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Linda H. Edwards • Samantha A. Moppett

Legal Writing

Process, Analysis, and Organization

EIGHTH EDITION

Linda H. Edwards, University of Nevada, Las Vegas
Samantha A. Moppett, Suffolk University Law School

Using a process-based approach that presents writing as a logical sequence of steps, ***Legal Writing: Process, Analysis, and Organization*** puts a mastery of legal writing within every student's grasp.

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- Sample office memorandum, e-memo, letters, trial brief, and appellate brief, as well as the cases that were used in the examples, which are conveniently located in the Appendices

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10051096-0002

ISBN 978-1-5438-3946-3

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EIGHTH EDITION

Wolters Kluwer

LEGAL WRITING

EDITORIAL ADVISORS

ASPEN COURSEBOOK SERIES

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Process, Analysis, and Organization

EIGHTH EDITION

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Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

Cover image credit: iStock.com/ijeab

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3946-3

Library of Congress Cataloging-in-Publication Data

Names: Edwards, Linda Holdeman, 1948- author. | Moppett, Samantha A., author.
Title: Legal writing : process, analysis, and organization / Linda H. Edwards, E. L. Cord Foundation Professor of Law, Emerita William S. Boyd School of Law, University of Nevada, Las Vegas; Samantha A. Moppett, Professor of Legal Writing Associate Director, Legal Practice Skills Suffolk University Law School.
Description: Eighth edition. | New York : Wolters Kluwer, 2022. | Series: Aspen coursebook series | Includes bibliographical references and index. | Summary: "Coursebook for Legal Writing students"—Provided by publisher.
Identifiers: LCCN 2021050718 | ISBN 9781543839463 (paperback) | ISBN 9781543839470 (ebook)
Subjects: LCSH: Legal composition. | LCGFT: Casebooks (Law)
Classification: LCC KF250 .E38 2022 | DDC 808.06/634—dc23/eng/20211109
LC record available at https://lccn.loc.gov/2021050718

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To Dan

Words fail.

—LHE

To my husband, Jon, and daughters, Jocelyn and Charlotte.

—SAM

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PREFACE TO THE EIGHTH EDITION

Like prior editions, the Eighth Edition of *Legal Writing* adopts a process-based approach, not a document-based approach. Learning to write using a document-based approach is like learning to cook by reading a description of the finished dish: how it looks, how it tastes, how it smells. The description of the finished dish is important because the cook needs to understand her goal. But the description of the dish doesn't tell her what she needs to *do* to get there.

Learning to write using a process-based approach is like learning to cook that same dish by reading the recipe. The recipe takes the cook through the stages of preparation ("chop the carrots into quarter-inch slices; sauté the onions in one tablespoon of olive oil"). In those early stages, the elements of the dish don't look, taste, or smell the way they will when the cooking process is completed ("cook over low heat, stirring constantly until thickened; then pour into the chicken stock mixture and simmer for one hour"). But those intermediate stages are critical to achieving the end result.

Like a recipe, this book consciously tracks the stages in the writing process. Concepts are introduced at the points where they become relevant to a writer's process of creating and communicating content. In this new edition, the rule structure is still the starting point. Earlier expansions in the treatment of analogical reasoning and narrative are maintained, but the material is significantly streamlined to meet the needs of modern students. A streamlined approach also preserves the primary pedagogical role of the professor and the student's actual writing assignment. After all, a student can't learn too much by reading about how to write. The real action happens in the writing itself. This book aims to convey the crucial information without adding unnecessary distraction or reading time.

Other changes improve the book's substance. To explain the challenge of adjusting to the uncertainty of the law, the Introduction now includes information about learning as a complex, multistep process. Specifically, the Introduction incorporates Bloom's Taxonomy, a framework created to categorize education goals. In the discussion of authority, this edition now includes all three categories of sovereign entities in the United States with the power to make and enforce laws: the federal government, the states, and Native American tribes.

Chapter 11 has been updated to include information about e-memos, as currently a lawyer's primary way of communicating legal analysis is via e-mail. Because of the prevalence of e-mail communication, some additional material on professional e-mails is included.

The citation chapter has been updated to reflect the changes in the Seventh Edition of the *ALWD Guide to Legal Citation* and the Twenty-First Edition of *The Bluebook*. Chapter 15 on revising now includes a discussion of the proper use of "they" as a singular pronoun. Chapter 16 now addresses texting as another mode of communication that lawyers use.

The section on brief writing has been enhanced and restructured. Material has been added about electronic filing and certificates of compliance. To parallel the organization of Part I on writing an office memo, Stage 3 now includes Chapter 22, "Organizing for Your Reader: The Argument Section," and Chapter 23, "Completing the Draft of the Brief." Revision and oral argument are covered in Chapters 24 and 25, with a brief discussion of virtual oral arguments in the wake of the COVID-19 pandemic included in Chapter 25.

Appendices: The sample documents are designed, of course, for critique, not for mimicry. The samples in this edition are:

- *Appendix A:* An office memo applying a three-element conjunctive rule and using rule-based reasoning, analogies, policy, and factual inferences.
- *Appendix B:* An office memo applying a rule with factors and making significant use of factual analogies.
- *Appendix C:* Sample e-memo.
- *Appendix* D: Sample correspondence.
- *Appendix E:* A trial-level brief applying a procedural rule (setting aside a default judgment) that incorporates the substantive rule. A subpart of the analysis uses a set of factors.
- *Appendix F:* An appellate brief addressing a pure question of law setting out two alternative arguments.
- *Appendix G:* An appellate brief making extensive use of statutory construction tools, including the definition of terms used in the rule and arguments based on applicable policy rationales.

Linda H. Edwards
Samantha A. Moppett
December 2021

ACKNOWLEDGMENTS

No book is the product of the author alone — certainly not this one. My former Mercer colleagues encouraged and supported the book from its inception. Mercer legal writing faculty Susan Bay, Jim Hunt, Lenora Ledwon, Gus Lehouck, Adam Milani, Kathy Sampson, Kevin Shelley, Michael Smith, Greg Spicer, David Walter, and Stasia Williams have taught me much and have made the learning fun. Three deans, Phil Shelton, Dick Creswell, and Larry Dessem, paved the way. Suzanne Cassidy, Sarah McPherson, Cary Gonzalez, Michelle Davis, Jane Burns, and Barbara Blackburn, worked faithfully and without glory. Special thanks to Jack Sammons for bold ideas, to Hal Lewis and Reynold Kosek for wise counsel, and to Sidney Watson and Joe Claxton for their faith in the project.

Like all teachers of legal writing, I am blessed by being part of the national legal writing community. No list could identify all the colleagues who have shared generously of their vision, enthusiasm, wisdom, and experience. I am especially indebted to Deirdre Alfred, Jan Armon, Mary Beth Beazley, Joel Cornwell, David Drueding, Alice Dueker, K.K. Duvivier, Neal Feigenson, Dennis Hynes, Steve Jamar, Katie McManus, Phil Meyer, Teresa Phelps, Terry Pollman, Leslie Reed, and the anonymous reviewers who made such perceptive comments on early drafts. Particular thanks to Mary Lawrence, Richard Neumann, and Marilyn Walter for their steadfast support of their legal writing colleagues, including me.

I gratefully acknowledge my debt to Emilie and Katie Edwards for their forbearance; to Cathi Reinfelder for redeeming the text from many errors; and to Carol McGeehan for nurturing and enlarging my vision of the book.

I would also like to thank the following copyright holder for permission to reprint the map of the federal judicial circuits: *2009 Summer Judicial Staff Directory* 963 (CQ Press 2000). Copyright © 2009 by Congressional Quarterly, Inc. Phone: (202) 729-1863; URL: http://directories.cqpress.com.

—Linda H. Edwards

First and foremost, I would like to thank Linda Edwards for entrusting me to work on the Eighth Edition of *Legal Writing*. Having used Linda's books in my legal research and writing classroom throughout my career, I am honored and privileged to have my name on the cover with hers.

I am also thankful for the national legal writing community. The steadfast encouragement and support from this community is beyond what I could have imagined when I began teaching over 20 years ago. It is impossible to list everyone who has touched my career, but I would be remiss to not mention Terrill Pollman and Judith Stinson, mentors extraordinaire, and Kathleen Elliot Vinson, an exceptionally supportive director and friend.

A special thanks to Timothy Bolen, Heidi K. Brown, Adam Eckart, Marnie Hodahkwen, and Dyane O'Leary for advising me on some updates to this edition. I am also grateful for the support from my Suffolk colleagues, Suffolk University Law School, and my research assistant, Joslyeen Mitri.

Finally, thanks to Stacie Goosman at Wolters Kluwer and Sarah Hains at The Froebe Group.

—*Samantha A. Moppett*

INTRODUCTION

Before you begin your first legal writing assignment, take a moment to consider yourself, the nature of the authorities you'll be using, and your professional responsibilities.

I. WHO ME? A WRITER?

Most new law students wouldn't call themselves writers. They wouldn't say that in three years they plan to take a job as a professional writer, earning most of their income by writing. But that's exactly what lawyers do. Most lawyers write and publish more pages than a novelist, and with much more hanging in the balance.

You'll earn most of your income by writing for publication.

You are studying to be a professional writer, even if you don't think your skills are good enough yet to justify the title. If you think of yourself as a writer working on ways to improve your own craft, you'll find it much easier to learn the skills you need. You'll start to notice good and bad writing everywhere you look and imagine ways to improve it. You'll take the time to look up a pesky grammar rule. You'll be more willing to revise and edit. In other words, good writing will be important to you, and you'll soon find that it is within your grasp. In the long run, your determination to write well will make much more difference than your entry-level writing skills. What's the message? You can do this. All it takes is hard work. As you develop your writing skills, you may fail. Remember, fail stands for first attempt in learning.

First
Attempt
In
Learning

II. PLIABLE AUTHORITY

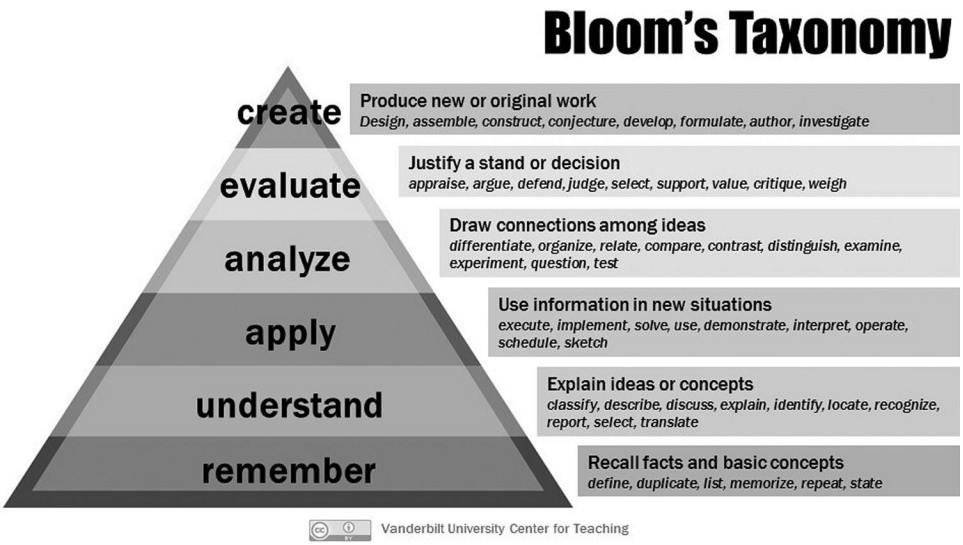
Many of us arrive at law school thinking that learning the law will be like learning the rules of Monopoly™. But the law is not like Monopoly™. Many legal rules are created in a series of judicial opinions, so you'll find different

versions of the rule written by different judicial writers, not just one official statement in the Rules booklet. And when they wrote those opinions, the judges were focused on deciding the case before them, not explaining future situations. What's more, some of those judges—or their law clerks—are not great writers, or perhaps they were too busy with a heavy caseload to think and write as clearly as they would have liked. Statutes can be unclear as well, and even the clearest statutes are later subjected to comment and explanation by multiple judges.

Even more fundamentally, a legal rule must use general verbal descriptions to identify the people and situations to which it applies. It isn't just a matter of who draws the card. Nor can the descriptions always be as concrete as "a player who lands on Park Place." The law often relies on such vague standards as "reasonable care" or "the best interests of the child."

Understanding the law is actually more like a detective's job than a Monopoly™ game. You're going to have to interpret what you find. You'll take clues from the language of courts, legislatures, agencies, and commentators. You'll have to evaluate the meaning and significance of it all to try to reach an answer that makes sense of those clues. In other words, understanding the law is a constructive act, and you will be the one doing the constructing.

The challenge of adjusting to the uncertainty of the law makes sense when you recognize that learning is a complex, multistep process. You may have heard of Bloom's Taxonomy, a framework created to categorize education goals. This framework, comprised of six major categories, helps to understand the levels of learning. The categories, revised in 2001, are remember, understand, apply, analyze, evaluate, and create.[1]



1. Patricia Armstrong, *Bloom's Taxonomy*, Vanderbilt Univ., https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/.

The first category, remember, refers to an individual's knowledge, which is a necessary precondition to putting the "skills and abilities," the remaining categories, into practice. Undergraduate studies generally involve learning at the three lowest levels of the taxonomy: remember, understand, and apply. Although remembering—recalling basic facts and concepts—is necessary for higher levels of learning, legal analysis requires learning at higher levels in the taxonomy. In essence, lawyers are problem solvers and clients' problems are unique. As such, a lawyer's knowledge and comprehension of the law is simply a foundation. Lawyers must analyze, evaluate, and create to apply the law to new and novel situations to achieve the client's objectives.

This book will help you to develop these higher levels of learning and recognize and work with the legal clues referenced above so your legal analysis will be more accurate and thorough. Even so, adjusting to the uncertainty of the law and the pliability of authorities can be unsettling. Just remember that this frustration and confusion is part and parcel of beginning law study. Soon you'll be used to the uncertainty, and you'll even come to like the opportunities it can give you to influence the law's development.

As you embark on your study of the law, you need to be comfortable being uncomfortable.

III. ETHICS

Like everything else you do in law practice, your legal writing will be governed by the ethical standards your state has adopted. Most states use a version of either the ABA's Model Rules of Professional Conduct or the earlier Model Code of Professional Responsibility. Sanctions for violating these rules range from private censure to public disbarment. No matter the version your state uses, however, your objective legal writing[2] must meet at least these standards:

- *Competence* (including legal knowledge, skill, thoroughness, and preparation);[3]
- *Diligence;*[4]
- *Promptness;*[5] and
- *Candid, unbiased advice*.[6]

It should go without saying that you must never advise or assist a client to commit a crime or a fraud.[7] Short of illegality or fraud, however, you might still disapprove of some of your client's options or views. For those uncomfortable situations, you'll have two points of comfort. First, while your advice must

2. The ethical rules governing *persuasive* legal writing are covered in Chapter 17.
3. Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 1983).
4. *Id.* at 1.3.
5. *Id*.
6. *Id.* at 1.7.
7. *Id.* at 1.2(d).

include an accurate assessment of the law, it can also include relevant moral, economic, social, and political considerations.[8] In fact, an important part of your counseling role is to help your client consider all factors—not just the law—before deciding a difficult question. Second, remember that advising a client doesn't mean that you personally endorse the client's activities or views.[9] It means only that you are providing the client with all the relevant information so that the client can make her own decision.

These ethical standards should apply to your legal writing starting now, not just after you are a lawyer. They apply to the work you'll do as a law clerk, and they'll be among the standards your legal writing professor will use to evaluate your law school writing. Be sure that every document you write meets these standards of professional responsibility.

IV. PLAGIARISM

A writer commits plagiarism if she presents as her own the words or ideas she has found in another source. Most of us first learned of plagiarism in school. There, plagiarism happens primarily when a writer (1) doesn't attribute an *idea* to its source, or (2) doesn't use quotation marks to show that the *words themselves* came from another source. In an academic setting, an author implicitly represents that she is the source of all ideas and words not otherwise attributed. Failure to attribute borrowed words or ideas constitutes plagiarism. It is both a lie and a theft.

In law practice, though, the concept of plagiarism can be confusing. Lawyers and judges often use, without attribution or quotation marks, language and ideas drawn from other lawyers' work. Firms keep form files and brief banks so documents prepared by one lawyer can be "recycled" by another. Law clerks write opinions for their judges to sign. Judges incorporate into their opinions whole sections of briefs filed by lawyers. Associates write briefs to be signed by partners. Law publishers publish books of pleadings and other legal forms.

Some people question whether the concept of plagiarism applies in a practice setting. They argue that writing in law practice does not carry a representation that the author is the source of all unattributed ideas and words, especially not when the document is asserting a legal point. In legal practice, the writer's goal is not to take personal credit for originating ideas. Instead, in law practice, the goal is to serve the client efficiently and well. The identity of the writer is irrelevant. Proponents of this position argue that service to

8. *Id.* at 2.1.
9. *Id.* at 1.2(b).

a client requires presenting the most effective material in the most effective manner for the least cost.

No matter what standards may apply in law *practice,* though, your law school writing is being done in an academic environment where the writing assignment has pedagogical goals. Each assignment focuses on helping students learn and teachers evaluate that learning. To learn how to write good legal documents, you need to write them yourself, and your teacher needs to be able to identify your ideas and text to be able to evaluate them. To avoid committing plagiarism, proper attribution is necessary.[10]

Your school's honor code probably prohibits plagiarism, which may include even "mere" carelessness. An honor code charge is serious business for any student, but especially for law students. In a couple of years, you'll be applying for admission to the bar, and most Character and Fitness Committees ask questions about honor code violations. You'll have to report any honor code proceeding. You may have to appear personally to explain yourself, and your bar admission may be delayed or denied.

So carefully follow your teacher's instructions about using material from another source or working with another student. Be precise in your note taking so you can tell where each idea came from and distinguish between paraphrases and quotes. *Unless you have explicit instructions to the contrary, do not use the words or ideas of another without proper attribution and, where appropriate, quotation marks.*[11]

Now that you understand your own status as a professional writer, the nature of the authorities you'll be working with, the ethical standards you must meet, and the concept of plagiarism in legal practice, it's time to begin working out your analysis of the legal issue you've been assigned.

10. Chapter 14, section II introduces how to cite to sources consistent with the two most often used citation guides.

11. For a discussion of when quotation marks are appropriate, see Chapter 14, section III.

CHAPTER 1

FIRST THINGS FIRST

Before we move to Part I, we will cover a few fundamentals of the course. This chapter begins by addressing adult learning and explaining the book's focus on writing as a process. Next, the three different types of writing that lawyers engage in—defined by the role of the lawyer when writing them—are considered. Finally, the chapter discusses how to read a case, a staple of law school, and summarizes the types of legal reasoning that lawyers use.

I. ADULT LEARNING: INCREMENTAL LEARNING, THE WRITING PROCESS, AND "FLIPPED" CLASSROOMS

Students from first grade through high school and even some in college might be able to learn well by simply doing whatever the teacher asks them to do, but adult learners are different. Adult learners both need and deserve to understand the point of what they are being asked to do. So how does adult learning work in law school? How should it?

Incremental Learning

Much of law school learning traditionally has been done by immersion. New law students are invited to jump into the pool, flail around, and try to keep their heads above water until they figure out how to swim. You show up on the first day, start reading cases, try to respond to questions in class, and feel generally lost for months on end. You're supposed to learn by finding your own way, by responding to questions in class, and especially by listening to the dialog our professor has with your classmates. Dean Michael Hunter Schwartz

has called this the Vicarious Learning/Self-Teaching Model. We're supposed to learn primarily by listening to others talk in class and by teaching ourselves the law outside of class.

Thankfully, most extreme forms of this learning model have all but disappeared. Today, many professors supplement a gentler version of the traditional method with explanation, handouts, and even some exercises. Still, in most non-skills classrooms, a version of the traditional model predominates. But in a legal writing class, the primary course goal is different. The primary goal of a legal writing class is to teach new skills, and learning theory experts know that we best learn a new skill by taking small steps and gradually moving toward expertise. Luckily, legal writing fits this incremental learning model well.

Writing as a Process

Writing is a process with naturally occurring stages and distinct goals at each stage. As you move step by step toward a finished document, you learn new material at the time it becomes relevant to your work. That's why this book is *organized by those writing stages, not by the components of a finished document*. The book will take you through four main stages of a writing assignment and help you use each stage as your own writing coach. Look at the Table of Contents to notice the chapters in each of the following stages:

Stage 1. Organizing for Analysis: Outlining Your Working Draft. Before you think about your reader and about the finished document, you'll need to work out your own analysis. You'll need to figure out your answer to the question you've been asked. Stage 1 helps you take the first steps toward that analysis by identifying the issues and organizing them in a manageable way. In Stage 1, you'll learn how to read statutes and cases, synthesize them, and use the structure of a legal rule to organize your own thinking. You'll learn about the legal system in Stage 1, so you can evaluate the precedential values of the authorities you've found.

Stage 2. Drafting the Analysis: Writing the Working Draft. Once you've identified the issues and roughed out an organization, you'll need to work out your answers. Stage 2 shows you how to do that. Here is where you'll learn about explaining and applying a rule (a version of the famous "IRAC"[1] organization) and how to organize your thoughts into the kind of structured, linear thought that lawyers use. Many of us come to law school without much prior experience in this sort of organization. The discipline of Stages 1 and 2 will help you develop this vital lawyering skill and use the writing process to guide, deepen, and test your ideas.

1. IRAC stands for **I**ssue, **R**ule, **A**pplication, and **C**onclusion.

Stage 3. Converting the Working Draft to an Office Memo. After your analysis is solid—and only then—Stage 3 helps you convert your analysis into a document designed for your reader. For this stage, you'll need to identify the audience for the analysis and the purpose of the document that you are drafting. Here you'll tweak your organization to meet your reader's needs and add the other components of the document, like a heading, a question presented, a brief answer, a fact statement, and a conclusion.

Stage 4. Revising to Achieve a Final Draft. Finally, in Stage 4, it's time to pay attention to the fine points of writing, like grammar, punctuation, clarity, and citation form. These matters may seem like technicalities compared to accurate analysis, but they are the first things your reader will notice. A sloppy document invites a reader to doubt its accuracy, so Stage 4 helps you make the document as technically perfect as it can be.

This book is organized by these writing stages *because the writing process is a thinking process.* In each stage, that process helps you think more clearly. Here are some hints for using this writing process to its greatest advantage:

- *Be willing to revisit earlier stages*. A completed document should take the reader on a linear journey, but you'll find the process of creating the document to be far from linear. It circles you back to earlier stages again and again as you understand more about the issue, the facts, and the law. The dynamic nature of this process makes it alive, challenging, even fun. If you're willing to construct, dismantle, and reconstruct your writing, you'll produce a good document.
- *Experiment with different writing strategies and observe your own writing process*. What works well for you at each stage and what doesn't? Do you work better if you dictate a draft first? Does free-writing help you? How about charts or colored pens? Each writer's process is unique. Try to learn as much as possible about your own.
- *Be patient*. On your first few writing assignments, don't try to combine or compress the writing stages. Your goal is to let each stage teach you some critical skills. Soon you'll be able to speed up each stage. For instance, you might find that you can accomplish the goals of the working draft stage with some other, quicker form of prewriting, like a detailed and annotated outline. When you're ready, you can customize each stage to fit your own skill level, the assignment's complexity, and your unique process.
- *Learn the general principles before you decide to try something new*. Learning legal writing is a little like learning music theory. In college, music students take courses in music theory. They first learn the principles most composers use in most situations. After they understand those principles, they can learn when and how to depart from them. This is an introductory course on legal writing, so it teaches the basic principles that apply in most situations. First learn those basic principles. Soon

you'll develop the judgment to know when and how to choose a different strategy.

Legal Writing in a "Flipped" Classroom

Adult learning theory shows that adults learn better by active (experiential) learning activities—by applying new ideas to relevant situations. A "flipped" classroom is just such an opportunity. It means that your professor will expect you to have understood the reading material before you come to class. Don't expect her to just lecture about the same material you've just read. Instead, in class you'll often work on the exercises in each chapter or apply the concepts to your own writing assignment. Flipped classrooms provide the very best opportunities for learning, so welcome those class times when you and your classmates are actively working together.

Don't expect your professor to just lecture about the same material you've just read.

Now, before you begin your first legal writing assignment, take a moment to consider your role, what to look for in a case opinion, and how lawyers reason about a legal question.

II. UNDERSTANDING YOUR ROLE

As a lawyer, you'll likely write many kinds of documents—court papers, letters, e-mails, legal instruments, and internal working documents for the law firm. As different as these documents are from each other, they all fall roughly into one of three categories defined by your role when writing them.

- Planning and preventive writing
- Predictive writing
- Persuasive writing

Your writing will differ significantly depending on which of these three roles you're performing. In addition, your writing will differ depending on who your audience is and what the purpose of the document is.

Planning and Preventive Writing. You'll do planning and preventive writing when you draft transactional documents like wills, trusts, leases, mortgages, partnership agreements, and contracts. Planning documents like these define the rights and responsibilities of the parties and the limits of their conduct, creating the rules that govern the relationship, much as case law and statutes do for society at large. These documents require the ability to foresee a range of future legal issues in any given situation and then prevent them by accounting for all possibilities, and resolving those possibilities before they happen, in the transactional document. The audience for preventive writing documents is often a client, business people, and other lawyers, rather than judges.

Planning and preventive writing can be very satisfying because it requires creativity and because, typically, there are several paths to a satisfactory result. You can create and structure some of the most important transactions and relationships in someone's life or in the commercial world. Also, with careful planning, you can prevent future disputes because preventive writing occurs before a dispute occurs. This timing is different from the timing of other types of legal writing that occur after an injury or dispute has arisen. Lawyers who engage in planning and preventative writing enjoy the ability to engage in collaborative and proactive lawyering, helping clients document relationships and prevent injury. Most lawyers would rather help clients prevent injury than recover from injury.

Predictive Writing. Predictive writing is part of another satisfying task—client counseling. Clients and other lawyers will often seek your advice when they face an important decision. You'll need to research the law, predict the most likely result of each possible choice, and help your client or colleague choose wisely.

You'll write predictively in both transactional and litigation settings. In transactional settings, you'll predict legal outcomes to analyze and prevent possible problems. Litigation requires deciding many questions as well, ranging from relatively routine matters of litigation management to such fundamental matters as whether to settle the case.

In predictive writing, you'll often write an *office memo* (addressed to another lawyer who has requested your help) or an *opinion letter* (addressed to your client). Your job is to analyze the relevant law objectively, as a judge would do. In predictive writing, the purpose is to inform and educate. You will weigh the strengths and weaknesses of each possible argument. You don't take a side. The answer might not be the answer your client or colleague wants to hear, but it's the answer they need in order to make a good decision.

Persuasive Writing. Legal problems can't always be prevented, of course, and some end up in litigation. When that happens, you become an advocate, taking on a persuasive role. No matter what result you might have predicted, your purpose is to persuade your audience, most frequently the judge, to reach the result most helpful to your client. You'll marshal the strongest arguments and refute opposing arguments. The most common persuasive document is the *brief* (also called a *memorandum of law*).

Although the goals of prediction and persuasion differ, on a fundamental level they can't be separated. To predict a result, you'll have to understand the arguments each advocate would present. To persuade, you'll have to understand how the argument will strike a neutral reader. So improving your predictive analysis improves your persuasive analysis, too, and vice versa.

This book focuses on teaching predictive and persuasive writing. That being said, the skills that you will develop writing predictively and persuasively are easily transferable to preventive writing. Before you go on, turn to

Appendices A and B, which contain sample office memos, and to Appendices D-F, which contain sample briefs. We'll study the parts of each document in more detail later. For now, just notice the audience and purpose of each kind of document and how it will eventually appear.

EXERCISE 1-1

Recognizing Your Role

Identify the primary lawyering role called for in each of the following situations:

1. A client (a widower) has been diagnosed with a fatal form of cancer.
   a. The client asks you to draft a will and trust to protect his assets for his children.
   b. The client asks you whether there is a procedure by which he can designate someone to care for his children after his death and whether it would be wise for him to do so.
   c. The client asks you to file a lawsuit seeking recovery against his employer for exposure to carcinogens in the workplace.
2. A client has located a piece of real property she wishes to buy and then lease to a commercial tenant. The title registry lists an easement allowing the owner of the property next door to use the driveway along the back of the property. But the client would like to expand the existing structure on the property and eliminate the driveway.
   a. The client asks you whether the easement can be challenged legally.
   b. The client asks you to approach the owner of the property next door and seek the release of the easement.
   c. The client asks you to draft both the release of the easement and a lease for the new commercial tenant to sign.

III. READING CASES: INTRODUCTION

Even if a statute controls your legal issue, you'll probably find yourself reading cases about that statute. In law school's first few weeks, reading cases may be the most important skill to practice. It's helpful to get an early overview of the parts of a case opinion so you know what information to notice and where to find it. Judicial opinions don't follow an established formula, but most of them roughly follow this format:

- Case name, court, citation, date (at the top of the opinion)
- Facts (what happened to raise the legal issue)
- Procedural history (what happened in prior courts or agencies)
- Legal issue(s) to be decided

- Rule(s) of law (the court's statement of the applicable legal standard)
- Reasoning (the court's reasons for deciding the case as it did)
- Holding (the court's decision on the relevant facts)
- Order (what will happen next—e.g., remanded for trial)

Notice the difference between the governing rule of law, the holding, and the court's reasoning. The *rule* sets out the legal test the court used to decide the case (e.g., to revoke a will, a testator must take some action that demonstrates her intent). The *holding* states the court's conclusion about whether the facts of this case meet that legal test (e.g., merely marking a large "X" across only the first page of a five-page will, as the decedent did here, is enough if the other evidence of intent is sufficiently strong). The *reasoning* is the full discussion of why the court decided the legal issue as it did. The court's reasons may include multiple forms of reasoning, including the language of the governing rule of law, comparisons to prior cases, policy rationales, and the court's interpretation of the facts. The final section in this chapter gives you an overview of legal reasoning or how lawyers think. First, though, practice case reading with this exercise.

EXERCISE 1-2

Finding the Parts of a Case

Exercises in later chapters will use the case of *Coffee System of Atlanta v. Fox*, found in Appendix H. Read the case now and identify the parts of the opinion. Be ready to discuss your answers in class.

IV. HOW LAWYERS THINK

Lawyers and judges argue and decide cases by using several kinds of reasoning. Here are the most important:

- Rule-based reasoning
- Analogical (or counteranalogical) reasoning
- Policy-based reasoning
- Narrative

We'll study each more closely in later chapters, but we'll start with an overview. As you read cases in all your classes, notice how judges are using these kinds of reasoning.

(1) *Rule-based reasoning* applies a rule of law directly to the facts of the case. It says, "*X* is the answer because *the applicable rule of law* requires it." What is it about the following sentence that makes it an example of rule-based reasoning?

RULE-BASED REASONING
Harold Collier should not be bound by the contract he signed because he is a minor, and the case of *A v. B* held that minors can't execute binding contracts.

(2) *Analogical reasoning* shows factual similarities between earlier cases and the client's situation. It says, "*X* is the answer because *the facts of this case are just like the facts of* A v. B, *and X was the result there*." What is it about the following sentence that makes it an example of analogical reasoning? How is it different from the example of rule-based reasoning using the same case in the prior example?

ANALOGICAL REASONING
Harold Collier should not be bound by the contract he signed because, like the successful defendant in *A v. B,* who was under the age of eighteen, he is only sixteen.

Counteranalogical reasoning is the opposite of analogical reasoning. You show *differences* between case authority and the client's facts—differences that justify a different result in the client's case. What is it about the following sentence that makes it an example of counteranalogical reasoning?

COUNTERANALOGICAL REASONING
Unlike the situation in *C v. D,* where the minor lost because he had deliberately misrepresented his age, Harold Collier never made any statement about his age.

(3) *Policy-based reasoning* asks which answer would be best for society at large. It says, "*X* should be the answer because *that rule will encourage good results for our society and discourage bad results*." What is it about the following sentence that makes it an example of policy-based reasoning?

POLICY-BASED REASONING
Harold Collier should not be bound by the contract he signed because he is only sixteen, and people that young should be protected from the harmful consequences of making important decisions before they are old enough to understand what they are doing.

(4) *Narrative* implies an answer *by telling a story whose theme calls for a certain result*. It uses storytelling techniques like characterization, context, description, dialogue, and perspective to appeal to commonly shared notions of justice, mercy, fairness, reasonableness, and empathy.

Sometimes the relevant legal rule incorporates a narrative theme. For example, in Harold's case, maybe the rule allows enforcement against minors only if the other party didn't use undue influence. Narrative would use storytelling techniques to show that the other party's conduct did or did not amount to undue influence. What is it about the following sentences that make them an example of narrative?

NARRATIVE

Here, the narrative theme is part of the governing rule.

Harold Collier should not be bound by the contract he signed because Jenkins, a car dealer for twenty-two years, pressured Harold, discouraging him from calling his parents to ask advice and telling him that another customer was looking at the car at that very moment. Jenkins lowered his voice, said, "I'll tell you what I'll do. I'll knock off $1,000 just for you—just because this is your first car. But you can't tell anyone how low I went. This will be our secret."

Even if the rule doesn't use a narrative theme, you can still use narrative to show the fairness of a certain result. A judge might exercise any available discretion in favor of the client or might create an exception to, reinterpret, or even overturn the rule. Narrative appeals to commonly shared notions of justice, mercy, fairness, reasonableness, and empathy. Because these values underlie many policy rationales, narrative can partner with policy-based reasoning, showing a real-life example of the policy that justifies the rule.

For example, remember that the rule about contracts made by minors is supported by the policy that minors should be protected from the harmful consequences of making important decisions before they are old enough to know better. Narrative can bolster that policy point. What is it about the following paragraph that makes it an example of narrative? And what is it about that narrative that relates to the policy-based argument?

NARRATIVE

Here, the narrative theme provides an example of a policy point.

Harold Collier should not be bound by the contract he signed. He is only sixteen; he has never shopped for a car; he was pressured by a sophisticated sales agent; he did not have the benefit of advice from any advisor; and the car purchase will exhaust the funds he has saved for college.

Each method of reasoning is powerful, and they work best together. Rules establish the structure of the analysis (Chapters 2–6, 18, and 19). Within that structure, you'll want to use reasoning based on rules, analogies, policy, and narrative (Chapters 7–10, 19, 20). Start now to notice the kinds of reasoning you find in the cases you read, the arguments you hear your classmates make, and your own analysis of hypotheticals.

EXERCISE 1-3

Forms of Reasoning

Read section I-A of the sample office memo in Appendix A. Identify each form of reasoning you find.

Now you have a glimpse of the process that lies ahead, the concepts of incremental learning and flipped classrooms, your lawyering roles, the parts of a case opinion, and the forms of reasoning you'll use. It's time to begin working out your analysis of the legal issue you've been assigned. As we'll see in the next chapter, the first thing to do is to identify and outline the legal rule that will answer the question you've been asked.

PART I

THE PROCESS OF WRITING PREDICTIVELY: THE OFFICE MEMO

STAGE ONE

Organizing for Analysis: Outlining Your Working Draft

CHAPTER 2

OUTLINING RULES

The first step in the writing process is identifying and outlining the legal rule that will answer your question. The good news is that this outline of the rule will give you the outline of your analysis. Later in the writing process, your analysis will become a document designed for your reader, but first it will go through several stages. Don't worry yet about your reader. First work out your own analysis.

I. OUTLINING A RULE: OVERVIEW

The foundation of your legal analysis is the relevant rule of law. By *rule of law* we mean a statement that explains the test for deciding a legal issue.[1] Begin by finding the rule that will govern your issue and outlining it. Harkening back to your high school civics class, note that rules come from courts, legislative bodies, and the executive branch. You will have to engage in legal research to locate the rules applicable to the issue(s) you have been asked to address.

This chapter introduces rule outlining first by outlining a rule in the abstract—that is, without reference to a set of facts or a legal question. *This is how you'll outline rules to make a "course outline" and to study for a final exam.* For a course outline, you'll outline rules in the abstract because you don't yet know the exam questions.

For the purposes of this chapter, skip Roman numerals when outlining; we'll add those in Chapter 3. Otherwise, though, just use traditional outline

1. Sometimes you can express a rule in more than one way. In Chapters 5 and 19, we'll explore the flexibility of legal rules.

form: uppercase letters, Arabic numerals, and lowercase letters, as necessary. For example, imagine you are working on a course outline for your criminal law class. You are about to outline the rule that defines burglary:

> Burglary is the breaking and entering of the dwelling of another in the nighttime with the intent to commit a felony therein.

How might you outline this rule—that is, write it out in a way that makes its structure visible? As you can see, this rule contains a batch of elements—essential requirements to a cause of action—and *each* must be proven before a set of facts can constitute burglary. Here is an outline of this rule:

To establish a burglary, the state must prove *all* of the following elements:

A. breaking
B. entering
C. dwelling
D. of another
E. in the nighttime
F. intent to commit felony therein

Notice how this outline of the burglary rule will let you focus on each element in an orderly way, not forgetting any element and not mixing your analysis of any one element with any other.

II. COMMON RULE STRUCTURES

As you learn to outline rules you'll begin to see certain common structures. Learning these structures helps you recognize them quickly and outline rules easily. As you see rules of law later in this book, in your other law school courses, and in the practice of law, develop the habit of noticing the rule structure. These structures will be fundamental to your legal analysis in all settings—legal writing assignments, course outlines, exams, and the practice of law.

1. A mandatory elements structure (a conjunctive test). This kind of rule lists a set of elements, all required. Do you see that the burglary rule above is an example of a mandatory elements structure?

2. An either/or structure (a disjunctive test). This kind of rule sets out two or more subparts, either of which is enough to answer the question. Here is an either/or rule:

> An easement can be created by a deed, by an exception to the statute of frauds, by implication, or by prescription.

In outline form, the rule looks like this:

An easement can be created in any of the following ways:

A. by deed,
B. by an exception to the statute of frauds,
C. by implication, or
D. by prescription.

Notice that the first two rule structures are different only because the introductory language tells us whether all subparts are required or whether any single subpart is enough to answer the question by itself.

3. A factors (aggregative) test. This kind of rule gives us a flexible standard guided by multiple criteria (factors). Some rules use an objective standard. The burglary statute, for example, defines burglary using a set of relatively objective criteria. Was it a dwelling? Did it belong to another? Did the defendant enter it? But some rules use a much more flexible standard, giving more leeway (discretion) to the judge. To help judges exercise their discretion wisely and uniformly, rules using flexible standards often identify factors (criteria) to guide the decision. Here's an example:

> Child custody shall be decided in accordance with the best interests of the child. Factors to consider in deciding the best interests of the child are: the fitness of each possible custodian; the appropriateness for parenting of the lifestyle of each possible custodian; the relationship between the child and each possible custodian; the placement of the child's siblings, if any; living accommodations; the district lines of the child's school; the proximity of extended family and friends; religious issues; any other factors relevant to the child's best interests.

In outline form, the rule looks like this:

Child custody shall be decided in accordance with the best interests of the child, to be determined by considering relevant factors such as the following:

A. the fitness of each possible custodian;
B. the appropriateness for parenting of the lifestyle of each possible custodian;
C. the relationship between the child and each possible custodian;
D. the placement of the child's siblings, if any;
E. living accommodations;
F. the district lines of the child's school;
G. the proximity of extended family and friends;
H. religious issues; and
I. any other factors relevant to the child's best interests.

Notice the difference between this rule structure and a rule with mandatory elements (a conjunctive test). In a conjunctive test, all the subparts must be met. But here the subparts are just factors to consider together, not

separate individual requirements. One or more can be absent without necessarily changing the result. The judge gauges the importance of each factor.

4. A balancing test. This kind of rule balances opposing considerations against each other. A balancing test is also inherently flexible, so it often includes factors or guidelines to help the judge weigh each side of the balance.

For example, consider this procedural question: Before trial, parties in civil litigation exchange information with each other by using interrogatories (written questions calling for answers under oath). A party receiving a set of interrogatories might object, arguing that answering would be unduly burdensome. To decide whether the party must answer the interrogatories, the judge applies the following rule:

> A party must respond to interrogatories unless the burden of responding substantially outweighs the questioning party's legitimate need for the information.

To measure "burden," the judge might consider a variety of factors, including the time and effort required, the cost, any privacy concerns, and any other circumstances. To measure "legitimate need," the judge might consider a variety of other factors, such as how important the information would be to the trial, whether the information is available from another source, and any other circumstances relating to the party's need. In outline form, the rule looks like this:

A party must respond to interrogatories unless the burden of responding substantially outweighs the questioning party's legitimate need for the information.

A. The burden of answering:
   1. the time and effort necessary to answer
   2. the cost of compiling the information
   3. any privacy concerns of the objecting party
   4. any other circumstances raised by that party's situation

B. The questioning party's need for the information:
   1. how important the information would be to the issues of the trial
   2. whether it would be available from another source or in another form
   3. any other circumstances relating to the party's need for the information

Compare this rule structure with a factors test. In a factors test, the judge uses factors to decide a single standard (e.g., best interests of the child). In a balancing test, the judge balances two competing interests, using factors to gauge the strength of each interest as compared to the other.

5. A rule with exception(s) (a defeasible rule). Any of these rule structures also might include exceptions. Here is an example of a rule with two exceptions:

> A lawyer shall not prepare any document giving the lawyer a gift from a client except where the gift is insubstantial or where the client is related to the lawyer.

In outline form, the rule looks like this:

> A lawyer shall not prepare any document giving the lawyer a gift from a client except:
>
> A. where the gift is insubstantial, or
> B. where the client is related to the lawyer.

Again, notice the difference between this structure and the others. The introductory language defines the subparts as exceptions to a general principle.[2]

6. Rules combining several structures. Most of your early assignments will use relatively simple rules, but sometimes a rule might combine more than one rule structure. The larger structure will fit one of our examples, but within a subpart, the rule might use a different structure. For example, when discussing the balancing test we noted that it often includes factors to help the judge weigh each side of the balance. Similarly, in the defeasible rule above, note that the rule is also disjunctive—an exception exists if either of the two exceptions is found. We'll see more of how this works in Chapter 3, Part III. For now, just focus on the basic idea of rule outlining.

III. A FEW HINTS ABOUT OUTLINING RULES

Outlining a rule helps you understand the rule clearly. Outlining is a tool for careful, critical reading—perhaps the most important of all lawyering skills. Here are a few pointers for outlining rules.

1. Follow traditional principles of outlining. Two outlining principles especially apply to outlining legal rules. (1) Each subdivision must have at least two parts; and (2) each subpart should include the whole analysis of that point and nothing more. For instance, in the burglary rule, notice that each subpart covers one and only one element.

2. Notice relationships among subparts. Double check the relationships among subparts. If your rule has factors, how do they interrelate? Do they all

2. Sometimes (but rarely) the relevant rule might be a simple declarative statement with no subparts (e.g., to be valid, a will must be signed).

count equally or might some be more important than others? You'll find clues to these questions in the cases that apply the rule, and you can also use your common sense. The point here is to remember to ask yourself these questions as you formulate the rule.

3. Notice whether the list of elements or factors is meant to be exclusive. The rule might answer that question expressly, using language like "and any other relevant factors." Or the rule might merely imply whether the list is exclusive, such as by introducing the list with the word "including" to indicate that other factors may be relevant, too. If the rule's language doesn't tell you whether the list is exclusive, check other authorities and use your common sense.

4. Consider restating the rule in your own words. Using your own words helps you understand the rule, and you can often state the rule more simply and clearly than its original writer did. But don't rephrase the key terms of the statute (e.g., "best interests of the child"), and be sure that your rephrasing is accurate.

5. Ask what you'd have to prove to show that the requirements of the rule are met (or not). For example, a rule might provide that a speaker's words will be considered an offer if the hearer had a reasonable belief that the speaker intended by the words to make an offer. The words "reasonable belief" would require the hearer to prove not one thing, but two: (1) that she believed that the speaker intended to make an offer, and (2) that her belief was reasonable.

6. You can sometimes change the tabulation (numbering and lettering scheme). You might be able to organize the rule more simply and clearly than its original writer did, but don't change the tabulation unless your version will be easier to understand and the original structure isn't so well known that the cases all use it in discussing the rule.

7. Convert layered negatives to affirmative statements if it won't change the meaning. Layered negatives often occur in rules with exceptions—rules where the main clause says that something is not permitted unless certain facts are true. For example, find the layered negatives here:

> A lawyer shall *not* prepare any document giving the lawyer a gift from a client *except*:
>
> A. where the gift is insubstantial, or
> B. where the client is related to the lawyer.

Layered negatives are hard to understand. They make the rule structure needlessly complicated. Get rid of them when you can.

A lawyer *can* prepare a document giving the lawyer a gift from a client *only if*:

A. the gift is insubstantial, or
B. the client is related to the lawyer.

Exercises in Formulating a Rule from a Statutory Format

Use the rule structures above to outline the following rules about professional responsibility. These rules aren't easy, so you'll need to read each one carefully. Also, be prepared to see a variety of approaches among your classmates' answers. Think of these exercises as a game rather than a test,[3] and don't expect to find a "right" answer. Also, keep a copy of your answers. We'll be working with most of these same rules again at the end of Chapter 3.

EXERCISE 2-1

A lawyer shall not . . . collect an unreasonable fee. . . . The factors to be considered in determining the reasonableness of a fee include the following: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent.[4]

EXERCISE 2-2

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[5]

3. Learning theory teaches us that we learn better when we approach learning lightheartedly, as play.
4. Based on rule 1.5(a) of the American Bar Association's Model Rules of Professional Conduct.
5. Model Rules of Prof. Conduct r. 1.6(b) (Am. Bar Ass'n 1983).

EXERCISE 2-3

A contingent fee[6] agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses[7] to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[8]

EXERCISE 2-4

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[9]

Hint: Under what circumstances must the lawyer decline representation?

An Exercise in Formulating a Rule from a Statement in a Case

EXERCISE 2-5

A contract in partial restraint of trade and reasonably limited as to time and territory and otherwise reasonable is not void. *Coffee System of Atlanta v. Fox* (Appendix H) (paraphrased).

6. A contingent fee is a fee that is due only if the lawyer achieves a favorable result. For instance, the fee for representing a plaintiff in a personal injury suit might be 33 percent of any funds recovered. If nothing is recovered, the lawyer's fee is zero.

7. Such expenses can include court filing fees, costs of depositions, expert witness fees, transcript preparation charges, travel costs, and the cost of creating trial exhibits.

8. Based on rule 1.5(c) of the American Bar Association's Model Rules of Professional Conduct.

9. Model Rules of Prof. Conduct r. 1.9(a) (Am. Bar Ass'n 1983).

CHAPTER 3

USING RULES TO ORGANIZE YOUR ANALYSIS

Chapter 2 introduced rule outlining. There you outlined rules in the abstract—without trying to answer a legal question. That's how you'll outline rules to create a course outline and study for a law school exam. Now we'll turn to rule outlining to answer a specific legal question. The rule outline will organize both your own analysis (your working draft) and, ultimately, the office memo (or brief—see Part III) you'll write.

I. ORGANIZING A WORKING DRAFT

The first step toward creating your working draft is creating its organization, and the most important principle is this: *Use an outline of the rule as the outline of the analysis*.

For a simple example, we'll return to the burglary rule. Assume that you work in a prosecutor's office. Gerald Shaffer has been arrested for striking his estranged wife. The police have charged him with criminal assault. Because Mr. Shaffer forcibly entered his estranged wife's house, the police want to know whether they can also charge Mr. Shaffer with burglary. In other words, did Mr. Shaffer commit burglary? Assume that you have located and outlined this rule as we did in Chapter 2:

> To establish a burglary, the state must prove *all* the following elements:
>
> A. breaking
> B. entering
> C. dwelling

D. of another
E. in the nighttime
F. intent to commit felony therein

It's easy to see how the rule's outline will organize your legal analysis. Understanding the rule structure (see Chapter 2) is essential to predicting the result of the application of a rule to a client's facts. Using this outline as a guide, your analysis of the Shaffer question would discuss each element separately, completing the discussion of one element before proceeding to the next.

II. HINTS FOR ORGANIZING THE DRAFT

Outlining a rule to answer a legal question is almost the same as outlining a rule in the abstract. Here are the few differences and a couple of hints to make the process easier.

1. Begin with a Roman numeral devoted to the question you've been asked. Generally, in predictive legal writing you'll be answering one or more questions. In the working draft, reserve the Roman numerals for these questions. For the Shaffer question, the Roman numeral would be:

I. Did Mr. Shaffer's acts constitute burglary?

If you've been asked several questions, use a Roman numeral for each. If you've been asked only one question, use a Roman numeral "I" for that question, and don't worry that you have only one Roman numeral. Let the use of the Roman numeral assure you that this is the issue you were given and, therefore, that this is the point of connection between the question and your own analysis.

2. Immediately after the question, state the rule that governs the question that you have been asked to address. For instance, in the burglary example the sentence would be:

I. Did Mr. Shaffer's acts constitute burglary?

To establish a burglary, the state must prove that the defendant's acts constituted a breaking and entering of the dwelling of another in the nighttime with the intent to commit a felony therein.

3. Now add the rule's subparts in outline form. These subparts will be the headings and subheadings of the corresponding parts of your analysis. Headings provide an important thinking and writing discipline. They help you