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Legal Writing

Process, Analysis, and Organization

*Fifth
edition*

Linda H. Edwards



Wolters Kluwer
Law & Business

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*Process, Analysis,
and Organization*

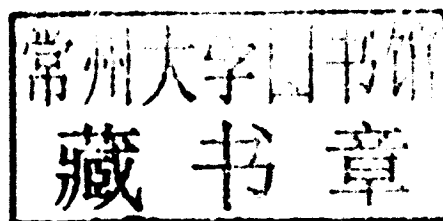
Fifth Edition

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Wolters Kluwer

Law & Business

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TO DAN

Words fail.

Preface to the Fifth Edition

Like prior editions, the fourth edition of *Legal Writing* adopts a process-based approach rather than a document-based approach. The difference between a process approach and a document approach can be expressed using an analogy to cooking. Learning to write using a document-based approach is like learning to cook by reading a description of the finished dish: how it looks, how it tastes, how it smells. The description of the finished dish is important because the cook needs to understand her goal. But the description of the finished dish doesn't always tell her what she needs to *do* to get there.

Learning to write using a process-based approach is like learning to cook that same dish by reading the recipe. The recipe takes the novice cook through the stages of preparation ("chop the carrots into quarter-inch slices; sauté the onions in one tablespoon of butter"). Often, in those stages, the elements of the dish do not look, taste, and smell the way they will when the cooking process is completed ("cook over low heat, stirring constantly until thickened; then pour into the chicken stock mixture and simmer for one hour"). Those intermediate stages, however, are critical to achieving the end result.

Like a recipe, this book consciously tracks the stages in the writing process. Concepts are introduced at the points where they become relevant to a writer's process of creating and communicating content. The function of a rule structure in creating large-scale organization is still the starting point, and earlier expansions in the treatment of analogical reasoning and narrative are maintained. Material throughout the book is streamlined, however, to make room for an expanded set of sample documents in the appendices. The sample documents are introduced with material addressing relevant analytical and organizational characteristics of each and with questions inviting critique of the documents rather than blind acceptance and unthinking emulation.

The primary enhancement with this edition is the inclusion of a chapter on professional letter-writing (Chapter 16). An introduction to letter-writing is becoming increasingly important since so many students work in law office environments immediately after their first year of law study. The chapter

teaches general principles of professional letter-writing. It then specifically covers retainer letters, advice letters, status letters, demand letters and responses, confirming letters, and transmittal letters. The chapter is easy to use with little increased course time. Sample letters are provided in Appendix C. Since the new chapter is located at the end of the predictive writing section, all chapters after Chapter 15 have been re-numbered. Similarly, all appendices after Appendix B have been re-lettered.

Appendices: All sample documents have introductory material designed to demonstrate particular characteristics of the document, particular kinds of legal issues, and particular structures of analysis. The sample documents are designed, of course, for critique, not for mimicry. The samples in this edition are:

- Appendix A: An office memo applying a three-element conjunctive rule and using rule-based reasoning, analogies, policy, and factual inferences.
- Appendix B: An office memo applying a rule with factors and making significant use of factual analogies.
- Appendix C: Sample Letters.
- Appendix D: A trial-level brief applying a procedural rule (setting aside a default judgment) that incorporates the substantive rule. A subpart of the analysis uses a set of factors.
- Appendix E: An appellate brief addressing a pure question of law setting out two alternative arguments.
- Appendix F: An appellate brief making extensive use of statutory construction tools, including the definition of terms used in the rule and arguments based on applicable policy rationales.

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Like all teachers of legal writing, I am blessed by being part of the national legal writing community. No list could identify all of the colleagues who have shared generously of their vision, enthusiasm, wisdom, and experience. I am especially indebted to Deirdre Alfred, Jan Armon, Mary Beth Beazley, Joel Cornwell, David Drueding, Alice Dueker, K.K. Duvivier, Neal Feigenson, Dennis Hynes, Steve Jamar, Katie McManus, Phil Meyer, Teresa Phelps, Terry Pollman, Leslie Reed, and the anonymous reviewers who made such perceptive comments on earlier drafts. Particular thanks to Mary Lawrence, Richard Neumann, and Marilyn Walter for their steadfast support of their legal writing colleagues, including me.

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Introduction

Legal writing is a process with distinct stages and distinct goals at each stage. Each writing stage serves an important function as you work toward a finished document. This text identifies four main stages of a writing task and invites you to use each stage as your writing tool. As the following paragraphs describe each stage, refer to the table of contents to identify the chapters that fall within each.

Your first job as a writer is working out your analysis of the issue, so the first two writing stages (Chapters 2 through 10) create a “working draft.” Your primary purpose in writing a working draft is to use the writing process as an analytical tool. Dean and former Judge Donald Burnett put it this way:

Clear expression, then, is not merely a linguistic art. It is the testing ground for ideas. Through the discipline of putting an argument into words, we find out whether the argument is worth making. . . . The secret . . . is to start verbalizing early—while there is still time to learn from the discipline of forming ideas into words. You must begin by identifying your client’s goal and the issues to be resolved. Each issue is defined by a cluster of facts and governing legal principle. If you cannot articulate this nexus of law and fact, you do not yet have a grasp of the case.¹

Your working draft is nothing less than “grasping the case.” It guides, deepens, and tests your analysis in a number of ways, but its most important role is in forming your ideas into the kind of structured, linear reasoning that lawyers must master. Legal reasoning applies the relevant legal authorities and policy rationales to the client’s facts. This kind of reasoning is not our culture’s dominant mode of thought or expression. Many of us come to law school without much prior experience in this sort of reasoning. The discipline of the working draft will help you develop this vital lawyering skill.

After your analysis is solid, stage three converts that analysis into a document designed for your reader. The text first introduces the study of law-trained readers, a study you should pursue during your entire legal career. Then the text shows you how to select an organizational plan that will meet your reader’s needs and achieve the document’s goal. The third stage is completed by adding the other components of the document, including a statement

1. Donald L. Burnett, Jr., *The Discipline of Clear Expression*, 32 *The Advocate* 8 (June 1989).

of the relevant facts about your client's situation. In the fact statement you will use narrative techniques to tell your client's story. Effective and strategic narration requires skills different from the rule-based reasoning process you will be practicing when you write the legal analysis sections of your documents. The text will introduce you to the storytelling skills you'll need for good legal writing.

The final stage turns your attention to the fine points of writing, calling for decisions about style, tone, level of formality, and strategic word choice. It is also the stage for editing to achieve clarity, correct citation form, punctuation, and grammar. These matters may seem like technicalities compared to the importance of accurate analysis, but grammar, style, and citation form are the most easily visible criteria for judging writing. Readers will notice these areas first and draw from them conclusions about the skill and care of the writer. A sloppy document invites a reader to doubt the document's substantive accuracy.

The book takes you through each of these four stages, and it introduces in each stage the information you'll need for that stage. Here are several hints for using this writing process to its greatest advantage:

First, be alert for signs that you need to revisit earlier stages. While the completed document should take the reader on a linear journey toward the document's conclusion, you will find that the *process* of creating the document is far from linear. Rather, the process is recursive; it requires you to circle back to earlier stages again and again as you understand more about your legal issue, your client's facts and goals, and the available legal strategies. The dynamic nature of this process is what makes it alive, challenging, and fun. Your willingness to construct, dismantle, and reconstruct your document will be crucial to achieving a good written product.

Second, experiment with different writing strategies and observe your own writing process. What works well for you at each stage and what doesn't? Do you work better if you dictate a draft first? Does free-writing help you? How about charts or colored pens? Each writer's creative and analytical processes are unique. Part of your goal in your first few years of legal writing should be to observe as much as you can about your own process so you can adopt writing strategies that work for you.

Third, be patient. On your first few writing assignments, take each stage in its turn without trying to combine or compress them. Your goal on these first assignments is to let each stage of the writing process *teach* you some critical skills. Soon you will have developed those skills well enough to speed up each stage. For instance, you might find that you can accomplish the goals of the working draft stage with some other quicker form of prewriting, like a detailed and annotated outline. You will learn to customize each stage to fit your own skill level, the complexity of the assignment, and your own unique creative processes.

Finally, master the general principles before you decide to try something new. Learning legal writing is a little like learning music theory. In college, music students take many courses in music theory and composition. In these courses, they first learn the "rules"—the principles most composers use in most situations. Then after they understand those principles, they learn when and how to depart from them.

This is an introductory course on legal writing, so it teaches the basic substantive and organizational principles that operate in most situations. Following these organizational principles in your first legal writing assignments will teach you important information about law study and about legal writing. First master the basic substantive and organizational principles covered in this course. Soon you will develop the judgment to know when and how you can depart from them.

Legal Writing

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