

Mastering Legal Analysis and Communication

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*to
Courtney and Westley,
for all the inspiration you bring*

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Series Editor's Foreword

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. A “Checkpoint” at the end of each chapter encourages you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver
Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law

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I am also deeply thankful for the help provided by my assistant Ms. Barbara Churchwell. Finally, I would like to acknowledge the patience and assistance afforded me by Russell Weaver, the general editor of the series, and by Ms. Jennifer Gilchrist at Carolina Academic Press.

I also need to acknowledge the contributions of several scholars in the field for contributing to my understanding of the concepts I discuss in this book. Their work has played an important role in the formation of my views, but any omissions or inaccuracies are my own. They are (listed with the work(s) I found particularly helpful):

Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers)*, 10 *LEGAL WRITING* 23 (2004);

_____, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* (2002);

BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* (3d ed. 2004);

STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1995);

LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* (4th ed. 2006);

_____, *LEGAL WRITING AND ANALYSIS* (2003);

_____, *The Convergence of Analogical and Dialectical Imaginations in Legal Discourse*, 20 *LEGAL STUD.* F. 7 (1996);

- PATRICK HURLEY, *A CONCISE INTRODUCTION TO LOGIC*, 1997 (6TH ED.);
- LINDA D. JELLUM AND DAVID CHARLES HRICIK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* (2006);
- Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 *Clinical L. Rev.* 149 (2004);
- STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. MCMANUS AND STEVEN D. JAMAR, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (1999);
- GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980);
- RICHARD K. NEUMANN, JR., *LEGAL REASONING AND WRITING: STRUCTURE, STRATEGY, AND STYLE*, 1998 (3D ED.);
- HERBERT N. RAMY, *SUCCEEDING IN LAW SCHOOL* (2006);
- DAVID S. ROMANTZ AND KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (1998);
- PIERRE SCHLAG AND DAVID SKOVER, *TACTICS OF LEGAL REASONING* (1986);
- Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 *MERCER L. REV.* 919 (2007);
- _____, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2002);
- RUTA K. STROPUS AND CHARLOTTE D. TAYLOR, *BRIDGING THE GAP BETWEEN COLLEGE AND LAW SCHOOL* (2001);
- PAUL TIDMAN AND HOWARD KAHANE, *LOGIC AND PHILOSOPHY: A MODERN INTRODUCTION*, 1999 (8TH ED.);
- STEVEN L. WINTER, *A CLEARING IN THE FOREST* (2001).

Introduction

This book is designed to help you master the analytical and communication skills you will need to become an expert in the legal profession. The topics covered in what follows are selected to help you both grasp key foundational concepts, and introduce you to advanced ideas that are generally only mastered by experts in the legal system. This book is not meant to substitute for the casebooks and course books that you will have in your law school classes. I have tried very hard to craft this material into a helpful resource that will enable you to navigate the many complex and difficult concepts that you will need to learn and master, explaining to you the processes you can use to make that journey. I hope this book will make that journey easier, and ultimately more rewarding.

There are a great many books that discuss legal reasoning, legal writing, legal research, appellate advocacy, and other lawyering skills. This should come as no surprise, as the legal academy has rightfully (and finally!) focused much more fully on these fundamental aspects of lawyering in recent years. Over the past two decades many people within the legal academy have worked very hard to ensure that your legal education is more comprehensive and well-rounded. The profession has responded to these efforts, and your education is therefore better than it would have been a generation ago.

So many good books have been written in these areas, in fact, that it may seem strange that another is being added to this already crowded field. This volume is meant as an adjunct to the more detailed treatments of legal analysis and communication that you may be assigned. Like other books in the “*Mastering . . .*” series, this book is designed to give the reader (whether a novice law student, or a more advanced user), a sense of the landscape of contemporary scholarship and theories on the topic. While not an exhaustive review of all the literature on legal analysis and communication, what follows is a discussion of the major theories and conceptual constructs that one will encounter in a careful study of these vitally important aspects of what it means to be a lawyer in the United States.

Several things should be mentioned here at the outset. First, you will note throughout this book that I use certain terms that may seem a little stilted and abstract. For example, I refer to the legal system in the U.S. as a “discourse community,” and an intellectual “domain.” I also use the terms “novice” and “expert” fairly extensively. This terminology is not meant to confuse you, or to unnecessarily complicate the discussion (although it may, admittedly, have that effect). Instead, I am attempting to do two things by using this terminology: 1) draw upon recent scholarship about how the legal system in the U.S. works, and 2) utilize more advanced notions of how students learn important concepts in new domains. Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 *CLINICAL L. REV.* 149 (2004).

It is now widely accepted that the legal system in the United States is a distinct “discourse community.” JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS 16-20* (2000). So, when I suggest—as I do throughout the book—that our legal system is a “domain” that utilizes and shapes the analytical and communication skills of its members according to a shared understanding of the individuals initiated into that system, I am drawing upon a more complicated and textured notion of what our conception of the law entails. This more complicated notion of the U.S. legal system will undoubtedly shape your educational experience, no matter where you attend law school. Similarly, when I say that learning and developing certain skills will assist you in moving from “novice” to “expert,” that assessment is based on the extensive research that has been conducted by scholars in the profession aimed at better serving the needs of students and the profession. Robin A. Boyle, *Employing Active Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 *U. DET. MERCY L. REV.* 1 (2003). Your studies will truly be a journey of discovery that will lead from your introductory notions of how the law operates, to a more textured and complicated understanding that is similar to others who work and practice in the legal system.

The second thing to note is that an attempt has been made to accommodate (if not fully synthesize) competing theories regarding the topics discussed. In some cases the theories within a topic (paradigms in legal writing, for instance) are just different ways of expressing the same idea. On other topics (for example, theories of jurisprudence), the ideas expressed are not necessarily mutually exclusive. I have tried to be as comprehensive in my discussion of the topics discussed as I can, given the constraints of this volume. I have not made an attempt, however, to be neutral in my treatment of the various ideas discussed. Some of the theories found in the literature are better than others. Where appropriate, I have discussed the relative merits of the ideas explored. While this

is clearly not meant to be a work in critical theory, some normative assessment cannot be helped.

Next, as I mentioned above this work should not be viewed as a substitute for any of the skills oriented books that are on the market. This is not a “how-to” book that simplifies or obviates the need for detailed treatments of legal reasoning, writing or advocacy. Rather, this work should be viewed as a compliment to these works. I attempt to explain, and perhaps provide context for, the theoretical constructs that one will find as they use other books on legal analysis and communication. This is not a desk reference or style manual, however. This book is intended to be a learning tool for students (novice and expert) of these topics. This volume should be used as an aide to further understand (and perhaps clarify) the concepts and ideas that one will confront in their study and practice of legal analysis and communication skills.

Finally, the reader will note that I have used somewhat complex philosophical concepts in certain places throughout the text. This use is based on two things: my background, and my belief that one of the principal deficiencies with many of the legal analysis and skills course books out there is that they do not fully explain the foundations of many key concepts they use. I try to explain, where relevant, the theories behind key ideas that are used in the field. I am convinced that this sort of conceptual genealogy will help those who want to (or need to) understand where these ideas spring from. This, in turn, will provide a broader context for key concepts. This is not a philosophical treatise, however. This volume is not designed to be a work in high theory. *Mastering Legal Analysis and Communication* is what I would like to think of as a work in practical jurisprudence, accessible to novices yet helpful to more advanced students of the topics considered. As such, the discussion of the topics and theories contained here are what Jean Baudrillard might call mere simulacra: simple and superficial representations of the true, fleshed out notions that are more fully developed in other places. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (1995). I have made an attempt to provide copious references for those who wish to delve deeper into the philosophical heart of these ideas. I have also attempted to provide adequate references to the literature on the topics discussed, both in the text and in the bibliography. I have tried, though, to curb my own enthusiasm for these discussions so as to not derail the purposes I outlined above. I hope I have struck the proper balance.