The Wrongs of Legal Writing

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Legal writing could be the most important course in law school. It could provoke more careful and sustained thought than is usually possible in other courses. It could be extremely useful in landing and keeping a job. After law school, it could mean the difference between winning and losing cases.

Or it could be a virtual waste of time. That depends on the quality of the legal writing program at a law school, and on the faculty’s and administration’s commitment to it. Some law schools have invested much time, energy, and money in teaching legal writing. Others, probably a majority, have not given legal writing the attention it deserves.

Legal writing usually is a first-year course based on a series of memorandum- and brief-writing assignments that culminate in a moot court argument. It generally is taught together with library
research, computer research, and citation form.

But legal writing is more than English composition skills applied to law. And it is not a technical course that lies outside the intellectual pursuits of the core curriculum. Writing about law requires thinking about law. And that is crucial to learning to “think like a lawyer.”

The act of writing disciplines the thought process. Sound legal arguments are based on a chain of carefully linked premises, and each premise is based on a clear understanding of the law and the facts. Putting an argument on paper (or on a computer screen) forces the writer to assemble it with care, and enables the writer and others to see how well it holds together. Because assignments usually are due in several weeks, the writer has an opportunity to reflect upon the problem. As a result, legal writing can provide an intellectual challenge that is comparable to anything else in law school.

A legal conclusion reached in conversation, without the benefit of writing, is more likely to be incomplete and incorrect, and probably will not be as thoughtful—something the person drawing that conclusion may not know until he or she tries to put it in writing.

In most classes, students read several cases for each class, interested mostly in the black-letter law. The professor may use hypothetical problems during class, or ask questions based on variations on the facts of the case, but discussion of any one problem usually will last for only a few minutes. At exam time, students use black-letter law to provide, for the first time, written answers to complex problems.

For learning legal doctrine, the system works pretty well. But legal method is more than doctrine; the essence of lawyering is solving problems by applying statutes and cases—not just black-letter law—to real situations. That involves research as well as sustained thought. Legal writing is therefore a necessary supplement to other courses; neither works well without the other.

Students learn more about writing and analysis from drafting memos and briefs than they learn from writing exams. “In order to organize an office memorandum or a brief,” says Diana Pratt, legal writing director at Wayne State University Law School, “the writer must be able to understand and articulate each of the elements of a legal rule. The student must be able to read unedited cases to find not only the general rules, but also the facts that are sufficient and insufficient to meet the test. The student must then be able to analogize the facts from the problem to the facts of the case.

“This is much closer to lawyering than the issue-spotting a law school exam requires,” she adds. “No competent lawyer could analyze a client’s
problem with the paucity of legal and factual information provided by or within the time constraints of a law school exam."

Her view is echoed by Professor Ralph Brill of Illinois Institute of Technology (IIT) Chicago-Kent School of Law. "Legal writing is the best trainer on legal analysis that there is—even better than my torts class," he says. "When I teach torts, we'll cover informed consent in medical malpractice in an hour. If I assign it as a legal writing problem, they will spend fifty to seventy hours on research, and their depth of analysis will be far better than anything we covered in class. They will know more about the subject, and it will stay with them longer."

Legal writing courses can also offer more and better feedback than other courses. In good legal writing programs, teachers provide detailed written comments on perhaps half a dozen major assignments over the school year, and then meet individually with students after papers are returned. This feedback is the basis for much, perhaps most, of the learning that occurs. Students know how they are doing, and can improve both writing and analysis for each successive paper. In other courses, by contrast, students rarely get any feedback on their exams other than a grade, and many lack a clear sense of how they can do better.

Legal writing skills are important in the real world of legal employment, particularly because of the increasingly competitive job market for law school graduates. Hiring decisions, of course, still depend on grades, personality, work habits, and other factors. But writing skills are increasingly an important part of those decisions.

"Legal writing skills are very important," says Nancy Krieger, director of placement at the University of Michigan Law School. "They are more important now than they were ten years ago. Employers used to assume that law students could write, but now they worry about it. This is a direct result of any number of associates who can't write well."

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"The ability to write well is a prerequisite to getting an offer," says Mark Cusick, hiring partner at Squires, Sanders & Dempsey in Cleveland. "We now devote even more effort than we used to in evaluating the writing skills of summer clerks at the beginning of the summer and in working with those clerks who have difficulty."

One city government attorney says he recently had to ask for the resignation of a new lawyer, despite his brilliant resume. "I couldn't afford to edit each of his memos five or six times," she says.

Law schools that have chosen to emphasize legal writing believe that it helps their students find jobs. "It certainly helps us place students," says Pratt. For more than a decade, Wayne State's intense first-year writing program is taught by full-time instructors. "Firms know they're getting somebody who can solve problems and write about them."

Because many law schools do not produce lawyers with good writing skills, many employers have training programs for summer clerks or new attorneys. In 1978, for example, Shearman and Sterling in New York City hired an English Ph.D. to help new associates with writing, and other firms followed suit. Most law offices teach writing simply by reviewing, criticizing, and revising the writing of summer clerks and new associates.

Learning to write on the job, however, is no substitute for learning to write in law school. Since few firms have resources to formally train new attorneys in legal writing, law school graduates who go into solo or small practices, or who work for many government agencies, are unlikely to get any more formal help in writing.

Informal training by senior attorneys who review, criticize, and revise the work of summer clerks and new attorneys can't substitute for a good law school program, either. In the pressure to meet deadlines, senior lawyers often lack the time or patience to explain why a brief needs to be revised. Furthermore, most lawyers are not trained to teach writing, and many do not themselves know how to write well.

"I've had several hiring partners admit to me privately that they don't necessarily know how to write," says Abbie Willard Thorner, assistant dean at Georgetown University Law Center and past president of the National Association for Law Placement.

Trying to learn writing on the job can also be painful. It is stressful to learn how to assemble an argument when the brief is due at the end of the day, to try to persuade a senior attorney of one's brilliance when one's writing is not brilliant at all. And it is particularly stressful because a client's fate—not a grade in a legal writing course—may be at stake.

In the final analysis, good legal writing is essential to being a good lawyer. Cases are routinely won and lost because of the quality of briefs and pleadings. Carefully prepared counseling memos steer clients out of trouble and help them go about their business, while poorly written memos can lead clients to disaster.

Litigation is one area where differences in writing skills are especially crucial. "There's no getting away from the importance of writing," says one experienced litigation attorney, "and it can make a difference in the result." This is particularly true in close cases. Although judges and their clerks frequently make up for differences in writing skills, they are often too busy and too impatient to find the kernel of wheat in a brief full of chaff.

"If you file a good brief, you will probably be okay, no matter how ineffective your oral argument," writes Chief Judge William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit and William C. Bryson, special counsel to the U.S. Department of Justice, in a recent National Institute for Trial Advocacy newsletter. "If you file an ineffective brief, however, you are almost certainly in deep trouble, regardless of your oratorical skills."

Good writing skills can help in other ways, too. "The thinking process in writing is directly applicable to the oral presentation," says Bruce Katcher, a partner in the Philadelphia firm of Wolf, Block, Schorr, and Solis-Cohen. "To the extent you base your trial presentation on your pretrial written material, good writing skills help you in a trial. If your writing is all over the place,
How does your school's legal writing program measure up? Here are some basic elements of a good program.

1. Legal writing programs should be taught by full-time professionals. Full-time teachers have several advantages over third-year law students, practicing lawyers, and graduate law students. For one, they have teaching background. Teaching writing is different than writing itself; many fine writers cannot explain their craft. In addition, full-time teachers can prepare classes more thoughtfully, grade papers more carefully, and spend more time with students. Students who are trying to teach a writing course while taking classes and interviewing for jobs, and practicing lawyers who are juggling a busy schedule, simply don't have enough time to teach a course properly. Student-taught courses can also convey the message that legal writing is trivial.

2. Legal writing programs should be taught by people with multi-year commitments. Professional writing teachers who are hired on long-term contracts or into tenure-track positions can significantly improve legal writing programs. "Course development follows a pattern," says Wayne State University's Diana Pratt. "If people stay longer, programs get better." This is particularly true when schools appoint teachers with special backgrounds and career goals in legal writing rather than junior faculty or administrators with no special interest or expertise. Unfortunately, many schools have programs that either limit legal writing teachers to one or two years, or create an environment that is conducive to rapid turnover.

3. Legal writing programs should emphasize analysis while also giving attention to grammar and practical considerations. Many legal writing programs focus on analysis, and properly so. Programs that ignore or underemphasize method miss one of the central values of a writing program. At the same time, some people get into law school without general writing skills, and legal writing programs need to help them. Also, writing programs need to make students aware of practical issues, and particularly the difference between good writing and effective writing. Persuasion, litigation strategy, and other practical considerations present intellectual challenges in the real world.

4. Legal writing programs should be based on sustained one-to-one communication between teachers and students. Evaluating writing, and learning from the evaluation, are key parts of a program. Detailed written comments by a teacher on a paper are more helpful than a few cursory notes. But students frequently have questions or require further explanation. In many programs, conferences between student and teacher are mandatory for some or all papers. That is useful because intense interaction gives students a clearer idea of what they are doing right and what they are doing wrong.

5. Legal writing programs should include all three years of law school. There is a substantial consensus among practicing lawyers that students should do as much writing as they can while in law school. This includes not only memoranda and briefs, but also contracts, wills, complaints and related litigation papers, statutes, and other documents. First-year legal writing programs, by themselves, are insufficient because they do not usually focus on documents other than briefs and memos, and because they allow second- and third-year students to get rusty in their writing skills. Put another way, required legal writing programs in the second and third years greatly help students build and develop their writing and analytical skills.

6. Legal writing courses should build writing and analysis skills in a logical and continuous manner. The first-year course at many schools progresses from nonresearch memos to research memos to briefs, from shorter papers to longer papers, from simpler problems to more complex problems. This system makes sense, though some schools are experimenting with variations on the theme. Succeeding courses, in drafting, advanced advocacy, or other subjects, should build on the principles taught in the first-year program. A good legal writing program also requires a coherent set of goals and methods for implementing them. To ensure that this happens, a law school should have one person with overall responsibility for the shape and content of the program, regardless of how many other faculty are involved.

7. Legal writing programs should be graded in the same manner as other courses, and should be offered for comparable academic credit. Given the pressures that are placed on students, law schools cannot expect legal writing to be taken seriously unless they give it the same academic status as other courses. If all other courses are graded, but legal writing is pass/fail, legal writing will be taken less seriously. If all other courses are for three or four credits per term, but legal writing is for one per term, legal writing will get less attention. When legal writing courses have an academic status that is comparable to other courses, students learn a good deal more.

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law schools about how legal writing programs should be structured. The ABA's Section on Legal Education and Admissions to the Bar conducted a survey of legal writing programs for the 1984-85 academic year. That survey showed 30 programs that were taught mostly by students, another 30 taught mostly by nontenure-track faculty, 17 taught mostly by law practitioners or judges, and a variety of other programs. Of 103 responding schools, only 33 showed more than one tenure-track faculty member involved in a writing program.

The survey reflects a marginal commitment to legal writing at many law schools. "Most legal writing administrators are not satisfied with the research and writing programs at their schools," says IIT's Brill. The most common complaints, he adds, include unreasonably heavy teaching loads ("Classes of fifty or more are common," Brill says), too little academic credit, lack of upper-level courses, and lack of faculty and administration support. "Frequently there is outright hostility to the legal writing course, especially when students cut substantive courses before [writing] assignments are due," he says.

Many legal writing directors believe that alumni are more supportive than faculty members. Second-class status, relatively low salary, and lack of opportunity for advancement are other problems for instructors. In some programs, morale is low and turnover high.

To no small extent, these problems affect the quality of legal writing programs. "Where the instructors and directors have little or no professional status as faculty members, and the salaries offered are demoralizing, it is hard to entice good people into the positions," says Wayne State's Diana Pratt.

The logical result is that students are slighted. "The first thing I did was go through the files for the last thirty years," says a newly hired legal writing director. "They have been reinventing the wheel over and over again."

Many law schools, however, are upgrading or expanding their writing programs. Legal writing is becoming an increasingly serious academic specialty as more people make career commitments to teaching or directing programs, and to writing in the field.

Some law schools, such as Chicago-Kent, Puget Sound, and John Marshall, have developed three-year writing programs. Others are upgrading their first-year programs. Still others are adding upper-level writing courses, giving more credit hours to legal writing, changing legal writing from a pass/fail to a graded course, and making other changes.

Program content is also becoming richer. "There are more programs making use of cross-disciplinary instruction in such fields as English, linguistics, or psychology," says Professor Mary Lawrence of the University of Oregon School of Law.

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These trends correspond to a greater professionalism emerging among legal writing teachers, which could have far-reaching implications. At many law schools, writing teachers are staying longer. More law schools are hiring people with a special interest or expertise in legal writing. While tenure-track positions for legal writing teachers are rare, there are more tenured professors teaching legal writing than ever before.

More people are using legal writing as a vehicle for scholarship, too. Dozens of textbooks for legal writing, research, and method, are now available, compared to a handful a decade ago. "The quality of materials continues to get better, and there is more material available," says Professor Marjorie Rombauer of the University of Washington Law School, who first taught the subject in 1960. "That contributes to the improved quality of teaching."

As important as these developments are, more needs to be done. "There is a new professional image that we have among some faculty and administrators," says Lawrence, "but it's an uphill battle."

The battle is over resources and priorities. The cost of improving legal writing programs is a significant issue at many schools. Replacing students who teach legal writing with full-time instructors, for example, requires money for salary and fringe benefits, office space, and secretarial support, among other things. Those who want better legal writing programs must often answer questions about where the money will come from.

Adding legal writing courses may also crowd out other activities. Five years ago, Temple University Law School added a requirement that its students do a guided research and writing project, apart from its regular first-year legal writing course. "The discussion was not over whether it was a good thing," says Professor Richard D. Lee, "but rather what the faculty would have to give up in other courses and activities to teach it."

It is worth overcoming these obstacles for better legal writing programs. Effective legal writers can understand and apply the law more thoughtfully. They are better lawyers, and they are more likely to get and keep jobs they want. For everyone involved—law schools, lawyers, judges, and consumers—that is a goal worth writing for.