

Legal Communication and Research

Legal Communication and Research

Lawyering Skills for the Twenty-First Century

Ian Gallacher



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For Julie, who glitters.

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Foreword

It probably seems ominous for a book about writing to need a foreword to explain what it contains and how it works. You, as the book's reader, might legitimately ask what a book about writing can offer if it needs its own explanation.

Don't worry. Or, at least, don't worry for that reason. This foreword is here to make things easier, but I hope and think the book isn't too difficult to understand without any introduction. But having said I would try to make this even easier, let me try.

The book is organized into five principal sections: Writing in Theory, The Writing Process, Analysis, Persuasion, and Legal Research. There are four appendices as well: a checklist to help you with editing and proofreading, a quick overview of judicial structure, a very short review of the litigation process, and a reminder about the three branches of the federal government. Each of the chapters in the five principal sections consists of three parts: an introductory section that describes what the chapter's about and what you should know once you've read the chapter, the chapter itself, and a series of focus questions you might want to use to help you as you work through the material in the chapter.

The focus questions are designed to mirror the active reading process I hope you'll use throughout your reading of this book and, in fact, your reading of all material while you're in law school and in law practice. Some of these questions are provocative and appear to question the material in the chapter, but that's an intentional strategy; I want you to question the text aggressively in order to be sure that you're getting the most out of it. If you end up disagreeing with the text as a result, that's fine as long as you are confident in your position and can back it up in the face of questioning as aggressive as yours has been.

Some chapters also have exercises accompanying them. These are designed to help to reinforce some of the material in the chapter, not to give you extra work to do or to add to your general stress level. So please feel free to ignore them unless your legal writing professor says otherwise.

What you won't find in here are extended examples of the writing styles and the types of documents the book discusses. This is a considered choice, not just an accidental omission.

Examples can be very helpful in providing clarification to a discussion. After you've read about how to write and structure an analysis memo, it would probably be reassuring to see a complete memo written in the style you've learned: a validation, in a way, that what you'd learned is in fact what's expected.

But examples can also have a more powerful negative effect. Some students believe that they needn't learn so much about the "why" of doing something a particular way because the example gives them the "how" and that, they think, is all they'll need. They don't believe they need to understand the reasons behind the way a document is written or structured as long as they understand the superficialities.

And they might be right. That probably will get them through the course, and might even get them a good grade. But that isn't the purpose of this book and it shouldn't be your purpose either: good grades are important, of course, but they're a by-product of learning rather than its ultimate goal. What I'm going for with this book, and what you should be aiming for in your law school education, is a solid and secure foundation for a writing style that will see you through law school and on into practice. You'll improve on it all the time, I hope, but your own fundamental writing style should be in place by the end of your legal writing course. And the only way to make sure you've really assimilated the suggestions of this book is to work through writing assignments on your own and have that work commented on by a skilled legal writing professor who's working towards the same goal as you. Writing, with helpful critiquing of your work, is the only way to learn how to write, so I've stayed away from extended examples to remove the temptation of trying to learn by emulation.

The book is written in a voice that is assuredly not one you should use in your formal legal writing. I'll make this point several times because it's very important: the texts you read in law school—especially in your first year—aren't intended to be models for your legal writing, whether it be the predictive style you might learn first or the persuasive style of writing you learn later in your first year. Most law school textbooks are written in a lofty, impersonal style and the court decisions they excerpt are written to reflect the court's decisions, not to persuade a court of the correctness of a particular position, as lawyers must do in litigation. This book uses a different strategy, and is intentionally written in a chatty, relaxed voice that is just as inappropriate for formal attorney writing as the impersonal style of most textbooks or the detached style of court opinions. I'm much more interested in persuading you of the things I'm saying than in imposing them on you, so I tried to adopt a voice that would reflect that intent. Please don't copy this style for your memos, briefs, exam answers, papers, or law review comments and notes.

Writing is an inherently personal activity. No one can tell you how you should write and what your writing process should be; only you can decide that for yourself. But writing is an intentional, not reflexive, activity, so the process by which you produce a piece of writing, and the writing itself, should be subjected to careful and thoughtful scrutiny. That's the purpose of this book: to give you the tools necessary to help you decide how best to express your legal analysis in writing and what process will best accomplish that ideal expression.

Legal research—the other main subject of this book—is the most challenging area you will study in law school. That's a bold claim, but I stand by it. The technological developments of the past twenty years mean that hardly anything about legal research has gone unchanged and the pace of that change is increasingly dramatically. No area you study in law school is changing as rapidly as legal research. And no static book can hope to stay current with all the developments in the legal research world, which is why

this book doesn't even try. Rather, it discusses the world of legal information as it is at the time of writing and uses that baseline as a place from which to discuss the research process. That process has remained unchanged since the advent of computer-assisted legal research and the possibilities for self-indexed, as opposed to the more traditional pre-indexed, research offered by computers. If you concentrate on how to research rather than where you're going to research, the superficial changes in the various media available to the legal researcher won't affect you nearly as much as you might think.

For many of you, the prospect of studying writing and research intensely will seem like an unchallenging way to spend your time. Those who believe this will doubtless be experienced writers and researchers, and will assume that those strategies that have served you well in the past will be easily adapted to the law. For others, the thought of having your writing and research skills subjected to the detailed scrutiny that is certainly coming will seem like a daunting prospect. Those who believe this might have succeeded in their academic careers up until now without having to write much and you are now concerned that the learning curve will be too steep for your comfort.

The news—bad or good, depending on your perspective—is that you're both wrong. Legal writing is a very different skill from anything you might have learned before, and that means you are all—experienced and inexperienced writers alike—starting more or less from the same place. For much of the time during your introduction to legal writing, the more experienced writers might feel unduly constrained by the new technical requirements being imposed on you, and that—ironically enough—might make legal writing harder than it is for those with little writing experience: you have habits to unlearn, while they are starting from the beginning. But if you work at it, you'll all improve.

The best thing to do, whatever your belief about the state of your writing skills, is to set aside any preconceived notions about legal writing and come to the subject as fresh and willing to learn as possible. If you do that, and take what you learn as the sincere attempt of your writing professor, and me, to help you develop your own voice as a legal writer, you'll get as much out your legal writing studies as possible.

So. Thank you for reading this book, and thank you for (I hope) approaching it in the spirit it was written. And relax. Really: studying the law can be difficult and confusing at times, but you'll only get as much out of it as you can if you don't tense up against it. Try to enjoy yourself and look forward to improving your writing skills, regardless of how advanced they were when you came to law school.

Okay. Let's get started.

Acknowledgments

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