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TEACHING LEGAL WRITING IN THE LAW SCHOOLS (WITH A SPECIAL NOD TO LEGAL DRAFTING)

REED DICKERSON*

The French theologian, George Bernanos, is reputed to have said that the "worst, most corrupting, lies are problems poorly stated."¹ Although I have not verified the attribution, the comment seems apt for the discussions now taking place respecting the law schools' dismal failure to teach adequate legal writing, let alone legal drafting. Despite long-standing public and professional complaints (and some contempt), there has been little improvement in the pedagogy of legal writing in the past 40 years. Nor is there much hope for the next 40 years, unless we radically change our approaches to this and several related problems. Conventional wisdom solidified by pedagogical tradition has guaranteed failure, largely because the problem has been oversimplified and misstated. The failure to see its full dimensions is reflected in the existence of courses called "Legal Research and Writing."

The Association of American Law Schools recently conducted a panel discussion on what the law schools can do to solve the problems of instructor turnover, inadequate transitional guidance, administrative inefficiency, low evaluation of the task, low salaries, lack of prestige, and student discontent. Some of the solutions suggested for discussion were providing more money, rotating responsibilities among experienced faculty, and attaching small sections to substantive courses. Unfortunately, such suggestions deal with symptoms rather than causes. None relates to the root causes of the law schools' general lack of success. Here are some of these causes:

(1) We have trivialized legal writing by calling it a "skill," when expository writing, of which legal drafting is one kind,² is a basic discipline, perhaps the most basic of all disciplines.

(2) We have demeaned legal writing by treating it as mainly a matter of language, thus playing down one of its most important functions: the improvement of substantive

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1. Senator Daniel F. Moynihan at Baruch College, Chicago Tribune, June 24, 1977, §1, at 11.

2. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 6-7 (1965).

ideas. Expository writing not only reflects thought, but helps to shape it.³ Preoccupation with merely putting words together tends to obscure, for example, the fact that as a planner the draftsman is also a sculptor of ideas, an engineer, and an architect.

(3) We have further demeaned legal writing by trying to crowd too much into single, elementary courses.

(4) Misreading the need to join form with substance, we have needlessly diluted writing courses by requiring the student to do the kind of time-consuming legal research traditional to courses on law library research, term papers, or law review assignments. Unfortunately, we cannot make a concentrated attack on the legal writing problem if we continue to combine it with a comparable attack on legal bibliography or with one on legal or factual research. No course aptly called "Legal Research and Writing" can provide adequate training in legal writing.

(5) The growing practice of importing English teachers and other language experts into law schools (and even law firms) tends to confuse the need for special instruction in forensic legal writing, or in legal drafting, with the need for remedial general writing.

The first thing, therefore, is to stop teaching courses with this kind of blurred emphasis. They slight both subjects involved and mislead students into believing that they are receiving adequate instruction in either.

Does separating the two emphases necessarily disembodify the writing discipline by divorcing form from substance? Not at all. Although a factual and legal background is necessary, a course in legal writing should permit only such research as is compatible with an adequate attack on the relevant conceptual, architectural, and verbal problems. One way to handle this is to select topics that enable the students to write on the basis of substantive considerations that are already in their heads or have already been developed in large part by others. I have found several beautiful drafting problems in which most of the basic data can be taken for granted and in which the policy research consists mainly of thinking about the problem and organizing the information that is already in hand or quickly available.

In legal drafting courses, the best insurance against sacrificing precious writing time to the needs of substantive research is to

3. MARTIN, *THE LOGIC AND RHETORIC OF EXPOSITION* 1-2 (1958); Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It*, 29 J. LEGAL ED. 373 (1978).

revise existing instruments. In this way, it is possible to meet both the need to learn how to compose and the need to show how good writing is integrated with the ascertainment and improvement of substantive policy.

To do justice to legal research (and to legal writing), on the other hand, some integration of research strategy with writing strategy is desirable to show how the two can be most profitably dovetailed. In my assigned drafting exercises, I permit only very general research before the student puts his tentative thoughts in writing. He thus defers the more detailed research until he has prepared a coherent draft whose unsubstantiated assumptions are plain enough to indicate where the remaining research needs exist. By thus providing specific research foci, the approach saves valuable time and, by encouraging substantive "talkback,"⁴ it enhances the quality of the end product. Imparting this valuable insight does not require heavy doses of factual or legal research.

The draftsman's research obligation is ordinarily not to dig out the basic facts but, by the quickest trustworthy means available, to ascertain (and help develop, if necessary) the specific policies that the client wants to implement. Here, satisfactory initial policy research can often be done mainly by explicating an existing instrument. The conceptual structure is then built and, where necessary, gaps are filled with compatible tentative assumptions, which follow-up research will verify or refute. This moves the draftsman quickly into the essentials of drafting and illustrates the benefits of substantive talkback that this approach inevitably produces.

Similarly, I would think it desirable to separate courses or seminars that are heavily oriented toward legal research from the mechanics of library research and the modest ancillary writing exercises necessary to direct library searches. As with their self-proclaimed writing ability, lawyers tend to take for granted their facility with both doctrinal research and non-doctrinal research.⁵ Because our immediate preoccupation lies with legal writing and only secondarily with legal research, I merely point out here that each is important enough to receive special consideration in the legal curriculum. Relief from acute academic congestion can be achieved in almost any curriculum by dropping several of what some wit has called "Law and the Elephant" courses.

Even if freed from conventional legal research, legal writing is too important to be confined to one course. If the case method

4. *Id.*

5. Peter Nycom recently described legal research as "the unrecognized legal discipline." P. NYCOM, *Legal Research—The Unrecognized Legal Discipline*, in *SENSE & SYSTEMS IN AUTOMATED LAW RESEARCH* 81 (1973).

deserves attention in many courses, legal writing, which is a more basic discipline, certainly deserves something better than a single shot. For one thing, the non-emotive expository writing that we call "legal drafting" should be separated from forensic legal writing. The disciplines differ in rigor and approach, and each is important enough to deserve separate treatment. It is ironic that current courses in legal writing are badly tilted in favor of litigation, when in the real world of modern lawyering dependence on the drafting discipline is far more pervasive than is dependence on litigation skills. Incidentally, except for jury instructions, the litigation process involves almost no legal drafting.

In turn, training in legal drafting is appropriately distributed between a large-class course in the basics of legal drafting for lawyers generally and an advanced seminar in legislative drafting for those interested in becoming specialists in that field.

Another reason for including core courses in legal writing or drafting is that the "pervasive" method of teaching (distributing a discipline widely within the substantive curriculum), which has succeeded beautifully for the case discipline and only mildly for such across-the-board concerns as professional responsibility, has yet to be satisfactorily adapted to legal drafting. The specifics are simply not there.

In the meantime, either we are relegated to the status quo, which is intolerable, or we can break up this congeries of problems and give each element the attention it deserves. Unfortunately, the venerable case method has little to offer preventive law, where we deal only with kinds of situations, dissociated from the specifics of particular controversies.

I have long struggled to teach legal drafting but, except in small seminars, my efforts have been only modestly successful. I have also tried the pervasive approach of injecting drafting exercises into substantive courses such as Sales and Legislation, but I found that I was spending too much time accomplishing too little. I now confine my drafting efforts in such courses to commenting, as the occasion arises, on the deficiencies of particular litigated instruments. As a buttressing operation, it is no substitute for core courses in drafting.

Today's main problem is to develop a pedagogy for teaching elementary legal drafting to large classes. Because every lawyer needs to know how to draft at least routine legal documents, it is not enough to conduct an occasional and reasonably successful project seminar for a mere 8 to 12 students. The course must be not only equipped to handle substantially larger numbers but made acceptable to faculty members other than intimidated recent recruits.

The most baffling pedagogical problem is to handle the chronic student requests for personal attention. This requires developing a

method of sharing with the students the specific benefits of completing their assignments. The classic method is to have the instructor or a teaching associate prepare a detailed critique of each student paper. Although this is not as effective as the master-apprentice approach, the latter is beyond the practical reach of educational institutions. As the theoretically next-best alternative, personal attention to individual student papers has been routinely accepted as a *sine qua non* of instruction in expository writing.

Ironically, this assumption has effectively aborted all large-class instruction in legal drafting in the law schools. Almost no senior professor will touch such a course because, in the absence of enough affordable teaching assistants, he is unwilling to suffer the numbing burden of analyzing and discussing individual student papers. Putting that burden on junior instructors has failed because they are only rarely trained in the drafting discipline and the traditional editorial tedium has resulted in high turnover. Worst of all, the intellectual challenge of most classroom writing projects as traditionally conducted is relatively low. This is unlikely to intrigue the better legal minds.

Here is how we are currently trying to solve the problem of teaching legal drafting at the Indiana University School of Law. My sample is the class of 62 students who took my course in Legal Drafting in the spring of 1979. This was taught without pedagogical help, my part-time student assistant having only kept track of student assignments and done miscellaneous research. (The pattern of operations having now been set, even this kind of help will probably be dispensed with.)

The keystone of the new approach is the decision, announced at the outset of the course, that the student will get *no* outside-of-class individual attention. Assignments are collected and their receipt recorded. The professor samples the papers and from them selects for class discussion the most typical or significant drafting errors or contributions. The relevant parts of the text involved are put on transparencies that can be marked up while projected on a screen, making it possible for all members of the class to observe and participate with the professor in developing an improved draft.

At the beginning of the course, each student acquires a set of mimeographed materials exemplifying almost all of the many dimensions of drafting. Although the materials are too voluminous to be discussed in their entirety, the student is required to read them to enlarge his perspective, particularly to emancipate him from the confining notion that drafting is only manipulating words. A chronic drawback of traditional approaches is that, by concentrating on the minutiae of style, they perpetuate the misimpression, still widely shared, that legal drafting requires only wordsmiths and that legal

drafting, far from being a hard-nosed basic intellectual discipline, is a pedestrian skill, worthy only of paraprofessionals or eccentric pedants.

Among the topics covered by these materials are the nature of legal drafting, some basics about language and communication (especially in their interaction with thought), relations between the draftsman and his client, the basic elements of communication, the role of external context, the relation between legal drafting and research, the concepts of legal audience and editorial attitude, the problem of conceptualizing the elements implicit in the particular problem, the architecture of legal instruments, the elements of drafting style, the role of definitions, the hierarchical aspects of legal rules, the simplification of legal instruments (especially consumer documents), scientific aids to drafting (such as logic trees, flow charts, "language normalization," and computers), amendments, the organizational and procedural environment necessary to effective drafting, and the codification of statutes or regulations.

During the course, the student is given a series of assignments, each designed to represent a significant aspect of the drafting process. One is to explicate an existing or proposed document for the purpose of preparing the student to interrogate the client. Another is to prepare a set of questions to ask the client before embarking on a first draft. Another is an exercise in de-gobbledyhooking an existing contract preliminary to a thoroughgoing effort to revise it without changing substance. Others involve specialized exercises in arrangement, tabulation, definition making, and simplification.

Many of the specific points are illustrated by projecting transparencies. In most cases, the students have been given hard copy on which they can post the changes made in class and which they can then keep as a record.

As the first part of the final examination, the students are assigned a take-home project of revising (without substantive change) a complicated one-page legal document that contains typical drafting inadequacies. They are also invited to append such comments on the redraft as they think appropriate.

The second part, which is given in the conventional way, is designed for the most part to let the students show how adequate a grasp they have of the assigned reading materials. It also includes a short drafting exercise to help verify that they have not obtained outside help on the take-home part.

Anonymous student evaluations made at the end of the 1979 effort showed a general satisfaction with it, with several important reservations. The most prevalent comment was that the student would have liked personal attention, a seemingly reasonable suggestion that for any large class must, nevertheless, be rejected out of

hand. To comply with it would mean early death for the course (and perhaps the professor).

One complaint was that the reading materials were too extensive. The point was well taken and the aggregate is being reduced, but not to the point where it fails to provide a comprehensive survey of the drafting field. The other significant complaint was that not enough class time was spent on the analysis and revision of specific legal documents. Again, the point was well taken, with the result that the course is being increased from two hours a week to three.

In general, the approach is sound because it works.

