

## CONTENTS

<i>Table of Charts and Sample Documents</i>	xxv
<i>Preface</i>	xxvii
<i>Acknowledgments</i>	xxix
PART I      LAW SCHOOL—GETTING STARTED	1
Chapter 1    Introduction to Writing Style: Policy, Purpose, and Audience	3
I.    General Approach	3
II.   The Perspective of the Legal Writer	4
III.  A Policy-Oriented Approach	6
IV.  Purpose and Audience	7
A.    Purpose	7
B.    Audience	8
V.   Overview of the Process of Legal Writing	9
A.    Developing Skills of Legal Method and Analysis	9
B.    Researching the Law	10
C.    Prewriting	10
D.    Writing	10
E.    Revising Your Writing	11
F.    Revisiting Earlier Stages	11
VI.  Summary	11
Exercise 1-1	12
Chapter 2    Overview of the Case Method of Study	15
I. <i>Hadley v. Baxendale</i> : A Case Study	15
II.   The Litigation Pyramid	18
III.  The Casebook Method of Study	18
PART II      INTRODUCTION TO THE LEGAL SYSTEM	21
Chapter 3    Common Law	23
I.    Overview—Sources of Lawmaking Powers	23
A.    Legislative and Executive Branches	23
B.    Judicial Branch	24
C.    Common Law as a Backdrop for Legislation	25
D.    Other Systems of Government	25
II.  Common Law	26
A.    Historical Roots	26

B. Examples: Common Law Burglary and Murder	27
C. Common Law in Constant Change	28
III. Summary	28
Exercise 3-1	29
Chapter 4 Legislation	31
I. Roles of Constitutional and Statutory Law	31
A. Example: Embezzlement	32
B. Example: Consumer-Protection Legislation	32
C. Increasing Significance of Legislation	33
II. Judicial Interpretation and Application of Statutes	33
A. Vagueness and Ambiguity	33
B. Intrinsic and Extrinsic Evidence of Legislative Intent	34
C. Statutory Construction When Interpretation Fails	35
III. Case Studies in Statutory Interpretation	37
A. Illustration: Imprecision Leading to Ambiguity	37
1. The Problem	38
2. Intrinsic Evidence	38
3. Extrinsic Evidence	39
B. Illustration: Generality Resulting in Vagueness	40
Exercise 4-1	42
IV. Legislative Enactment and Change	44
Exercise 4-2	45
V. Interplay between Legislation and Common Law	47
A. Relationship Between Legislation and Common Law	47
1. Legislative Primacy	47
2. Legislation as Guidance for Common Law	48
3. Common Law as Background for Legislation	48
B. Judicial Power and Limitations Regarding Legislation	49
VI. Summary	50
PART III LEGAL METHOD AND ANALYSIS	51
Chapter 5 The Role of Precedent: The Court System and Stare Decisis	53
I. Introduction to Stare Decisis	53
II. The Court System	54
A. Structure of State and Federal Courts	54
B. Court Structure and Stare Decisis	56
III. Scope and Application of Stare Decisis	57
A. Building a Wall of Case Law, Brick by Brick	57
B. Analogizing and Distinguishing Precedent	58
1. An Inexact Science with Ample Room for Argument	58
2. Gaining Comfort with Legal Uncertainty	60
3. Example: Warrantless Searches of Cars, Houses, and Mobile Homes	61
C. Overruling Precedent	63

1. Standards for Departing from Normal Application of Stare Decisis	63
2. Changes in Social and Legal Context	64
3. Abandonment of Erroneous or Unworkable Precedent	64
4. Flexible Application of Stare Decisis to Constitutional Issues	65
IV. Summary	67
Exercise 5-1	67
Exercise 5-2	69
Chapter 6 Deductive Reasoning and IRAC—Introduction to Legal Analysis	79
I. Overview—Solving Legal Problems	79
II. Overview of Deductive Reasoning and IRAC	80
A. Deductive Reasoning in the Law—Uses and Limitations	80
1. The Legal Syllogism	80
2. Validity and Correctness of Legal Syllogisms	81
3. Limitations of the Legal Syllogism	82
B. IRAC	83
III. “ <i>T</i> ”—Identifying Issues for Analysis	84
A. Defining Issues	84
1. Issues and Subissues	85
2. Continuing Development of Issues	86
3. Materiality	87
Exercise 6-1	87
B. Scope of Analysis	88
1. Examination Answers	89
2. Office Memoranda	89
3. Briefs	89
IV. “ <i>R</i> ”—Formulating the Legal Rule	90
A. Overview—Sources of Authority	90
1. Primary and Secondary Authority	90
2. Jurisdiction in Which Primary Authority Controls	91
3. Strength of Case Law as Precedent	92
a. Level of Court	92
b. Controlling, Analogous, and Distinguishable Authority	93
4. Summary	94
Exercise 6-2	95
B. Analysis of Legal Standards	96
1. Depth of Analysis	96
2. Hierarchy of Authority	97
3. Policy Analysis	98
Exercise 6-3	99
4. Synthesis of Incremental Law	99

5. Developing Arguments for Both Sides	100
Exercise 6-4	101
V. “A”—Application of Law to Facts	101
A. Basic Patterns	101
B. Developing Arguments for Both Sides	102
Exercise 6-5	104
VI. “C”—Reaching Conclusions	104
VII. Summary	105
Exercise 6-6	105
PART IV    STEPPING STONES TO LEGAL MEMORANDA—CASE BRIEFS, OUTLINES, AND ESSAY EXAMS	109
Chapter 7   Case Briefs	111
I. Study of Cases	111
II. Preparing a Case Brief	112
A. General Approach and Format	112
B. Elements of a Case Brief	113
1. Identification of the Case	113
2. Issue and Holding	114
a. Issue	114
b. Holding	117
3. Facts	120
a. Significance of Facts	120
b. Selecting Facts for Your Fact Statement	120
c. Mastering the Facts	122
4. Procedural History	122
a. Elements of Procedural History	122
b. Significance of Procedural History	123
5. Reasoning	124
a. Rule and Rationale	124
b. Holding and Dictum	125
6. Evaluation	126
7. Synthesis	127
a. A Bridge Between Case Briefs and Outlines	127
b. Reconciling Disparate Results	128
c. Comparing Reasons for and Limits on Consistent Results	129
d. Limited Utility of a Case Viewed in Isolation	130
III. Summary	130
Exercise 7-1	131
Chapter 8   Reorganization, Summary, and Inductive Reasoning in Outline Form	139
I. Reorganization—Mapping the Forest	139
II. Inductive Reasoning	142
A. Analogy	142

B.	Generalizing from Particulars	144
	Exercise 8-1	145
C.	Relationship to Deductive Reasoning	147
	1. Formulating the Rule	147
	2. Applying the Rule to the Facts	148
	3. Role of the Course Outline	148
III.	Techniques of Outlining Course Materials	149
A.	Fundamental Principles of Outlining	149
	1. Classification	149
	a. Topics and Subtopics	149
	b. Transitions and Overviews	150
	c. Revealing Comprehension or Confusion About Relationships Between Points	151
	2. Getting Started	151
	a. Working from a Disorganized “Laundry List”	151
	b. Illustration: Everything in Its Place	152
	c. Special Challenges of Organizing Course Materials	152
B.	Content of the Outline	153
	1. Identifying, Constructing, and Stating Rules	153
	2. Illustrating Rules with Examples	153
	a. Case Summaries as Examples or Exceptions to a Rule	153
	b. Adding Policy Analysis	155
	c. Examples on Either Side of the Line Defined by the Rule	156
	Exercise 8-2	157
C.	The Outline as a Study Tool	158
IV.	Summary	158
	Exercise 8-3	159
Chapter 9	Essay Examinations	163
I.	Overview—Perspective and General Format	163
	A. Perspective	163
	B. General Format	164
II.	Elements of the Answer	164
	A. Issues	164
	1. Identifying Issues	164
	2. Scope of Analysis	166
	3. Expressing Your Identification of Issues	166
	B. Legal Rule	168
	1. Presentation of Legal Rules	168
	2. Depth and Formality of Analysis of Legal Rules	169
	C. Fact Analysis—Application of Law to Facts	169
	1. Presentation of Fact Analysis	169
	2. Depth and Formality of Fact Analysis	170
	D. The Conclusion	170
	1. Taking a Position	170

2. Comprehensive Conclusions	171
III. Techniques for Writing Exam Responses	172
A. Effective Use of Time	172
B. Mastering the Assignment	172
C. Prewriting	172
D. Writing the Answer	173
IV. Summary	174
Samples	177
Exercise 9-1	181
PART V    PREDICTIVE ANALYSIS—THE OFFICE MEMORANDUM OF LAW	183
Chapter 10 Introduction to the Law Library	185
I. Mastering the Assignment	185
II. Research Tools	186
A. Traditional Research Tools	187
1. Statutes—Code Services	187
2. West’s Case Reporters with Headnotes and Key Numbers	188
3. West’s Case Digests	188
4. Using a Citation Service to Check Subsequent History	193
5. Legislative History	194
a. Codebooks	194
b. Congressional Information Service	195
c. Individual Compiled Legislative Histories	195
6. Research Tools for Administrative Regulations and Specialized Areas of Practice	196
B. Making the Most of Computer-Assisted Research	196
III. Research Strategy	198
IV. Using the Library	199
A. Taking Notes	199
B. Library Courtesy	200
V. Reorganization and Outlining	201
VI. Summary	203
Chapter 11 Content of the Office Memorandum of Law	205
I. Overview	205
A. Oral Report, E-Mail, or Full Office Memorandum?	205
1. Oral Report	206
2. Traditional Office Memorandum of Law	206
3. Streamlined E-Mail Memo	206
4. Pedagogic Focus on Traditional Office Memoranda	207
B. Traditional Office Memorandum: Audience, Purpose, and Perspective	208
1. Audience and Purpose	208

2. Perspective	208
II. Alternative Formats for a Traditional Office Memorandum	209
A. Tradition, Flexibility, and Adaptation	209
B. Format A: Effective for Multi-Issue Memoranda	209
1. Ordering the Elements to Aid Comprehension	209
2. Facts in Different Places to Perform Different Tasks	210
a. Example: Narration of all Essential Facts in Action for Breach of Contract	210
b. Example: Analysis of Facts Relevant to Each Issue in the Discussion Section	210
3. Conclusions in Different Places to Perform Different Tasks	211
4. Overlapping Sections Are Like Actors Returning to Play Different but Complementary Roles	211
C. Format B: For Especially Complex Cases	212
D. Format C: A Slightly Streamlined Approach for a Full Memorandum	212
E. Flexibility and Adaptation	213
III. Elements of an Office Memorandum	214
A. Issues—Identification and Expression	214
1. Review	214
2. Example: Identifying Issues in a Title VII Suit	215
3. Expressing Issues with Particularity	215
B. Brief Answer	217
C. Facts	217
D. Discussion	219
1. Introducing Your Analysis	219
2. Analyzing the Law and the Facts	221
a. Example: Statutory Analysis	221
b. Example: Established Common Law	224
E. The Conclusion	225
IV. Summary	226
Samples	227
Chapter 12 Organization of Office Memoranda and Briefs	241
I. Format	242
II. Relationships Among Multiple Issues and Subissues	242
A. Proper Relationships Among Topics	242
B. Order of Topics	245
1. Logical Organization in an Office Memorandum	245
2. Strategic Organization in a Brief	245
3. Discussing or Arguing Full Range of Issues	246
C. Technique	246
III. Progression Within Section or Subsection	246
A. Hierarchy of Authority	247
B. Progression from General to Specific	247

C. Progression from Fundamental to Complex	250
D. Separation or Consolidation of Analyses	251
1. Overview	251
2. Single Syllogism in Undivided Section	252
3. Separation of Elements of Single Syllogism into Multiple Subsections	253
4. Multiple Syllogisms Within Single, Undivided Section	254
a. Separation of Multiple Syllogisms	255
b. Consolidation of Multiple Syllogisms	256
c. Discretion to Separate or Consolidate	257
d. Separate Analysis of Adverse Authority in Responsive Brief	259
5. Summary	260
IV. Paragraphs	260
A. The Role of Paragraphs Within a Section	260
B. Paragraph Content and Development	261
C. The Role of Sentences Within a Paragraph	263
V. Summary	265
Chapter 13 Legal Writing Style in the Office Memorandum	267
I. Clarity	268
A. Simplicity and Plain English	268
Exercise 13-1	269
B. Sentence Structure	270
1. Structuring and Punctuating Long or Complex Sentences	270
a. Closure Through Punctuation	271
b. Repetition of Prepositions or Other Linking Words or Phrases	272
c. Complex Series	274
d. Toward a Flexible, Policy-Oriented Approach to Punctuation	275
Exercise 13-2	279
2. Concrete Verbs and Active Construction	280
a. Concrete Verbs	280
b. Active and Passive Construction	280
Exercise 13-3	283
3. Effective Placement of Modifiers	283
Exercise 13-4	284
4. Restrictive and Nonrestrictive Clauses	285
a. The Role of the Comma	285
b. The Choice Between “That” and “Which”	287
c. Procedural Labels	289
Exercise 13-5	290
C. Precision	290
1. Careful Expression of Analysis	290
2. Beyond Dogma	292

II. Concise Writing	293
A. Content: Scope and Depth of Analysis	294
1. Scope of Analysis	294
2. Depth of Analysis	294
a. Depth of Analysis of Legal Authority	295
b. Incomplete Syllogisms	297
B. Form: Efficient Organization, Sentence Structure, and Phrasing	297
1. Organization and Repetition	297
2. Sentence Structure and Phrasing	298
a. Repetition	298
b. Verb Structure	299
c. Implicit Information	299
d. Tension Between Clarity and Conciseness	300
Exercise 13-6	301
III. Review and Revision	301
IV. Summary	302
Chapter 14 Presenting, Quoting, and Citing to Authority	305
I. Citation Form	306
A. Constitutions, Codes, and Federal Regulations	307
B. Published Case Law	308
1. Basic Citation Form	308
2. Abbreviations of Case Names	309
3. Parallel Citations	309
4. Subsequent History	310
5. Order of Authorities Within a String	311
6. Specific Page Cites	311
7. Short-Form Citation	312
8. Citations to Alternative Sources of Case Law	313
a. Public Domain Citations	313
b. LEXIS, Westlaw, Slip Opinions, and Internet Sites	314
C. Basic Citation Form for Books and Articles	316
D. Citation Within a Citation	317
E. Citation Signals	317
1. No Signal	318
2. “ <i>See</i> ”	318
3. “ <i>Accord</i> ”	319
4. “ <i>See generally</i> ”	319
5. “ <i>Cf.</i> ” and “ <i>Compare . . . with</i> ”	320
6. “ <i>See also</i> ”	320
7. “ <i>But</i> ” and “ <i>contra</i> ”	322
8. “ <i>E.g.</i> ”	323
Exercise 14-1	324
II. Presenting Your Authority Effectively	325
A. Subordinating Your Citations	325
1. Citation Clauses and Sentences	325

2. In-Depth Case Analysis	327
B. Synthesis of Case Law	328
1. Lack of Synthesis Burdens the Reader	328
2. The Benefits of Expressing Your Synthesis	330
3. Parallels to Effective Study Techniques	331
4. Consolidated Statement of Synthesis	332
III. Quotations	333
A. Using Quotations Selectively	333
B. Presenting Block Quotations	334
1. Basic Techniques	334
2. Special Techniques for Advocacy	337
Exercise 14-2	338
IV. Summary	339
PART VI INTRODUCTION TO ADVOCACY	341
Chapter 15 Advocacy: Overview and Ethics	343
I. Overview—Procedure and General Format	343
A. Procedure	343
B. Basic Formats for Briefs	344
II. Good Faith, Reasonableness, and Full Disclosure	345
A. Assertion of Claims and Defenses	345
B. Disclosure of Adverse Authority	346
C. Misleading Legal Argument	347
III. Summary	348
Chapter 16 Developing Your Legal Arguments	349
I. Organizing Legal Arguments	350
A. Choosing a Theme and Supporting Arguments	350
1. Selecting Arguments	350
2. Developing a Theme	350
3. Mood and Metaphor	351
B. Determining the Order of Your Arguments	353
1. Leading with Your Strongest Argument	354
2. Special Considerations for Responsive Briefs	354
C. Internal Organization: Deductive Arguments	355
II. Introducing Legal Arguments	356
A. Point Headings	356
B. Introductory Paragraphs	357
III. Developing the Deductive Argument	359
A. Arguing the Law	359
1. Hierarchy of Authority	359
2. Strength of Case Law as Precedent	359
3. Depth of Analysis	362
4. Presenting Your Authority	362
B. Analyzing the Facts	363
C. Conclusions	364
IV. Summary	365

Chapter 17	Expressing Your Advocacy: Persuasive Writing Style and Oral Argument	367
I.	Persuasive Writing Style	367
A.	Persuasive Language	368
1.	The Adversarial Approach	368
2.	Clichés That Weaken or Offend	369
3.	Personal Attacks	370
B.	Sentence Structure	370
	Exercise 17-1	371
II.	Oral Argument to the Court	373
A.	General Format	373
B.	Formality and Demeanor	373
C.	Content of the Argument	374
1.	Introduction of the Argument	374
2.	Body of the Argument	375
a.	General Strategy	375
b.	Using the Facts	376
c.	Responding to Questions	376
3.	The Conclusion	378
D.	Nervousness and Verbal Stumbling	378
III.	Summary	379
	Exercise 17-2	379
PART VII	PRETRIAL ADVOCACY—PLEADINGS AND MOTIONS	383
Chapter 18	Pleadings	385
I.	The Complaint	385
A.	Format and Content	386
1.	Jurisdictional Statement	386
2.	Claim for Relief	387
a.	Allegations of Fact and Citations to Law	388
b.	Substance of Allegations	389
c.	Specificity of Fact Allegations	391
3.	Request for Relief	395
B.	Style and Organization	395
1.	Writing Style	395
2.	Organization	396
II.	The Answer	397
A.	Admissions and Denials	397
B.	Affirmative Defenses	398
C.	Counterclaims	399
III.	Summary	399
	Exercise 18-1	400
Chapter 19	Motion for Summary Judgment	409
I.	Procedural Context	409
II.	Standards for Summary Judgment	410

III.	Format for Summary Judgment Briefs—Overview	412
IV.	Statements of Facts	413
V.	Supporting Evidentiary Materials	416
VI.	The Motion	416
VII.	The Brief	418
A.	The Introduction	418
B.	The Argument	419
C.	The Conclusion	420
VIII.	Summary	421
	Sample	422
Chapter 20	Motion to Exclude Evidence Before Trial	437
I.	Pretrial Exclusion of Evidence	438
II.	Format	439
III.	The Motion	439
IV.	The Brief	440
A.	The Introduction	440
B.	The Argument	442
1.	Legal Rules	442
2.	Application of Rules to Facts	442
C.	The Conclusion	443
V.	Summary	444
	Sample	445
PART VIII	APPELLATE BRIEFS	449
Chapter 21	Standards of Appellate Review	451
I.	The Record on Appeal	451
II.	Standards of Review in the Federal Courts	452
A.	Overview	452
B.	Restricted Appellate Review of Findings of Fact	453
1.	Review of Jury Findings	453
2.	Review of a Judge’s Findings of Fact	454
C.	Conclusions of Law: Mixed Conclusions of Fact and Law in a Nonjury Trial	456
1.	Review of Discretionary Rulings	456
2.	Mixed Findings as Predominantly Fact or Law	457
3.	Constitutional Facts Doctrine	458
III.	Summary	458
Chapter 22	The Brief—Effective Appellate Advocacy	461
I.	Overview of Appellate Briefs: Format	461
II.	Statement of Issues	463
A.	Issue Statements as Preliminary Advocacy	464
B.	Credibility of the Advocate	465
III.	Statement of Procedural History	466
IV.	Statement of Facts	467
A.	The Power of Facts	467

<b>Contents</b>	<b>xxiii</b>
B. Persuasive Presentation of Facts	467
1. Advocacy with Credibility	467
2. Premature Legal Argument	469
C. Constraints	469
D. Summary and Perspective	470
V. The Argument	470
A. Summary of Argument	471
B. Standard of Review	471
C. Arguing the Law—The Role of Policy Analysis	472
D. Arguing the Law and the Facts	475
1. Strategic Choices	475
2. Varieties of Fact Analysis	478
a. Nature of Appellant’s Challenge	478
b. Procedural Posture	479
VI. The Conclusion	480
VII. Summary	480
Exercise 22-1	480
PART IX WRITING TO PARTIES: CONTRACTS AND CORRESPONDENCE	519
Chapter 23 Contracts	521
I. Basic Approaches	521
II. Fundamental Components	522
A. General Format	522
B. Introduction to the Contract	522
C. Recitals	523
D. Statement of Reciprocal Promises	524
1. Introductory Clause; Recital of Consideration	524
2. Precision in Drafting	526
a. Simplicity; Terms of Art	526
b. Deliberate Imprecision	527
3. Merger Clauses and Parol Evidence	528
E. Signature Line	529
III. Summary	529
Exercise 23-1	530
Chapter 24 Advice Letters	533
I. Advice Letters Distinguished from Opinion Letters	534
II. Purpose, Audience, and Writing Style	534
III. Format	535
IV. Introduction and Statement of Issues	536
V. Brief Answers	537
VI. Facts	538
VII. Legal Analysis	539
VIII. Conclusion; Strategic Recommendations	540
IX. Summary	541
Exercise 24-1	541

Chapter 25	Demand Letters	547
I.	Purposes of a Demand Letter	547
II.	Audience, Tone, and Writing Style	548
III.	Format	549
IV.	Overview	549
V.	Factual and Legal Basis for the Demands	550
A.	Stating Your Legal Premises	550
B.	Audience	551
C.	Avoiding Concessions, Admissions, and Waiver	552
VI.	Demands and Threats	553
VII.	Summary	555
	Exercise 25-1	555
APPENDICES		563
Appendix I	Introduction to the Legal System: Problems for Part II of the Main Text	565
Appendix II	Legal Method and Analysis: Problems for Part III of the Main Text	569
Appendix III	Case Briefs and Outlines: Assignments for Part IV of the Main Text	571
Appendix IV	Office Memoranda: Assignments for Part V of the Main Text	577
Appendix V	Legal Writing Style: Problems for Chapter 13 of the Main Text	593
Appendix VI	Pleadings and Briefs: Assignments for Parts VI-VIII of the Main Text	597
<i>Index</i>		607