How to Succeed in Legal Writing by Really Trying

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Legal writing is perfected over a career. No matter how good you are today, you’ll get better with effort, practice and an open mind. Anyone admitted to the bar is smart enough to be a competent legal writer. Some require more study than others. Some must be edited more than others. But any law student and lawyer who thinks logically can be a competent legal writer. The issues are how to teach someone to be competent if they aren’t already and how to teach someone to be excellent if they’re already competent.

Are some people born with talent to write like a lawyer? Or is good writing something a good lawyer develops? Will those we nurture ever be good enough to keep up with their naturally talented peers?

Great legal writers turn complicated legal issues into something simple and understandable. They bring their audience to a logical conclusion, one that suits their clients. Sometimes a first-year law student is a natural at legal writing. We’ve all met the lucky few who ace writing courses from the get-go. But even those who aren’t naturals at legal writing can learn how to be competent legal writers.

THE NATURE-NURTURE DEBATE

Nature and nurture combine to produce skillful people. The nature-nurture debate asks whether people’s genetics or environment make people who they are. The scientific community agrees, more or less, that it’s both: 1 Natural ability and education enable proficiency. Talent alone doesn’t produce excellence. Athletes, artists, and musicians work hard to be better and stay the best. Excellent writing, like any skill, results from work and dedication to the craft.

With enough effort, anyone smart can become a good writer. Fiction writer Stephen King thinks that writing skills are innate and that one can improve only slightly with hard work.² He thinks that competent writers can be good writers but that they can never be great writers, and that bad writers can never be competent no matter how much they practice.³ The Legal Writer respectfully disagrees.

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King says that good writers are sometimes born with a well-tuned ear, just as some musicians are born with perfect pitch.⁴ But perfect pitch, the ability to reproduce a musical note by ear, isn’t innate.⁵ Japanese psychologist Ayako Sakakibara taught children to have perfect pitch.⁶ She proved that anyone can learn it. If anyone can learn perfect pitch, anyone can learn legal writing.

Success in legal writing is about hard work. The issue is that students who aren’t good writers — the students who need to work hardest in their writing courses — think they’re good writers. This is the Dunning-Kruger effect.

THE DUNNING-KRUGER EFFECT

Some law students suffer from the Dunning-Kruger effect. That’s a cognitive bias that prevents people from learning. Social psychologists Dunning and Kruger’s 1999 study, Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments, found that unskilled people don’t recognize their lack of skill.⁷ The more incompetent someone is, the stronger the bias.⁸ Many law students and young lawyers suffer from this effect.⁹

Law students who think they’re talented writers don’t think they need to study writing. They resent their writing professors for suggesting otherwise. Students suffering from the Dunning-Kruger effect can’t recognize good writing when they see it. By the time students realize they aren’t talented legal writers, there might not be time enough for them to improve their grades. Students should acknowledge that they might suffer from a cognitive bias and accept their writing professor’s suggestions from the start.

Along similar lines, most law students suffer from the Better-Than-Average effect. The Better-Than-Average effect is the cognitive bias that most people think they’re above-average at some skills.¹⁰ Most drivers think they’re above-average drivers. Most law students think they’re above-average legal writers.

But there’s a silver lining. The way to overcome cognitive biases is through legal-writing instruction. Dunning and Kruger found that the unskilled people can assess their abilities better after learning a skill.¹¹ Well-taught and motivated writing students can conquer their cognitive
biases and become better writers. Writing professors and their students must both struggle to make that happen.

HOW TO TEACH

If students can't learn legal writing, why do we bother teaching it in law school and during CLEs? Why do we bother reading and writing articles like this one? Because we can teach and learn legal writing.

A legal-writing professor must motivate students to develop writing skills. Students’ exposure to critical thinking during the first year of law school improves their legal writing. By the end of their 1L year, all students develop basic legal-writing skills. Writing professors teach law students how to be lawyers. Legal-writing courses are the most important skills courses. They take the law and policy students learn in their substantive courses and put them to work.

Students will get a return for the time they invest in legal writing. It frustrates students that writing courses are worth fewer credits and require more work than substantive courses. The time students spend on legal-writing assignments will help them in substantive courses. Legal-writing skills are necessary for exams. Legal-writing assignments are an opportunity to practice analysis and get direct feedback from a professor. On exams, students must identify issues, know the rule, apply the facts to the rule, and address counterarguments. Students learn how to do this in legal writing. They also learn how to persuade, research, cite, and organize. These skills are critical to success in law school and success as a lawyer.

Legal-writing courses show what good legal writing looks like. In law school, students read judicial opinions that aren’t good models of legal writing. Judicial opinions in substantive classes teach students the law. But they lead students to believe that this is how a lawyer should write. Many opinions are filled with legalese and lengthy discourses on how the court arrived at the law instead of stating what the law is and defending their positions. Students need exposure to well-written models to know what to do and what not to do.

As long as students are logical thinkers, they can be competent legal writers. Logical thinkers can learn to write for the reader. The reader is the only one who counts. Know the reader to know the right tone (persuasive or objective) for the assignment. When writers write in plain English and keep subjects next to predicates, the reader understands what the writer is trying to communicate. When writers write in the active voice and prefer verbs to nouns, the reader is engaged. Sentences should go from old to new, simple to complex, short to long, and end with power.

CRITICIZING CONSTRUCTIVELY

The fundamental issue with teaching legal writing is that students resist the process. Their egos are wrapped up in their writing. Students start law school confident in their own abilities as writers. A writing professor is the first to crush their confidence. Bad grades and a damaged pride make some students do the minimum or give up.

Students shouldn’t see criticism as failure. Confident writers seek advice from fresh eyes. Feedback improves the writing and the writer. Through feedback, students can evaluate the strengths and weaknesses in their writing. Students shouldn’t be wedded to their work.

Badly given feedback is debilitating. Writing professors should instruct students on how they grade, whether it’s on a grading rubric, line-by-line on the assignment, or comments at the end. In giving feedback, writing professors should address the students’ biggest issues. If there are problems in their analysis, structure, or case law, students must learn how to prioritize their edits. When the professor marks every mistake, students focus on small edits while ignoring major issues.

Positive comments help students accept criticism. Professors’ edits should highlight something good about the student’s work. Writing professors discourage students when feedback is too harsh or vague. Feedback that ends on a good note encourages students to revisit the assignment and reach out to their writing professor for help. Some writing professors criticize the way a boss would. This strategy hurts students’ growth as writers, and they’ll resent the writing professor.

HOW TO LEARN

When entering law school, students should expect to struggle at legal writing. Legal writing is a new skill. A good writer isn’t always a good legal writer, although only a good legal writer can be a good lawyer. Law students who majored in English or history might believe they’re good writers until they start law school.

Writing in college differs from writing in law school. A lawyer’s audience differs from an undergraduate’s audience. Undergraduates write essays for professors who're
experts on the topic. Lawyers are the experts of their case. Their audience isn’t as familiar with the facts or law.

Undergraduates are wordy writers. They overcomplicate issues and don’t edit for concision and clarity. They’ve a word count to reach.26 College courses give students word minimums; law-school courses give students word maximums. In law school, every word counts. Time spent on one argument is time not spent on another. If the student’s writing is clear and concise, they can say more in less space.

A lawyer’s words are more powerful than an undergraduate’s. Lawyers write to persuade someone to do something: to make a decision. That decision has real consequences for clients. A clear and concise brief can be the difference between a decision in your client’s favor or consequences for clients. A clear and concise brief can be the difference between a decision in your adversary’s favor or a decision in your adversary’s favor.

THINK OF LEGAL WRITING AS A PRACTICAL SKILL

The fundamentals of legal writing teach students how to write like lawyers. Teachers teach, chefs cook, and lawyers write. Learning the fundamentals of legal writing helps students address complex issues clearly.27 Good legal writers outline discussion and argument sections into the IRAC, CRARC, CREAC, etc., structure; state their conclusion up front; and begin each paragraph with topic sentences. Students think adhering to a strict structure stifles their writing. Law students must master the fundamentals before they can break the rules.28

IT’S ALL IN THE REWRITE

Students procrastinate writing their first drafts. Sometimes it’s because they can’t stop researching and want to know everything before they write anything. If you wait until you’re “ready” to write, you’ll never have enough time to rewrite and edit. Writing the first draft shows the gaps in research and the weaknesses in the argument. The first draft needn’t be perfect. Only the final must be right.

Edits, rewrites, and constructive criticism are part of the process of being a good writer. No matter their ability, all writers write a first draft. This is the last step for bad writers. This is also when those with a natural talent shine. A good writer understands that a first draft is only one step in a long process. Before the first draft there is research, outlining, researching again, and outlining again. After the first draft is editing, revisiting research, revisiting the outline, rewriting, and editing.

Law students learn when they realize that legal writing can be learned. Poor writers who start law school can become competent writers. Good legal writers become good because they worked hard. Students develop when they’re eager to learn, study the fundamentals of legal writing, and accept constructive criticism from their legal-writing professors.

Legal-writing development doesn’t end with the first year of law school. Students should take more legal-writing courses in their second and third years. A good legal writer can become a great legal writer if they continue to develop their writing skills throughout their career. Summer internships, clinics, pro bono hours, and post-graduate employment are opportunities to further enhance legal-writing skills. Always push yourself to be a better writer. It’ll make you a better lawyer.

3. Id.
4. Id. at 184.
6. Id.
8. Id.
11. Kruger & Dunning, supra note 7, at 1131.
12. For another piece on teaching legal writing, see Gerald Lebovits, Surviving Your 1L Year (Again): A Primer for First-Year Legal-Writing Adjuncts, 25 Perspectives: Teaching Legal Res. & Writing 133 (2017).
15. Mary S. Lawrence, An Interview with Marjorie Rombauer, 9 Legal Writing, J. Legal Writing Inst. 19, 30-31 (2003).
22. Id. at 1136.
23. Id. at 1132.
24. Sperling & Shapcott, supra note 17, at 78-80.
25. Keene, supra note 14, at 103.