

# **The Pre-Writing Handbook for Law Students**



# The Pre-Writing Handbook for Law Students

**A Step-by-Step Guide**

Second Edition

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Miriam E. Felsenburg



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I dedicate this book to Deborah Leonard Parker and Christine Nero Coughlin, two amazing legal writing directors who have made my job a joy; and to Joseph and Ellen, who make the rest of my life a joy.

Laura P. Graham

This book is dedicated to the memory of my beloved Mother, Gertrud K. Felsenburg, Ph.D., who would be very proud; and to Regina.

Miriam E. Felsenburg



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edition of *The Pre-Writing Handbook*. They have sharpened my own understanding of the role pre-writing plays in the work of novice legal writers. And through their struggles and eventual successes, they have confirmed my conviction that time spent focusing on pre-writing, early and often, pays great dividends throughout their law school years and beyond.

Laura P. Graham

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# Introduction

Effective legal writers are, by definition, effective legal analysts. Almost every form of legal writing involves communicating legal analysis. And like learning any other skill, learning to be an effective legal analyst and writer requires practice and patience.



*The Pre-Writing Handbook for Law Students* is designed to help you develop and practice the skills that will allow you to effectively analyze legal questions to arrive at sound answers about which you are confident. The confidence you gain from engaging in the *pre-writing process* outlined in the *Handbook* will then translate into a smoother, more effective *writing process* and a better written product.

While we hope that the *Handbook* will be useful to legal writers in many contexts beyond the first-year classroom, we have deliberately geared it toward beginning legal writers, who often find the going tough. We have confirmed through careful research that many beginning legal writers struggle in part because they underestimate the key role that legal analysis plays in effective legal writing; they believe that effective legal writing is primarily a matter of style and format. Of course, those aspects of legal writing are important to the finished *product*—the memo or brief that will ultimately be submitted to the supervising attorney or to the court. But long before style and format come into play, the legal writer must engage in the *process* of deciding what the document should say. We refer to this process as the *pre-writing process*.

Routinely engaging in the pre-writing process is especially important for novice legal writers, because legal analysis is more complex, and often more difficult, than they expect. Legal analysis demands a level of independent critical thinking that does not come naturally to many beginning law students. The law is often ambiguous, and conclusions are often difficult to come by. And how you arrive at your answer to

a legal question is just as important to your eventual legal reader as the answer itself. Legal analysts must train themselves to keep their minds open from the moment they begin thinking about a legal question until the moment they are certain they have every piece of available information needed to answer that question.

Moreover, effective legal analysis rests in part on a conscious engagement in metacognitive processes. Metacognition has been defined as “thinking about thinking.” As you analyze a legal question, you need to pause periodically to evaluate your progress. You need to train yourself to recognize gaps in your understanding and to address them before moving forward. Most beginning law students are already good metacognitive learners; the pre-writing strategies in the *Handbook* are designed to help you become even more deliberate about using metacognitive strategies to enhance your analytical skills.

Throughout the *Handbook*, we have identified crucial metacognitive “checkpoints” in the pre-writing process—points where you should slow down, or perhaps stop, to assess your progress and to make any necessary adjustments. Each checkpoint is labeled with either a “pause” symbol  or a “stop” symbol . We urge you not to skip these important checkpoints, because they identify key opportunities to become more adept at monitoring and refining your pre-writing process.

We have deliberately limited the scope of the *Handbook*. While it addresses all of the steps in the *pre-writing process*, it does not discuss all of those steps in equal depth. For example, while Chapter 5 discusses the role of legal research in the pre-writing process, it does not detail the many and varied methods of conducting legal research; we proceed on the assumption that you will receive comprehensive legal research instruction as part of your first-year curriculum. On the other hand, the *Handbook* spends a great deal of time on the pre-writing steps that should happen *after* the legal research is done.

The *Handbook* only briefly introduces the steps in the *writing process*—that is, the steps involved in producing a finished written product, such as a memo or brief. We consider outlining, drafting, editing, revising, polishing, citing, etc. to be beyond the scope of the *pre-writing process*. The *Handbook* proceeds on the assumption that you will receive comprehensive legal writing instruction as part of your first-year curriculum.

That is not to say that there is no writing involved in pre-writing. At each step of the pre-writing process, you will be encouraged to put the results of your work in writing. However, your written record of your pre-writing work is intended for one audience only—you. Thus, there is great flexibility in terms of what it looks like. We have suggested

some formats for recording your pre-writing work, but these formats are not “magic”—you should feel free to adapt them to suit your purposes, or even to create your own formats. The key is to discipline yourself to capture your work at each step of the pre-writing process in a written form that you can return to at later points in your process. In the recap at the end of each chapter, we provide a running list of the written products that should be generated during the pre-writing process.

*The Pre-Writing Handbook for Law Students* offers specific techniques for making pre-writing a regular part of your process when working on legal writing assignments. These techniques are illustrated in the context of a typical first-year legal writing assignment, in which the junior attorney (the student) receives information about a case from a senior attorney or supervisor (the professor) and is asked to produce a specific legal document (a memo, a trial brief, etc.). Of course, this is but one of many contexts in which legal analysis is required, but it is a context that will be immediately familiar to most users of the *Handbook*.

Each chapter of the *Handbook* contains detailed illustrations of the steps in the pre-writing process, using two well-developed scenarios from different areas of the law. Each chapter also includes exercises based on four additional scenarios, so that you can independently practice the pre-writing skills explained in that chapter. We urge you to complete all of the exercises in each chapter, even if your professor does not require you to; the exercises build on one another, and each individual exercise will benefit you more if you have completed the prior exercises.

As these scenarios are developed throughout the *Handbook*, you will notice that heavy emphasis is placed on the crucial skill of recognizing the narrow legal issues that must be analyzed in order to answer the broad questions the scenarios present. To assist you in developing that skill, we have included in the recap at the end of every chapter a description of the issues in the two scenarios, as refined by your work in that step of the pre-writing process.

Precisely because the *Handbook* emphasizes the need to move slowly and deliberately through the pre-writing process, we urge you to move slowly and deliberately through the *Handbook* itself. More than likely, your professor will break your reading of the *Handbook* into many small chunks, and this is a good thing. As you will see in Chapter 6, close, active reading is a vital skill for both beginning law students and seasoned lawyers; thus, close, active reading of the *Handbook* itself is required in order for you to get the maximum value out of it.

Chapter 1 provides an overview of the four stages of the pre-writing process; Chapters 2 through 8 elaborate on the individual steps within

those four stages; and Chapter 9 briefly discusses the transition from the pre-writing process to the writing process. We believe that by reading the *Handbook* and completing the exercises, you will gain a level of confidence in your legal analysis skills that will propel you towards becoming an excellent legal writer.