

Contents

<i>Preface</i>	<i>xxv</i>
<i>Acknowledgments</i>	<i>xxvii</i>

I **LEGAL WRITING AND LAW** **1**

1. Introduction to Law **3**

§1.1	Legal Writing Is Decisional Writing	3
§1.2	Writing Skills Can Profoundly Affect a Lawyer's Career	3
§1.3	Where Law Comes From	4
§1.4	The Common Law	5
§1.5	Law's Vocabulary	5

2. Rule-Based Reasoning **7**

§2.1	The Inner Structure of a Rule	7
§2.2	The Application of a Rule	14
§2.3	Some Things to Be Careful About with Rules	16
§2.4	Causes of Action and Affirmative Defenses	17
<i>Exercise</i>	<i>Rule 11 of the Federal Rules of Civil Procedure</i>	18

3. Issues, Facts, Precedents, and Statutes	21
§3.1 A Precedent's Anatomy	21
<i>Exercise I Dissecting the Text of</i> Roberson v. Rochester Folding Box Co.	23
§3.2 The Interdependence of Facts, Issues, and Rules	28
<i>Exercise II Analyzing the Meaning of</i> Roberson v. Rochester Folding Box Co.	30
§3.3 The Anatomy of a Statute	31
<i>Exercise III Analyzing the Meaning of §§ 50 and 51 of the New York Civil Rights Law</i>	32
§3.4 How Statutes and the Common Law Interact	32
II	
INTRODUCTION TO LEGAL WRITING	35
4. Predictive Writing	37
§4.1 How Predictive Writing Differs from Persuasive Writing	37
§4.2 The Documents Lawyers Write	38
§4.3 How to Predict	38
<i>Exercises Nansen and Byrd</i>	43
5. Inside the Writing Process	45
§5.1 Product and Process	45
§5.2 Five Phases of Writing	46
§5.3 Planning the Work	47
§5.4 Researching and Analyzing	48
§5.5 Organizing Raw Materials into an Outline	48
§5.6 Producing a First Draft	49
§5.7 Rewriting	50
§5.8 Polishing	52
6. More About Writing	55
§6.1 Writing and Thinking Are One Process	55
§6.2 Your Readers	56
§6.3 Voice and Professional Tone	57
§6.4 Overcoming Writer's Block	57

Contents

§6.5	Plagiarism	59
§6.6	For <i>All</i> Writers — Even the Famous Ones — Writing Is Very Hard Work	60
§6.7	Don't Imitate Older Judicial Writing, Even If You Find It in Casebooks	61

III GENERAL ANALYTICAL SKILLS 63

7. Selecting Authority 65

§7.1	Why Authority Matters	65
§7.2	How Courts Are Organized	66
	§7.2.1 State Courts	67
	§7.2.2 Federal Courts	67
§7.3	Sources of Law	68
	§7.3.1 Primary Authority	68
	§7.3.2 Secondary Sources	69
§7.4	The Hierarchy of Authority	70
§7.5	How to Use Nonmandatory Precedent and Secondary Sources to Fill a Gap in Local Law	71
	§7.5.1 Laying the Foundation	71
	§7.5.2 Filling the Gap	73
§7.6	How Courts Use Dicta	74
§7.7	Nonprecedential Opinions	75
<i>Exercise</i>	<i>The Hierarchy of Authority</i>	76

8. Working with Statutes 79

§8.1	Five Tools of Statutory Interpretation	79
§8.2	The Statute's Words	80
§8.3	The Statute's Context	81
§8.4	Canons of Statutory Construction	81
§8.5	Interpretations from Nonmandatory Authority	82
§8.6	Legislative History	82
§8.7	An Example of Statutory Interpretation at Work	83
§8.8	How to Present Statutory Analysis in Writing	89
<i>Exercise I</i>	<i>Plagiarism and the Board of Bar Examiners</i>	90
<i>Exercise II</i>	<i>The Ironwood Tract</i>	90

9. Working with Precedent	91
§9.1 Eight Tools for Working with Precedent	91
§9.2 Synthesis	92
§9.3 Determining Policy from Precedent	92
§9.4 Analogizing and Distinguishing	93
§9.5 Testing for Realism	93
§9.6 An Example of the Precedent Skills at Work	94
§9.6.1 The Client’s Story	94
§9.6.2 Four Precedents	95
§9.6.3 Using the Precedent Analysis Tools	99
<i>Exercise I Duress</i>	102
<i>Exercise II Emil Risberg’s Diary</i>	102
10. Working with Facts	103
§10.1 What Is a Fact?	103
§10.2 Identifying Determinative Facts	105
§10.3 Building Inferences from Facts	105
§10.4 Identifying Hidden and Unsupportable Factual Assumptions	107
<i>Exercise The Menu at the Courthouse Cafe</i>	109
IV	
ORGANIZING PROOF OF A CONCLUSION OF LAW	111
11. Paradigm for Organizing Proof of a Conclusion of Law	113
§11.1 Why We Need to Organize Proof of a Conclusion of Law	113
§11.2 A Paradigm for Structuring Proof	114
§11.3 Why Legal Readers Prefer This Type of Organization	116
§11.4 Varying the Paradigm Formula to Suit Your Needs	117
§11.4.1 Varying the Depth	117
§11.4.2 Combining Separately Structured Analyses	118
<i>Exercise Changing Planes in Little Rock</i>	118

Contents

12. Varying the Depth of Rule Explanation and Rule Application	121
§12.1 Introduction	121
§12.2 Conclusory Explanations	123
§12.3 Substantiating Explanations	124
§12.4 Comprehensive Explanations	125
§12.5 Beware Cryptic Explanations	127
<i>Exercise Punitive Damages and Bedbugs</i>	128
13. Combining Proofs of Separate Conclusions of Law	131
§13.1 Introduction	131
§13.2 How to Organize Where the Rule Includes Multiple Elements or Factors	131
§13.3 How to Organize When More Than One Claim or Defense Is at Issue	134
§13.4 How to Organize Alternative Ways of Proving a Single Conclusion	135
§13.5 How to Organize When You're Writing About Separate but Related Issues	135
§13.6 How to Start Working with Multi-Issue Situations	136
14. Working with the Paradigm	139
§14.1 Using the Paradigm Structure to Outline and to Begin Your First Draft	139
§14.2 Rewriting: How to Test Your Writing for Effective Organization	141
<i>Exercise Teddy Washburn's Gun</i>	143

V **COMMUNICATION OF PREDICTIVE ANALYSIS** **147**

15. Interviewing the Client	149
§15.1 Clients and Lawyers	149
§15.2 The Interview	150
§15.2.1 Learning What the Client Knows	150
§15.2.2 Questions	151

§15.2.3	Listening and Talking	151
§15.2.4	How to Conclude	152
16. Office Memoranda		153
§16.1	Office Memorandum Format	153
§16.2	Writing an Office Memo	157
§16.3	How to Test Your Writing for Predictiveness	158
17. Email Communication		159
§17.1	Professional Tone and Appearance	159
§17.1.1	Keeping It Professional	160
§17.1.2	Writing the Email	161
§17.1.3	Making the Email Easy to Read	161
§17.2	Email and Confidentiality Problems	162
§17.3	Email Pitfalls	163
§17.4	Communicating Legal Analysis in an Email Memo	164
§17.5	How to Test Your Emails for Professional Effectiveness	166
18. Oral Presentations to Your Supervising Lawyer		169
§18.1	Preparing	170
§18.1.1	Getting the Assignment	170
§18.1.2	Researching	170
§18.1.3	Writing Out Your Analysis	170
§18.1.4	Whittling Down the Analysis to the Initial Summary	171
§18.2	Questions from Your Supervisor During the Meeting	171
§18.3	Typical Questions	173
§18.4	The Most Essential Points	174
§18.5	Mistakes to Avoid	174
19. Client Advice Letters		175
§19.1	Advice in Writing	175
§19.2	Style and Tone in a Client Advice Letter	176
§19.3	How to Organize a Client Advice Letter	176

Contents

VI		
GENERAL WRITING SKILLS		181
	20. Paragraphing	183
§20.1	How Paragraphing Reveals Your Organization	183
§20.2	Probative Paragraphs and Descriptive Paragraphs	184
§20.3	Thesis Sentences, Topic Sentences, and Transition Sentences	185
§20.4	The Two Most Common Ways of Botching a Paragraph's Beginning	186
§20.5	How to Test Your Writing for Effective Paragraphing	188
<i>Exercise I</i>	<i>The First Weeks of Law School (Probative and Descriptive Paragraphs)</i>	189
<i>Exercise II</i>	<i>Escape from Prison (Paragraph Unity, Coherence, and Length)</i>	190
	21. Effective Style	193
§21.1	Clarity and Vividness	193
§21.2	Conciseness	195
§21.3	Forcefulness	197
§21.4	Punctuation and Other Rules of Grammar	200
§21.5	How to Test Your Writing for Effective Style	201
<i>Exercise</i>	<i>Kalmar's Driveway</i>	211
	22. Quotations	213
§22.1	Quotation Format	213
§22.2	How to Test Your Writing for Effective Use of Quotations	215
<i>Exercise</i>	<i>The First Amendment</i>	219
VII		
THE SHIFT TO PERSUASION		221
	23. Introduction to Motions and Appeals	223
§23.1	Introduction to Persuasion Through Motions and Appeals	223
§23.1.1	What Happens During a Motion	223
§23.1.2	What Happens During an Appeal	224
§23.2	The Roles of the Brief and of Oral Argument	226
§23.3	How Judges Read Briefs	227

24. Developing a Persuasive Theory of the Case	231
§24.1 Strategic Thinking	231
§24.2 Theories: Of the Case, of the Motion, of the Appeal	232
§24.3 Developing a Theory: Be Open to Possibilities	232
§24.4 Developing a Theory: Process	233
§24.5 How to Evaluate Your Theory	235
<i>Exercise Escape from Prison? (Developing a Theory)</i>	236
25. Telling Your Client’s Story in a Statement of the Case (or Facts)	239
§25.1 The Basics	240
§25.2 The Basic Tools of Persuasive Storytelling	240
§25.3 The Opening	241
§25.4 Tips for Effective Storytelling	242
§25.5 Dealing with Bad Facts	244
§25.6 The Procedural History	245
§25.7 How to Evaluate Your Statement of Facts	246
§25.8 Story Ethics	246
<i>Exercise I</i>	247
<i>Exercise II Escape from Prison? (Rewriting Fact Statements)</i>	248
26. Developing Persuasive Arguments	251
§26.1 What Is an Argument?	251
§26.2 What Judges Expect from Written Argumentation	252
§26.3 Types of Legal Arguments	253
§26.3.1 Motivating and Justifying Arguments	253
§26.3.2 Policy Arguments	254
§26.3.3 Brainstorming Arguments	256
§26.3.4 Selecting and Organizing Your Arguments	256
§26.3.5 Stating Rules Clearly and Persuasively (Rule and Rule Proof)	258
§26.3.6 Working Carefully with the Facts (Fact Application)	259
§26.4 How to Handle Adverse Authority and Arguments	259
§26.5 Argumentation Ethics	261
§26.6 Evaluating Your Arguments	262
27. Handling the Procedural Posture	265
§27.1 Why Procedural Postures Matter	265
§27.2 Types of Procedural Postures	265

Contents

§27.2.1	Motions Challenging the Quality of a Party's Allegations	266
§27.2.2	Motions Challenging Other Aspects of the Way in Which the Litigation Began	267
§27.2.3	Motions Challenging the Quality of a Party's Evidence	267
§27.2.4	Miscellaneous Case-Management Motions	268
§27.3	Writing in a Procedural Posture	268
§27.4	Researching to Account for Your Case's Procedural Posture	270
 28. Motion Memoranda		273
§28.1	Motion Memorandum Format	273
§28.2	Writing a Motion Memorandum	276
 29. Appellate Briefs		277
§29.1	Appellate Brief Format	277
§29.2	Writing the Appellate Brief	281
§29.2.1	Developing a Theory of the Appeal	281
§29.2.2	The Process of Writing a Brief	281
§29.3	Handling the Standard of Review and the Procedural Posture Below	283
§29.4	Limitations on Appellate Review	287
 30. Point Headings and Subheadings		289
§30.1	How Points and Headings Work	289
§30.2	The Basics	290
§30.3	The Process of Creating Point Headings: Brainstorming Arguments	292
§30.4	The Importance of Facts	293
§30.5	How to Evaluate Your Headings for Effectiveness	293
 31. Questions Presented		295
§31.1	Introduction	295
§31.2	Four Ways of Structuring a Question Presented	296
§31.3	Writing an Effective Question Presented	298
§31.4	How to Evaluate Your Questions Presented for Persuasiveness	299
<i>Exercise</i>	<i>G.G. v. Gloucester County School Board</i>	303

VIII		
INTO THE COURTROOM		307
32. Oral Argument		309
§32.1 Your Three Goals at Oral Argument		309
§32.2 Structure of an Oral Argument		310
§32.3 Questions from the Bench		312
§32.4 Delivery, Affect, and Style		314
§32.5 Formalities and Customs of the Courtroom		316
§32.6 Preparation for Oral Argument		316
§32.7 <i>State v. Dobbs and Zachrisson: An Oral Argument Dissected</i>		318
APPENDICES		331
A. Statute Analysis Exercises		333
B. Precedent Analysis Exercise		345
C. Sample Office Memorandum		353
D. Sample Email Memo		359
E. Sample Client Advice Letter		363
F. Sample Motion Memorandum		367
G. Excerpts from Appellant’s Fourth Circuit Brief in <i>G.G. v. Gloucester County School Bd.</i> (2016)		381
H. Excerpts from Appellee’s Fourth Circuit Brief in <i>G.G. v. Gloucester County School Bd.</i> (2016)		401
<i>Index</i>		<i>419</i>