

CULTURE TO CULTURE

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A Guide to U.S. Legal Writing

Jill J. Ramsfield

PROFESSOR OF LAW
DIRECTOR OF LEGAL RESEARCH AND WRITING
GEORGETOWN UNIVERSITY LAW CENTER

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To my students, who continue to teach me

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PREFACE

My journey with international law students began in 1986, when six black South African lawyers were unceremoniously dumped into my first-year legal research and writing course. “They need a bit of research and writing,” said one dean, figuring, I guess, that putting them in the evening division would keep them from cluttering up other useful courses. It took me about six weeks to recognize that this was not working at all. One student was a distinguished law professor, another a constitutional scholar. All had practiced law as attorneys in South Africa and had been invited here to study at the graduate level in the hope of increasing their chances of being among the first black advocates in South Africa’s white-dominated attorney-advocate system. They knew law, they knew research, they knew English. What they did not know were the peculiar twists and turns of our system, the expectations of our audiences, and the patterns we use to explain the law, solve problems, advocate, and research. So we created our own year-long seminar, and my romance with international students began.

Nineteen years later comes this book. In a courtship of ups and downs, cross-cultural adventures, humorous clashes, and bold risks, we have come to know each other. My international students have shared their hopes and expectations, their strengths and frailties, their suggestions and insistencies. We have learned from each other. We have challenged each other. We have created, criticized, and connected together. This book celebrates this long relationship by revealing what we have learned and offering it to others.

We have learned that law is language and logic; there is no separating the substance from the presentation. So while chemical formulas or musical compositions may easily transcend cultures, law cannot. We have learned that U.S. law may be best studied in contrast with the law of other systems, in a healthy cross-cultural exploration of likes and dislikes, propensities and preferences. My international students bring not only their respective languages, but also their legal culture’s intellectual rhetorical preferences. At home, they may move from point A to conclusion Z in quite a different manner than do U.S. lawyers. Our brand of federalism seems often to require students to use different sources of authority and patterns of reasoning than at home, different language, and different conventions. The cross-cultural relationship can be more com-

plicated than it first appears, and my students have appreciated being in a course that allows for discourse on this complex conversation.

Thus this book. While I agree with many of my colleagues that using the same books that U.S. law students use immerses international students directly in U.S. law, I have discovered that a more specialized text may help. I have supplemented, explained, elaborated, cajoled, and cheered international students through standard U.S. legal texts, including my own. The process is hard and a bit U.S. culture centric. With no discussion about comparisons and criticisms, those texts (including my own) tend to begin the conversation in the middle. This book instead holds a private conversation with international students who are here for a host of specific reasons. I hope this book helps them and my teaching colleagues to enjoy the conversation and leave with a good contrastive sense of how U.S. lawyers communicate—and why.

ACKNOWLEDGMENTS

My thanks to the many people whose ideas and suggestions helped to shape this book. Special thanks, of course, go to my many international students, who taught me more than I taught them over the period of seventeen years as we created and developed United States Legal Discourse at Georgetown. Several professors offered their assistance during this project, especially Charles Abernathy, Charles Gustafson, Darcy Kirk, Don Langevoort, Mary Lawrence, Mary Ray, Susan Ryan, Girardeau Spann, and Franz Werro. Over several months, a number of students offered their assistance: Mindy Barry, Davin Blackborow, Whitney Case, Adam Cashman, Steven Fairchild, Vivian Hunter, Rachel Losk, Carl Fleming, Tanya Stern, Tina Tolentino, Barbara Wally, Jeb White, and Amy Wilkinson-Hagen. Outline examples came from Matthew Arch-Beck, Sharon Nokes, and Osamudia Guobadia. Tanya Stern checked the Bluebook citations at least twice, showing much patience for many changes.

Chris Anzidei offered very helpful edits and penned the brief in Chapter 5; Regina O'Brien wrote the complaint. My colleague Brooke Bowman of the Stetson law faculty converted the Bluebook citations to ALWD so that they are accessible to all students studying in the U.S. And Susan Ryan assisted on the very challenging Chapter 2, and Appendices B and C.

Making a Herculean effort in the book's last stages was Francois Quintard-Morenas, without whom I could not have finished. His international perspectives and unflinching representation of the book's audience kept me focused. He read every word, added and subtracted on demand, drafted the opinion letter in Chapter 5, and researched whatever was required. His enthusiasm and exceptional analytical abilities combined to move the book forward. Ina Chang, singer and editor, was a saving grace; her sure hand revealed much, and she transformed the book from a draft to a text. The kind deans and faculty at the William S. Richardson School of Law at the University of Hawai'i at Mānoa offered me a lovely office for finishing the book. *E c'è sempre il mio caro Eugenio, fedele, felice, e il mio amore. Molte grazie a tutti.*

November 1, 2004

INTRODUCTION

My husband has been to over 100 countries, both for work and for leisure. To him, travel is the “other education,” the way he learns about others and about himself. He is fluent in at least six languages, which is unusual for an American, so he sees countries through the eyes of the many friends he has met and through the linguistic constructs of each country. He knows intimately the adage “another language, another soul.” For me, the journey is more difficult. While I have studied three foreign languages, I cannot speak with his kind of facility. Rather, I make my best effort, and I manage to be understood, as often through gesture as through word. My listeners and I try to do our best to reach some understanding.

In preparing this book, I went back to this notion of travel. I asked people from a number of nations, “Why do you travel? What do you want from that experience?” Without exception, they responded with some version of “I want to know how the people there live.” None mentioned the tourist spots, though surely they would want to visit them. Rather, they spoke of learning about another culture, another way of life, another way of looking at the world. Even on a short trip, they would want to meet local people, to dine “where there aren’t any tourists,” to walk the streets frequented only by locals — to live, even if for the briefest time, like a person of that country.

I have posed the same question to my international students in the last two decades: “Why do you visit U.S. law schools? Do you want to become a U.S. lawyer?” For some, the answer is yes. “To see the tourists spots — our constitution, Bill of Rights, important laws, or current hot topics?” Again, yes, for some. “Or do you want, for just a short time, to see how we live? To speak our language, dine at our legal table, walk the streets that the tourists don’t walk?” Ah.

If you have come for the last reason, this book is for you. It is not for U.S. students. They have their own vision of what we do, from living here and growing up within this legal system. For visitors, a trip to the U.S. legal system calls for more foundation, more comparison with other systems, a more detailed tour. So, just as the locals might show you around when you travel, this book can serve as your “local” tour guide. It will take you up the back streets and alleys, invite you into the local restaurants, and introduce you to the family. It will show you how U.S. lawyers live.

This tour of the U.S. system begins, in Chapter 1, with a general overview of the system. Chapter 2 takes you into the back room of U.S. legal research, where most of the analyzing and problem solving is done. Chapter 3 takes you on a historical-analytical tour of the thought patterns U.S. lawyers use to work within this hybrid statutory and common law system. These patterns make both reading and writing more comprehensible. Chapter 4 tours the peculiar brand of English U.S. lawyers use, first by showing how lawyers derive the significant language from cases and statutes and then by demonstrating twenty principles of usage. Chapter 5 applies all of the principles and themes in a series of sample legal documents.

Connecting these ideas from chapter to chapter is a scenario of an international artist, Faber, who feels that his rights have been violated. This sample case invokes state, federal, and international law, so it offers a good journey through the U.S. system, including the library, the analytical patterns, the language, and the forms we use to communicate as lawyers. It also follows the client from an initial inquiry through a possible settlement agreement, each step of which offers you a point of comparison or contrast with your own legal system. Whatever your areas of substantive interest, you will find examples in this scenario that you can transfer to those topics. In other words, understand how this scenario works, and you will be on your way to understanding how a number of state, federal, and international issues work in our system.

Throughout the book, you will see *Culture to Culture* sidebars, places of comparison or contrast where you can pause and think about how your legal culture compares to ours. You will also see some historical notes at the beginning of each chapter. Questions appear throughout the text; these are meant to stimulate comparisons and contrasts between legal cultures. At the end of each chapter, and sometimes throughout, you will see practical examples of the points discussed in the chapter. Many of these points are about Faber, but a few other scenarios also appear. If you read from start to finish, you may have a sense of culmination when you reach the samples in Chapter 5. If you skip between the chapters and the examples in Chapter 5, you may have a more specific sense of how the suggested themes and principles work. You can use the book in a way that best suits you: read from start to finish, read the historical background before reading the chapter, read the practical examples before reading the text; focus on the *Culture to Culture* points, or just read those segments that are most useful to you. At the end of the book are appendices for easy reference, some of which address the practical demands of law school. It is your guide to use as you would like while you tour the U.S. legal system.

As you proceed through the tour, you will see several themes emerge. These themes connect the places on the intellectual map of U.S. legal practice and begin to explain why the system works the way it does.

- **The U.S. federalist system has its own research ethic, analytical patterns, and language.** As much as this system may resemble others, any traveler will quickly discover that its scope, conventions, and challenges differ. The research can be overwhelming and can compound what appear to be simple issues. The analytical patterns appear quite “logical” at first, then veer off into unexpected forms. And the language appears to be English, but in its legal manifestation it

hardly resembles the language studied in preparation for the trip here. As with any traveling you will probably learn more if you resist less; instead, enjoy the comparisons and contrasts with your own researching, thinking and writing.

- **U.S. judges have a lot of latitude in deciding cases, which in turn affects and develops U.S. analytical patterns.** U.S. legal history developed primarily in the common law until World War II, when federal and state legislative and executive branches began to codify common law, unify issues, and promulgate statutes and regulations. Still, judges interpret those statutes and regulations by investigating their constitutionality, defining their terms, and analyzing their possible applications. Thus judicial decisions are still the focal point of U.S. legal study, the main course of our legal diet.
- **A journey through the U.S. federalist system requires the visitor to live with ambiguity.** With so many analytical patterns at play in this hybrid statutory and common law system, few outcomes are sure or predictable, and this situation makes many visitors very uncomfortable. In my own travels, I have often gotten directions like this: an enthusiastic local person listens to my badly phrased question and breaks into an elaborate explanation of where to go, turn, cross over, and end up. These directions are hard to follow. They require some knowledge of the local terrain—a feel for the place, so to speak. Then, when I get where I want to go, I find that the business has closed or the building is under renovation or the landscape has been altered. The same is true in visiting the U.S. legal system. With so many sources and so many arguments available, U.S. law includes a lot of ambiguous directions, which frustrate many visitors. Looking for the statute and a few cases to answer a question, you may instead encounter three statutes, a series of regulations, and countless cases with contradictory outcomes. It may feel like time to go home. But the ambiguity can bring adventure to the journey, and it is the only way we know how to work.
- **The U.S. legal community is reader based, not writer based.** Here, the legal writer is responsible for designing the document according to the reader's needs. This includes using an acceptable range of materials within an acceptable range of thought patterns and using an acceptable range of language possibilities. These acceptable ranges often differ from those in other cultures. Many travelers think we use more law, more strange arguments, and more fastidious language than they use at home. Part of being in this community is learning its expectations: full explanations of all issues in step-by-step fashion with all arguments, citations, and references placed in the document. Nothing is assumed because there are too many possible arguments and outcomes in this hybrid federalist system. The reader will not know what you are thinking unless you state it, and he expects you to do so.
- **The U.S. system is best studied in contrast to your own.** Traveling to another country offers surprising contrasts that reveal cultural norms: street signs hang differently, doors open in the opposite direction, drivers are on the other side of the road, and laundries operate differently. Traveling is indeed the “other

education,” a good way for you to better understand your own country’s strengths and weaknesses, quirks and delights, customs and attitudes. The same is true for visitors to our legal system. You may prefer how we do things, you may not. You can construct your own schema of comparison— not just what is the same or different, but what best suits your path to success.

Studying how U.S. lawyers think and write can be enjoyable and fascinating—and frustrating. Visitors balk at long U.S. contracts and wonder why opinion letters are so detailed and legal bills are so high. We have long been admired, chastised, and even sued for our way of thinking, working, talking, and writing. The U.S. legal system calls on visitors to be creative, careful, comparative, and consistent. Some ingenuity in planning the journey, some preparation for its twists and turns, and some patience as you discover the system all help. To make the most of the journey, you need a thick notebook for recording the comparisons and contrasts, and a tour guide.

This book cannot cover every question, every contrast, and every permutation of cross-cultural legal study. But it aspires to make the general comparisons enjoyable, informative, and worth relishing, whether for a year of study or for many years afterward. The idea is to give you a behind-the-scenes look at the life of U.S. lawyers, enough so that you not only survive but enjoy your vacation, enough so that you appreciate the similarities and differences between this legal culture and yours— enough so that you may want to return, at least for another visit.