


Aspen Coursebook Series



Legal Writing and Analysis

Third Edition

Linda H. Edwards



Wolters Kluwer
Law & Business

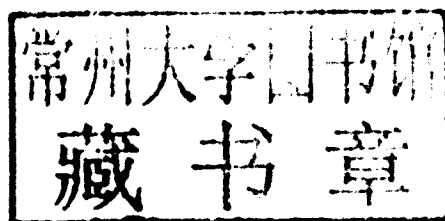
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Linda H. Edwards

William S. Boyd School of Law
University of Nevada, Las Vegas



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Preface

This book is a concise text that tracks the traditional legal writing course syllabus. It groups relevant material together instead of scattering it in different stages of the writing process. It includes numerous examples and uses frequent short exercises to encourage students to apply new material. It provides students with the necessary structure for organizing a legal discussion. Finally, it includes discrete materials that offer students the opportunity to explore a deeper level of understanding than its small size would imply.

The Book's Organization: Part One explains the legal system and introduces lawyers' roles within that system. Part Two explains how to work with the raw material for analysis. It covers briefing and synthesizing cases, analogizing and distinguishing case law, and interpreting statutes. Part Three presents the traditional organizational formats for communicating the analysis of a legal question (the basic IRAC or CRAC structures). Parts Four and Five cover the components of office memos, letters, trial-level briefs, and appellate briefs. Part Six presents material on citation and style and Part Seven introduces oral argument.

How This Book Differs: The primary difference between this book and my earlier text, *Legal Writing: Process, Analysis, and Organization*, is the way the material is grouped. This book is not so unrelenting in its process approach, although it still recognizes writing as a process. The first book presents its material in stages defined entirely by a writer's progress toward completing a particular assignment. Although that approach offers real advantages, course time and resources do not always permit its use and *Process, Analysis, and Organization* is less flexible pedagogically. In contrast, this book groups relevant material together in a more efficient manner while still providing guidance about the writing process. That guidance is identified throughout the book by the recurring symbol shown in the margin.



Examples and Exercises: Another characteristic of this book is its frequent use of examples and exercises. For instance, Chapter 1 succinctly describes the writing roles of planning and prevention, prediction, and persuasion, and then describes several hypothetical situations asking students to decide which kind of writing each situation would require. Later in that chapter, after an introduction to plagiarism and the purposes of citation, students see examples of when to cite and then read a short legal discussion and identify the ideas that need citations. This pattern of examples and exercises continues throughout the book.

Organizing a Legal Discussion: The book explains the standard IRAC and CRAC paradigms and explains how to use those paradigms in discussions of multiple issues. The book introduces the structures inherent in rules and shows students how to use those rule structures to identify issues and to organize their written discussions.

Flexible Levels: Each major section presents its material at a basic introductory level so all the core information is concisely grouped. Courses that have time for a more advanced treatment can also cover optional chapters

that take students deeper into the material. For instance, the core chapters of Part Two explain briefing and synthesizing cases and interpreting statutes. This material is presented at a level appropriate for all students. Then, Part Two concludes with an optional more advanced chapter explaining the major forms of reasoning lawyers use and providing examples and simple exercises for that material.

Similarly, in Part Three, the core chapters explain how to organize and write a legal analysis, including how to analogize and distinguish cases. This material is presented at a level appropriate for all students. Part Three then ends with an optional chapter showing students how to broaden and deepen their analysis in each part of their IRAC or CRAC structure. This chapter can be assigned as required reading, assigned as optional reading, or omitted entirely.

Finally, in Part Five, the core chapters explain how to write a trial-level and appellate brief. These chapters present everything a first-year student needs to know to write her first brief. Then Part Five ends with an optional and completely free-standing chapter explaining how a lawyer can use her awareness of a judge's legal philosophy to target her argument more effectively. Again, this supplemental chapter can be assigned as required reading, assigned as optional reading, or omitted entirely.

The goal of this book is to provide a pedagogically flexible text for basic legal writing, readily adaptable to fit the needs of any traditional legal writing course. It presents the fundamentals in a concise, lucid style for first-year students. It also offers discrete sections of more advanced material that can be included or omitted at the discretion of the professor. The book includes ample examples and exercises, which relieve the professor of the burden of generating such material, but that may nonetheless be supplemented at any point. It is, in short, a basic text, adaptable to a wide variety of legal writing programs.

The Third Edition adds material on one of the most important forms of reasoning—factual inferences. The new material appears primarily in Chapter 5 (Forms of Legal Reasoning) and Chapter 11 (Deepening Your Analysis). The Chapter 5 material includes explanation, an example, and an exercise giving students practice in making factual inferences. The Chapter 11 material provides additional explanation and an additional exercise in recognizing factual inferences. Finally, the citation and quotation material (Chapter 20) has been revised to match the current editions of the *ALWD Citation Manual* and the *Bluebook*. The book's website contains additional annotated examples of memos, briefs, and letters.

Linda H. Edwards

December 2010

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I am privileged to be part of a remarkable national legal writing community. Space does not permit listing all of the colleagues who have shared generously of their vision, enthusiasm, wisdom, and experience. I hope they each know how thankful I am for their friendship and for their many contributions to our discipline. Two names cannot be omitted, however: Mary Lawrence, who has mentored generations of legal writing colleagues, and Tom Blackwell, whose memory will continue to guide us for years to come.

The chapters of this book dealing with the grounding of analysis and argument in underlying theories of jurisprudence would not have been possible without the friendship, advice, and encouragement of doctrinal law colleagues, especially Scott Brewer, Martha Minow, and Joseph Singer. Errors, of course, are my own. I owe a debt of gratitude to Darby Dickerson for her invaluable assistance with Chapter 20. Thanks are due also to the wonderful people at Aspen Publishers, especially Carol McGeehan, Melody Davies, Richard Mixter, Betsy Kenny, and Peggy Rehberger. I am especially grateful to the anonymous Aspen reviewers whose comments contributed so significantly to the book.

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And finally, my deepest thanks to Dan Edwards. Yet again, words fail.

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PART ONE

*Lawyers and the Legal
Landscape*

Overview of the Lawyer's Role

Most students entering law school would not call themselves writers; nor would they expect that in three years they will be professional writers, earning a significant part of their income by writing for publication. Yet that is precisely what lawyers do. Most lawyers write and publish more pages than do novelists, and with greater consequences hanging in the balance.

This book introduces the critical skill of legal writing. In this chapter, we begin with an exploration of the kinds of writing lawyers do, both in litigation and in other kinds of law practice. Understanding this legal landscape will help you understand the legal issues of the cases you read and the various research and writing tasks you will be asked to perform.

I. WRITING AND A LAWYER'S ROLES

Lawyers write many kinds of documents—court papers, letters, legal instruments, and internal working documents for the law firm. As different as these documents are from each other, they all fall into one of three categories defined by the lawyer's primary role when writing them: (1) planning and preventive writing, (2) predictive writing, and (3) persuasive writing. A lawyer's writing differs significantly depending on which of these three roles the lawyer is performing.

A LAWYER'S WRITING ROLES

- Planning and Preventive Writing
- Predictive Writing
- Persuasive Writing

Planning and Preventive Writing. Lawyers engage in planning and preventive writing when they draft transactional documents such as wills, trusts, leases, mortgages, partnership agreements, and contracts. Planning documents define the rights of the parties and the limits of their conduct, much as case law and statutes do for society at large. Thus, planning documents