SKILLS & VALUES
LAWYERING PROCESS:
LEGAL WRITING AND
ADVOCACY

David I. C. Thomson
LP Professor and Director, Lawyering Process Program
University of Denver, Sturm College of Law
Chapter One

THE LAWYERING PROCESS

INTRODUCTION

By entering law school you the student have asked your teachers (and textbook authors) to help you become a lawyer. But what does it mean to be a lawyer? And what sort of lawyer do you want to be? It is not too early to start asking yourself these questions. While you may not know the answers yet, thinking about them is a valuable thing to do, even in (perhaps especially in) your first year of law school.

Practicing law is a profession, which means that we — the community of lawyers — profess something together, and we do that publicly (which is what profess means). We profess together that we will adhere to a declared and shared set of values, and we agree that we will all act in ways that uphold the rule of law. For lawyers this is expressed in the Code of Professional Responsibility. A shared code of values is the sine qua non (an indispensable element) of a profession. The preamble to the New York State Code of Professional Responsibility captures this well:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity of the individual through reason for enlightened self-government . . . . Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

So in swearing an oath to uphold the Code (which you will do when you are sworn in as a member of the bar in a few years), lawyers acknowledge that they play a special role in society, and owe a duty to the effective functioning of that society by exercising skill and moral judgment in the performance of their work. Among other things, this means that lawyers are not necessarily supposed to do everything a client asks them to do.

Within those bounds, there is room for you to begin to think about, and eventually decide, what sort of lawyer you want to be. The Code of Professional Responsibility provides a “floor” for conduct, below which a lawyer can be disciplined and perhaps even disbarred. While we need to understand those rules (the subject of another course in law school) we want to dedicate our professional lives to working somewhere above the floor. Where you will operate is part of your own decision as to what sort of lawyer you want to be. We call this the formation of your professional identity.

In short, being a lawyer means you are committed to a set of important duties and
responsibilities. It is an important job and intellectually rewarding as well. This book introduces you to the fundamental skills and values that lawyers must have to effectively do their work. Keep in mind, though, that this is only an introduction. One of the great things about deciding to become a lawyer is that you are committing yourself to being a life-long learner of all the skills and values needed to be a professional counselor at law. And it starts now.

**What Lawyers Do**

What do lawyers actually do? In basic terms, the lawyer’s job is to determine the law that applies to a client’s situation, to counsel the client about the available lawful options, and to advocate for the client in private meetings and public venues such as courts.

Clients come to lawyers with plans, problems, or issues that involve the law. You might have come to law school thinking that lawyers just “look up the answer” in law books and give that to the client. But it is generally much more complicated. Legal problems rarely have easy answers; if they did, there would not be much need for lawyers. Lawyers do indeed look up the law and find somewhat similar situations to the one the client is involved in. Very rarely, though, do they find the exact same situation. As a consequence of this, lawyers draw analogies and comparisons between the law and the client’s situation, and use that information to counsel and represent the client. We use these prior situations and compare them to client facts in an effort to predict or argue a certain outcome on behalf of the client.

The “lawyering process” is the process that lawyers go through to do their jobs and obviously (given the title) it is the subject of this book. It involves legal research skills (looking up the law), reading skills (reading statutes and cases and interpreting them), and legal reasoning skills (drawing analogies). And it involves advocacy skills — representing a client’s position to others, in writing or in the spoken word.

All of these skills are essential to becoming a lawyer. You can be an effective lawyer without knowing well certain parts of the law, but you cannot be an effective lawyer if you cannot find the law, read it quickly and competently, draw analogies, and analyze and articulate the situation your client is in, and advocate on behalf of your client to others. While there are many types of lawyers and specializations within the profession, all lawyers must have these fundamental skills. So learning the lawyering process is in many ways the most important part of becoming a lawyer. Time spent learning these fundamental skills in law school will always be time well spent. But remember that it takes time to master them; few students become great legal writers and researchers after one year of law school. The ones who become accomplished legal writers typically do so later in their careers. They are able to achieve this, however, only when they have had a good foundation in law school and have spent time building on that foundation later on in school and in practice.

To be good at the lawyering process you need to learn several discrete things. You need to understand how the American legal system is set up. You need to learn how to conduct legal research so you can find the statutes and cases that are applicable or analogous to your client’s situation. You also need to know how to read the statutes and cases that you find and process what you read into useful information for your client.
You need to know how to organize what you have found and then present it in writing. You need to know how to write certain legal documents, and understand the audience for those documents. You need to learn and follow accepted legal writing style, and you need to learn the particular form of citation to authority that commonly supports legal writing. You need to learn how to orally advocate for your client’s position and how that differs from legal writing skills. The chapters of this book address each of those discrete skills in turn. What follows is a brief introduction to each one.

Legal Research

Like most forms of information subject to being researched, legal material is categorized in a particular way, and interconnects in a particular way as well. Once you learn the categorization scheme, and the methods of interconnection, it becomes easier since they repeat across areas (or subject matters) of the law. For example, state law and federal law are considered separate systems, but they are organized in similar ways so if you learn one you can learn the other more easily.

Today legal research is a more complicated task than it used to be since there are a plethora of sources for legal material. As late as the 1970s legal information was primarily found in the statutes, and in casebooks, treatises, and law reviews — all printed resources housed in libraries. Starting in the 1980s, the two major online research services, Westlaw and Lexis built two computer-based research services roughly parallel to the physical books. In the late 1990s free online services brought legal research resources onto the Internet and these continue to proliferate.

When legal research was limited to printed materials in law libraries, the task of conducting research was similarly circumscribed and straightforward. But today competent legal researchers not only need to know the strengths and weaknesses of each of these sources, printed and electronic, but also how to mix and match them for greatest efficiency. Some research tasks can be started on Google but end in books. Others may need to start in books, move to the paid online legal resources and end with free Internet legal resources. The best way to begin learning how to be an excellent legal researcher is to approach the changing tasks with flexibility and an open mind, and to think of each task as a learning opportunity to expand and hone your research methods.

Reading Legal Materials

At first reading legal material — statutes, cases, and analysis of both — will seem foreign. This is primarily for two reasons: (1) legal material uses many terms that are new to non-lawyers, and (2) legal material is presented in formats that are unfamiliar to non-lawyers. Once you get used to both differences they will no longer seem foreign.

The best ways to get used to these differences is immersion and attack. One of the reasons that first year law school is so difficult — you may feel at times that you have strapped on a firehose — is found in the value of immersion. You are in some senses learning a new language, and as with foreign languages immersion works well for most people. But passive immersion is not the best approach when you are learning how to read legal material. Instead, you want to attack — interact with it, push back. Look things up, ask questions, and write in the margins things like: “what?” “how does that
make sense?” and “why was this statute written this way?” Be quizzical.

Case briefing is a technique used by many first year law students as they are reading cases and learning how to interact with legal materials. There are several useful forms of briefing a case. The one that is best is the one that works best for you. But the basic idea behind briefing a case is to break it down into its component parts so you understand what it adds to the law in the area you are studying. By articulating in your own words the issues in the case, its procedural history, the case’s holding and its reasoning, you interact with it more deeply and are placed into a quizzical relationship with the court’s decision.

Organizing What You Find

As you conduct legal research — reading the statutes and cases you find and taking notes on them — you will discover that you need to develop a method of organizing what you have found. That way you will not need to backtrack on your research and can pick it up again where you left off after taking a break or after working on other projects. There are a number of software programs — many of which are used by law offices across the country — that can help you do this, such as CaseMap from Lexis. With these programs you can link to the electronic file containing the case, or to statutory material that you may have found online, and take notes on what you found to be the most important or helpful facts or holdings from each case. These programs can also help you to categorize the holdings into groupings that help to express the law in the area. Categorizing what you have found is an essential step in the research phase as you prepare to analyze what you have found and think through how it might apply it to a client’s situation.

Basic Legal Documents

Legal writing takes several primary forms. Legal “memos” are typically internal documents, shared only within the law office where you work or with a client, and offer an objective analysis of the law and its applicability to the client’s situation. Legal “briefs” are external documents, filed with a court or regulatory agency, and offer an advocacy position in support of a resolution of a legal issue that is favorable to your client. Legal “transactional documents” (such as contracts) memorialize agreements made between two or more parties to exchange goods or services and are typically the result of negotiations between the parties that are facilitated by a lawyer. Lawyers also write many other sorts of documents, such as opinion letters (expressing a legal opinion to a client), demand letters (requesting a resolution of a client matter before litigation), and settlement letters (memorializing or requesting certain terms for settlement of a dispute).

All of these legal documents follow a particular form of legal expression and are written in a similar style. The common form of legal expression is in four parts: (1) a statement of the issue or concern, (2) an explanation of the legal rules that are applicable to that issue, (3) an application of the rule to a client’s facts, and (4) a conclusion that summarizes the explanation and application provided. If there is more than one issue needed to fully analyze the client’s problem, this form is repeated to address each issue in turn.
Legal Writing Style

The style of legal writing, or its tone, is not informal, but it is also not turgid and full of legalese. Despite what you may have thought before law school, important sounding terms such as “wheretofore” are frowned upon in legal writing. But legal writing does have its conventions. For example, contractions and idiomatic or slang terms are frowned upon. The highest value of legal writing is being concise and to the point. Writing that is plain, simple, and direct is what you aim for. This is for good reason: the topics lawyers write about are usually rather complicated so making the complicated simple is what is most valued. While these rules might at first seem constraining, there remain many opportunities to be creative. The avant-garde jazz bass player Charles Mingus put it best: “Making the simple complicated is commonplace; making the complicated simple, awesomely simple, that’s creative.”

Filling up your writing with frills or misdirection will just distract your readers from what they need to understand: the law as it applies to your client.

To achieve this sort of simple and concise writing requires a different sort of approach than what you might have used in prior writing experiences. It requires much more planning and time in the pre-writing stages. Starting to write without any pre-planning is a recipe for wasting time and a poor final product. Writing with insufficient pre-planning is also inefficient, hampering your efforts and making the process more difficult than necessary. A simple outline — which might have worked for you in the past — will usually not be sufficient to help you produce a good piece of legal writing. Rather, a “thick” outline with detailed instructions to yourself about which section will discuss which case, and what parts of that case will be emphasized in that section, is what you need to prepare before you start writing. If you spend the time doing that sort of work in advance, the final product will always benefit because it is much easier to write plain, simple, and direct prose when you understand the problem thoroughly and know exactly what comes next in your explanation of it.

The best lawyers are meticulous about the writing they produce, and invest considerable effort into making sure each document conveys what it needs to, and that it does so in the least amount of space. They are careful to assure the accuracy of their citations to authority, and they proofread their documents closely. These efforts all contribute to the reputation and authority of an attorney. A strong reputation is one of the best ways to get new client referrals so it is worth developing good habits now, and putting in the extra effort to edit and proofread your documents with a high attention to detail.

Citation

The key to understanding legal citation is that it is designed to provide the reader with all needed information about the authority you are offering for a particular statement in your writing, while also taking up the smallest possible amount of space. It is important to be proficient at it since it validates your writing while providing valuable information concisely. It can certainly seem picky and difficult as you are learning it. But if you are careless with your citations, you not only miss opportunities

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Olivia Bertagnolli, Creativity and the Writing Process 182 (1982).
to provide important information, but you also undermine your credibility as a lawyer. Your fellow lawyers and judges expect citations to be in the correct form. When they find citations that are sloppy, missing, or incorrect they immediately question the care the writer has taken with the rest of the product, whether it be a memo, letter, or brief. If the citations are poor the analysis is assumed to be poor as well. Good citation and good writing complement and support each other; you cannot have one without the other.

Advocacy

Lawyers of all types are advocates in one way or another, not just the trial lawyers that you see on television who embody the archetype of the lawyer-advocate. All lawyers advocate for their clients’ needs and interests. Often they do so out of the public eye, in negotiations or in drafting agreements. Sometimes they advocate for their clients in court, trial, or in appellate argument. In any of these settings, advocacy involves the skills of persuading others that your client’s position is the one that should prevail. So an essential component of being a lawyer is being an advocate.

Often the advocacy work lawyers do is not in writing exclusively, but is conducted orally — in speech — in either private or public settings. So a key aspect of what lawyers do is express legal information on behalf of a client through the spoken word. Thus, part of the lawyering process is developing the skills of oral advocacy, the ability to speak clearly, concisely, and effectively on behalf of a client.

This might be something you welcome, or something you find daunting. Even if you welcome it you will find it more challenging that you might at first expect. It is hard to learn to express legal information in a way that is clear and convincing and yet not histrionic. If you find it daunting, learning the basic skills of oral advocacy and practicing them will help make you more comfortable. At a minimum it will give you the confidence to complete the task required and do so with aplomb. The Lawyering Process course usually ends with training in oral advocacy and provides opportunities to practice it and learn its component skills.

Conclusion

So this is what lawyers do. They learn about a client’s problem, research the applicable law, and apply it to the client’s situation in writing and orally. It is good and important work, and an honorable profession to join. In this quote Teddy Roosevelt reminds us why: “Far and away the best prize that life has to offer is the chance to work hard at work worth doing.” You will find, I suspect, that studying law and practicing it will offer you work worth doing in copious amounts.

Further Reading

Ian Gallacher, *Coming to Law School: How to Prepare Yourself for the Next Three Years* (Carolina, 2010).