

SECOND EDITION

Legal Writing

The Strategy of Persuasion

NORMAN BRAND

JOHN O. WHITE

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Second Edition

Norman Brand

John O. White

St. Martin's Press
New York

Library of Congress Catalog Card Number: 87-060506
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21098
fedcba

Manufactured in the United States of America

Cover design: Darby Downey
Project management: Editing, Design & Production, Inc.

ISBN: 0-312-00257-2

For information, write:
St. Martin's Press, Inc.
175 Fifth Avenue
New York, NY 10010

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Preface

The second edition of *Legal Writing: The Strategy of Persuasion* has been written to help law and pre-law students in three specific ways. First, it is designed to be used as a textbook in law school courses in legal writing and legal analysis. To that end, it focuses on law examinations, legal memoranda, and legal briefs. Second, the book may be used in undergraduate, pre-law courses in legal writing. For pre-law as well as law students, we have presumed no particular legal background. All examples and writing exercises provide simplified rules of law that can be applied to hypothetical situations. Third, we have written this text so that it may be used by law students and pre-law students as a self-contained guide to the process of writing the kinds of assignments required in law school. Students who want to get a head start on law school, or who want to improve their writing ability before their first law exam, will find specific writing strategies and tactics in this book.

Law professors and writing instructors who have used *Legal Writing* in past years will be glad to see that the second edition has retained the familiar and valuable features of the first edition and has added new materials and chapters to make it even more useful.

The new Chapter One, THE PROCESS OF LEGAL WRITING, is an analysis of the rhetoric of persuasion and the writing process as they apply to legal writing. In this chapter, we examine the pre-writing considerations of purpose, audience, and form, and take the student through the separate writing steps involved in composing and revising. We give the student practical answers to the questions, "How do I get started?" and "What do I do next?"

In Chapter Two, THE STRATEGY OF LEGAL PERSUASION, we analyze the tasks called for in writing an answer to a law examination question. Then we present writing strategies and techniques necessary to produce a successful answer. In Chapter Three, TECHNIQUES OF LEGAL WRITING, we take the reader step-by-step through the process of analysis and writing using a sample law examination question. While there is no "trick" to answering a law question, no panacea that will insure superior grades, there is a practical approach that enables students to analyze a problem, spot the issues, and organize an answer logically and effectively.

Chapter Four, **WRITING BRIEFS AND MEMORANDA**, is a new chapter that presents a careful and detailed analysis of requirements and techniques for writing briefs and legal memoranda. We explain their purpose, audience, and format, and offer suggestions for thoughtful analysis, clear organization, and appropriate style. We also provide specific writing strategies and models for the writer.

Chapter Five, **THE MECHANICS OF LEGAL WRITING**, provides a review of common mechanical and grammatical problems that occur in legal writing. We analyze the problems and suggest ways students can identify and correct their errors.

In Chapter Six, **LEGAL WRITING STYLE**, we analyze the nature of writing style and present approaches that help students eliminate stylistic flaws. One of our major goals in this chapter is to try to simplify and clarify legal writing style. It is an antidote to the disease of “legalese,” which often blights law student writing.

In Chapter Seven, **LOGIC AND ARGUMENT**, we examine the underlying logic of persuasive legal writing. We explain the terms “logical argument,” and “law structured argument,” to help students understand the conceptual framework of their writing. We also examine and discuss the skills of recognizing and using slanted language.

Finally, Chapter Eight, **SAMPLE PROBLEMS AND ANSWERS**, contains law examination questions with representative and complete sample answers. In all chapters, we provide examples and give writing exercises so students can practice their writing.

Together, these chapters provide students with a comprehensive and analytical look at the kind of writing required in law school along with strategies and techniques for achieving success on those writing assignments.

Any student who is in law school, or who plans to go to law school, should study this textbook for a detailed analysis of exactly what is expected in law school assignments. It will provide students with writing strategies that will enable them to write successful briefs, memoranda, and answers to law examination questions.

Acknowledgments

We are indebted to our students, to our faculty colleagues, and to all of those who used the first edition of this book for their suggestions and encouragement. We are especially grateful to Kellis Parker and Richard Wydick of the University of California, Davis, School of Law, and to Barry Vickrey, University of North Dakota School of Law; Richard Reynolds, University of Connecticut; Marilyn Williams, Johnson County Community College; Rachel Vorspan, Director of Legal Writing, Fordham Law School; Michael Werth, formerly of University of Maryland; Ronald Newman, University of Miami; Terence Collins, University of Minnesota; and David Samuelson, Southwestern University School of Law.

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CHAPTER ONE

The Process of Legal Writing

INTRODUCTION

Most expository writing, certainly all that is required in law school, is persuasive writing. Writers try to persuade their readers to do something, buy something, or believe something. The rhetoric of persuasion may take any of several different forms in writing, from emotional appeals to subliminal suggestions and from intricate logical constructions to inferential leaps. And advertising, evangelism, and politics may employ some of these strategies of persuasion when they are appropriate to their audiences and purposes. The strategy of persuasion appropriate for legal writing, however, requires concise, clear, complete, and logical explanation and argument. It requires a clear statement of issue, a complete discussion of relevant factors, and a logical analysis of points leading to a conclusion. Finally, legal writing requires clear, concise, and plain language.

Our goal in this textbook is to help you understand the writing process that results in good legal writing. The law exam answer, memo, or brief that you turn in is the result of a process involving

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many separate but interrelated stages. We will go through those steps, examining, explaining, and illustrating the process.

LEGAL WRITING

A law student has three major kinds of writing assignments: the law examination, the legal memorandum, and the brief.

The Law Exam

Most law examinations present a hypothetical fact situation and call for analysis and a conclusion.

A throws a rock at B that hits C. B, in dodging the rock, knocks D off the curb, breaking D's leg.

Discuss the rights and liabilities of all the parties.

In keeping with the instructor's directions (or "call of the question"), you must analyze the situation, identify the legal issues, apply the rules of law, and conjecture on the outcome of any possible legal action. But what is most critical is that your reasoning process is clearly shown and that your conclusions are supported by fact and discussion. While specific methods for answering this type of question are discussed in later chapters, the important thing to remember here is that the law exam is graded on the basis of the argument, the analysis, and the reasoning—not merely the conclusion.

Legal Memorandum

A legal memorandum, while requiring similar analytical and persuasive abilities, is a researched discussion of a hypothetical—and usually complex—fact situation.

During a security check at the boarding gate of an airline, an employee of the Smith Detective Agency noticed a white powder in the bottom of Walter's briefcase. The employee called a deputy sheriff who was standing nearby and showed him what he had found. The deputy told Walter he would have to search him. Walter objected to the search, but the deputy patted him down.

The deputy felt a soft object in Walter's inside coat pocket and demanded that Walter show him what was in the pocket. Walter refused. The deputy then reached into Walter's pocket and pulled out what appeared to be a packet of cocaine.

Walter was arrested and charged with possession of cocaine. Upon analysis, the powder in the briefcase turned out to be talcum powder, but the packet did contain cocaine. At the trial the cocaine was introduced into evidence over Walter's objection. Walter was convicted of possession of cocaine and sentenced to six months in jail.

You are to write a memorandum to the senior partner in your firm, discussing whether Walter should appeal his conviction.

The Brief

A brief takes the process one step further. It is a formal presentation of an argument for, or against, a plaintiff or defendant. In the brief, a law student may be assigned either side. Writing a brief requires skillful persuasion and the ability to make clear the reasoning behind the position.

(A brief should not be confused with "briefing" a case. To brief a case is to make specific notes on a case in order to remember the key elements. It is really just a matter of taking notes and preparing individual study guides.)

We will discuss each kind of writing assignment in more detail in the following chapters, but for now you should remember that writing skills for all of these assignments are based on similar principles and strategies of persuasive writing. A general overview of the writing process involved should prepare you for the specific task of writing answers to law questions, legal memoranda, and briefs.

THE WRITING PROCESS

Struggling writers might like to imagine that others—natural writers—somehow find writing easy. They might like to think that those lucky few are gifted with an ability to sit down and immedi-

ately write a polished draft. Divine intervention or inspiration must account for that clear and lucid prose.

The truth is that writing is not easy, and a skilled writer has developed his or her talent by mastering a process that leads to a clear, well-organized, detailed final draft. The process is not the same for every writer. We all begin, stop, make progress, stop, and begin again. Thus, the process is sometimes recursive rather than direct. We can, however, identify three distinct stages in the writing process: pre-writing/planning, writing/drafting, and revising/editing.

Pre-Writing

Most students who have problems in writing spend too little time in the pre-writing stage. They begin to write before they are clear about what they intend to say and about what strategies and steps they mean to use. These students know only where they are to start and roughly where they intend to arrive. Too often they end up somewhere else. Even if they do arrive at the planned destination, they may have traveled a circuitous and rocky path to get there. There is a better way.

Before beginning to write, you must be clear about audience and purpose. You must have analyzed the problem, established a solution, and developed a strategy for explaining that solution. You must have anticipated problems and counterarguments. And you must have organized your ideas so that you know where you are going before beginning to write.

Purpose. The first consideration in pre-writing is understanding the purpose of the writing assignment. In a law examination you may be asked to discuss and decide all issues, or to discuss the rights and liabilities of all the parties, or to address particular issues. Those writing instructions are sometimes referred to as “the call of the question,” and they establish your immediate task. There is, however, more to purpose than the call of the question. You must think of the writing assignment as the place you demonstrate the clarity of your thinking, your skill in analysis, your ability to explain, your logical reasoning, and your clear and effective writing. The purpose of a law examination, memo, or brief assignment is not only to determine if you can arrive at a right answer; it is to test your ability to analyze, synthesize, organize, and explain the law.