LEGAL WRITING
BY DESIGN
LEGAL WRITING
BY DESIGN

A GUIDE TO GREAT BRIEFS
AND MEMOS

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DEDICATION

To our families for their love and support,

Keith                     Thomas
Thomas                    Matthew
Matthew                   Parker
Lorraine (Mom)            Mary Ella (Mom)

And to our Dads, always

Carlyn                    Sylvester
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INTRODUCTION

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“There was a man who disliked seeing his footprints and his shadow. He decided to escape from them, and began to run. But as he ran along, more footprints appeared, while his shadow easily kept up with him. Thinking he was going too slowly, he ran faster and faster without stopping, until he finally collapsed from exhaustion and died. If he had stood still, there would have been no footprints. If he had rested in the shade, his shadow would have disappeared.”

— Benjamin Hoff, The Tao of Pooh

The goal of our book is to help you “rest in the shade,” at least when it comes to legal reasoning and writing. It’s to remind you, in easily understandable terms, that you already know how to reason and argue. You’ve been doing it since you could speak.

We are by nature logical creatures, meeting situations with the memory of how we’ve acted in the past and projecting how we might act in the future. As children, we learned the value of precedent: “Well, Matthew got to stay up this late when he was my age, so why can’t I?” We also learned that there were rules and then there were RULES. Just as it was when we were kids, as lawyers, our goal in employing reasoning is simple: it’s to make a point; it’s to get what we want.

Through hypotheticals, samples, and commentaries in the upcoming chapters, we’ll remind you how to design a legal argument. In Section I, we’ll discuss legal rules and reasoning; and explore how to select, from an almost limitless
number of possibilities, an orderly sequence of statements that lead logically to a conclusion. We’ll talk a bit about logic, and we’ll use terms like syllogism, premises, analogy, induction, and deduction, but we won’t delve too deeply into any other logic concepts. We’ll keep our book user-friendly. Our purpose in discussing the logical underpinnings of “the argument” is simply to remind us of how we think.

In studying legal reasoning, we’ve got to keep one paramount principle in mind: writing and reasoning are joined at the hip. We can’t write effectively without reasoning effectively. Writing is just a by-product of reasoning.

After reviewing the reasoning process, we’ll see how to transform our thoughts into writing. In Section II, we’ll review the basics of clear and effective writing. Then in Sections III and IV, respectively, we’ll see how to design and write a predictive memo and a persuasive brief. In Section V, we’ll discuss writing and editing tips. Finally, in Section VI, we’ll show how all of these principles come together in a sample memo and three sample briefs. In all Sections, we’ll go step-by-step through each subject and address strategies that work. (After teaching thousands of students, and writing memos and briefs ourselves as practicing lawyers, we’ve seen what works and what doesn’t.) Our approach, of course, isn’t the only way to design a well-reasoned legal memo and brief, but we think it’s an effective way of doing so.

The “tone” of our book is conversational; it’s how we teach our students. We don’t preach, we discuss. And, as you’ll see, we also like a good laugh every now and then.

Let’s now explore the nature of an argument and the process of reasoning. We’ll begin by addressing rule-based or deductive reasoning, briefly touch on inductive reasoning, and then explore the hybrid process (part inductive, part deductive) of arguing by analogy. By the end of Section I, we’ll see how understanding the design of the legal argument helps us transform our thoughts into great briefs and memos.