

The Pedagogy of Legal Writing

One frequently hears that form follows function. If this adage is as true in legal publishing as it is in architecture, recently published legal-writing texts may tell us something about the state of writing instruction in law schools.

In the last decade, legal writing has assumed a more important position in law schools. Responding to alumni complaints that recent graduates write poorly, law schools have devoted more staff, hours, and resources to first-year legal-writing courses; some have hired writing specialists — often freshly minted Ph.D.s in English — to assist the legal-writing instructors. The Legal Writing Institute was founded to improve the teaching of the subject.

Recently published textbooks demonstrate the increasing importance of legal-writing classes. After several decades in which only a few books on legal writing appeared — aimed at practitioners — legal publishers now recognize the importance of the legal-writing market and publish books tailored to first-year writing classes.

How much of this increased attention translates into actual writing instruction in law schools? If the books' contents are any indication, the answer is, Not as

much as you might think, but enough to be beneficial.

How much, though, can writing instruction help the neophyte law student? A decade ago, E.D. Hirsch described a study in which students wrote essays on familiar and unfamiliar topics. As might be expected, the essays on unfamiliar topics were not as well written as those on familiar ones. If by "well written" we mean only more felicitous, this observation is not surprising. But the study showed that the writing problems went beyond style. They found

that when a topic is unfamiliar, writing skill declines in all of its dimensions — including grammar and spelling — not to mention sentence structure, parallelism, unity, focus, and other skills taught in writing courses. . . . Part of our skill in reading and in writing is skill not just with linguistic structures but with words. Words are not purely formal counters of language; they represent large underlying domains of content. Part of language skill is content skill.¹

Hirsch's point bears directly on the pedagogy of first-year writing courses and the need for students to achieve basic "legal literacy" before they can become effective legal writers. The most salient finding in the study was that the

students' grammar and spelling — skills that might seem to be independent of content — declined in the essays on unfamiliar topics. Legal-writing teachers confront this phenomenon almost daily when working with first-year students.

Douglas Laycock admits once mistakenly believing that the goal of first-year writing courses is “to turn mediocre writing into good writing.” After spending a year evaluating the first-year writing program at The University of Texas, Laycock concluded that

the first-year writing program can do very little in direct pursuit of this goal. My conceptual mistake was to assume that students entered law school with the basic skill, which is general writing, and that we could immediately begin to improve on that skill. But that is wrong. The basic skill is *legal writing*, and students do not have it when they enter.²

The conventions, skills, and vocabulary that students must master, ranging from legal analysis to citing authorities, distinguish legal writing from other types of writing. And, of necessity, much time in first-year writing courses is devoted to teaching students these special traits of legal writing. Without some legal literacy, students have nothing to draw upon

and cannot reasonably be expected to show more than basic facility with legal materials.

Considered collectively, recently published textbooks support Laycock's point that much of the first-year writing course is devoted to teaching students things other than writing *per se*.³ These books stress legal literacy. Only a small percentage of each is devoted to writing skills that might help students turn mediocre writing into good writing.

What little writing instruction there is addresses the peculiarities of legal writing — the arcane formulation of the Question Presented and large-scale organizational matters of the office memorandum. Students using these books may become adept at working with legal materials, but they will not necessarily become better writers. Although the books admonish students not to adopt the worst traits of legal writing, specific writing instruction is clearly of secondary importance.

So where does this leave us? First-year coursebooks confirm that writing is but one of many skills covered. So it must be. Anyone who has taught first-year law students knows that the learning curve is incredibly steep during the first semester. Yet, once the students start to be legally literate, their writing rapidly improves.

This improvement comes not from additional training in writing — although there may be some spill-over effect — but from the students' greater command of basic legal materials.

If law schools are to teach their students to be better writers, they must strengthen writing courses in the second and third years. Preferably, these writing courses would not entail merely the usual seminar papers so common in most law schools. Faculty who teach upper-division seminars are generally more interested in the substance of their courses than in their students' writing abilities; and students, knowing that their grades depend primarily on mastering the substantive law, concentrate on the law, not on their writing.

Some observers tout law review as a writing experience that can help improve legal writing. There is good reason to question this assumption, for law reviews often reflect the excesses of legal writing. Moreover, even if law-review writing were worthy of emulation, it is a type of writing that most students will never do again once they leave law school.

If law schools cannot stress writing more in the second and third years, when it will do the most good, the responsibility must fall on the legal profession to develop writing programs for attor-

neys. Some law firms, recognizing how valuable strong legal-writing skills are, have hired full-time writing specialists who are responsible for developing in-house programs, while others have drawn on the expertise of writing consultants to provide specialized writing training. Perhaps, indeed, the most effective training in legal writing is offered not in law school but in law firms.

—Christopher Simoni
Northwestern University
Law Library

1. E.D. Hirsch, Jr., *Cultural Literacy*, 52 AM. SCHOLAR 159, 164 (1982).
2. Douglas Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEG. WRITING 83, 83 (1990) (emphasis added).
3. See, e.g., HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (1989); RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (1990); DIANA V. PRATT, *LEGAL WRITING: A SYSTEMATIC APPROACH* (1989); CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* (1990).