



STRATEGIC LEGAL WRITING

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There are many legal writing texts that emphasize *how* one writes; this book is unique because it focuses on *why* one writes. Every chapter challenges the reader to write in a way that will be most effective in achieving a strategic objective. Each assignment has been carefully considered by the authors and fully vetted to simulate for the reader the type of decision-making involved in the preparation of important legal writing, whether in a general counsel's office, a law office, a U.S. Attorney's office, or a judge's chambers. Simply put, the authors' approach is that effective legal writing does not exist in a vacuum. This book provides practical assignments that teach the student how the best legal writing is not an end in itself, but a means to achieving a larger strategic objective.

Donald N. Zillman served as Judicial Clerk for the 9th Circuit Court of Appeals and as a U.S. Army Judge Advocate General's Corps officer and was third in command as Special Assistant Attorney General for the State of Arizona. As an educator, Zillman taught at the Law School at Arizona State University from 1974 to 1979 and the University of Utah from 1979 to 1990, and he continues to teach at the University of Maine Law School since he began there in 1990. As an administrator, Zillman served as Dean of the University of Maine Law School from 1990 to 1998, as Interim Provost and Academic Vice President of the University of Maine from 1999 to 2000, and as Interim President of the University of Maine at Fort Kent from 2001 to 2002 and has held the title of President of the University of Maine Presque Isle since 2006. In addition, he retains his position of Edward Godfrey Professor of Law at the University of Maine Law School.

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Origins of the Book

This book began with the casual pairing of the two authors to teach a course at the University of Maine School of Law entitled Advanced Legal Writing. As the title suggests, this is a course for 2L and 3L students that carries on from the required 1L Legal Writing course. Prior versions of Advanced Legal Writing at Maine Law had struggled to find a purpose and an audience. One version provided further instruction in the preparation of a judicial appellate brief. Another version required the student to prepare a scholarly journal article. Neither version attracted many students.

Don and Evan had separately asked the administration about teaching a writing course that stressed short assignments, intensive editing, and hard student thinking about *why* they were writing. Law school deans invited us to combine our efforts. The result was a new approach to Advanced Legal Writing. A splendid first class of students did everything that we asked and more. They passed on their experiences to upcoming classes. We soon were over-subscribed. As we refined our materials, the strategic aspects of our teaching came increasingly to the fore.

The text is a product of our separate backgrounds. Most of Don's career has been in the legal academy. After a federal judicial clerkship, a short stint with a Public Defender's Office, and four years with the U.S. Army Judge Advocate General's Corps, he began a legal teaching career at Arizona State University. He moved from there to the University of Utah Law School and came to Maine in 1990 to take the deanship of the state's single law school. Happily for him, Don was able to continue teaching while carrying out decanal duties. Since stepping down from the deanship in 1998 he has divided his time between academic and administrative duties. The years 1999–2000 and 2001–2002 were devoted to interim appointments as an academic vice

president/provost and as a campus president. In other years, Don was a member of the Maine Law teaching faculty with a research and writing agenda. In summer 2006, Don returned to administration as the president of the University of Maine at Presque Isle.

Don's background has given him the unusual experience of being both a provider (the usual lawyer's role) and a recipient of legal advice. In his positions as dean, provost, and president, he has relied on both government and private counsel to shape his actions as a campus leader. The materials in Chapters [One](#), [Three](#), [Five](#), [Seven](#), and [Nine](#) reflect the kinds of legal questions that face a senior academic leader. Their focus on a university setting is explained both by Don's background and by the expectation that law students will know the world of the university, while they might not know "the territory" if the problems were set in the Nuclear Regulatory Commission, a state department of transportation, or a private securities trading business.

Evan's experience includes a clerkship for the Honorable W. Eugene Davis of the U.S. Court of Appeals for the Fifth Circuit, seven years as a litigation associate with the firm of Williams & Connolly in Washington, DC, and thirteen years as an Assistant U.S. Attorney in Portland, Maine. Evan's approach to legal writing takes into account lessons from each of those experiences, including the very different litigation demands in the public and private sectors. Chapters [Two](#), [Four](#), [Six](#), [Eight](#), and [Ten](#) emphasize the kind of legal challenges that litigators face every day, including the drafting of complaints, motions, and responses. There is a mix of criminal and civil litigation assignments, as well as some refreshers on how to navigate the maze of applicable procedural rules.

We have shared portions of this text with some able lawyers and writing specialists. Our thanks to Eugene Fidell, Carol Hawkins, Catherine Redgwell, Kathy Bubar, John Gulliver, and Tammy Hutchins. Their comments have improved this text and validated our approach to the course. Our thanks also to Ethelyn Boyd and Linda Zillman for their invaluable help in preparing the manuscript. Evan offers special thanks to the Honorable W. Eugene Davis for his support and guidance. In addition, this book would not have been possible without the help and encouragement of Paula Silsby, Bill Browder, David Collins, and Melody Richardson. Most of all, Evan thanks Sara, Jackson, Anders, and Gareth for their never-ending love and inspiration.

Disclaimer:

The views expressed in this book are those of the authors, not those of the U.S. Department of Justice or the University of Maine System and its campuses. Exercises in this book have their origin in legal matters handled by the authors during their careers. However, names and facts have been changed for educational purposes and to preserve privacy. The exercises do not describe actual legal situations or real people.

What Is Strategic Legal Writing?

We emphasize many things in this text. Two are the values of brevity and clarity. Make every word count. Be clear about what every word means. Eliminate words or phrases that do not enhance your message.

Modern electronics ended the age of the telegram. One of the virtues of the telegram was its charge per word. The thirty-five-word telegram cost more than the ten-word telegram. Generations of cost-conscious Americans became skilled at saying as much (or more) with fewer words. For example, you need to instruct your client on your arrival for an important business meeting. Consider these two messages. “I can get a flight out of Dulles that connects through Chicago and gets me into your airport at about ten o’clock at night unless, of course, we get delayed for weather or security concerns. I would appreciate it if you could have someone meet me at the airport so I don’t have to struggle with the long cab lines and can get right to the conference hotel without getting lost in the complex of one-way streets that I remember from my last visit to your fair city.” Is that any clearer than: “Arrive airport 10 PM. Please meet me there!”?

Having stressed brevity, clarity, and the importance of each word, let’s dissect the title. Strategic. Legal. Writing. Take the words in reverse order.

WRITING. This IS a book about writing. Both of us read widely, including legal materials, general fiction, and nonfiction. We share a bias that good writing in one context is good writing in others. That is not to say there is nothing distinctive about legal writing. However, things like clarity and brevity that improve writing in one context usually improve it in others. The lessons in writing that improve a good high school essay or an effective business letter also make a good legal document.

A second bias of ours is that good writing is the product of good editing. A very small percentage of the world can produce gifted writing in the first draft, whether on paper or word processor. The large majority of us (including Don and Evan) need to edit our initial work, often ruthlessly so. And, increasingly in this busy world, this must be self-editing. The law student or young lawyer may have visions of the kindly senior partner sitting down with early drafts of memoranda or motions and picking apart every sentence with collegial pats on the back. Good luck! Very few \$300-per-hour lawyers can afford to provide this sort of mentoring, even assuming that they would do it well. You will need to do most editing on your own. The really bad writer, before or after self-editing, is likely to be fired – sooner rather than later.

LEGAL. Many of us came to law school, and the practice of law, with an idea of what legal writing was supposed to look like. “Whereas, the aforementioned Smith gives, devises, bequeaths, grants to the party of the third part. . . .” Sound familiar?

A part of our message is that it doesn’t have to be this way. And, it shouldn’t be. Remember clarity and brevity. We repeat. Chances are that what would be good writing in business, other professions, government, and so on will be good writing in law. The rule doesn’t apply everywhere. For example, some writing may derive its strength from its creativity in organization. The reader struggles to discover whose thoughts are being expressed or when the author has changed from past to present tense. The winning advertising slogan or political message may be successful because no one knows just what it means. Or because it lets everyone hear what they want to hear. These are not good precedents to carry over to legal writing.

We need to remember that legal terms have precise meanings. “Rob,” “bequeath,” “slander” may mean things to the layperson that they do not mean to the lawyer. The ten-dollar word may be the only one that accurately conveys legal meaning to the legally trained reader. In that case, use it.

Much of your initial legal writing course in your first year of law school centered on expressing the result of your legal analysis of problems, statutes, and cases. This case is similar, but not identical, to the problem your client has presented to you. How do you explain the similarities (with the advantages of controlling precedent) and the differences between the established law and your client’s problem? The most skillful and even poetic writer doesn’t automatically bring along good legal analysis. I recall a memorable law school final

exam in which a creative writing grad student who had started law school had me hanging on every well-chosen word. Unfortunately, there weren't enough of them and some issues were omitted altogether. Writing: A+. Legal analysis: C+. Through the course of the problems in this text, we will discuss aspects of good legal analysis and how to translate that from mind to paper.

STRATEGIC. We move to the most important element. Put simply: What do you want to achieve with this piece of legal writing? We give you our first hint. Don't be surprised if you should have several objectives.

Consider the following letter:

Mr. Joseph Hardy, CEO
Hardy Widget Company

Dear Mr. Hardy:

As you may know, your company has supplied us with widgets for the last eight years. We typically buy 8,000 widgets from you each month. The widgets are a crucial component of our best-selling Supergizmos.

We have just completed partial inspection of this month's shipment of widgets. A sampling of the widgets shows at least half of them are substandard in height and weight. Their use would almost certainly cause Supergizmos to fail within six months. The failure could give rise to serious personal injury or death to the Supergizmo user.

The Katahdin Commercial Code, section 2-126, allows us to refuse an entire shipment "when a substantial portion of the products do not meet specified and material standards for the product." The Katahdin Supreme Court case of *Roth v. Zillman* interprets that provision. In *Roth*, plaintiff identified 20 sweaters in a shipment of 1,000 in which the sleeves were already separating from the body of the sweater due to inadequate stitching. The Court made clear that this was a "material" failure. It further emphasized that a sample of 20 was sufficient to reject the entire shipment of 1,000 without more extensive inspection of the entire lot.

We are highly distressed at this careless, if not fraudulent, conduct on your part. Rest assured that we will take every legal step to protect our interests.

Joan Becker, President
Becker Manufacturing Company

As a piece of writing, the letter meets most tests of good writing. It is clear and concise. It moves in a logical order. Word choice is satisfactory. Sentences aren't so long as to be confusing. Although the language is pedestrian, the message is conveyed.

As a piece of legal analysis, the letter also appears satisfactory. Assuming the author accurately describes the Katahdin Commercial Code and the Roth case, the legal analysis is solid. Here is a general rule of law (the Code provision). Here is a controlling case (Roth) that has facts similar to the problem facing the author of the letter. The conclusion (we have a legal remedy for the defective widgets) may be so obvious that it does not need to be stated. Shouldn't the lawyer who drafted the letter for Ms. Becker feel fully satisfied with the result?

It is worth asking two crucial questions. Both should have been asked before the letter was written. First, what is the prior history between Hardy Widget and Becker Manufacturing? Second, what result does Ms. Becker want from the letter?

The letter itself indicates Hardy and Becker have been doing business for eight years. This sounds like a relationship that has worked well for both buyer and seller. Hardy may have worked hard in the past to meet unexpected needs of Becker (hurry-up deliveries, slight modifications of the contract specifications). Mr. Hardy and Ms. Becker may work together in community activities or be fellow alumni of the local college. Suppose this is the first instance of a problem with widget quality? Is this really the letter to send? What would Ms. Becker's reaction be if the return mail brought the following letter?

Ms. Joan Becker, President
Becker Manufacturing

Ms. Becker:

You may consider any subsequent relations between our companies terminated immediately. Have your lawyer contact my lawyer regarding your unhappiness with the prior shipment.

Joseph Hardy, CEO
Hardy Widget Company

A well-written, accurate statement of the law has threatened a long-running and productive relationship. Possibly, things can be patched up. However, it is

unlikely that Ms. Becker and Mr. Hardy will fully restore their prior relationship. The letter may be a strategic disaster.

By contrast, the letter could be the appropriate document. Suppose a previously good buyer-seller relationship had headed downhill in the last year. Previous shipments of widgets were substandard. Deliveries were often late. Phone calls and letters hadn't corrected the situation. Ms. Becker had explored other options for the supply of widgets and found several attractive suppliers. In your counselor's role as her attorney, you had asked Ms. Becker: "What response do you want from the letter?" She responded: "If we don't get an abject apology and a believable plan for improvement, we are through doing business with Hardy." Then the letter may be the right document for that purpose.

Throughout the text we explore each aspect of the title. Strategic. Legal. Writing. We offer checklists that relate to the specific problem assigned. They also may be relevant to any legal writing. In some cases, we indicate rights and wrongs of strategic legal writing. Part of the challenge of our problems is that you may have different opinions from your classmates or your instructor as to what your strategic objectives might be. What is important is that you have considered why you reach the conclusion you reach. If you are doing that, you are on your way to being a good strategic legal writer.

Using the Text

We've designed the text so that it can be used in a variety of teaching (including self-teaching) contexts. We first describe how we have used the materials to team-teach a one-semester, three-credit course for second- and third-year law students. We then suggest other ways of using the materials. We anticipate that instructors will bring a rich variety of practice and writing experiences to their teaching and the text. There is ample room for them to substitute parts of their professional experience for sections of the text.

Our objective from the first offering of the course was to expose law students and new lawyers to the kinds of strategic legal writing that they would encounter early in their careers. We wanted a division between litigation materials and nonlitigation or office practice or transactional materials. During one semester (thirteen or fourteen weeks), each student is required to prepare ten separate writings. We ask the student to rewrite one, two, or three times. Our goal is to have the final product be a writing of the highest quality, suitable for use in a real-world practice situation. We also tell law students that their portfolio of final drafts should serve them well in any job interview.

We begin the first class with an overview of the course. We particularly stress the strategic aspect of legal writing – what are the objectives you have for this document? We then present the first assignment. Normally, we ask the students to read (or re-read) the assignment in class. We then offer some additional guidance about the situation in which they write or about the final product that is expected. The students are then turned loose to write their first draft. Office hours and/or electronic communication allow for mid-assignment questions.

The second meeting of class begins the students' experience in multitasking. We are always amazed that some students seem surprised to have three

assignments in some stage of completion at one time. Welcome to the real world, folks! We receive the first drafts. The students are then invited to review the material in the follow-up sections at the back of the text. We open the class for general discussion on the law, on approaches to writing, and on the strategic aspects of the problem. This can be a good opportunity to do some role-plays involving the characters of the problem. The results from those role-plays can then be included as part of the background facts for later drafts of the assignment. This is also the time to discuss some of the general guidance we provide throughout the text. The advice may focus on writing, legal analysis, or strategy.

At the second meeting of the class, we assign the second problem. We alternate between litigation and nonlitigation exercises. If the course is co-taught, that spreads the instructor workload. We also have found the students enjoy the variation. However, nothing prevents doing all litigation exercises first and then all transactional exercises, or vice versa.

Instructor evaluation of the student drafts now begins. Evan applies red ink to paper. Don will prepare a general e-message to the class that addresses common problems that have shown up in many drafts. He will then prepare individual e-messages to each student that addresses their first drafts. Both of our comments address strategic, legal, and writing problems. Some matters will clearly be wrong. The student has misread a precedent case. The student has forgotten to include a verb in the sentence. The tone of the letter insults a valued client's intelligence. We normally make clear that change is needed but do not specify exactly what the change should be. Other matters invite the student to explain more of their thinking. Do you really think the Smith precedent can be taken that far? Does your attempt at humor help or hinder your message? Does your conclusion leave the other party a graceful exit from her ill-considered position? Our invitation is to a hard rethinking of "what the writing is trying to do." The student can appropriately respond: "I appreciate your concerns, but I think this sentence needs to be a tough demand rather than a soft invitation to rethink." From those critiques and from the in-class comments, students prepare the second drafts. Some students will have gotten it nearly right the first time on some exercises. The second draft may be their final. Other students may have misunderstood the assignment, misread the law, or made other major errors. Total restarts are not unknown.

In this fashion, we move through the semester. We normally take one or two weeks in which we do not make a new assignment to allow students to