

LEGAL METHOD AND WRITING



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|| PREFACE ||

We legal educators strive primarily to develop analytical skills through classroom discussion of statutes and appellate judicial opinions. Secondly, we teach substantive rules of law in the subjects that provide the context for the development of analytical skills. We typically devote even less attention to developing verbal skills, perhaps on the assumption that college and private practice are the best places for training in oral and written expression.

The activities of practicing attorneys, however, suggest that legal writing classes are important in disproportion to the emphasis given to them in law school. Although analytical skills and a general knowledge of legal principles form the intellectual foundation of your practice of law, legal analysis is only as effective as the quality with which it is expressed. In your practice, you undoubtedly will devote a substantial proportion of your time and effort to drafting legal documents such as office memoranda, letters, pleadings, motions, briefs, contracts, and wills. Moreover, techniques of expression are closely linked to the underlying substantive analysis; indeed, problems in writing style often betray confusion in the analysis.

Unfortunately, as a first-semester law student, you may have difficulty seeing the relationship between your efforts in legal writing classes and your short-term objectives for success in law school. You will rationally measure your success in law school by the grades you earn on final exams. On the other hand, you will be tempted to view your first-year writing courses, which may be ungraded, as a means of achieving a wholly distinct goal of preparing for successful performance in summer clerkships and in post-graduate practice. The extreme academic pressures of law school may stimulate you to place primary emphasis on your short-term goals of success on final examinations in graded courses and perhaps to resent an ungraded legal writing course as an inconvenient distraction.

With this book, I hope to reassure you that your work in your first-year legal writing courses will directly contribute to your success with law school

exams as well as with legal documents that you draft in a summer clerking position or in post-graduate employment. I attempt to achieve that objective in two ways. First, I hope to eliminate any mystery in the study of law by comprehensively examining the three critical components for success in law school: (1) briefing and synthesizing cases, (2) reorganizing and summarizing course materials in course outlines, and (3) analyzing and answering essay examinations. Second, I demonstrate in Parts I-III that the skills you develop in analyzing a client's legal problem and drafting an office memorandum are directly transferable to your task of analyzing an essay exam and writing the exam answer.

Additionally, this book examines techniques of advocacy and client representation that should appeal to a broad spectrum of readers: participants in a first-year moot-court program, students in an advanced writing seminar, student law clerks and practicing attorneys. For example, Part IV examines written advocacy in the context of pleadings, pretrial motions, and appellate briefs. Moreover, it thoroughly examines principles of writing and persuasion that apply generally to any litigation document. Part V provides a step-by-step approach to drafting simple contracts, advice letters and demand letters. Finally, the extensive citations in footnotes, most of which first-year law students can pass over, will provide attorneys with a valuable source of authorities.

Chapters 4 and 9-11 of this book address matters of style. They use problems and examples to outline a general approach to style that focuses on the policies underlying conventions of composition and presentation of legal authority. In these chapters, I encourage you to adopt the following philosophy: we should not memorize and mechanically apply rules of composition any more than we would mechanically apply "black-letter" rules of law. Instead, we must understand the goals and purposes of the conventions of legal writing, and we should apply them flexibly to satisfy those goals and purposes.

Of course, this book reflects my own style quirks and biases: I freely split infinitives but always use the serial comma, and I dislike sexism in language. The problem of sexism in language arose most often in this book in the form of personal pronouns in the third person. If I constantly resorted to an ostensibly generic pronoun normally associated with the male gender, such as "his" or "him," I would offend those readers who do not view the pronoun as gender generic and who believe that the increasing numbers of female attorneys and judges deserve specific recognition. On the other hand, multiple pronouns, such as "his or her," often needlessly clutter already complex sentences, and plural pronouns, such as "they," are not always consistent with content. As a provocative response to the problem, I have alternated between male and female pronouns, for example by referring to an associate in a law firm with the pronoun "he" and to his supervising attorney with the pronoun "she." This approach may distract or even offend nearly all readers at one time or another, but it at least dramatizes the need for truly gender-neutral singular pronouns in our language. Perhaps writers should coin the terms "hes" and "hem."

Charles R. Calleros

March 1990

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Although my courses in contracts and civil rights legislation consume a substantial portion of my time and energy, I have always managed to maintain a role in legal writing programs at the College of Law and in Phoenix law firms. My interest and enthusiasm for legal writing stem largely from the inspiration and training that I received as a court law clerk at the Office of Central Staff Attorneys for the United States Court of Appeals for the Ninth Circuit. In particular, I owe a continuing debt of gratitude to my primary supervisors, Peter Shaw, now practicing in San Francisco, and Gregory Hughes, now practicing in Sacramento. I am equally grateful to United States Court of Appeals Judge Procter Hug, Jr., who sowed the seeds of my current views on flexible, policy-oriented approaches to legal writing.

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