

**SKILLS & VALUES
LAWYERING PROCESS:
LEGAL WRITING AND
ADVOCACY**

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SKILLS & VALUES LAWYERING PROCESS: LEGAL WRITING AND ADVOCACY

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MATTHEW  BENDER

Dedication

To Kathy
With gratitude for
all your love and support

Introduction

The first time I taught a legal writing and oral advocacy course was nearly 30 years ago. The students in that class have long since graduated and by now practiced law for many years. I am sure they have overcome the errors that I no doubt made in my first year of teaching. My recollection is that the director of the program gave me the class list but little else in terms of direction about what to do. In those days there was nothing like the now quite mature pedagogy of teaching the course, worked out over the years since by my many colleagues in the field. Back then there was little to go on. I remember meeting with the class every Monday morning at 8:00 a.m., before putting in a full week of work as an associate in a New York City law firm. My Sundays were spent reviewing papers, providing feedback, and preparing for class.

I do not remember whether I assigned a textbook. If I did it might have been *Legal Method: Cases and Text Materials* (West, 1980) by Professors Jones, Kernochan, and Murphy at the Columbia Law School. As the title suggests, it was essentially a casebook that covered the legislative process and statutory interpretation. But it included very little about legal writing. Or it might have been *Introduction to Advocacy* (Foundation Press, 1981) which was produced by the Board of Student Advisors at Harvard Law. Aside from these works, I did not have much to choose from. In those days there were no legal writing textbooks, at least not as we currently conceive them.

Today we have a plethora of such textbooks from longtime leaders in the field, scholars such as Helene Shapo, Linda Edwards, Charles Calleros, Anne Enquist, Richard Neumann, and Laurel Oates. Many of these books are now in their fifth or sixth edition. Teachers of the legal writing and advocacy course have a diverse and mature group of books to choose from when they decide on a text for their courses.

These works are large and comprehensive, covering every aspect of the subject. In contrast, this book aims to be shorter, more focused, and (I hope) more pedagogically flexible. First, it is a hybrid text, which means that only a portion of the text is printed, with the rest residing online. When a professor adopts this text, it comes with a fully populated website with supporting materials for the students in the course. This site is part of the Web Courses system, owned and supported by Lexis, which runs on the Blackboard courseware software. As a result, the professor never has to set up their own site for the students, such as on TWEN or Blackboard. Even better, if they are familiar with Blackboard, the Lexis Web Courses system works very much the same because it is based on Blackboard. On the companion site for the book, they will see a full Teacher's Manual as well (only available to the professor), with a suggested Fall and Spring semester Syllabus, rubrics, assignments that tie into the design of the book, and various supplemental materials. Also included is a suggested full problem set for the "closed memo" that most courses begin with. On the student portion of the site, there are numerous examples and supporting documents, each of which ties into each chapter in the print book. But these, too, are all customizable by the professor.

As a result of the close integration between the print book and the online site, it would be unfair (or at least incomplete) to judge the print book alone, without reviewing the online site as well. All told, there is probably twice as much material online as what you

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hold in your hands. And, as noted, it is all customizable by the professor and immediately useable by the student as needed.

So, the first difference between this text and other such books is that this one is a hybrid text, which allows the book to be somewhat cheaper, and also allows for more interactive features in the online portion of the text than can be achieved in print. Second, it is based on the belief that students today need to read less and do more, to be active rather than passive. Aristotle said, “What we have to learn to do, we learn by doing.” It is no secret to educators that our students are changing. Some assume this is a bad thing and lament the “short attention span” of the Google generation. But most teachers would rather, as teachers have for millennia, reach their students wherever they are with what they need. This book attempts to do that for a new generation of legal writing students.

Third, students are learning this material for the first time and perhaps do not need to read in the first year huge amounts of information about the writing process. Students certainly do need a deeper understanding later in law school, and in practice. But as they are first learning how to do, they need to do, rather than spend so much time reading about it. So the topics addressed in this book are covered (in the print text) at less depth than in the traditional legal writing textbooks. The chapters are designed to introduce the basic concepts of the fundamental lawyering skills — and to be supplemented with additional interactive information online. Lawyering and advocacy skills are learned through an iterative process of doing and failing, doing and failing, with the instructor providing support and feedback until success is achieved.

Finally, this book is designed for flexible use. Each professor has his or her own ways of teaching the course. The older textbooks all have their own approaches, which may not be fully in sync with how the professor treats the material. So the professor compensates by creating his or her own assignments, handouts, and examples. When the two differ, this can be confusing for students. A central idea behind this textbook is — as much as possible — to enable professors to assign limited amounts of reading and then use the online materials (and their own materials) in ways that best suit their individual approaches to the course.

The Carnegie Report (2007) criticized law school for, among other failings, not being intentional about the formation of professional identity among its students. Many law professors received this criticism quizzically since a course in professional responsibility has always been a part of legal education and indeed is required by the ABA. The report was responsible in part for this confusion because it unintentionally blurred the distinction between (1) the required course in professional responsibility and (2) a new concept introduced in the report — the formation of professional identity. But there is an important difference between these two concepts.

Professionalism includes, of course, such responsibilities as thoroughness, respect for opposing counsel and judges, and responding to clients in a timely fashion. *Professional identity* includes a lawyer’s decisions about these behaviors, his or her sense of duty as an officer of the court and, perhaps most importantly, his or her sense of responsibility as part of a system that is engaged in upholding the rule of law. Teaching professional identity means we ask students to finish this sentence: “I am a lawyer and that means for me that I will resolve this ethical dilemma as follows . . .” The Carnegie report is probably correct when it says that law schools do not do that very successfully.

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The problem is that the formation of an identity is not something professors can “teach” per se. You cannot teach a person to form his or her own identity. Rather, professors need to create “situations” in which students can be confronted with ethical questions and reflect on the decisions they make, and be guided by us as teachers as they form their own professional identities. The Skills & Values series of textbooks offer materials to help teachers create these learning situations.

This book, as with the entire Skills & Values Series, is a new and different way to think of a legal text than any we have had in the past. It is designed to be adaptable and to help us teach students what they need to know to become well-rounded and skilled professionals. And it tries to tap into the ways our students learn best, so that we may successfully prepare them “*for their future, not our past.*”¹

How this Book Is Organized

What follows are 14 chapters that provide students with an introduction to the key aspects of the Lawyering Process from understanding what lawyers do, to research, writing, citation, writing style, drafting, persuasion, and oral arguments. These chapters provide introductory reading on each topic, with supplemental reading sometimes offered by the professor, and examples, quizzes, checklists, and tutorials provided online. After reading the assigned chapter for class, the student should next go to the online site to see what additional materials have been provided to read or work with before class. If the student would like more reading on a chapter topic, each of the chapters concludes with a short list of recommended further reading on that topic.

At the end of each chapter, the student will find an assignment or exercise. The professor may assign these, or may substitute his or her own assignment. There will also be opportunities for the student to identify and consider ethical questions that confront lawyers every day. They are designed to help the student along the journey to forming his or her own professional identity as a lawyer.

There is also this thing called Google, but you have probably heard of it. Google search results are not always authoritative, but the Internet can be a tremendous guide to learning. The approach of this book is to encourage the student to customize his or her reading and learning on each of the topics and not feel limited to what is contained in the book. We all learn differently and each student should seek to take charge of his or her own legal education. Good lawyers are life-long learners, and it is not too early to cultivate that approach to everything about the law.

When students start law school, the journey seems long, and the path at times seems foggy and unclear. It is unsettling to join a discourse community where one does not even know what one does not know. But the good news is that the fog will gradually clear during the first year, and this course can be a port in the storm. It is the place where students can safely ask questions that might seem basic and naive, and where they can begin to make the connections between what they are learning in this course with what they are learning in their other courses. Before long, students in this course realize that they have learned a lot about how the legal system works, and their future role in it as lawyers, and the fog begins to clear.

¹ David I. C. Thomson, *Law School 2.0: Legal Education for a Digital Age*, xi (2009).

Acknowledgments

As with any such effort, there are many others whose support and contributions went into this book, and I want to offer my thanks to them. I am grateful first to Cardozo Law School in New York City, for its willingness years ago to take a chance by hiring as an adjunct someone barely out of law school himself. I had, as I recall, 32 students in that first class, and while it was a lot of work on top of my practice, I remember my students as being engaged, hard-working, and supportive. I was hooked on teaching and have remained so ever since. I owe a large debt of gratitude as well to the hundreds of students I have had since then in my Lawyering Process classes at the Sturm College of Law at the University of Denver, where I have taught for many years, the last decade as a member of the full-time faculty. I hope, of course, these students would say they learned a lot from me, but it is truly I who learned a great deal from them. In many ways this book is the product of what they have taught me about how they learn this material, and what works best as they develop their skills in the course.

I have also over the years been supported and aided by an impressive array of teaching assistants and research assistants, many of whom have contributed directly to this book in one way or another. I have learned a lot from all of my TAs and RAs, especially in their thoughtful guidance about the learning styles of the current generation of students. They have given me feedback about many aspects of the course, particularly the reading materials I have assigned over the years. Among those TAs and RAs, I specifically thank: Chad Grell, Eileen Joy, Ian London, Kendra Beckwith, Megan Embrey, Kate Bartell Nowak, Jill Sage, Kelley Haun, and Lisel Thompson. Also, I am grateful to former students Krista Nash and Logan Cornett, though not serving as TAs or RAs for me, gave me excellent feedback on early drafts of the book. I am indebted to all of these students for helping me to conceive the book and keep it oriented toward what students need when encountering the course material.

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sure where each idea originated or how many wonderful colleagues have added to it.”²

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² Terrill Pollman, Judith Stinson, Richard K. Neumann, Jr. & Elizabeth Pollman, *Examples & Explanations: Legal Writing* xi (Aspen, 2012).

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