



1974

Legal Problem Solving: Analysis, Research and Writing by Marjorie D. Rombauer

Stephen O. Kinnard
Wayne State University

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Kinnard, Stephen O. (1974) "Legal Problem Solving: Analysis, Research and Writing by Marjorie D. Rombauer," *Kentucky Law Journal*: Vol. 62 : Iss. 4 , Article 13.

Available at: <https://uknowledge.uky.edu/klj/vol62/iss4/13>

This Book Review is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH AND WRITING. By Marjorie D. Rombauer. Minnesota: West Publishing Company, 1973. Pp. XXI, 212. \$6.00.

This textbook is designed for use in legal research and writing programs. Since the utility of the text is limited to a particular course, proper assessment requires a brief evaluation of the content and materials used in legal research and writing programs.

Legal research and writing is a subject that has, for a long time, been begging for a comprehensive textbook. The present dearth of adequate teaching materials, concomitant with the unsatisfactory course structure,¹ has hindered legal research and writing programs. The coverage and use of legal research tools, the writing of memoranda and briefs, plus the moot court experience usually constitute the core of the course instruction. Unfortunately, available teaching materials are spotty and too narrow in scope. These materials are effectively limited to either legal research² or memoranda and brief writing;³ in fact, only a few mention oral advocacy,⁴ and many are geared for the practicing attorney.⁵ The inevitable result is that instructors are without coherent textual materials to form the substance of their course.

¹ Generally taught in the first year, the course must compete for the student's interest with several other more established courses which require more preparation time and receive a greater number of credit hours. The course is commonly conducted by recent law school graduates and occasionally supervised by a permanent faculty member. Because of their short tenure, these professors comprise what may be categorized as the bedouin segment of the teaching faculty. These factors, plus the need for a low student-faculty ratio to facilitate assignment consultation, render the course structurally ineffective to instruct students in the area of written and oral communication.

Only recently have these long festering problems been addressed by both professor and student alike. See, e.g., Aaron, *Legal Writing at Utah—A Reaction to the Student View*, 25 J. LEGAL ED. 566 (1973); Germain, *Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience, 1971-72*, 25 J. LEGAL ED. 595 (1973); Gilmer, *Teaching Legal Research and Legal Writing in American Law Schools*, 25 J. LEGAL ED. 571 (1973); Lloyd, *A Student View of the Legal Research and Legal Bibliography Course at Utah and Elsewhere—A Proposed System*, 25 J. LEGAL ED. 553 (1973); Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL ED. 538 (1973).

² E. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* (3d ed. 1967); M. PRICE & H. BITNER, *EFFECTIVE LEGAL RESEARCH* (3d ed. 1969); W. ROALFE, *HOW TO FIND THE LAW* (6th ed. 1965).

³ F. COOPER, *WRITING IN LAW PRACTICE* (1963); M. PITTONI, *BRIEF WRITING AND ARGUMENTATION* (3d ed. 1967); H. WEIHOFEN, *LEGAL WRITING STYLE* (1961); Von Baur, *How to Look Up Law and Write Legal Memoranda—Revisited*, 11 PRAC. LAW. 23 (1965).

⁴ BOARD OF STUDENT ADVISORS, *HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY* (1970); JOSEPHSON, KLEINBERG & TOM, *HANDBOOK OF APPELLATE ADVOCACY* (1967).

⁵ J. APPLEMAN, *SUCCESSFUL APPELLATE TECHNIQUES* (1953); R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* (4th ed. 1969); F. WEINER, *BRIEFING AND ARGUING FEDERAL APPEALS* (2d ed. 1961).

Professor Rombauer's recent second edition of *Legal Problem Solving* is a significant step toward eliminating the textual inadequacy in this area. The text seeks to provide a functional approach to the analysis, research and solution of legal problems. It is divided into three parts. Part I deals with interpreting and predicting the controlling law. The second part is devoted to problem analysis and research. Part III deals with written and oral communication and advocacy.

The subject headings of the three parts suggest the range and focus of the text. The author begins the process by examining the primary elements involved in legal problem solving, case law and statutes. The depth of this examination places this text above all others in the field. Indeed, Part I of the material is the most effective portion of the text. In these chapters the student is first introduced to courts as the appropriate arena for application of these elements and to the various forms of law. The inquiry is then narrowed specifically to the common law. The role of case law is discussed, and the examination of a case is then broken down to opinion analysis, evaluation and synthesis. The organization and discussion of these techniques is excellent and should enhance the beginning student's understanding of case law and its application. A similar procedure is followed in interpreting legislation.

Part II involves problem analysis and research. The author explains the different types of legal publications (*i.e.*, primary search and secondary search) and discusses various legal publications and their common features. Unlike other texts in this area, the use of sample pages—a traditional feature in legal bibliography publications—has been nearly excluded. Two pages from a Shepard's citator are the only exception. If instructors view this omission as a shortcoming, other materials are readily available to supplement the text in this segment of legal research.⁶

The author then explains the various methods of preliminary problem analysis, including the index and topic approach to legal publications, and discusses suggested steps in research. Search techniques for both legislation and common law are thoroughly discussed. The author has wisely chosen to emphasize the search for legislation as step one in research. Beginning law students too often rely on case law to resolve their legal problem without considering the role of statutes in the scheme of problem analysis. The textual arrangement

⁶ SAMPLE PAGES (1970), illustrates the organization of research techniques used in West's publications. The material is expressly designed for classroom use in legal research courses.

of materials in this area will, hopefully, alert the student to this consideration.

The writing of memoranda and appellate briefs along with the preparation and delivery of oral arguments comprise the final part of the text. The memorandum segment conforms to the excellence of the other two parts of the text. The use and preparation of the memorandum is well analyzed and communicated by the author. Special emphasis is devoted to the discussion section which is very helpful because it forms the heart of a memorandum. A short section deals with citation form. While the material contained therein is not sufficient to warrant abandonment of the *Uniform System of Citation (White Book)*, it does give the beginning student citation forms for the basic materials he or she will encounter and use most often.

The appellate brief and oral argument section, however, is abbreviated and incomplete, thereby rendering Part III the least effective portion of the text. Although excellent material by Professor Karl Llewellyn is included,⁷ sufficient treatment of several areas crucial to argument, appellate or otherwise, is lacking. For example, more attention should be focused on planning the approach of an argument. Proper selection of the angle of attack or defense is a paramount consideration that the author should have further pursued. Likewise, the ability to communicate to a court the proper approach with which to resolve an issue is an art deserving greater attention than is given in this text. Court-designed preferences and standards in decision-making also should be accorded additional consideration in planning the approach of an argument.⁸

Additional discussion is needed on the use of authority in argument, specifically on how to handle adverse authority. Although distinguishing adverse decisions is the most frequent method, guidance should be given in the use and misuse of concurring and dissenting opinions, legislative history and analogies to both counter adverse authority and bolster the advocate's own position.

Oral communication, a skill whose use is not limited to appellate matters, should get greater attention than it is presently afforded in legal education. It is a fundamental tool whose utility cannot be disputed,⁹ and it is also capable of instruction to first-year students,

⁷ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

⁸ In *Ashwander v. T.V.A.*, 297 U.S. 288, 346-48 (1936), Justice Brandeis explained a number of judicial standards for accepting cases to adjudicate or for disposing of them. See also Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

⁹ "The brutal, hard fact of the matter is that cases frequently are won or lost on oral argument." F. WEINER, *EFFECTIVE APPELLATE ADVOCACY* 11 (1950).

in part, through textual materials. The available material, however, is scattered throughout several books and articles and has not been adequately crystallized and communicated in a single work.

In *Legal Problem Solving* the author gives only superficial treatment to oral argument. This segment is nothing more than two and one-half pages of discussion by the author and an additional page and one-half of bibliography which deals, in a limited manner, with oral advocacy. While the general guidelines expressed by the author are helpful, the text fails to give adequate discussion of and guidance in this form of communication.

In planning the argument, consideration must be given not only to how you or your opponent views the case,¹⁰ but also to how a specific tribunal will approach the particular issues before it. Changing places with the decision-maker is the key to analyzing any approach to the oral presentation.¹¹

Flexibility in an argument is always necessary, and for more than merely coping with the pressures of oral advocacy.¹² The sequence of presentation by the appellant, as opposed to the appellee, also requires flexibility for issue anticipation, points of emphasis and use of rebuttal time. Yet flexibility, as well as planning and "court-gauging", is given short shrift by Ms. Rombauer.

Further guidance in the presentation and use of facts in an argument is also needed. The complexity of a factual situation, with its accompanying legal issues, may necessitate the "marshalling" of facts rather than simply a narrative approach.¹³ Moreover, facts and legal issues should not be sterily separate. Integration of the facts into legal arguments greatly aids a court in considering the perspective of its decision in a given case. This guidance in factual presentation and integration is important because of the obligation of complete knowledge of the record imposed on advocates by courts.¹⁴ Furthermore, a discussion of the need to rehearse the presentation of an argument and the use and misuse of notes or other visual aids during the argument is also absent.

Despite the uneven quality of the text, *Legal Problem Solving* is a substantial contribution to a frequently neglected area of legal educa-

¹⁰ M. ROMBAUER, *LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH AND WRITING* 181 (2d ed. 1973).

¹¹ John W. Davis, in a lecture before the Association of the Bar of the City of New York, on October 22, 1940, stated that he considered this element a cardinal rule of oral advocacy.

¹² M. ROMBAUER, *supra* note 10, at 181.

¹³ *Id.* at 170.

¹⁴ F. WEINER, *EFFECTIVE APPELLATE ADVOCACY* 188 (1950).

tion. The author has attempted, and succeeded for the most part, in producing a text sufficiently broad in scope and requiring less supplementation than other works in the area. Hopefully, if there is a third edition of *Legal Problem Solving*, it will include a section on written and oral communication which will contain the rich fare of the other two parts of the present edition.

*Stephen O. Kinnard**

* Law clerk for the Honorable Charles W. Joiner, United States District Court, Eastern District of Michigan. Instructor of Law (legal research and writing), Wayne State University School of Law, 1972-73. B.A. 1968, William Jewell College; J.D. 1972, Indiana University.