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# IF WE CAN'T TEACH OUR STUDENTS TO WRITE...

LET'S EXAMINE SOME ALTERNATIVES  
THAT MAY HAVE A CHANCE TO WORK

**BY MICHAEL BOTEIN**

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Questions about legal writing skills inevitably lead to questions about the essential skills of "lawyering." To be sure, opinions differ as to what these skills are, but there is certainly general agreement that law graduates should be able to produce articulate and reasoned written material.

For decades law teachers have worked to reform law school curricula, giving special attention to first-year programs. But most of these efforts have ignored serious analysis of methods for teaching students the vital lawyering skills of research, analysis and writing.

This oversight is particularly troublesome since the writing ability of college graduates had declined steadily in the last decade, according to a February 1977 report in the *New York Times*. A law graduate's inability to write competently obviously has a major impact on his or her success as a lawyer. Moreover, as legal education faces a future with declining enrollments and revenues, law schools literally cannot afford to disregard questions of efficiency in designing legal writing programs.

Much of the difficulty with the traditional "legal writing" or "legal research" course may simply lie in its name, which usually gives no real clue to the course's goals or techniques. Legal writing courses can conceivably cover anything from fundamental composition to oral advocacy—in any substantive context. This ambiguity invites superficial analysis of the problems in developing skills in research, analysis and

writing. Thus, it is easier to implement symptom-oriented changes than to define fundamental goals with an eye to available tools. Our first task, then, is to identify some specific goals of a legal writing program.

(1) *Developing basic composition skills.* Teaching English composition to graduate students seems patently ridiculous on its face: after all, this nation's much-vaunted system of free public education should be able to produce reasonably literate citizens. The fact is, however, that basic language skills of college graduates have fallen off in recent years. While a substantial number of law teachers apparently recognize this problem, most hold undergraduate schools accountable and see little role for law schools. Although remedial education is usually not seen as a responsibility of professional schools, the need for it simply cannot be ignored.

(2) *Teaching formal aspects of legal writing.* Training students in legal jargon and citation form also seems like a rather lowly task for a professional school. Nevertheless, students should not be expected to learn these skills on their own in their usual course work, and the White Book is hardly an ideal vehicle for self-directed learning.

(3) *Using legal research materials.* A graduate must be able to utilize research tools to find relevant materials. As with formal skills, a certain amount of structured training is necessary to insure that students

acquire research skills. Inability to find relevant materials can be disastrous to a graduate—and to a law school's reputation.

(4) *Familiarity with basic legal documents.* By the same token, a law school should insure that its graduates can manipulate basic legal documents, forms, etc. However, I do not believe that a law school should feel compelled to fulfill this goal on a large-scale basis. The legal profession assumes that bright young attorneys know few practical details but can learn them quickly. I think that is correct, particularly if the other legal writing goals are met.

(5) *Analyzing legal problems.* On the other hand, teaching legal analysis is a law school's prime responsibility. This final goal is by far the most important for the student, since it enhances his or her ability to perform complex tasks in a professional manner.

To be sure, conventional classes do—and must do—this job to a very large extent. But they cannot shoulder the whole load. In most courses, a teacher can spend only a very limited amount of time in developing each student's analytic skills, either inside or outside the classroom. And even if teachers had more time, conventional courses need to cover so much material that a teacher cannot focus on a student's treatment of a narrow area. To a certain extent, of course, seminars already may fulfill this goal; pragmatically, however, only a few students take a large number of seminars.

With four of these five goals in mind—insuring students' competency with language, technical forms, research materials and legal analysis—it may be useful to analyze specific means for reaching specific goals.

#### **WHAT ARE THE EXISTING ALTERNATIVES?**

Different techniques are most appropriate for meeting different goals. The problem lies in devising the best mix of techniques. Before considering the options, however, it may be fruitful to review the most common types of programs, their values and their costs.

•The most expensive option gives a full-time teacher responsibility for all the relevant goals. To be sure, this probably brings the greatest amount of talent to bear on each student, but its cost is usually prohibitive.

•A somewhat less expensive option is an associate-in-law program. The principle behind it is to use new and comparatively inexpensive talent to give full-time faculty more flexibility and time. Associates are quite capable of correcting composition, jargon and citation errors, and they usually have enough analytic ability to handle most problems. But because associates have not taught before, their pedagogical insight may be somewhat limited; accordingly, their drafting and correcting of problems is sometimes less than outstanding. Faculty supervision can help cure this problem, but intensive faculty participation defeats the main purpose of the program. Thus, results of associate-in-law programs are often less than satisfactory.

•A third option combines some features of the first two by involving a faculty member and a student teaching assistant. In theory this method should pro-

vide an optimal combination of student and faculty resources. A top-notch teaching assistant can presumably correct composition jargon and citation errors, leaving a teacher free to focus on analysis.

But even more than associates-in-law, teaching assistants naturally have somewhat limited analytical ability and pedagogical insight.

•A fourth option reverses these priorities by giving all teaching responsibility to upper-class students who are subject to very limited supervision by one or two faculty members. In this case the cost is obviously quite low—but so is the quality. In cases where a school is interested in offering moot court or a similar learning model, this method might be fine. However, the basic problem is the distance between the supervising teacher and the first-year students, since the upper-class students may be weak in formal skills, research ability and analytic competence. To a large extent, this approach represents the nearsighted leading the blind. It is a cheap approach with cheap results.

•The fifth option is a totally student-run operation. This approach attempts to recreate law review training on a school-wide basis. To be sure, it has a very sound cost rationale; a law school bears only the inevitable but low expenses of typing, reproduction, etc., but naturally this model is also weakest in pedagogical terms.

#### **ADMINISTRATING DILEMMAS**

In addition to the philosophical questions involved in choosing a legal writing program model, there are several practical, administrative concerns which a law school must also consider. Obviously, these five options—and variations on them—may be applied in a number of ways. But what about such factors as status as separate courses, ties with substantive courses, amount of credit, and number of semesters?

*Separate but unequal.* The most common practice is to opt for a separate course. This approach, however, creates several problems. A separate course usually carries fewer credits than conventional offerings and thus seems less significant to students. Inevitably, their commitment to the course suffers. Students often feel that the work is not worth the credit, that the course is "mickey mouse," or that the teacher must be inferior to be teaching it in the first place—an attitude which also rubs off on teachers.

*Where does legal writing fit?* Another significant question concerns the amount of credit a writing program should carry. The old practice of no-credit allocation seems counter-productive. If writing assignments are not part of a conventional course, lack of credit only compounds the problems noted above.

If a writing program is part of a substantive course, however, failure to give separate credit creates other problems. First, it penalizes students who invest much time in writing projects. Inclusion of writing program grades in the final course grade might ameliorate this problem to a certain extent, but it could detract from the importance of the course material. Similarly, lack of credit reduces the amount of class time for substantive issues; a conscientious teacher or student in-

evitably uses class time to discuss writing projects.

*How much is it worth?* The next issue, then, is fixing the proper amount of credit for a writing program. It is possible to work out some rough figures, by comparing existing credit allocation schemes. For example, an effective writing program might consist of the following exercises and amounts of student time:

Simple library "finding" exercises to acquaint students with the nature and location of major research tools	10 hours
Short (five pages) memorandum of law, to introduce research and analytical techniques	15 hours
Long (ten to fifteen pages) memorandum of law, to develop independent research and analytical skills	25 hours
Drafting exercise, e.g., will, trust, statute	15 hours
Brief and oral argumentation	50 hours
	<hr/>
	115 hours

Conventional wisdom assumes that students should invest three hours outside of class for every hour in class. In a 15-week semester, one credit would represent at least 45 hours of class preparation and five hours of final exam preparation. On this basis, the above program should have at least two credits.

*Duration and placement.* What is the best time to offer a writing program and how long should it be? Lumping a major program into one semester seems unwise. One semester does not allow students sufficient time to receive and reflect upon critiques. At best, a student will receive corrections on a prior exercise a few days before beginning a final draft of a new project. This defeats much of the educational value, since students cannot benefit from their prior work—and especially their prior mistakes.

On the other hand, it is difficult to pinpoint an appropriate location for a two-semester program. The second semester of the first year is probably the most appropriate time to begin a writing program because by then students will have acquired significant analytic ability from their first semester courses. Beginning a writing program in the second semester would probably entail moving back those third semester courses which require certain, specific writing skills, but that should not unduly difficult.

#### A FLEXIBLE, INDIVIDUAL APPROACH

As the above arguments have shown, the existing models for legal writing programs present not only practical problems, but serious difficulties in achieving program goals. Probably the most viable approach would be for each school to create its own model. Instead of establishing a monolithic structure, this approach would emphasize a flexibility in method and specialized instructional technique to achieve particular educational goals.

Probably the most efficient means of achieving the first goal—namely, effective English composition—is to use non-legal professional writing teachers, since

using law faculty to teach basic English composition seems a waste of limited resources. In light of the poor market situation for humanities graduate students, they might be interested in expanding their activities to law schools. In addition, most areas of the country appear to have a plethora of present or former high school English teachers who are anxious to tutor. If a professional writing instructor spent two hours apiece on three major papers with each student, the annual cost would be \$30-\$60 per student. This cost could be even lower than it appears since, presumably, not all students would require remedial training.

Top-flight third year students can provide instruction in the proper use of legal jargon, citation forms and research tools. Many students with experience on publications or with intensive seminars can adequately perform these substantially mechanical tasks, and if a third-year student spent two hours on each of three major papers, the total cost would be \$30 per student annually.

Only law teachers and the very best third-year students can achieve the third goal of teaching legal analysis, but if writing instructors and third-year students have corrected all other errors, the teacher's and teaching assistant's jobs would be comparatively easy. The teaching assistant would draft problems and check for gross analytical mistakes; the teacher would supervise the drafting of problems and double-check the teaching assistant's substantive comments.

If a teacher spent one hour on each of three papers—a liberal estimate—the annual cost would be \$50 to \$100 per student depending on rank; if a teaching assistant spent two hours on each of three papers, the cost would be \$30 per student annually.

The main advantage of this alternative is that it relieves faculty of menial chores. One teaching credit per semester might be fair compensation for faculty members; in fact, to the extent that the faculty workload were less than one credit, this approach actually might attract faculty participation. The main disadvantage of this alternative is that it would require a faculty member to supervise several law students and writing teachers, but this coordination problem is not as difficult as it might appear. The educational goals are comparatively discrete, so there is no need for extensive coordination between writing instructors and teaching assistants.

This discussion ends with basically the same moral as it began: law schools must identify their particular needs and techniques in a legal writing program, instead of plugging in existing models. The first task is to reach a consensus on appropriate goals. This process not only allows a school to select fine-honed teaching tools, but also exposes hidden costs. The next step is to choose narrowly defined educational methods to achieve these goals, perhaps resulting in the hybrid type of program suggested above. No doubt this painstaking analysis of goals and methods can be time-consuming, difficult, and, perhaps, frustrating. But it can result in better lawyers (perhaps at a significantly lower cost) than by simply penciling in a writing program as an afterthought to legal education. ¶