lack familiarity with some of the most basic skills necessary to practice law. Most law students in the final semester of their studies would be hard-pressed to describe with any specificity what a lawyer actually does at work.

It is the purpose of these materials to provide law students with a

realistic glimpse into the work activities of a first year associate lawyer at a hypothetical full-service law firm. While law students are exposed to doctrine and, to a more limited extent, the case method, the reality of the practice of law must certainly remain a bit murky. The somewhat unusual format of the diary entries included in part one is intended to personalize this view and to make this introduction more relevant and realistic.

One classic approach to teaching skills begins with a demonstration of the skill, followed by an opportunity for the student to imitate the activity, followed by an explanation of relevant principles, and then most importantly, followed by repeated opportunities for the student to practice the new skill. This is the paradigm followed in these materials. Part one introduces six basic skills. Each skill is demonstrated by the reflective narrative of the fictitious first-year associate, Cody Smith, who practices law in the fictitious state of Columbia. All citations to Columbia statutes and appellate decisions (for example, Columbia Penal Code section 1231 or *People v. Mixie* (1983) 12 Col. App. 3d 345 have been invented and no such authority actually exists. However, the fabricated authority closely follows the structure and content of typical state law, although the language has been somewhat simplified to better illustrate the concept being considered. Each diary entry is followed by a short checklist of the principal features of the skill. Then, exercise questions supplied are intended to provide the student with the opportunity to attempt and practice the skill introduced. The two video segments contained on the DVD, in the form of client interviews, provide the information needed to do these exercises. The first video segment, *People v. Garth*, supplements part one; the second video segment, *Ekel v. Ernst*, supplements part