

## Transitioning From Practical Legal Writing to Academic Scholarship

*The Legal Scholar's Guidebook*

Elizabeth Berenguer (Aspen Publishing 2020), 340 pages

Anne E. Mullins, rev'r\*

A client walks into your office with a problem—mostly standard, but with an unexpected issue. After the meeting, you hop on your computer to do some preliminary research. As you continue researching, you realize that your client's unexpected issue is quite a riddle. No court or agency has solved the riddle. You turn to journals and law reviews, trusting that surely some professor somewhere has tackled this riddle! Not so. Your client's case is eventually resolved with the riddle still intact. Long after your client is gone, that riddle is still there, inviting you to come play, to solve it if you dare. What to do?

Of course, you know what to do. You can hear your favorite professor's parting advice to you as you galloped off into the sunset of law practice: When you find an issue that you just can't let go of, *write an article!* But it's been years since you graduated from law school, and you're not even sure where to begin . . .

*The Legal Scholar's Guidebook*<sup>1</sup> is a highly effective resource for newcomers to scholarly legal writing because it demystifies the scholarly legal writing process. It doesn't simply tell readers *what* to create; it teaches them *how* to create it. As such, it is particularly well suited to practitioners transitioning into academia and new faculty members. There are six chapters in the book. Each chapter focuses on a distinct part of the process—choosing a topic, performing initial research, determining whether the topic is preempted, managing the research process efficiently and ethically, using sources effectively, and writing the final product.

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\* Professor of Law, Stetson University College of Law. I am grateful to Stetson University College of Law for its support.

<sup>1</sup> ELIZABETH E. BERENGUER, *THE LEGAL SCHOLAR'S GUIDEBOOK* (Rachel E. Barkow et al. eds., 2020).

Each chapter includes prompts to help readers engage with their source material and their own project with the mental agility and flexibility of an experienced scholar. Relatedly, each chapter concludes with steps that readers can follow to write the final product. Finally, each chapter contains concrete advice for readers experiencing imposter syndrome as they work through the scholarly writing process. As a result, the book is especially useful for anyone who might hesitate before entering scholarly conversation.

## 1. Getting started

The *Guidebook* opens by helping readers choose a topic. Consistent with its how-to approach, the *Guidebook* doesn't just tell readers where to look for topics. Instead, it explains how to engage with sources through a mixture of description, stock questions the reader can use to probe a source, and the author's own experience as a practitioner transitioning into academia. It encourages readers to narrow the topic down to something manageable—a major challenge encountered by most (all?) novice scholars.

With background instruction on how to choose a topic, readers are ready to draft their own topic selection essay. There are guidelines for readers to follow in drafting their essays, and the *Guidebook* explains how the reader will use the essay in upcoming parts of the process. Readers can see a sample essay in Appendix 1.

## 2. Research strategies and preemption checks

After helping the reader choose a topic, the *Guidebook* explains how to conduct initial research. The starting place is a thoughtful organizational scheme that sets researchers up to succeed managing large amounts of research. There are tips for a variety of different organizational preferences, from color-coding schemes for the pen-and-paper readers to Zotero<sup>2</sup> for the more technology-reliant readers.

After laying the groundwork with organization, the *Guidebook* moves to research planning. It lays out a four-step process in which readers identify questions, identify potential sources, make a research plan, and track information. The *Guidebook* explains to readers how to follow each step in the process, offering examples, sample research tracking charts,<sup>3</sup>

2 Zotero is an online tool to help researchers collect and organize sources and produce bibliographies. You can read more about Zotero in Chapter 2 and by visiting [Zotero.org](https://www.zotero.org).

3 BERENGUER, *supra* note 1, at 27–29.

and concrete advice. For example, in explaining how to make a plan, the *Guidebook* advises readers to “allot time in blocks, usually two to four hours, for research.”<sup>4</sup> And the *Guidebook* explains why: “Less than that, you probably will not have time to find enough helpful sources, which will require you to revisit the same research task at another time. Longer than that, you will likely hit a wall and become inefficient in your research process.”<sup>5</sup>

After providing readers with a structured approach to their research, the *Guidebook* provides an overview of databases that legal scholars typically use. The *Guidebook* covers the usual suspects, like Westlaw and Lexis. Importantly, it also covers how to access databases that will be less familiar to novice scholars—including JSTOR, HEINOnline, SSRN, govinfo, LegalTrac, Index to Legal Periodicals, and ProQuest. The *Guidebook* tells readers how to access these databases and why it might make sense to do so.

With a structured approach and several places to find sources, the *Guidebook* refreshes readers on the research process. Part of the process section is dedicated to readers who know very little about their topic; part is dedicated to readers who already have some knowledge. The *Guidebook* provides advice to help readers determine when they are finished researching.

Once readers have familiarity with the research process and planning, the *Guidebook* leads readers in creating a research plan and working bibliography. Instructions and a series of prompts are included to help readers complete the research plan, along with references to Appendices II and III to see sample research plans and working bibliographies.

With a research plan in place, the *Guidebook* helps readers determine whether a topic has been preempted, i.e. covered already by another scholar. The *Guidebook* explains what preemption is and why readers should care about it. Significantly, the preemption check is reframed from a tedious obstacle to an opportunity to make progress in the research process. There are tips on how to set alerts for topics in rapidly changing areas of law. The *Guidebook* also directs readers to a variety of databases that will be most helpful in determining whether a topic is preempted—a helpful refresher for practitioners accustomed to using one or two of the major commercial platform providers in their typical day-to-day work.

Once readers have conducted preemption research, the *Guidebook* assigns a 500-to-1,000-word essay identifying the leading scholars in the

4 *Id.* at 26.

5 *Id.*

field and summarizing their positions on the reader's topic. Appendix IV provides a sample essay.

Finally, the *Guidebook* teaches readers how to make reading source material strategic and efficient. The *Guidebook* places prioritizing sources in context by urging readers to consider the purpose for which they are writing, and from there identifying reliable sources most relevant to that purpose. As a result, the *Guidebook* distinguishes between the type of prioritizing that readers use in law practice versus prioritizing for the purposes of producing legal scholarship. The *Guidebook* challenges readers to assess each source and determine its reliability. In keeping with its how-to approach, the *Guidebook* does not just tell readers to use reliable sources. Instead, it defines what reliability is, and it shows readers how to assess reliability through the identity of the publisher, the author, and the purpose of the source. Finally, the *Guidebook* provides a step-by-step process for reading sources in a resource-conscious manner.

The *Guidebook* concludes its research instruction by challenging readers to develop a 2,500 to 3,000-word research summary. A structured worksheet is included to help readers complete the summary. The worksheet supplies prompts to force readers to capture basic information, like a source's purpose. Significantly, the worksheet also supplies prompts that provide scaffolding to guide a novice scholar in approaching sources critically, the way a disciplined and experienced scholar does reflexively. For example, the worksheet asks readers to identify the source's main assumptions, to articulate what the consequences are of taking the author's line of reasoning seriously, and to articulate what the consequences are of *not* taking the author's line of reasoning seriously. In completing the summary, readers will shift from organizing their research by source to organizing their research by topic. Appendix V has a sample research summary.

### 3. The analytical framework

The *Guidebook* presents the analytical framework as a central, required component of any scholarly project. The *Guidebook* explains that “the analytical framework is simply a systematic method of inquiry or problem-solving.”<sup>6</sup> The concept is framed accessibly for novice scholars, presenting frameworks as “different lenses through which to consider similar legal questions” or “a systematic approach to solving legal problems.”<sup>7</sup>

6 *Id.* at 64.

7 *Id.* at 63.

The *Guidebook* provides explicit prompts to help readers critically evaluate the frameworks in sources upon which they rely. It also provides prompts to assist readers in identifying or creating an analytical framework for their own project. The prompts direct readers to determine, among other things, what the purpose of the writing is, what assumptions are being made, what inferences are being made, and whether there are opposing viewpoints. The prompts engage novice scholars in the methods of thought and inquiry that are second nature to experienced, disciplined scholars. For example, the *Guidebook* asks readers to explicitly identify their inferences, and it challenges them to consider whether there are other ways to interpret the information.

The *Guidebook's* coverage of the analytical framework is particularly powerful for practicing lawyers who are new to academic legal writing. Vibrant practitioners spot problems and solve them deftly and efficiently for their clients: Problem produces solution. Without more mindful adjustment of role from practitioner to scholar, an article written as though it were client-centered work product can appear to be an advocacy piece or an undergraduate-style policy paper. Academic legal writing demands both more and less—more examination and questioning and less certainty that the writer's solution is *the* solution. Vibrant scholars spot problems, analyze them from multiple viewpoints, and produce a possible solution (with all of its limits and opportunities).

The *Guidebook* ensures that novice scholars follow the problem-analysis-solution approach instead of the problem-advocacy-solution approach. It does so through encouraging readers to adopt an analytical framework as one of the key components of the paper. The *Guidebook* identifies several frameworks from legal philosophy that legal writers can use, such as critical race theory. It explains the analytical frameworks in an accessible way, and it provides annotated examples from law review articles. Many of the analytical frameworks suggested are well suited to social justice issues. Indeed, I actually found myself wishing that there was a bit more explicit guidance for readers whose analytical framework comes directly from extant legal doctrine instead of legal philosophy.

The *Guidebook* also includes a section on the Universal Intellectual Standards that writers can use to assess their research and writing.<sup>8</sup> It identifies and explains each of the eight standards in a one-page graphic, and it encourages readers to follow the standards. The standards offer a useful lens through which to assess intellectual honesty and rigor, but their inclusion felt abrupt and, for a reader unfamiliar with them, potentially overwhelming without more explanation or guidance. In the second

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<sup>8</sup> *Id.* at 69–71; see also RICHARD PAUL & LINDA ELDER, CRITICAL THINKING: CONCEPTS & TOOLS (2014).

edition of the book, I would want to see the section either developed more fully or removed, given that the book already includes the same type of guidance very accessibly in multiple places.

Ultimately, the *Guidebook* challenges readers to identify an analytical framework the reader wishes to use for their paper, and it provides a series of prompts to guide the reader in fully developing and evaluating the framework. A sample framework is available at Appendix VI.

#### 4. Drafting

With a topic selected, research largely completed, preemption checked, and an analytical framework chosen, the reader is ready to write. The *Guidebook* provides organizational paradigms readers can use depending on the type of scholarly work they are writing. The *Guidebook* also provides organizational paradigms based on the type of analytical framework used. With an organizational framework in hand and the benefit of the *Guidebook's* foundational assignments, the reader is well-prepared to create an annotated outline. The *Guidebook* provides advice on how to engage in a disciplined drafting process, with a schedule and a plan of attack. Finally, the *Guidebook* describes the mechanics of the drafting process and points readers to Appendix XI for a revising/editing/proofing checklist.

The *Guidebook* encourages readers to develop an annotated outline that readers will create from their working bibliography and their research summary. An annotated sample is available at Appendix VII.

#### 5. Examples

At 145 pages, the appendices containing examples make up over half of the book. I was initially taken aback at the text-to-appendix ratio. After reading the book, however, I think the appendices are one of its most valuable components. The appendices are heavily annotated to showcase the concepts explained in the text. The annotations are simple and clear, and they explicitly tie back to what readers learned in the text. They are a key component of the text's how-to approach.

For readers who need detailed examples of concepts in action in order to learn, the appendices will be the hero of the book. For practitioners undertaking legal scholarship for the first time on their own, without the support of a law school class or law review advisor, the appendices are a gift.

*The Legal Scholar's Guidebook* is an excellent how-to guide for creating legal scholarship. The text along with the appendices provide a level of guidance and detail that one would expect from a graduate-level scholarly writing seminar. I recommend *The Legal Scholar's Guidebook* to anyone who wants to transition from practical legal writing to scholarly legal writing or any other newcomer to scholarly legal writing.