

Successful Legal Analysis and Writing: *The Fundamentals*

Bradley G. Clary
Pamela Lysaght

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SUCCESSFUL LEGAL ANALYSIS AND WRITING:

THE FUNDAMENTALS

Second Edition

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DEDICATIONS

To all of the hard working legal writing teachers
who labor every day to help law students become
accomplished lawyers.

B.G.C.
P.L.

To Mary-Louise—for being there.
B.G.C.

To Leon—for eternity.
P.L.

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PREFACE

This is a book about legal analysis and writing for first-year law students. There are many fine books about these topics on the market. A reader might well ask—why one more? We set out in this preface our fundamental design premise, our fundamental theme, six principles that beginning legal writers need to understand, and features inherent in good legal analysis and communication.

The Fundamental Design Premise: Flexible Components and Templates

In our experience, many of the texts currently on the market are comprehensive; that is, they tend to be designed for an entire course—a form of one-stop shopping. They offer considerable advice on many aspects of analysis and writing. They are very good, but precisely because of their length and comprehensiveness, they are not always ready-references. Further, they may offer advice that is either beyond a given law school's legal writing program goals or that has to be affirmatively explained away as at least partially inconsistent with that professor's different advice. (This may be inescapable for any text on legal analysis and writing. Our goal is to minimize significantly this potential problem.) Comprehensive texts are not necessarily what every purchaser wants.

A possible analogy is to stereo equipment: Some purchasers want to buy a completely integrated unit. The turntable, the disc player, the speakers, the receiver and other equipment are all pre-assembled in a single product. There is no design work for the purchaser to do. No assembly is required. All the bells and whistles are included. There is one convenient package. But it is, of course, the manufacturer's package.

Some purchasers, on the other hand, want to build the stereo system to fit their own particular needs. They want a particular type of speaker. They want a different disc player. They want basic functionality, and then they want to add their own bells and whistles. The integrated package from the manufacturer provides great value, but not the flexibility they want. Instead, they want only certain basic components, to which they will make their own additions.

Our book adopts a basic component approach to legal writing. Legal writers can assemble a competent analysis and written product by mastering the concepts in this book. They can also mix and match the pieces they want. Additional bells and whistles are for individual professors and students to add, to fit the programs at their own law schools.

The Fundamental Theme: Problem Solving

We think there is a place for a book on legal analysis and writing that expressly looks at those subjects through a problem-solving lens. Consider one of the cases in a first-year doctrinal text in contracts, torts, or criminal law. Does it just drop into place? No, someone's life story was rolling along. A problem developed. "The law" stepped in to solve the problem through the efforts of lawyers and other persons. Those efforts followed a standard sequence: The lawyers first had to learn the facts of the story and identify the problem. Then the lawyers had to identify the potentially applicable legal principles and analyze them. Once the lawyers analyzed the principles, the lawyers had to apply them to the facts of the problem. That analysis reached a conclusion as to how "the law" does and/or should resolve the problem. The lawyers then communicated the analysis to one or more audiences—a client, a colleague, a judge, an adversary, or others. In the end, a court picked a resolution among competing choices as to the facts, the law, or both, and the authors of the casebook elected to publish the court's decision to illustrate a legal proposition. This selection occurred far down the line. The lawyers did considerable work long before the court decided the case, and long before the casebook authors decided to include the case in their texts.

This book is about the work of lawyers. We provide fundamental advice and templates for analyzing and discussing legal problems from the standpoint of practicing lawyers who have to help solve them. For this purpose, we think of lawyers as being on a two-stage expedition, which we will reflect in the organization of the balance of this book. The first stage is to assemble the material required for a successful expedition to solve a problem. At this stage, we focus upon a standard road-mapping sequence of identifying the problem with specificity, identifying the key facts in the relevant story that give rise to the problem, identifying with specificity the legal rules that might potentially apply to the problem, analyzing the relevant legal rules and applying them to the material facts, and identifying a solution to the relevant problem. The second stage, once the lawyers have assembled all of the key

material, is to communicate the expedition's route to anyone who has to move with the expedition to the proposed solution. At this stage, we focus upon the creation of such types of legal documents as office memoranda, client letters, trial court briefs, and appellate court briefs.

SIX KEY PRINCIPLES

1. Legal analysis and writing are audience-focused.

Because legal analysis and writing are fundamentally about problem solving, they must be audience-focused. The logic is simple: The relevant story is not the lawyer's story. The relevant problem is not the lawyer's problem. The legal principles are not the lawyer's principles. The ultimate decision-maker is not the lawyer. Instead, the story is the client's. The problem is the client's. The legal principles are the court's or the legislature's. The ultimate decision-makers are the juries and judges (in litigated cases), or the clients (in settled cases and in transactions that do not result in litigation), or other persons or entities such as agencies, colleagues, and adversaries (in various settings). These are all audiences.

As a result, the writer has to evaluate constantly how his or her analysis and communication will be received by others. And audiences these days often share some of the following characteristics: They are busy. They have too much to do and too little time in which to do it. They are on information overload. They are used to getting information in sound bites. They want quick answers. They want solutions. They want efficiency. They want to simplify their lives.

We assume that our audience shares some of these characteristics. Thus, we aim to be short. We aim to be efficient. We aim to simplify.

2. Legal writing is hard work.

Problem solving is not easy. Communicating solutions so that an audience will both understand and adopt the solutions is not easy. This is all true—even with standard sequences and templates—and frustrating.

Picture a typical law student—bright, eager, academic achiever, maybe an English major, in law school to learn “the law.” Consider that typical law student's potential reaction to a required first-year legal writing

course: “I already know how to write. I don’t need college entry-level English again.” Concede also for present purposes that the reaction is accurate as far as it goes.

Even so, the immediate reaction is not on the mark. First-year legal writing courses are not a repeat of college freshman English. They are instead fundamentally courses about what it means to be a lawyer. And they are not just courses about “writing.” They are instead courses about how to piece together a story, how to identify problems, how to think about “the law,” how to parse legal rules, how to analyze and apply legal principles, how to determine what legal conclusion will solve a given problem, and how to reach a legal audience in writing. Lawyers spend their entire careers perfecting these skills. There are a lot of moving pieces that have to come together. This book aims to help law students understand those, through hard work.

3. Legal analysis and writing are learn-by-doing tasks.

For the most part, the only way to get good at analyzing and writing about solutions to legal problems is to practice. So what beginning legal writers need the most are a series of steps to follow and a set of simple templates that serve as models. Hard work and feedback are key ingredients to developing these skills.

Thus, this book is about basic building blocks and the sequence for using them. Beyond the basics, however, the book is short on additional commentary. We do not intend to be comprehensive. Readers tend not to absorb detailed nuances that may arise in thousands of different configurations unless they can place those nuances in the context of their own specific projects. We count on professors to practice students on the details they think their students most need to know to fit their own course designs.

4. Legal analysis and writing require the ability to multi-task.

A good piece of legal writing involves the integration of many tasks— assembling and disassembling facts, assembling and disassembling rules, re-looking at facts, re-looking at rules, applying rules to facts, reaching conclusions, and communicating conclusions. We are going to set out a sequence for these tasks, essentially in the order of the chapters in this text. But do not be misled by the linear sequence of the chapters. In practice, a

lawyer will be engaged in many of the tasks more or less simultaneously, moving back and forth among them.

5. Legal analysis and writing require living with ambiguity.

Legal rules are living things. They expand. They change. They contract. They find new application. They, like life generally, are often ambiguous. Even though there may be standard concepts that most persons can accept, reasonable people may differ over what “the law” says, what it should say, and how it should apply to a specific given problem.¹

The same can be said of the process of legal analysis and communication. Some templates tend to be more effective than others. Some methodologies tend to be more effective than others. We intend to set out in this book some approaches we think are generally acceptable to help you present consistently competent work product to your audiences. But reasonable legal writing teachers may prefer different advice in a given circumstance. None of them may be affirmatively “wrong;” each is making a different judgment about the best of alternative acceptable choices. This is an important point with which beginning legal writers must become comfortable. The key is to be able to explain why one judgment is preferred over another.

6. Legal analysis and writing are messy, but the final work product cannot be.

The process of thinking about solutions to legal problems and the process for producing an initial draft of a legal writing are messy. There are starts and stops. There are circles and semi-circles. There are reversals of direction. There are detours and unintended wrong turns. It is not uncommon for a lawyer to think she is dealing with one set of facts, research the law, begin applying the law, and discover that there are new or additional facts. It is not uncommon for a lawyer to think that one set of legal principles is relevant, only to find a lead to a new legal argument that heads in a different direction. It is not uncommon for a lawyer to arrive tentatively at one solution

¹ If everyone agreed on the rule or rules for any given circumstance in life, society would not need lawyers. Everyone would just consult the rulebook and cut out the middleman.

to a problem, only to talk herself out of that first solution and into a different second one, in drafting the memorandum explaining the first.

Beginning legal writers need to understand that all of this is natural. Starting and stopping, thinking and re-thinking, writing and re-writing are all parts of the relevant process. Just make sure, to the extent practical, that there is enough time set aside for the project to allow the full process to play out. Also, just remember that the final written work product the audience sees should not be a stream-of-consciousness recitation of the messy analytical and drafting process. Rather, the final written work product the audience sees must be clean, simple, straightforward, logical, and flow irresistibly to a solution to the legal problem at hand.

FEATURES OF GOOD ANALYSIS AND WRITING

What are the features, then, of a competent process and a competent final work product? Below are simple ones to keep in mind, no matter what type of legal analysis or communication you may be generating.

First, think.

It is hard to make a point if you have not developed a point to make. Ask yourself:

- What is the story I am analyzing?
- What is the problem?
- What are the potentially relevant legal rules?
- How do they apply to the problem?
- What is my solution to the problem?
- How can I best convey that to a reader?

Then, make your point.

Accurately. Accuracy involves honest fact statements, accurate citations to sources, and precision in details.

Clearly. Clarity involves eliminating ambiguity; preferring specifics to generalities; using road maps; and following a logical, organized structure.

Concisely. Concision involves eliminating excess language, getting to the point, and separating the relevant from the irrelevant.

Responsibly. Responsibility involves a sense of ownership of the process and product, a sense of fair play, a sense of professionalism, and avoiding inappropriate language and name-calling,

In your own way. As a writer, you still have to “be yourself.” Otherwise, you are not credible. Incorporate within your own personal style the various processes and templates that will help you best make your point.

Work and rework. Edit and re-edit.

The reader of a typical piece of legal writing has to be able to understand the writer’s point, see how to get there, and (especially in the case of persuasive writing) want to get there with the writer.

Editing is not just about checking details of work such as spelling, punctuation, sentence structure, and citation form, although such checking is vital. Editing is also about making sure that you have made a point your reader understands, can get to, and wants to get to.

Critique your work.

Unless you run out of time, do not stop working on your analysis and writing until you are satisfied with your answers to these questions:

- Do I understand the relevant story?
- Do I understand the problem to solve?
- Do I understand the legal principles that might apply?
- Have I analyzed and applied those principles to the facts?
- Have I reached a conclusion that will solve the problem from my client’s standpoint?

- Does my writing make the relevant point(s) to my reader?
- Will the reader understand?
- Will the reader follow?
- Will the reader accept?

As these questions demonstrate, the final stages of critiquing require the writer to shift focus—from the writer's perspective to the reader's perspective. In other words, effective self-critique requires evaluating your work product through the lens of the intended audience.

The focus of the rest of this book is on how to use these principles and features to successfully solve legal problems and communicate the analysis to your intended audience.

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