

# Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing

Douglas Laycock

During the 1988-1989 school year, I was commissioned to study the course in legal research and writing at The University of Texas. I taught enough of the course to count it as half my teaching load. I also observed the other teaching personnel in the course.

I learned many things, most of which relate to details of the Texas program. But the most important thing I learned is probably applicable at every law school in the country. The first-year legal-writing course cannot do much about bad legal writing. That course does not respond to the recurring complaints that our students graduate without knowing how to write effectively.

When law firms and faculty say that we should teach our students to write better, I think they mean something like this: Our students' writing is often dull and plodding, sometimes verbose, sometimes weakly organized, and we should help them make their writing more readable, more effective, and more powerful. Through years of faculty debate about the first-year writing course at Texas, I thought the goal of the course was to turn mediocre writing into good writing.

It is now clear to me 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.

First-year students must learn a large body of fairly objective information before they can write anything, and most writing instruction in the first year is devoted to teaching that information. This is mostly information of the sort the faculty has forgotten it ever had to learn:

What is a legal memorandum? What is its function and what is its form?

What is a brief? How is it different from a memorandum?

What is the form of a written legal argument? How do you introduce it, how do you conclude it, and how do you get on to the next point?

How do you use authority in an argument? What are the conventions for introducing and discussing authority? How do you cite the authority?

This kind of information about legal writing shades into substantive skills about legal reasoning, using authority effectively, and so forth. But much of it relates to formal writing skills peculiar to law. Students must learn a new set of conventions, a new set of forms, and a new vocabulary. First-year students must learn these things to do any legal writing at all, even if it is dull and plodding.

It is a little like learning a foreign language. Advanced students in French or German can work on writing more fluently and effectively. First-year students must struggle to write a complete sentence. The shift into legal writing is not so extreme, because most of the vocabulary and syntax remain the same. But the things that are new consume all that part of the first-year writing course that can be devoted to writing.

This brings me to a second insurmountable obstacle to improving writing in the first-year writing course. The course serves at least three academic functions, related but distinct. Perhaps most important, it gives students their only chance to practice their new legal reasoning skills on a sustained basis, and, at all but very small schools, their only

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chance to get sustained and individualized feedback. Second, it teaches legal research. Third, it teaches legal writing.

Putting the course in the first year tends to ensure that this last function is also least. First-year students are still struggling with the substance of legal reasoning, especially in the first semester. The substantive feedback on their writing assignments is critical, and their struggle with substance tends to crowd out attention to writing. In addition, the research component attempts to teach a vast amount of information and a complicated set of skills, and this consumes much of what is left of the course. In the limited time remaining for writing, instructors must emphasize the distinctive information about legal writing. They can criticize only so many things in one memo. After substance, research, and form, there is no time or student energy left for trying to write more effectively.

Recognizing the real functions of the course has implications for course design. Certainly the scope of the course should not be reduced. The functions that the course actually performs are important, even though they crowd out any chance to improve writing. Teaching the basics of legal writing is even more fundamental than teaching better legal writing. But we should recognize that the first-year writing course cannot address the problem of students who do not write well.

Any serious effort to improve our students' writing must go in the second or third year. To do any good, we would have to make them write more often and give them more feedback on what they write. The obstacles are obvious. Few faculty want to spend their time reading student writing exercises, especially at research-oriented schools. No one pretends that third-year students have much to teach second-year students, about writing or anything else. Hiring large numbers of writing faculty, off the research track, is prohibitively expensive and risks creating a large and discontented group of sec-

ond-class citizens. A serious legal-writing program in the second or third year would require large infusions of cash, imagination, and student time.

I do not have solutions to these problems, but I have some preliminary thoughts. The traditional academic seminar does not help much. Both students and faculty devote most of their attention to substance and not to writing. Students write one long paper, in a form that most of them will never use again, and they get one round of feedback between the draft and the final paper. Faculty who care a lot about writing spend a little time on writing in seminars; faculty who care little spend none. And no one believes that research faculty have been selected for their talents at teaching others how to write.

Writing assignments should be short, frequent, and closely scrutinized. Some of the best teaching I ever did—this was the students' judgment as well as mine—was in a capstone seminar in which I divided a brief among six teams of two students each. Each team wrote a short section of the brief, and I spent an hour with each team on the few pages it had written. We talked about strategy and tactics, word choice and tone, grammar, syntax and sentence structure, and coordination with the rest of the brief. That level of faculty effort is not sustainable at most schools. But I am convinced that close attention to short writing projects is a better model than the term paper.

It may be that most schools cannot staff a serious writing program in the second and third year. That is not a happy answer, but it leaves us no worse off than we have been in the past. Whatever we do in the second and third year, we should not kid ourselves into believing that the complaints about legal writing can be addressed in the first year. The first-year course performs other functions, and those functions inevitably come first. One thing it cannot teach is better legal writing.