EXAMPLES & EXPLANATIONS

Legal Writing

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Wolters Kluwer
Law & Business

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Wolters Kluwer
Law & Business

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Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

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Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-9730-3

Library of Congress Cataloging-in-Publication Data

Legal writing : examples & explanations / Terrill Pollman . . . [et al.].
p. cm.
Includes index.
ISBN 978-0-7355-9730-3
1. Legal composition. 2. Law—United States—Language. I. Pollman, Terrill, 1948–

KF250.L398 2011
808'.06634—dc22

2011014576

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To Ben and Elizabeth and JP

—TP

To my beloved and the three finest sons a mother could ever have

—JMS

For Lill and Alex as well as my coauthors and
our colleagues in the legal writing field

—RKN Jr.

For Pollman, supra.

—EP

Acknowledgments

Terry Pollman thanks Linda Edwards and her Advanced Writing Group of 2010 for helpful comments on the first chapters she wrote. Thanks also to her legal writing colleagues through the years at the William S. Boyd School of Law and to the law school for research support. Jordyn Raimondo, Jason Bacigalupi, and Charles Gianelloni have her gratitude for research assistance. Finally, she will always be grateful to her coauthors who made it fun to work together.

Judy Stinson thanks Laura Curry, Tamara Herrera, Carissa Hessick, Zig Popko, Doug Sylvester, and the Sandra Day O'Connor College of Law at Arizona State University.

Richard Neumann thanks Matthew Allen, Courtney De Witt, Rachael Ringer, and Kristin Stranc for their research assistance.

Elizabeth Pollman thanks Jeanne Merino, Norman Spaulding, and Stanford Law School for support and guidance. In addition, many thanks to past and present fellows involved in the Stanford Law School legal writing program for inspiration.

We all thank Linda Berger for allowing us to use the copyright and fair use problem she created. We know we are fortunate to be a part of the legal writing community, where so many great teaching ideas are so often and so generously shared. We hope that if we have forgotten to acknowledge an individual, you will understand that after years of teaching in such a generous community we are sometimes no longer sure where each idea originated or how many wonderful colleagues have added to it. Thanks to Kelli Bonds for excellent secretarial assistance. We also thank Wolters Kluwer Law & Business, especially: Carol McGeehan, Peter Skagestad, and Sarah Hains, as well as Jay Harward from Newgen and Michele DeAngelis. In addition, we are grateful to the anonymous reviewers who read drafts of the manuscript for Wolters Kluwer and made many valuable suggestions. (It really is anonymous; you know who you are, but we don't.)

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Legal Writing

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PART I

Introduction

Introduction

CHAPTER 1

How to Use This Book

Focus on the user and all else will follow.

—*Google slogan*

Google built a thriving business by making its products *useful* and *pleasingly easy to use*. We've tried to do something like that in writing this book.

Your memos and briefs will be more effective if you write them with the same goals in mind. Think about the reader's needs, just as Google has thought about yours. How can you make your memos and briefs *useful* to the reader? And how can you make them *pleasingly easy to use*?

This is the mantra for all writers: focus on the reader and create a document that's most usable for that reader. Your reader is your audience. In this book, for example, we've written in a more conversational tone than in a formal legal writing document because we think this will make it easier for you to read and use. When you can identify a specific reader—like your own legal writing professor—you'll need to pay attention, above all else, to that individual reader's priorities. This book explains what many professors typically consider to be effective writing, but you'll need to pay attention in class and ask questions in teacher-student conferences to tailor your document to the expectations of your audience—the reader who is also your professor. As with other books in the Examples & Explanations series, if we seem to be saying something different from what your professor says, your professor is right.

HOW THE BOOK IS ORGANIZED

The organization of this book generally follows the organization of typical first-year legal writing courses. Most courses first cover objective writing (which some call predictive writing) with students writing office memos, and then persuasive writing, with students writing motions and briefs. We've also included a section on revising and rewriting, because those skills are necessary to all good writing.

Most of this book's chapters are divided into four sections:

A typical chapter's first section—"What You Need to Know"—explains, as simply as possible, the essentials about a part of the writing process. Writing is a complex art. Sometimes in our attempt to give you what you need quickly, we necessarily simplify some of the finer points. For the most part, we cover, at a basic level, the essentials—the things everyone in a legal writing course must master. We've tried to keep things as straightforward as possible, to make the material accessible and quick to digest. Later, as you mature as a lawyer and writer, you'll pick up more subtle nuances. Learning to write is a lifelong project.

The next section—"How to Do It"—provides a step-by-step procedure for accomplishing the writing task that is the subject of the chapter. Not everyone follows the same steps to accomplish a purpose, but *we illustrate at least one way to think through* the particular parts of your writing project.

A typical chapter includes Examples that ask you to evaluate the effectiveness of a sample piece of writing.

Examples are followed by Explanations for you to check your work. How you use these examples and explanations will determine how much value the book will hold for you.

Throughout the book, most of our examples come from two hypothetical problems. One involves a vehicular manslaughter prosecution in which the defendant used a cell phone while driving (Appendix A has the details). In the other hypothetical problem, a popular singer alleges a copyright violation by another singer, who might in turn raise an argument based on what copyright law calls the fair use defense (Appendix B has the details). In many instances, you'll be able to follow the examples just by reading through the chapter in which they occur. But wherever you need more information or want to understand the example more fully, the facts and the relevant law are in the Appendices. In addition, some examples use fictional cases for illustrative purposes.

HOW TO USE EXAMPLES

Social scientists have learned much about how using examples helps you learn. Here are some of their findings.

Learning through examples can help you become a better writer. In law school, when you face a new writing assignment, you actually face two tasks. The first is to write a successful document for the assignment in your course. The second is to examine what you learn from the experience of producing that one particular assignment and then to use what you learn as you create new documents. Researchers have identified a problem with this process: the task of writing a new document takes up so much "cognitive load," or mental energy, that students have little left to spend on learning from the assignment. This research suggests there is great value in observing and thinking about writing when not simultaneously tasked with creating.

Passive observation helps little. Students learn best from examples when they "self-explain" as they observe. While the research makes clear that students can learn from examples, it also shows that those who *actively engage* with the example learn much more than those who observe passively. As you work through the book, talk with yourself silently about what you see and the choices you make.

The best strategies for "self-explanation" include observation, evaluation, and reflection. We've designed the examples in this book to provide all three ways to improve learning from examples. The step-by-step model in the "How to Do It" sections invite you to actively explain to yourself what you're *observing* as you work through the process. Check your work against our explanations of the steps. And it's especially important for you to *evaluate*—and to *reflect* on your evaluations—as you complete the questions in the "Examples and Explanations" portions of each chapter. As you compare your "self-explanation" to the explanations offered at the end of each chapter, reflect on the general rules you should learn from the chapter. This reflection will help when you next face the task of writing.

HOW TO USE THIS BOOK

Legal writing professors sometimes hesitate to give students examples because occasionally students use them poorly. We stress two things:

- Please do *not* imitate one of our examples without thinking about whether it's appropriate to your assignment. It might work for your assignment . . . or it might not. Decide.

- And please do not imitate an example just because it's in the book. Some of the examples illustrate ineffective writing and ask you to identify the mistakes in the example. Know what you're doing and why you're doing it.

By using the "self-explanation" technique as you work through the examples, you'll develop the ability to view your own work critically. You'll learn to articulate reasons for the choices you make in your writing, which will help you work while writing as part of a team. Be as specific as you can during this self-explanation. For instance, "This way of structuring the Question Presented helps me present the crucial facts in a convincing way." Learning to examine your own writing critically and to reflect on your choices is essential to becoming an effective legal writer.

Although this book necessarily oversimplifies some of the finer points about legal writing, we hope that it helps you improve in the areas where you struggle. Remember that writing is an art. Formulas will help get you started and can definitely improve your final work product, but writing involves a lifelong learning process. Your dedication to the craft and willingness to continue observing, evaluating, and reflecting is what will make you a truly gifted legal writer.

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