

TEACHING LEGAL WRITING EFFECTIVELY IN SEPARATE COURSES

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Until recently, many law schools made little effort to teach legal writing. They either assumed or believed that legal writing could not be taught to small or large classes, that law firms would teach law graduates to draft legal documents, or that law students properly instructed in substantive and adjective law would incidentally learn how to draft legal documents when their law practice required them to do so.

I believe that legal writing can be taught effectively in law schools to small and large classes, that law firms are not in a position to train young lawyers in legal writing, and that students do not acquire from the substantive and adjective law courses all the things which they should know to be good draftsmen.

Legal writing is the drafting of all kinds of legal documents, including legislative bills and administrative regulations. The skill of legal writing includes more than the ability to write well. Courses on legal writing are, therefore, not merely college courses on English Composition transplanted into a law school curriculum.

1. *Related Skills*

It is impossible to teach the skill of legal writing without also teaching many other interrelated legal skills, such as fact-research, law-research, fact-analysis, law-analysis, fact-synthesis, law-synthesis, negotiation, documentary interpretation, counseling, diplomacy (tact), and advocacy. A lawyer does not write a brief, draft a contract, or prepare an administrative regulation without using skills other than the skill of legal writing. He must learn the pertinent facts and the nonlegal problems. In doing this he uses the skills of fact-research, fact-analysis, fact-synthesis, and frequently also diplomacy. After he has ferreted out and organized the pertinent facts, he ascertains the applicable law and the legal problems. He does this by using the skills of law-research, law-analysis, law-synthesis, and frequently also documentary interpretation. He next determines the general contents of the document to be drafted. This must be worked out with the interested parties, taking into consideration all foreseeable legal and nonlegal problems. Securing mutual agreement to specific provisions involves the skill of negotiation. The client will undoubtedly rely upon the suggestions which are made by his attorney during the negotiation period. Suggesting, explaining, recommending, and convincing represent the skills of counseling and advocacy. Finally, the lawyer writes the document. The actual writing of the document might well be called the skill of legal composition.

Although lawyers use many skills whenever they draft documents, it is not necessary to emphasize constantly all these interrelated skills in legal writing courses.

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2. *Related Courses*

An increasing number of law schools are teaching the drafting of legal documents in a separate legal writing course. Other law schools are teaching legal drafting as part of the substantive and adjective law courses. I do not believe that there is necessarily a conflict between these two apparently diverse approaches to the subject of teaching legal writing. The main emphasis in substantive and adjective law courses is very likely to be upon the substantive or adjective law. Neither the teachers nor the students can spare the time required to give proper consideration to the general and specific things which can and should be taught in separate legal writing courses. The law of contracts may be taught from the draftsman's point of view, but it is the law of contracts which is being taught and not the drafting of contracts. However, students who have been reminded in their substantive and adjective law courses of the draftsman's problems are better prepared to benefit from separate legal writing courses than students whose attention has not been directed to these problems.

The Western Reserve Faculty of Law makes a conscious effort in the substantive and adjective law courses to point out how specific problems arose because of poor draftsmanship and how good draftsmanship might have avoided litigation. But the teachers of the four legal writing courses of two semester hours each are responsible for the teaching of legal writing.¹

Legal Writing I is a first-semester course. It includes basic research of the type usually taught in Legal Bibliography, the preparation of a brief on points of law, and oral argument of these points in moot court. During the first part of the course the emphasis is on thorough, accurate, and fast law-research. In the latter part of the course the emphasis is on law-research, legal composition, and advocacy.

Legal Writing II is now a fourth-semester course, but serious consideration is being given to teaching it in the third semester. It is always given in the same semester in which the course on Jurisdiction, Venue, and Code Pleading is taught. At the beginning of the course each student prepares a legal memorandum using only designated cases. In the preparation of this memorandum, law-analysis, law-synthesis, and legal composition are emphasized. Other exercises in Legal Writing II consist of the preparation of pleadings and a brief. The brief is on points of substantive or adjective law, or both, in support of the pleadings. In the preparation of the brief, law-research, law-analysis, law-synthesis, and legal composition are stressed.

In Legal Writing IV students write publishable law review notes and comments. Students may take this course in their fifth or sixth semester.

The editorial board of the Western Reserve Law Review consists of students selected on the basis of their scholarship and their ability to write as evidenced by the writing of a satisfactory note or comment. Each member of the editorial board, except the editor-in-chief and the case-notes editor, must write one or more satisfactory notes or comments each semester. All students are encouraged to write notes and comments and to submit them to

¹Legal Writing I and II are taught by Professor George N. Stevens; Legal Writing III is given by the writer; Legal Writing IV by Professor J. Norman McDonough.

the editorial board for publication in the Review. The editorial board determines which of the notes and comments written by its members and other students will be published.

3. *Objectives of Legal Writing III*

Legal Writing III is a course on legal composition and the drafting of specific legal documents. It is given in the fifth or sixth semester. The specific objectives of this course are, first, to create in each student an appreciation of superior legal writing and the desire to write well and accurately all legal documents, and second, to give each student sufficient practical training in drafting so that he will be a superior draftsman. While the specific objectives of the course are not attained with respect to every student, each becomes an increasingly better draftsman as the course proceeds, and upon its completion has sufficient confidence in himself to do a good job of drafting and to improve until he eventually may become a superior draftsman.

4. *Contents of Legal Writing III*

In addition to the general principles of good composition, there are certain general principles (with proper exceptions) of legal composition. I believe that the subject of legal composition includes at least the following elements:

- Need for precision
- Meaning of words
- The rules of construction
- Rules of law and legal writing
- When and how to define
- Simple and clear language
- Short and direct sentences
- Punctuation of legal documents
- Recitals of facts
- Desirability of flexibility and how to obtain it
- General organization, headings, and index
- Proper use of check-lists
- Proper use of forms

The general principles of legal composition are studied during the first few weeks of the course and also in connection with the drafting of each document. The historical pattern and the specific problems of each document drafted by the students are considered and discussed when the document is being drafted and thereafter at any time when it seems desirable. The historical pattern of a document is important. It has some functional value, such as promoting a certain uniformity in drafting which makes it easier for other attorneys to locate specific provisions. Also, many, if not all, attorneys in the draftsman's community may follow the historical pattern of a particular document, such as a deed or mortgage. Conformity may be a virtue.

Every student who completes Legal Writing III should be able to draft any legal document after proper study, and should be familiar with and know how to draft the following documents as an experienced draftsman:

- Simple contracts
- Leases
- Contracts for sale of realty
- Escrow agreements

Deeds
Waivers and releases
Mortgages
Secured and unsecured loan agreements
Patent licenses
Research contracts
Development contracts
Labor agreements
Trusts
Wills
Gifts
Legislative bills
Administrative regulations

Teaching a fairly large class in a single two-semester-hour course everything which has been outlined above involves certain problems, but I believe they can be satisfactorily solved.

5. *Drafting Exercises, Cases, Textbooks, Special Lectures, Educational Sound Films, Filmstrips, Articles, and Other Materials*

If each student were required to prepare a legal memorandum in connection with each document which he drafts, most of the time which he can spend on the Legal Writing III drafting exercises would be used for law-research. All students who take Legal Writing III have had adequate training in law-research. Therefore it should be reduced to a minimum. This can be done by preparing text statements of the applicable law for use in drafting specific documents.

Students must learn to use words with precision and to write in simple, clear language. They can learn to do this by writing, and by reading about the *use* of words in legal documents and the *meaning* of words. There are articles and other materials on the elements of legal composition listed above and on the drafting of specific documents. In the near future we hope to have a single text statement on legal composition which can be used in all the legal writing courses.

In each week of the Legal Writing III course each student drafts a document, several related documents, or specific provisions of very long documents. In order to make the drafting as realistic as possible, certain essential information is omitted from the statement of facts of some of the drafting exercises. The omitted information is given in class in response to specific inquiries.

Most of the drafting exercises consist of writing documents and checking similar documents written by other students. As soon as each student completes a document to his satisfaction, he submits it to another student, who examines it as counsel for the opposing party. When a document as drafted is entirely satisfactory to the student checking it, he writes "Satisfactory" and his name on the first page. When a document is poorly drafted but is considered by the student checking it to be satisfactory from the legal standpoint as to the rights and liabilities of the parties, he marks it "Satisfactory" and notes in the margins the specific defects. When a document is marked

"Unsatisfactory," the specific objections are listed on the back of the first page.

After a document has been checked by another student it is returned to the draftsman so that he may read any specific objections noted. The document is then handed in without being rewritten.

In view of the fact that each week there is a new drafting exercise, so that the students will become familiar with the organization and special problems of a number of different types of documents, they are required to revise only one exercise. I believe that the students profit more by drafting different documents than by rewriting each document after their attention has been called to defects and better ways of drafting.

Good legal draftsmen have the innate or acquired ability to detect slight but possibly serious defects in the documents which they write. To teach the students that they can detect flaws in documents which they have carefully written and carefully revised, one of the drafting exercises is not marked by another student before it is handed in. It is returned unmarked to the draftsman. He must revise it in such a manner that the nature and extent of the revision can be easily seen or he must note thereon that revision is not necessary.

As instructor in Legal Writing III, I read all documents submitted by students in this course and mark defects. Documents which can be used as "horrible examples" or which contain similar mistakes made by a number of students are discussed in class. Examples of good drafting taken from documents written by the students or by practicing attorneys are also considered in class. In the near future I hope to have on filmstrip examples of poor drafting and of good drafting, including documents drafted by students then taking the course. This semester I hope to have on filmstrip the evolution of certain documents, such as the deed from the very earliest to the modern short-form statutory deed used in some states. Also, this semester we shall begin a program of educational sound films to give students background information necessary for the intelligent drafting of various documents.

There is a definite need for a casebook in the Legal Writing III course to tie together its various elements. Six chapters of a temporary edition of such a casebook have been completed, and work on the remaining chapters is continuing.² Pertinent cases make the students more conscious of the need for good drafting. The cases uniformly call the students' attention to the fate of poorly drafted documents.

In addition to class discussions of the various documents, local lawyers who have specialized in the drafting and administration of certain documents, such as revocable *inter vivos* trusts, term loans, and labor agreements, are called in to explain these to the students.

This explanatory statement of Western Reserve's separate legal writing courses is necessarily a still picture of a growing thing. Only the general directions of this growth have been indicated.

²The titles of the completed chapters of the temporary edition of the casebook are: Liability of Draftsman, Drafting of Legal Instruments as Practice of Law, Definition, Recital, Contract, Lease.