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LEGAL WRITING AND RESEARCH: THE NEGLECTED ORPHAN OF THE FIRST YEAR

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> You realize that among many of your colleagues a long-term commitment to legal writing and research makes you suspect as an incompetent or a borderline crackpot. That course is usually "reserved" for the man who has the least seniority. —A Dean

> I have advised potential law professors for over twenty years. In that time only one prospective teacher has mentioned a real commitment to legal writing and communications. What can be of long-term interest in that area? What's the intellectual stimulation?—A Boalt Hall Professor

I. PROLOGUE

This article concerns realistic and implementable goals for a legal writing and research program. It is also concerned with goals and staffing problems for a full legal communications program.[1]

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1. As defined in this article, legal writing is the branch of legal communications that requires

This writer assumes that most law schools have not devoted sufficient monetary resources to legal writing and research, and that the legal teaching profession generally has not made a sufficient commitment of intellectual resources.[2] This neglect is slowly being remedied. The last few years have seen numerous inventive efforts to create new frameworks to house legal writing or legal communications programs. In this same time span new and intellectually sound teaching material has been issued,[3] which can be used to improve conventional legal writing programs. It is now up to law schools to make the commitment of manpower and money to achieve satisfactory results. Ideally, a school would have a full four-semester legal communications program taught by regular faculty members. However, the world is not ideal.

No legal writing or legal communications program will ever be totally successful; although ingenuity and effective teaching material can reduce the inherent dilemma that plagues these programs. Legal writing and research requires personnel with three major skills. The course depends on substantial administrative ability. It demands sophistication in the nuances of writing. And third, it involves some degree of competency in several areas of substantive law. Even if a school finds a few committed people with all of these attributes, it is unlikely to find enough teachers; and even if there were a sufficient number available, it would be prohibitively expensive. The most successful legal writing and research course on record was taught by two professors to 12 second-year students.

This article is divided into three major sections. Section 1 concerns the traditional student and faculty attitude toward most existing legal writing and research programs. It explores some of the misconceptions that have led to this negative attitude, and describes why it

a specific step-by-step approach to a persuasive legal argument. Legal memos and appellate briefs are examples of legal writing. Legal communications is concerned with both oral and written efforts to provide or gain information from a client, the court or the opposing side. Examples of this are client interviewing, complaint writing, deposition taking and motion drafting. There is another branch of legal communications commonly referred to as legal drafting. The drafter must have a substantial understanding of the underlying legal problems. However, the instrument that is produced is, on its face, a seemingly neutral statement of a predetermined legal situation. Drafting is unique because it is directed at a generalized audience and is oriented towards the future.

2. K. LLEWELLYN, THE BRAMBLEBUSH (1960) represents one of the few credible efforts to provide an intellectual foundation for law school teaching generally, and the need for writing skills in particular.

3. The goals section of this article will discuss new books and ideas. The format section will discuss the new structural formulations.

Another indication of the ferment in this area is contained in a symposium on legal writing, drafting and research in a recent edition of the *Journal of Legal Education*. These articles contain practical suggestions, concrete ideas and hints, as well as teaching suggestions. Robinson, *Drafting—Its Substance and Teaching*, 25 J. LEGAL ED. 514 (1973); M. Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL ED. 538 (1973); Lloyd, *A Student View of the Legal Research and Legal Bibliography Course at Utah and Elsewhere—A Proposed System*, 25 J. LEGAL ED. 553 (1973); Gilmer, *Teaching Legal Research and Legal Writing in American Law Schools*, 25 J. LEGAL ED. 571 (1973).

must be changed if a school is to take advantage of the new learning and excitement. The next section outlines goals for a legal writing or a legal communications course. It emphasizes the need for realistic goals based upon strong intellectual underpinnings. The last section deals with structural format. The possible structures are examined primarily in terms of hiring and retaining interested personnel. The emphasis is on the newest ideas. However, there is substantial examination of means to improve pre-existing formats.

II. TRADITIONAL ATTITUDES TOWARD RESEARCH AND WRITING PROGRAMS

Legal communications is becoming an exciting course to teach. Bright young people are becoming interested in it. But, before this interest can be translated into better programs, certain administrative, faculty and student attitudes must be understood and modified.

It is not difficult to convince an entering law student that he (herein "he" also implies "she") must know how to use a law library effectively. The law library is the repository of a branch of knowledge that is uniquely "legal." It is somewhat more difficult to convince him that lawyers think, and consequently write, in a different manner and style than do other people.[4] In the early weeks of law school, thought reformation is not an insurmountable task. The student soon notes the depth of analysis required by class discussions. However, this observation about analytical precision is not stressed in relationship to writing exercises. At many law schools, legal writing is considered as an introduction to formal written conventions. It is not conceived of as a concrete, reviewable means of developing analytical and synthetical skills.

It was long ago recognized that civil procedure is a necessary part of the law school. Procedure provides a vehicle for information transmittal, and also helps to determine the nature of this information. In a like manner, legal writing skills assure coherent communications and contribute to the precision needed for legal analysis.

Students often fail to perceive the value of a legal writing course. The writing staff is responsible for this lack of perception when they fail to define and isolate the elements required for a good piece of legal writing. They are remiss when their objectives are the equivalent of producing a good memorandum or appellate brief. They are to blame

4. R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 150 (1965) [hereinafter cited as R. DICKERSON] describes a legal drafting course. Dickerson's remarks are substantially true for a legal writing and research course as well. He says:

> Legal Drafting has aspects of complexity and precision unknown to the great bulk of writing of which the pre-law student makes contact. The differences in degree are so great as to constitute practical differences in kind. For this reason, the law schools should face more resolutely the responsibilities to teach a professional skill that every lawyer needs . . . and that only they can teach on a mass basis . . . .

if they make no attempt to differentiate between research, language and analytical, synthetical and persuasive skills.

The legal writing course requires a substantial commitment of time and energy. Good legal writing requires an inordinate amount of effort. Students are not likely to put forth this effort willingly in a situation where the writing program, its assignments and its personnel are not highly regarded by the rest of the faculty. The student's substantive courses are already considerably more time and energy consuming than anything he has experienced as an undergraduate. The student comes to school to "learn the law." He assumes he already knows how to write and that legal research skills are easily acquired. His assumptions are seemingly confirmed by the negative attitudes toward the legal writing program. The student must be convinced to substantially modify his writing style, and a change in faculty attitude would facilitate this. Then the student could more easily understand that finding the "proper case" in the law library is only the first step in providing assistance to the client.

The need for good legal communications is imperative. An experienced extraordinary writ clerk of the California District Court of Appeals in San Francisco once noted that over half of the writs he read were poorly drafted. It was difficult to know which case stood for which legal proposition. It was even hard to know exactly on which propositions of law the lawyer was relying. Another 20 percent of the writs had substantial defects in format or were simply dull. These formalistically defective and dull briefs were a real chore to read and analyze. Therefore, he often had to remind himself not to give these poorly written writs "short shrift" in terms of their legal validity.

No law professor would deny the value of clear and precise writing. Nor would any professor discount the value of a thorough knowledge of legal bibliography. It is easy, however, for most professors not to get involved in formulating policy or implementing the legal writing and research course. This is particularly true of professors who teach only second and third-year courses. Many law professors are unaware of the new and stimulating developments in legal writing and research methodology. All they remember is that their legal writing course was dull, unimaginative, and rather useless.

Other law professors genuinely feel that writing is not something that can, or should, be taught in law school. They feel that first-year law students already know how to write. Any problems that entering students may have can be isolated by entrance examinations and corrected by "backpressuring" the undergraduate institutions. Any unique qualities that differentiate legal writing can be picked up in seminars during law school, on summer jobs or after students have gone into practice. This feeling is the result of one or several assumptions. Some faculty members believe that the increasing quality of law

students guarantees precision in thought and writing skills. They expect a uniform, highly articulate and highly capable student body.[5]

There may have been a time when law school admission policies were more self-selecting. People who went to law schools were usually relatives of lawyers or other professionals. Other persons, such as journalism majors and debators, had a great deal of practice playing word games. Night students were claims adjusters, legal secretaries, and bailiffs who had some background in legal language and thought patterns. However, a high percentage of those now being admitted have had little or no practice with precise use of language. Many schools have extensive minority admissions programs. These minority students have not had the exposure to "middle-class" writing patterns and language. In addition, the tight job market has caused many engineers and scientists to gravitate towards law, and a wider range of humanities and social science students are applying.

Other law professors feel that the art of lawyering demands adaptability to unstructured situations. Therefore, they believe that it is undesirable to teach legal writing and research. The students should be sufficiently responsible to learn the skills that they need on their own. A few lectures on legal bibliography is all that is required.

Many of these professors forget where they gained their expertise in writing and research. They usually were members of the law review, which had built into it a feedback system with a substantial degree of editorial redundancy and a stress on analytical perceptiveness. It is a unique experience. Most students will not be chosen for law review, and thus their only formal writing opportunity will come through the legal writing program.

Some faculties and law school staffs have sincerely attempted to produce good legal writing or legal communications programs. The "inherent" differences between this course and the substantive law

5. The Advocate, Oct. 3, 1973, at 3, col. 2. This student newspaper of the University of Santa Clara Law School indicates the increase in academic qualifications of entering admittees of at least one law school.

SCU LAW STUDENTS: GETTING BETTER ALL THE TIME

	69-70	70-71	71-72	72-73	73-74
Average GPA,* entering class	2.67	2.80	2.89	3.07	3.18
Average LSAT,* entering class	530	556	578	613	626
Minority Students	N.A.	18	56	103	114
Women Students	16	39	64	103	127
Total Enrollment	288	402	447	749	801

* Excludes special admission students.

courses have led to less than satisfactory results. Unless it can be shown that the differences between the writing program and the substantive law courses are reconcilable, it will be difficult to convince schools to allow their writing professors sufficient latitude to create effective programs.

The written work-product requires close correction and one-to-one, oral teacher-student involvement. This is an extremely difficult type of teaching. It is very time consuming, enervating and sometimes fruitless. Experience indicates that the weaker the language skills and analytical abilities of the student, the more time the teacher must spend with him. Individual exercises are required. Often these exercises aim at correcting language defects. It is difficult for the writing professor to convince the rest of the faculty that there is intellectual fulfillment in seeing the student improve in even these basic linguistic skills. That type of teaching is not what most law school professors consider "teaching students law."

Many of the larger schools can afford to use graduate teaching assistants, whereas many of the smaller ones have to use student teaching assistants. Regardless of the size or prestige of the schools, the people who are most highly qualified to teach legal analysis and writing skills, the primary faculty, are in short supply. The ratio of faculty to students is always adverse to the one-to-one teaching method which is the most effective means in the learning process. Yet, well-supervised graduate or student teaching assistants can do a creditable job.

In a legal writing or legal communications program that does not use the full first year faculty there is often the problem of class conflicts. Even well-conceived legal writing assignments are tremendously time-consuming. Students, when faced with these types of assignments, oftentimes fall behind in their other classroom work. These conflicts can be avoided. On a technical level, assignments can be staggered. Preliminary research outlines can be required to avoid the students' tendency to procrastinate. The first-year professors can be informed in advance when students are going to have assignments, and the students can be advised to "brief" ahead in their substantive classes.

The "goals" section will show that the legal writing or legal communications course can be used to enhance and refine what is taught in the substantive law courses. It will emphasize that harmony rather than conflict can be the result. The writing course, or even a communications course, should not be expected to accomplish too much. No property professor would expect his course to teach all of property law in one year. Nor should the writing program be expected to produce a series of student written assignments of Holmesian quality. However, competency in written communications can be expected.

There are other realities about the writing course. The students

with the best pre-existing language skills will benefit the most from the program. Even a good program will not provide the latitude necessary to gain the maximum advantage for every student. Any set teaching pattern will be ineffective with some students, yet time and cost considerations limit the kinds of teaching situations that can be tried.

The next two sections of this article deal with innovative ideas in the area of goal definition and program format. It is hoped that these ideas will stimulate law school faculties to provide the legal writing directors with the opportunity to experiment. This is necessary if a legal writing or legal communications program is to be effective. Formulating realistic goals and the hiring of committed personnel are the focus of this article. After the goals have been defined and good personnel hired, there are a vast number of other decisions that have to be made. They deal with the policies behind the program and with its day-to-day operation, which is the subject of another article.

III. THE GOALS

Most legal writing programs are continually experimental, as most have never been realistically analyzed. There are two major problems facing any legal writing or communications course. The first is to provide a program that is more than a facade—one in which students learn something instead of just going through the motions. The second problem is to integrate this program into an already overcrowded schedule.

The first step in analyzing these two problems is to set forth a series of primary and secondary goals. Goals will not insure expertise, for even if a program is well carried out, familiarity with legal formulations is the most that can be expected. Legal writing is, after all, a professional skill that must be learned through years of practice.

The problem with articulating formal goals is that they always describe more than what is really going on. Just because one has set forth goals, one tends to feel that he is arriving at them. It is always necessary to understand that an individual student's weaknesses will dictate which goals are being emphasized. When a teaching assistant or professor sits down with a student to look over the student's paper, the specific problems of that student will be discussed. In that sense it is impossible to fully isolate specific goals. However, goal articulation is helpful in that it provides a target. Without an attempt to define and isolate specific goals there would be mass confusion. When goals are isolated and aimed at specifically, the chances of improving a student's skills are increased.[6] Moreover, even a good program which lacks

6. Alexander, *A Research and Writing Program for Small Schools*, 14 J. LEGAL ED. 377 (1962) [hereinafter cited as Alexander]. He states:

> It is, of course, imperative, in establishing a writing program, to structure it to fit well-conceived goals . . . . Aside from the fact that the single-goaled program may be incomplete, it often also suffers from confusion in the tutorial conferences and en route. The student may have difficulty using the research material; the instructor may be

specific goals has little chance of being reproduced. The program becomes totally dependent on the varied concepts and degrees of dedication of a continuing stream of instructors.

The definition of primary and secondary goals is not absolute. Any well designed program could accomplish any of the specific goals. The level of difficulty of the material covered would, however, have to be varied depending on the student's pre-existing knowledge of substantive law. Each new doctrine, formal convention or skill that must be mastered in a given time period increases the level of confusion and anxiety.

Administrative and cost factors may require that only a "legal writing" course be taught. If a larger commitment were possible, a four-semester legal communications program would be ideal. The first semester "getting to know law school" course would be followed by an "extended case method" program. Next would be an 11 week program aimed at drafting dispository legal instruments, *i.e.*, statutes, contracts and wills. The last step would be an appellate level moot court program. Most schools will not find it financially feasible to have more than a first-semester program followed by an appellate level moot court program.

A. *The Primary Goals*

This article contemplates a legal writing program that begins during the first semester. It is the most popular approach. Legal writing could be postponed until the second semester, when students have had some substantive law background. Or, legal bibliography could be taught the first semester when the student is relatively less sophisticated and more apt to accept the necessary drudgery. Then, the legal writing course could be taught in the second semester or even in the beginning of the second year.

The primary advantage of a first-semester course is that it provides diagnostic feedback. The writing program gives the teacher a concrete example of the student's mastery of legal conventions and his increasing analytical skills. Many students find the "treasure hunt" aspects of a well-designed legal writing problem to be more interesting and creative than simply studying cases.

The learning process is enhanced when problems are identified and corrective measures are taken before bad habits are developed. Educational psychology theory also notes that sustained and frequent feedback enhances the learning process by reducing the level of anxiety caused by the unknown. Anxiety can block effective learning.[7]

interested in stressing writing styles. Both address themselves to the adequacy of the end result . . . . Actually, the paper combines several distinct aspects of the student's training. Isolating them, to the extent possible, throughout the program, makes it far easier for the student to grasp and identify his difficulties and for the instructor to assist him in overcoming them.

7. M. E. ESON, PSYCHOLOGICAL FOUNDATIONS OF EDUCATION, at 1-57, 303-309, 360-381 (2d ed. 1972).

It would be possible for first-year courses to provide the students with a method of concrete, reviewable feedback. Some schools are experimenting with the "memorandum problem" approach to teaching substantive law.[8] This approach requires the students to do their normal class reading and to attend lectures. Three or four times a semester, the professor gives the students some well-thought-out fact situations. The students are then required to turn in office memoranda based on a synthesis of their previous learning. The professor corrects and comments on each paper. This method has numerous educational advantages, but it puts an exceedingly heavy burden on the professor. It seems to work best in specialty courses such as consumer law or insurance law where the class sizes are smaller. It also helps if the class is made up of second and third-year students who have a pre-existing interest in the subject.[9] Even in this type of situation, style, precision of language and legal writing conventions tend to be de-emphasized in relation to content.

Most schools will not choose the "memorandum problem" approach for first-year classes. Therefore, the legal writing course remains the only course designed to give the student periodic written and oral feedback. It is also uniquely situated to teach the student how to cope with the law school process.

Because the legal writing course is taking on such responsibility, it will have problems. The hostility and frustration that a new thinking process produces will necessarily be focused on the writing and research course. This will happen regardless of the intrinsic quality of the writing program itself.

The following describes the goals for a first-semester legal writing course:

1. Socialization of the students to the law school process and to lawyering
2. Introduction to legal literacy and conventions
3. Emphasis on legal analysis and synthesis
4. Introduction to persuasive use of the written word
5. Familiarity with legal research
6. Familiarization with various concrete legal documents and citation form
7. Preparation for school exams.

The legal writing faculty is uniquely situated to introduce students to the "socialization process" called law school. The Student Bar Association could attempt to introduce entering students to the nuances and mysteries of law school. The basic defect of this is that

8. Interview with Jesse H. Choper, Professor of Law at Boalt hall Law School, in Berkeley, California, November 10, 1971.

9. Interview with Frederick Lower, Dean of Loyola Law School of Los Angeles.

the program would be of short-term duration. Reliance on volunteers provides no mechanism for insuring the quality or continuity of the introduction. The transition to law school is difficult and full of anxieties. Without help the experience can be totally negative. The continuing relationship between the student and his legal writing teaching fellow or the legal writing professor provides a convenient means for question-asking and answering. A certain amount of simple handholding is necessary. This can give the student time to become socialized in the language and thought processes of law school.

Introducing students to the language of the law and being available to talk to them about individual and school-related problems may be the most important function of the legal writing and research course. This individual interaction is vital. However, certain written materials can also be useful. Students will feel more secure if they have some overview of the legal process. This can be provided by required summer reading; it can be handled through an introductory week, or it can be given to students during the first week of classes.

A brief introduction to how judges think is found in Cardozo's *Nature of the Judicial Process* (1921). If a more detailed analysis is desired, see Franklin's *A Biography of a Legal Dispute: An Introduction to American Civil Procedure* (1968). This book is valuable because it follows a single case throughout. It has legal documents as examples.

The Bramblebush, by Karl Llewellyn, still constitutes the best introduction to the law school process. It explains what is expected of a student. It relates law school to practice and, most importantly, it emphasizes the value of concise writing.

Legal literacy is saying what you mean to say within the acceptable norms of legal composition. Unacceptable legal writing may be the product of confused thinking,[10] a lack of verbal precision, the result of poor sentence structure or paragraph formation, or it may result from a lack of sensitivity to legal composition. Grammatical errors, improper sentence structure or confusing paragraphs may make it impossible for the reader to clearly analyze the legal argument. He will, therefore, be prone to dismiss it. The law professor, bar examiner and judge's clerk are not very receptive to the excuse that "I know what I mean, but I can't say it."

Most entering law students have "non-formal" writing experiences. They have not functioned in a world defined by convention. They were told to write a term paper, but allowed to organize it as they wished. Their word choice was not closely circumscribed. In that

10. Most students do not have extreme writing problems. The failure to help the students that do have trouble is often explained by saying that their writing problems are really thinking problems. The realization that these students don't "think straight" does not mean that the writing professor should assume that there is nothing he can do. If, for pedagogical reasons, the problems can be isolated and handled separately, *something* can be done about each one of them.

respect, law school and the practice of law are a "cold bath." The student must learn and understand the conventions. Only then can he manipulate or even violate the conventions with originality and success.

Many students have had little experience in using formal English. Now they are required to compose material in a type of English dictated by centuries of tradition. Their choice of words and phrases, as well as their forms of organization are pre-set. The word, "held," when related to a court decision, is a word of art. It also denotes a method of thinking: it relates a given fact situation to a given set of legal principles in a prescribed manner.[11]

The best book for those who have difficulty with paragraph and sentence structure is J. Blumenthal's *English 3,000* (1972). It provides a series of progressively more difficult exercises. For those who have some grammatical problems, but lack a sensitivity to word precision, the short and concise book by Strunk and White, *The Elements of Style* (2d ed. 1972), is recommended.

The first two chapters of W. J. Brandt's *The Craft of Writing* (1969) are designed to sensitize entering college students to the elements of formal composition.[12] There is no better means of making students aware of legal conventions than to have them read numerous pre-selected, well-written legal opinions.

Many legal writing programs attempt to teach nothing more than legal research and legal literacy. Any increase in the student's analytical faculties or his persuasive abilities is gratifying, but incidental to the course's goals. It is generally accepted that legal literacy is one of the chief objectives of the legal writing course. Legal writing undertaken in seminars in the second and third years will be, by necessity, more heavily examined for content than for style and form.

Legal analysis and synthesis are the processes by which cases and statutes are dissected, reviewed and put together again in a general pattern. All first year courses attempt to train the student to analyze and synthesize. Therefore, why is it necessary to have this a stated goal of the writing course? From the point of view of the legal writing course itself, it is mandatory that analysis and synthesis be taught. This necessity was eloquently expressed by Alexander, when he noted that regardless of how well one attempts to isolate goals,

> it is futile ultimately to attempt to judge either writing ability or research comprehension if the product of the student's effort is a confused mixture of holding and dictum, demon-

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11. *See* Comment, *Dictum Revisited,* 4 STAN. L. REV. 509 (1952), which provides another view. The author of this provocative piece contends that dictum is what a lawyer makes it (or of it).

12. The book's teaching manual is of superior quality and can be helpful, especially if copies are made available to students.

> strating no concept of synthesis of cases, some effort must be made to channel the student's thinking. In a program that begins as early in legal training as the one described, there is no escape from some orientation to legal analysis.[13]

The stress on analysis and synthesis can be of value to other law teachers. The legal writing course is really complementary to the substantive law courses. The writing program can relieve time pressure by introducing the students to the fundamental building-block of all legal analysis—case briefing.

The writing section, or personal student conferences, provides a place where students can test their grasp of analytical concepts. The legal writing section, because of its smaller size, allows the students to more comfortably explore substantive concepts, rules and doctrines.

The writing assignments facilitate deepening of analytical understanding. All that is required is that the substantive law professors coordinate their program with the legal writing course. Time constraints and the vast amount of material that the substantive professors must cover lead to a passing over or cursory handling of most legal issues. These issues, their analytical framework and their conceptual complexities can be explored in depth through research and writing. The students will benefit from thought provoking writing assignments. The best way to learn to write like a lawyer is to gain the *experience* of writing like one.[14]

Students are told during the first week of law school to keep "running outlines" of their courses. Most students wait until the last few weeks before exams to combine and analyze material. Students seemingly learn doctrines and rules in a linear and compartmentalized manner. If it were not for the writing course, the students would have no realistic opportunity to integrate subject material. It is only in this course that students get a feeling for the larger picture: How do doctrines flow from and into each other? How do procedural issues interweave into the substantive material?

This feeling for the larger picture is valuable in terms of what lawyers really do. Lawyers work on a multi-dimensional plane. They realize that problem-solving cannot be compartmentalized, but must take advantage of the learning from many substantive areas as well as consider the procedural context.

The student profits from a legal writing course. He gets a running picture of his ability to handle the legal thinking processes. He has concrete feedback on his growing analytical skills.

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13. Alexander, *supra* note 6, at 378.

14. The legal writing and research course's major defect is that it does not provide enough opportunity to write or research. Unless a full four semester program is contemplated, the first year program should be supplemented with mandatory research seminars or an extensive senior thesis. A properly supervised clinical program could also provide an alternative.

H. Weihofen's *Legal Writing Style* (1961) provides numerous examples of legal writing forms. The quality of the explanation of the whys and hows of legal writing is noticeably weak.

In July of 1973, West Publishing Company released M. Rombauer's *Legal Problem Solving* (2d ed. 1973).[15] There are chapters dealing with analysis and synthesis which are quite good. The book also has material on the court system and case briefing. If the book has a major defect, it is in the nature of its presentation. In several chapters, numerous authorities are quoted, but the author never expresses a definitive point of view about the best methods for learning synthesis and analysis.

Effective advocacy is the ultimate goal of law school training. Persuading a person to move from point A to point B by the use of language is the lawyer's primary skill. A grasp of legal research methodology, understanding legal conventions, being able to analyze and synthesize and having "lawyer-like thought patterns" are all building-blocks to the ultimate function of a lawyer—advocacy. It seems ironic that there is no generally required course in law school that *directly* attempts to teach students advocacy. It is believed that this will be a by-product of the thought process taught in substantive law courses.

People can be persuaded to change their position by the use of a gun, a kiss or a loaf of bread. The lawyer uses language to achieve the same purpose. "Objectivity" is the name of a particular persuasive stance.[16] Depending on how well the junior lays out his arguments, the senior lawyer will be more-or-less likely to accept the position of a memorandum.[17] Lawyers are always attempting to analyze their communications in terms of the likelihood of persuading their audience (whether it be a client, adverse party or trier of fact) that certain results will follow.

Since no other course in the first semester curriculum *directly*

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15. The book includes a teacher's manual. The first part of the manual contains practical suggestions on how to teach different writing and research skills. The latter section contains problems that can be given to students. These problems are analyzed for their difficulty and are "issue-spotted" with library references. Practical hints on program administration are found between pages 29 and 35. M. Rombauer, LEGAL PROBLEM SOLVING: ANALYSIS RESEARCH AND WRITING (Supp. 1973).

16. For twenty-five hundred years, people have argued about objective "truth" as opposed to subjective "truth." *But cf.* PLATO, GORGIAS (Penguin ed. 1972).

17. Rombauer, *How to Look Up Law and Write Legal Memoranda Revisited,* 11 PRAC. LAW. 23 (1965) admits that a memorandum writer must stress the negative authority as well as the positive. He asserts that a memorandum is a persuasive instrument. The author of the memorandum may have approached the area of law without preconceived ideas. Once he begins to analyze the materials, he starts a process of sifting and weighing which necessarily causes his memorandum to take a point of view. The writing process in turn becomes somewhat oriented toward convincing another of that viewpoint.

A truly objective memorandum is possible. The reader would have to rely minimally on the researcher's credibility, judgment or interpretive powers in only a few circumstances. The researcher would be the one to find the relevant cases and xerox them in total.

stresses persuasion (classically and presently defined as the art of rhetoric), it is then up to the legal writing program to do so. The writing course is the most appropriate place to examine *in depth* the difference between saying "I can't" rather than "I will not" or when and why one should use the passive voice.

Chapters 2 and 4 of W. J. Brandt's *The Craft of Writing* deal with argumentative writing and concepts of audience, formal logic, rhetoric, etc. Rombauer has a different point of view. Most of her material on persuasion is interwoven into the concept of prediction and appellate advocacy. According to her, a lawyer is engaging in "prediction" when he puts forth the strongest arguments that either side can muster and concludes how a judge or jury would receive them. She does not explore the issue of the effect of the prediction on the reader.

Legal research proficiency means finding the relevant cases 95 times out of 100. Competency in legal research is not the first aspect of a legal writing program; however, it is the exclusive province of the writing course. Some students may find summer jobs or clerkships that require them to write memoranda or appellate briefs. A few students will be chosen for Law Review. The vast majority have only the writing course to acquaint themselves with "how to find the law."

In the past, legal research technique has been taught by short "fill-in-the-blank" exercises. These exercises were preceded by illustrated lectures and expository reading assignments.[18] Although these methods are effective, they are dull.

A substantial amount of hard work and ingenuity has been exhibited by the law librarian at the University of Florida in Gainesville in devising a unique bibliographic program. Eight hours of lectures on library use are placed on cassette tapes. There are five major topics. Each group of students follows a major topic, such as loyalty oaths for teachers, through all the major and minor, primary and secondary research tools (*e.g.*, legal encyclopedias, digests, annotated statutes, municipal codes, case law, etc.). Where no reference is found in a particular source, another subject is explored. The students are given bibliographic sections to read. They then check out the tape recorder and go through the library at their own speed. At numerous places on the tape there are instructions to turn off the machine and explore research features of each book. This bibliography course is separate from the legal writing program.

Professor Rombauer states that research cannot be separated from problem analysis. Her research materials are cross-referenced to her analysis and synthesis chapters. She tells the students to analyze the

18. A readable, if somewhat superficial, handling of legal research is found in M. COHEN, LEGAL RESEARCH IN A NUTSHELL (1971). There are also two excellent legal bibliography books. The most thorough is M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH (3d ed. 1969). A somewhat less comprehensive but more readable book is E. POLLACK, FUNDAMENTALS OF LEGAL RESEARCH (4th ed. 1973), which contains useful summary outlines. The two books have substantially more material than first year students are likely to need or be able to digest.

problem. Then they are given a brief description of the books and are sent to the library to do preliminary research. Instructions are then given to reformulate the problem. This is followed by a search for primary mandatory authority. If such authority does not exist, then a search for secondary persuasive authority is instituted. The last step in each of the processes is a reference to legal periodicals to gain new analytical insights. This step is only necessary, where the issue is a novel one.[19]

Introducing students to various legal writing forms is vitally important if they are going to realize the diversity of functions that lawyers perform. However, in one semester it is not possible to have students master the technical skills necessary to write memoranda, complaints, demurrers, interrogatories, contracts and statutes. All of these particular legal forms, although united by a common thought and analytical process, are sufficiently unique to require substantial practice in formulating and writing them. Students should be shown copies of these standardized "work products" and introduced to their place in the litigation process. One way of doing this is by showing them a complete office file. The entering student needs to be impressed with the strengths and weaknesses of using prepared material so he can intelligently decide whether the time saved by using it is worth the risks.

The legal profession demands and expects that certain set patterns of presentation be observed. Those who do not follow these patterns are severely penalized. An appellate brief must be on the right size paper and have the proper style of headnotes, or it will not be accepted by the court. Citation form is a necessary, if not necessarily pleasant requirement. These presentation patterns are derived from the court's need to have uniformity and ease of access to materials. Whatever one may think of these stylistic requirements, it serves no purpose to violate them.

Law examinations are another form of legal writing. Preparation for them provides a chance to refine research skills, draw large areas of the law together and prepare the students for the "January holocaust." The advent of exams is an opportunity for the legal writing program to show its success. The last memorandum can be sufficiently broad to encompass most of a first-semester course. By having to research this given fact situation, the student is required to use all of the skills that he has previously learned. Moreover, he is now prepared in one area on which he will soon be tested.

A law examination is a means by which a student, in a step-by-step manner, can persuade a professor (his audience) that he "knows the law." To some extent, this demonstration is dependent upon rote memory; however, to a much larger extent, it requires analytical and

19. M. ROMBAUER, LEGAL PROBLEM SOLVING (2d ed. 1973).

synthetical skills. Good grammar, sentence structure and paragraph formation will also play a role.

Model exams with answers are very useful,[20] especially when the legal writing staff has the time to correct the student's answer. Their purposes are fourfold. First, they provide the student with some idea of what professors expect. Second, they help relieve the almost crippling anxiety which overcomes many students. Third, students who prepare for the model exam are forced to begin to put a substantive law course together. Fourth, if there is time for individualized correction, and the model exam is given at least six weeks before the actual exam, the students' answers can be used for diagnostic purposes.

B. *The Secondary Goals*

The Harvard and Michigan law schools are instituting legal communications programs. The University of California at Berkeley has a similar proposal under consideration.[21] This two-part, 11-week program is essentially a trial practice program without a trial. The first part would last between four and six weeks. It would emphasize legal research, introduction to legal forms, legal analysis, synthesis, persuation and introduction to law school processes. In this phase, students would be introduced to the types of ethical and moral problems that face lawyers daily. The second phase of this "extended case method" program would introduce the students to witness interviewing, complaint and answer writing and discovery techniques, as well as oral and written motion practice, ending with an argument for and against a summary judgment. It would emphasize the problems of procedural tactics and trial strategy.

The discussion of the "extended case method" is then followed by a consideration of an effective legal drafting program. The lawyer's role as draftsman is substantially different than his role as litigator. He is not trying to deal with past controversies. Instead, he is trying to avoid future litigation by present planning.

Because carefully drafted instruments must "explain the rules of the game" to a generalized audience, rather than trying to persuade or inform a particular individual, the writing involved "requires a degree of precision, accuracy and attention to structure and architectural

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20. Law schools should keep a file of old exams with exemplary student answers. S. KINYON, INTRODUCTION TO LAW STUDY AND LAW EXAMINATIONS IN A NUTSHELL (1971) is weak in its introduction to the legal system, but has numerous and well explained exapmles of examinations and answers. The book is somewhat dated now, but C. SMITH, HOW TO ANSWER LAW EXAMS (1946) is still the best book on the subject. It is particularly valuable because each examination question is followed by a good, average and mediocre answer. Each answer is followed by an explanation of why it received its rating.

21. The Boalt Hall Proposal is the model for much of the discussion of this legal communications program. This author has received permission from those who drafted the proposal to discuss their ideas.

detail that is otherwise unknown in writing outside the language of mathematics or logic."[22]

In order to obtain precision, the draftsman must initially clearly understand the law, the policies his client wishes advanced and the way in which language will aid and obstruct the carrying out of the client's wishes.

The drafter's skill includes an ability to state in neutral terms what is going on. The writing is clearly expository. Although statutes, and to some extent, wills and contracts do have the effect of persuading people to act or not to act, the documents themselves are not instruments of persuasion.[23]

Drafting is unique because it does not set forth why any given clause is included. A high degree of knowledge of substantive law on the part of the reader is required in order to understand whether an instrument has been properly drawn.

The "extended case method" emphasizes pre-trial fact-gathering, oral advocacy and motion practice in a quasi-realistic setting, which seems overly ambitious for first-semester students. The entering student needs to be socialized in the language of the law. He must talk like a lawyer before he can think like a lawyer. He needs some sense of the relationship between substantive law and procedure. In addition, a degree of sophistication in the demands of law school is also helpful. First-year courses deal with fact-interpretation, which is substantially different from fact-gathering. Legal learning is an organic, developing process. It is always attractive to envision a program that will envelop the students in a burst of illumination. Premature exposure, however, will only result in confusion.

A semester long program that moves the student progressively from client interviewing through a motion for summary judgment would not be impossible, although the workload on the faculty and the teaching assistants would be immense. However, this could be reduced by allowing a group of students to prepare an assignment which would then be criticized by the class. The program would be structured so that all the material for a "case file" would be prepared before the semester began.

The "extended case method" semester would include the following steps:

A. Interviewing skills. Lawyers are notorious for their poor "bedside manner." This partially explains why the interviewing process often does not lead to a full disclosure by the client. Consideration of good interviewing technique must be included in any legal communications program.[24]

Several students would interview the "client"—a second or third

22. R. DICKERSON, *supra* note 4, at 154.

23. *Id.* at 6.

24. Several schools, including Boalt Hall, are considering semester-long seminars in client interviewing and counseling technique.

year student, who would be answering from a prepared script. The teacher should stress that fact-gathering begins and ends with a good understanding of the underlying legal principles. The first interview should disclose why further interviews are necessary, and a need for library research should be apparent. The lawyer's dependence on gathered facts to formulate viable theories of action will become evident, as well as the difficulties that procedural constraints place on gathering information.

B. Non-Litigation options. Sometime during the litigation process, students should be introduced to and given a chance to play the role of negotiator. This can be done through an exchange of formal demand letters or in a face-to-face confrontation between plaintiff's attorney and the lawyer for the potential defendant.

C. Complaint, demurrer and answer writing. Students should be introduced to the strategic considerations that go into writing a good complaint or an adequate answer. How do you say enough to be legally sufficient without needlessly giving away damaging information?

D. Oral motions. The defendant should be required to demur to the complaint. Several students should be chosen to write points and authorities on either side as to the sufficiency of the pleadings. Several students should be selected to represent either party in short oral arguments, so that every student is given an opportunity to participate.

Short oral motions are advisable at several stages, so that every student is given an opportunity to participate. Brief oral motions most nearly re-create the oral advocacy encountered by young lawyers.

E. Discovery techniques and motions to compel. The discovery material should be covered in three stages. First, students should be given illustrated examples of interrogatories and deposition transcripts. Second, the evenly divided class should prepare objections to the discovery request. Brief memoranda on each side, based on assigned research in an area such as privilege or "lawyers work-product" would then be required. Third, students would orally argue the motions to compel, while others would actually take depositions. Both activities would be done in front of the full group.

The discovery material would teach both the technical and strategic aspects of the pre-trial mechanisms. Emphasis would be placed on the need for thorough preparation. Only through such preparation can the right questions be asked in the correct sequence, which in turn can pin the opponent down to a story which can prove embarrassing to him at the hearing on a motion for summary judgment.[25]

F. Summary judgment. The last phase of the chronologically

25. D. LOUISELL, MODERN CALIFORNIA DISCOVERY (Supp. 1969) provides the best technical and strategic analysis of when, why and how to use discovery techniques. He emphasizes repeatedly the need for thorough preparation by the lawyer.

arranged "extended case model" would be a summary judgment motion. Stress should be placed on the procedural aspects. The marshalling of facts found during discovery would be emphasized. Each student would write an argumentative trial brief and some students would orally argue the motions.

G. Role playing. The Boalt Hall proposal envisions a fully equipped mock lawyer's office. The Harvard program suggests the use of taped video court appearances by real lawyers. It also suggests having professors review the student's motion practice by the use of video tape.

The foresight, emphasis on concept, as well as verbal nuances required by legal drafting is unique. The "extended case method" deals with litigation. It emphasizes the same skills stressed in most substantive law courses. Legal drafting, on the other hand, emphasizes the lawyer's role as planner. It is the future that the lawyer is trying to structure and control. This need to handle future events requires that the lawyer be exceedingly knowledgeable of his client's wishes and of the pre-existing law, and very precise in his choice of language.

In 1963, the University of Indiana wanted to redraft a lease dealing with on-campus housing. Professor Reed Dickerson of the law school saw this short redrafting project as an opportunity to teach 162 second semester law students the drafter's art. The University received a well-drafted lease and the professor and his three graduate teaching assistants accomplished their major goals. Professor Dickerson used a six-phase approach to the drafting of the lease.[26]

Phase I: The Instrument and the Law

The lease was introduced to the students by the use of eight fact hypotheticals. This was meant to highlight the factually specific nature of the typical law school approach as opposed to the drafter's need to foresee all reasonable future problems. The first year students already had some background in the substantive law involved. Legal research was held to a minimum by having the students "pick the brains" of the teaching assistants.

Phase II: Questions and the Draftsman's Approach

This phase was pedagogically the most original. It emphasized the importance of asking the right questions rather than finding the right answer.

The lease was divided in half. The first half was analyzed by a professional draftsman. Sixty-four questions resulted. The draftman's questions were grouped into four levels of analysis. At the first level, the draftsman had to conceptualize the client's problem. This required a firm grounding in the legal framework as well as perceptive client

26. Professor Dickerson, *supra* note 4, at 152-53 noted that one semester was not enough time to produce accomplished draftsmen. However, he stated that the program:

> seemed to accomplish the important goals of sensitizing the students to the existence of the major drafting problems and of highlighting the vast contrast between 1) the traditional unicentric, case-oriented point of view of the litigant's counsel and 2) what Fuller has called the "polycentric" point of view of the legal planner and draftsman.

interviewing. Second, the drafter had to understand the role of the communications process. The author's position, the role of the audience, the elements that go into written utterances and the problem of relative context or environment were discussed. Third, there was an emphasis on the architectural questions. Questions were formulated dealing with the order of the instrument. Fourth, questions dealing with form, style and substance were developed.

The students reviewed the draftsman's efforts. Then they were required to write their questions covering the rest of the lease. The major policy issues were directly discussed with a representative of the university's on-campus housing department.

Phase III: The Outline

Students were introduced to the "architecture of drafting" through writing several drafts of an outline. This phase did not work out well. There seemed to be no set rules for what constituted a well designed lease.

Phase IV and V: The Actual Writing

Students rewrote the rent payment clause. They incorporated substantive as well as phraseological changes into the redrafting. The teacher then reviewed the rent payment revision, after which the students requested another opportunity to redraft a portion of the lease. This suggestion was accepted and the redundancy proved to be successful.

Phase VI: The End Product

The professional drafter submitted his result while the students compared their final revision to his. The comparison was highly satisfactory.

Moot Court stresses transcript analysis, fact manipulation and other advocacy skills within a strict procedural framework. Most law schools presently follow their first semester "getting to know law school" course with a second semester appellate level moot court program. This is the least controversial sequence and the least costly. The moot court program enhances all of the skills taught in the first semester. It stresses the skills required for both oral and written advocacy, it requires close and thorough reading of extensive trial records, and it puts stress on the value of fact analysis and manipulation. Also covered is the distinction between "questions of fact" and "questions of law." Lastly, it emphasizes the problems raised by the narrowing process of litigation and the formal rules on appeal.

The classical moot court program should begin with an extensive transcript. The student must evaluate the transcript in view of the strict procedural limitations imposed by the rules on appeal.

The emphasis must be on fact-shaping and manipulation. The student should learn that fact mastery is the heart of advocacy. The idea is to turn neutral or adverse legal doctrines into weapons by the use of fact manipulation.

The appellate review procedure emphasizes, probably as no other

part of the law does, the need to follow forms and convention. It explores the way in which the procedural matrix constantly narrows and defines the possible substantive arguments.

In recent years, the need for a moot court program has been questioned. It has been noted that few lawyers ever argue appeals. It seems overly dramatic to end an educational program with "one blazing 20 minute" argument before three hypothetical judges. The advent of student practice rules and the introduction of a clinical semester have caused many law schools to doubt the value of a moot court program.

A mock trial course is highly desirable. Often students will not take advantage of the state certification process. The clinical program allows only limited enrollment. Many clinical programs suffer from a lack of strong institutional control and direction. Classroom activities are not sufficiently coordinated with the practical aspects of the practice of law, and the practitioner often does not have the time to explain to the student the significance of his assigned work.

Even good clinical or certification programs have pedagogical defects. Many students have only the opportunity to do legal research and memorandum writing. They engage in very little advocacy practice. The factual situations encountered in real practice are usually less varied than those found in mock situations. Real cases may move too quickly for the student to comprehend, or the case that the student is working on may stall at an early stage in the proceedings.

It is true that young lawyers seldom engage in appellate advocacy. This does not mean that law students should be denied an opportunity to write a good appellate brief and to argue it orally. For those students without a debating background, it may be the only opportunity to engage in a structured, formal oral presentation before critical judges.

A trial level moot court program is possible. This "mini-trial practice course" would have the students prepare their oral arguments after having made their own trial record. That record would be dependent on how well the students interviewed their "clients," formulated and researched legal theories, prepared witnesses and cross-examined opponents. This approach, however, has several defects. First, it duplicates the two-semester trial practice course taught at most law schools. Second, the amount of written and oral material that would need teacher evaluation would be enormous. Third, an appellate level moot court program requires a limited number of trial transcripts. The material needed for a trial level program must be much more extensive and varied. Fourth, the press of time would necessitate a lack of proper emphasis on the rules of evidence. Fifth, the cost of a trial level course would be very high. It would negate most of the financial advantages of a moot court program.[27]

27. There are numerous descriptions of moot court programs. The best is found in U.C.L.A. MOOT COURT BOARD, HANDBOOK OF APPELLATE ADVOCACY (1967). An interesting idea is found

C. *The Art of Rhetoric*

The primary and secondary goals of a legal communications course have been enunciated. The writing course can play a unique role; it can teach advocacy directly.

The legal communications course at San Francisco's Hastings School of Law is entitled "The Legal Rhetoric Program." This program explores the linguistic manipulations involved in such simple acts as sending a client or an opponent an effective letter. It examines memoranda writing, legal drafting and the formal advocacy requirements of an appellate brief. These instruments are reviewed according to the general standards used to evaluate an argument rhetorically. The program director's contention is that any legal argument must be analyzed according to the rules of rhetoric. More broadly, he states that any legal communication which has not become completely mechanical can be evaluated in terms of one or more of the pedagogical devices used by rhetoricians.[28]

Rhetoric has been in eclipse for the last 100 years. It was a major area of study in classical times.[29] In the last several years there has been a substantial revival of interest in this classical art. Modern schools of rhetoric have developed at such institutions as The University of California at Berkeley and at Davis. This renewed interest has been translated into a concrete writing program at Hastings. While the students are introduced to the rhetorical concepts, the classical language is kept to a minimum. Understanding rhetoric requires a familiarity with *Ethos, Logos* and *Pathos*. These concepts, defined in classical times, have recently been redefined by Brandt and other linguistic scholars,[30] thereby expanding their meanings.

Ethos means the sense of the writer as it appears to the reader. This "voice" or "stance" is usually established early in any written document. It is what leads the reader to have a sense of trust and confidence in the writer.

Logos meant syllogistic reasoning to Aristotle. Legal reasoning is

in ROMBAUER, *supra* note 15, at 196-202, where she includes a verbatim moot court oral argument with judges' questions.

28. Interview with Thomas Kerr, Professor of Law and Director of the Legal Rhetoric Program at Hastings School of Law, in San Francisco, California, April 4, 1973.

29. *See* ARISTOTLE, THE ART OF RHETORIC (Loeb ed. 1967); QUINTILLIAN, BOOKS I-III (Loeb ed. 1969).

30. W. BRANDT, THE RHETORIC OF ARGUMENTATION (1970) incorporates classical learning with recent developments in the study of linguistics and comparative literature. Greek and Roman terminology are redefined. The author exhibits a high degree of original analysis. *See also,* J. WHITE, THE LEGAL IMAGINATION (1973) as well as W. BISHIN & C. STONE, LAW LANGUAGE AND ETHICS (1972) for advanced legal communications courses. The Bishin and Stone book is too long and too pedantic for anyone except graduating seniors. It seems to have been written more for law professors than for students. The White book is more compact and more practically oriented. Both books deal with important philosophical and moral questions raised by the lawyer's role in the communications process. These books discuss such questions as: Is a lawyer a "moral prostitute" if he uses his persuasive abilities to represent a corporation whose products injure people? How should a lawyer relate to a client whose will he is drafting? What does it mean to both the client and the lawyer to write an instrument ordering the world after the client's death?

never that precise. Legal logic is meant to produce "motion." Legal thought patterns may not be capable of causing a sense of absolute necessity or compulsion, but they do tend to capture the idea of inevitability.

The writer's sense of audience is broadly defined as *pathos*. The passion, prejudices and predilections of the reader determines the level and emotive content of the argument or communication. The focus on the audience can't be too specific. The lawyer can't simply write to a certain panel of the United States Court of Appeals for the Ninth Circuit. He has no way of knowing who is going to be on that panel. But reading cases, talking to others who have written briefs to that court and possibly his own experiences can generate certain reasonable assumptions and expectations.

When written or oral communications are conceived of in this manner, strategy in the use of language is possible. When all the elements come together, one can directly teach advocacy.

D. *Conclusion*

The legal communications course is never going to be loved by the students, faculty or administration. This is not necessary. What is required is a willingness by the faculty and the administration to be open to innovation. A major commitment of energy and resources is needed. When both of these commitments exist, there is a strong possibility of recruiting good personnel.

IV. THE FORMATS

A. *Introduction*

A major weakness of most legal writing or legal communications programs has been a lack of defined goals. Goal definition, however, does not solve the problem. What is needed is a mechanism for implementation, which would consist of a formal framework and the personnel to carry out the enunciated goals. Ultimately, the crucial variable in goal implementation is personnel, as the dedication and intelligence of the people running the program will determine the degree of success.

In any legal writing program, there are two areas involved with goal implementation. The central direction of the program and a mechanism for developing an institutional memory must be considered when discussing the types of goals sought.

This article will examine three institutional formats, primarily in terms of personnel hiring. The emphasis will be on finding personnel whose enthusiasm and commitment can be passed on to others. In addition, the formats will be examined to see how well they facilitate goal implementation. The stress will be on avoiding past mistakes.

Ways of improving pre-existing programs will then be considered.

1. Full-Time Faculty Model

The most inventive and potentially the most successful ideas for new legal writing formats are found at two west coast schools. At one school the program is taught by fully qualified assistant professors, who receive half of their teaching credit load for their legal writing duties. Another model envisions the use of the full faculty, each member of which would take a month off other teaching chores to handle small writing and research sections.

2. Graduate Teaching Assistant Model

Some schools, usually those with greater resources or prestige, have used a system that includes a director plus graduate teaching assistants. There have been several interesting variations on this theme and they will be explored, with an emphasis on improvements.

3. Student Teaching Assistant Model

Many schools have a legal writing director who uses numerous second and third year students. These programs have historically lacked uniformity and coherence. The quality of the teaching is necessarily limited by the personnel's lack of teaching experience. However, intrinsic weaknesses of this format can be mitigated.

Before discussing each format, the role of the director must be considered. This is necessary because the director's drive, personality and ingenuity will substantially determine the program's outcome.

B. *The Directorship*

Any legal writing program should have a strong director. His role will vary depending on the structural format of the program. Where the faculty teaches the course, the director will act as program evaluator and consultant. He will be a communications link among the various professors.

The role of the director is crucial when the program is taught by non-faculty members. He is needed to instill a sense of responsibility into these instructors, as well as to make concrete the vague contours of the articulated goals. His enthusiasm will promote interest in the program by faculty members and incoming teaching assistants.

The director must teach the assistants "how to teach." His knowledge and insight means that the teaching instructors can save time in designing problems and learning teaching techniques. This savings of time provides an opportunity for using innovative ideas. Strong leadership is also needed to have some degree of uniformity.

Very few law schools have had strong directors. In the past, the research and writing directorship has gone to an inexperienced faculty member or has been treated as a committee assignment, which meant a workload without teaching unit credit. Most law schools will not be able to employ a highly qualified person to direct only writing and research. If junior faculty members must be used, they should have

time to learn the necessary skills. When senior faculty members are used, their time and effort should be acknowledged. One school induced its faculty appointments chairman and its faculty tenure chairman to teach bibliography and writing. Each professor received three units of teaching credit out of an eight unit teaching load.

If a school shows a willingness to allow experimentation, another incentive is added. There is a challenge in putting together an effective course. Convincing the senior faculty that writing and research demands the same level of intellectual rigor as do other courses is also a challenge. In the past, the writing course has suffered from a lack of pedagogical respectability. In an "intellectual world," this is a great disadvantage. If the writing director does convince the faculty of the writing course's intellectual worth, then finding talented and interested replacements would be simplified.

There is a reservoir of proven talent. Many law school graduates have had one or more years of experience as graduate legal teaching assistants at such prestigious schools as the University of California at Berkeley, Stanford, Harvard and Catholic University of America. Many of these same people have, or are getting, extensive litigation experience in Office of Economic Opportunities programs or by working for nonprofit organizations. Some of these lawyers have also taught part-time.

Another source for qualified directors can be found in Masters and Ph.D. candidates graduating from rhetoric departments at such a school as the University of California at Berkeley. Many of these people have taken part in C.L.E.O. projects or in other minority improvement programs. In order to have credibility with law students it would be advantageous for these rhetoric-linguistic graduates to engage in at least one or two years of law school study. In fact, a full law school degree and a year or two of practice would be best.

With the new intellectualization of legal writing, research and communications, it should become easier to induce present members of law school faculties to take an active and long-term interest. At many major law schools, courses in linguistics, literature and the law, and language and ethics have become commonplace. If full-time faculty members who are interested in these programs are willing to accept directorships, the writing programs' prestige problem would be largely solved.

C. *The Faculty Model*

Two inventive variations on the faculty model will be considered. One is found at the University of Washington at Seattle, and another at Santa Clara University in California.

1. THE SEATTLE MODEL

Several years ago the University of Washington abandoned the staffing of their writing program with instructors and teaching assis-

tants, because of the difficulty in getting a group of people who would make a long-term commitment and the problem of the "second class citizenship" accorded to the instructors. To remedy these problems, a unique, if expensive, scheme was developed. The University fills its writing and research positions with people who have expertise in the area. When a legal writing professor is needed, schools that use legal writing assistants or have instructors experienced in writing and research are contacted.

In past years, Washington has moved to reduce the number of students assigned to each assistant professor. Presently the sections are approximately 35. This reduction in work load is expected to make teacher time available for traditional courses. Although the faculty member's primary responsibility is to the writing and analysis course, there is an expectation that the professor will ultimately teach up to six units of substantive law.

The faculty appointees are candidates for regular tenured positions; therefore, there is no prestige problem. The new assistant professor has experience in one-to-one teaching; therefore, the odds favoring a long-term commitment to writing and research are increased.

Washington's first year legal writing program is of an expanded nature. It encompasses not only bibliographical instruction and writing exercises, but also permits emphasis on analysis, evaluation and the other skills necessary for "legal problem solving." The six semester-hour course spans three quarters. It is divided as follows: (1) A three week segment introducing the students to case briefing and legal synthesis. This is followed with several simple writing assignments. (2) An 18 week segment with three major research, analysis and writing assignments, including the preparation of a memorandum on a moot court problem. (3) The final segment lasts eight weeks and has the students write a moot court brief and give at least one oral argument.

The program has a sense of continuity, which is provided by the long-term commitment of the assistant professors. It is also enhanced by a central, periodically re-examined file of materials. The program has no director, but one of its mainstays, Professor Rombauer, has ten years of legal writing experience. This continuity makes problem preparation easier and quicker. The time saved is used to devise new and more effective teaching techniques. It is also used to increase student-teacher contact.

Professor Rombauer decided, after many years, that the best way of teaching legal research was a "functional approach."[31] Mechanical "fill-in-the-blank" exercises proved to be dull, as they did not force the students to use a full research sequence. On the other hand, complex formal memorandum assignments tended to obscure research difficulties. Therefore, a middle ground was necessary.

This intermediate technique is the "functional approach." It re-

31. M. ROMBAUER, *supra* note 15.

quires the students to learn research skills while actually solving problems. Normally, this approach would require substantial additional work by the writing faculty. However, central files provide a mechanism for quickly achieving the goal. Major research assignments that have been given in previous years are rewritten to focus on one fairly simple issue. This process makes it unnecessary for the teachers to do substantial additional research. Yet, the professor is able to make available to the students his own detailed research notes as well as sample student memoranda from the preceding year.

The "Seattle Model" appears almost ideal. This format could be used to teach any of the primary and secondary goals. As a matter of finances, it is unlikely that Washington would institute a four semester program. If there is any weakness in this program it is in the student-faculty ratio. Six units of substantive law teaching plus a group of 35 to 40 legal writing students might make the program overly demanding. However, the time sequence is such that the professor is not expected to become an expert in substantive law areas until he has firmly established himself in the writing field.

2. THE SANTA CLARA MODEL

The Dean at Santa Clara, George Alexander, entered teaching by way of legal writing and research. His own experience convinced him of several "truths." The first was that the highly paid full-time faculty is best able to teach writing and research effectively. The second was that students learn more about legal communications when they have a concentrated immersion. The skills necessary for writing and research are, like the skills necessary for a language, best taught by continuous effort. Third, longitudinal writing programs tend to be "mere facades" or to overload the students. If the writing course is at all demanding, it results in either students being unprepared for class or doing a poor job on their memos or briefs.

The "Legal Writing Month" was an outgrowth of these verities. During the month of January all first year classes are halted. Each full-time faculty member is assigned 20 first year students. The students are in close contact with the professor during the full period. Professors who teach only first year courses can concentrate simply on the writing and research program. Professors with second and third year courses sometimes run into overlap problems since the month does not end until a couple of weeks into the new semester.

Each professor devises his own set of problems. Some professors concentrate more on research, and others more on writing and analytical skills. There is a general concensus that difficult topics such as tax and evidence will not be used. The professor is likely to use his regularly assigned legal research assistant to help him develop his writing course. The sections are limited to specific jurisdictions to minimize overloading the library.

This type of program maximizes innovative ideas. Several professors have attempted to show the students the progressive and "narrowing" nature of the litigation process. They have done this by having the students answer numerous simple research questions about a statute. That statute, in turn, formed the basis for a research memorandum, which provided much of the information necessary to argue an issue for a motion to compel discovery. The class was then divided into opposing teams and a moot court problem, derived from the original research, was assigned. After the moot court problem was handed in, there was oral argument.

Another instructor has devised a "quasi-extended case method" format. The first three days of the program are devoted to fact gathering. The students see a video tape of a client interview. They are then divided into groups of plaintiffs and defendants and are instructed to write questions for the live "client" the following day. These questions are submitted to the professor. The students are advised to consult a general research source such as an encyclopedia or hornbook before the live interview. After the interview with the "professor-client," the students must submit a statement of facts and a short paper describing the relevant legal issues. The professor then hands out a statement of the facts, in order to avoid any later controversies about the "given facts." The students then have seven days in which to write an office memorandum.

The last two weeks of the course are spent writing a moot court brief. There is no extensive transcript. The students are given a revised statement of the facts as they were found at the trial by the judge, together with the trial judge's conclusions of law and his orders. This serves as a record on appeal.

The appellant's brief, in rough form, is due in six days. It notifies the appellee of the appellant's contentions. The appellee's preliminary response is due three days later. There is no oral argument. The final drafts are due on the 14th day. They are then corrected by the professor and his teaching assistant.

This professor adds an element of realism to his course. Two times during the moot court segment the students are given brief, one day problems. These problems are derivative of the original research, but substantially different. They give the students a wider variety of research experiences as well as a feeling for the time pressure under which lawyers work.

The Santa Clara plan suffers from its own diversity. Although one professor does devote some time each year to making up room assignments, essentially there is no central direction nor any institutionalization of the program. No formal mechanism exists for informing one professor of what another professor is doing. Without central files or a director to transmit information, rumor or happenstance are the only mechanisms for improvement and change.

This lack of centralization leads to several results. First, there is little time to think about new and better teaching techniques. Too much time is needed to prepare problems. Second, many of the professors feel that they lack sufficient knowledge to teach students about the wide variety of research instruments. Others, although confident in their ability to analyze content, are uncomfortable when teaching grammatical, formalistic and stylistic skills. They simply do not feel competent to handle a broad based program. These factors plus time constraints cause some professors to rely too heavily on their research assistants to design and teach the course.

The program also lacks minimum standards. There is no guarantee that any particular student will receive at least a modicum of emphasis on each of the necessary writing and research skills.

There is no continuing mechanism to give the students feedback. The Student Bar Association has a two week orientation. Thereafter, some orientation leaders continue their sections on a voluntary basis; however, there is no institutionalized program. Students enter the research and writing month without a clear picture of their ability to brief cases, analyze material or synthesize doctrines. Santa Clara also lacks any formal device for relieving student anxiety. The student has no continuing relationship with a member of the institution.

The "Legal Writing Month" is a very concentrated program. It is difficult for professors to return material to students soon enough to avoid the development of bad habits. This is an inherent defect that probably cannot be corrected. Although the program is basically a sound idea, it needs a limited revision in order to be effective. Having a legal writing and research director would solve many of the problems. This person would collect and evaluate the material used each year, which would be stored in a central file. The material would then be available for other professors to peruse early in the fall semester or even late in the spring semester. Moreover, the director would provide direction and continuity. He could supplement the Dean of Students in alleviating student anxiety. The director could be an on-staff professor, who is given credit for his work, or an adjunct instructor.

The professors would be more comfortable with the program if the law librarian would institute a series of lectures for them on the wide variety of research instruments. Alternatively, a single professor or an outsider could be brought in to handle library tours, lectures on citation material and a general introduction to legal writing style. These activities could be followed by short written assignments, which would provide a minimum level of research competency and some emphasis on legal writing style. Professors who want to re-emphasize or concentrate on the material covered during these introductory lectures could do so. Since the basic material is already covered, other professors would be free to experiment with new ideas.

The writing month could be used for many purposes, but its

concentrated nature makes it unlikely that it would develop a primary/secondary goal sequential nature. However, as the "quasi-extended case method" experimentation showed, that is probably not necessary. Even as it presently exists, the Santa Clara idea has substantial virtue. A poll of students found that they greatly appreciated the break from standard routine. They enjoyed the in-depth work and an opportunity to concentrate on only writing and research.

D. *The Graduate Assistant Model*

Due to the variety of formats and the difficulty in their descriptions, this section will be divided into the following subtopics: 1) introduction; 2) past experience; 3) changing the image of graduate teaching assistants; 4) hiring qualified personnel; and 5) goal accomplishment. Then the Eisenberg plan, used at the University of California at Berkeley will be described, along with suggested improvements.

1. INTRODUCTION

Graduate teaching assistants are an expensive proposition, since they usually receive eight to ten thousand dollars a year. Their normal teaching load is 60 students. Therefore, only the most prestigious or wealthiest law schools can afford them. Oftentimes the assistants are given fee waivers to work towards a graduate degree. This practice is "doubly expensive" since it creates a positive incentive for the assistant to concentrate on his own degree work rather than his teaching assignments.

2. PAST EXPERIENCES

The major problem with graduate teaching assistants has been a lack of uniformly acceptable results, due to conflicting assumptions made by part of the faculty. It was assumed that the graduate teaching assistant could, on a moment's notice, put together his own legal writing and research program. A sense of spontaneity, ingenuity and responsibility, as well as inherent teaching ability, was presumed.

Typically, when the graduate arrived two weeks before school began, he was met by a member of the faculty who was assigned to show him where his office was located. The faculty member pointed out where last year's unedited, unrevised and unevaluated course material could be found, after which the graduate student was on his own.

The new arrival soon became aware that most faculty members did not care much about what he was doing; they considered him a one-year appointee to a relatively prestigeless skills course. Those who did arrive with a sense of responsibility and a real feeling for the job found themselves frustrated by a lack of time to evaluate material or to design new material. Moreover, there was no one to whom they could turn, for advice. Under these circumstances, originality was notable for its absence.

Faced with a lack of time and no defined programmatic goals, many teaching assistants felt lost and confused. Without incentive to innovate, others treated the job as a somewhat challenging interlude. Still others saw it as an opportunity to study for the bar exam or to get a master's degree.

3. CHANGING ASSUMPTIONS

In order to take advantage of the talents of good teaching assistants, continuity in the program and prestige for the associates are required. No one would question the need for a strong director if the course was being taught by student teaching assistants; however, a director is also needed in the graduate model. His function, though, is somewhat different. He can rely on the graduate teaching assistant to have a firmer grasp of the law. He can also expect them, because they are engaged in a full-time job, to spend more time and effort learning teaching techniques. This full-time commitment makes innovation a realistic possibility.

In order to get good results, the director will try to save teaching assistants preparation time by giving them insights into reliable teaching techniques. He will make certain that there is a substantial body of reviewed and evaluated course material available. The director has other functions. He can assure a reasonable degree of uniformity and coordination among the associates, as long as he does not stifle innovation and experimentation. He can also check assignments to make certain they are not too difficult.

The associate must be made to feel that the school cares about what he is doing. One sign of this would be a two-week orientation program. During that period, the director would meet with the associates on a regular basis. He would discuss the pre-existing material and the difficulties that the associates are likely to face. The director should introduce the associates to the full-time faculty, to encourage their introduction into the school structure. Familiarity with faculty personalities and specializations would increase the chances of meaningful intercourse, which would make it possible for the faculty to become familiar with, and possibly interested in, the new and innovative developments in legal writing. Hopefully, some social interaction might also develop.

The university can show its interest in the writing program in several ways. First, the program director could teach one section to keep him close to the program as well as providing a common body of experience that he can share with the teaching assistants and students. Students greatly appreciate this particular sign of faculty involvement and concern.

Second, the program should have its own full-time secretary. There is an enormous amount of time consuming work in a program involving the full first year class. This work must be done properly

and promptly. If it is not, the program will seem disorganized and students will lose respect for it.

Third, and most important, the writing program should be institutionalized by being given separate unit credit, equivalent to the actual work involved. In a capitalist society, that which is undervalued is not respected. If the students are going to do three units worth of work, the course should have such a unit value. It would be difficult to convince the faculty that they should reduce unit values in other courses. One alternative is to increase the number of units required for graduation, which would be a "wash" transaction. It better describes what is really going on than does a situation where three units of required work is given one-half unit of course credit.

4. HIRING GOOD ASSOCIATES

In the past, graduate teaching assistants have been hired on the basis of recommendations and resumes. If the quality of the teaching assistants is to be uniformly high, personal interviewing is mandatory. Interviewing is necessary if any feeling for the associate's ability to relate to students and dedication to the job is to be gained. Most major law schools have alumni throughout the country. These alumni, especially if they are already law teachers, could be used to contact the prospective candidates. Another possibility for cutting down the cost of interviewing, is contacting prospective candidates at the December meeting of the American Association of Law Schools.

One major drawback in any interviewing process is that many applicants of superior academic qualifications wait until March or April before applying, after they have been definitely rejected for possible court clerkships. What is needed is an inducement to get the students to apply earlier. A policy of helping to find teaching or other legal jobs for outstanding job performance by the teaching assistant would be such an incentive.

The quality of applicants applying varies depending upon climate and other living conditions. A major California urban law school might need to provide less incentive than a school located in a rural area in the midwest. The latter could increase its attractiveness by giving the recent law school graduate some responsibility for teaching a short section of a substantive law course.

5. GOAL ACHIEVEMENT

One must hire motivated and sensitive graduate teaching assistants and provide them with reasonable monetary rewards and a nurturing atmosphere. It is imperative that they have a well-developed program waiting for them when they arrive. The program should not be so rigid as to allow them no opportunity for innovation and experimentation. If these preconditions are met, the graduate teaching model is a highly effective one.

Recent law graduates have little experience in drafting dispository instruments. The precision and depth of understanding required by good drafting is greater than that required by any of the other primary or secondary goals. Yet, fully committed teaching assistants in a well designed program can do a good job even in this area; therefore, it is not neccessarily a case of the blind leading the blind.[32]

The graduate teaching assistant should have relatively little difficulty in introducing the first-year student to the rudiments of legal analysis and synthesis. He should have familiarity with the practical aspects of advocacy. If he has any difficulties in deciding how to teach advocacy, an expenditure of time, under the guidance of the program director and relevant texts on rhetoric should be a sufficient remedy. The graduate assistant should already possess sufficient expertise to handle the student's problems in relationship to examination technique.

The graduate teaching assistant should be able to perform adequately in the area of legal research. However, unless he has had a good legal writing program and some practical experience, it will be necessary for the director to broaden the teaching assistant's familiarity with the various research tools. Without formal teaching experience, the graduate student will be at a disadvantage in relationship to the demands of legal literacy. This weakness can be corrected by the hard work of the associate and insightful comments and practical hints from the program director. Also, a careful reading of a good English grammar text would help.

The graduate's major deficiency in relationship to a legal writing course is a lack of experience in substantive law. This can be partially remedied by an intimate relationship with a substantive law professor or by using a pre-designed file from which the graduate teaching assistant can do his own up-to-date research. Alternatively, the assistant should be encouraged to design his problems so they relate to an area of the law of which he already has in depth knowledge. This knowledge may have been gained through a summer job, law review, national moot court competition or actual practice. *Caveat:* the director must monitor these problems to make sure they are not too complicated for entering students.

The teaching assistant is capable of handling most of the goals of either a legal writing or a legal communications course. Ironically, the

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32. R. DICKERSON, *supra* note 4, at 153, comments on the performance of his teaching assistants. He states:

> In theory, to use inexpert teaching associates is to have the blind lead the blind. In practice, this has not been a problem. By participating in the planning and by some boning up in advance, the reasonably intelligent teaching associate can keep sufficiently ahead of his assigned students. Proof of the growth and agility of the teaching associates came when the professor prepared a tentative draft to be submitted as the final phase. That their specific criticisms were both sharp and to the point, was at the same time uncomfortable and reassuring to the professor. There is also evidence that much of their increased perceptiveness rubbed off on the students.

graduate teaching assistant may not be as sympathetic and understanding of the first-year student's problems as might be expected. After three years of law school and possibly one or two years of practice, he may have lost some ability to relate to students. His position, somewhere between that of a faculty member and a student, may cause him to be less than totally at ease with his students. The "extended case method" is a very demanding learning process for the graduate student as well as for his pupils. The sheer weight of material as well as the vast number of skills that have to be mastered might make it unwise to have graduate teaching assistants handle this type of program.

6. THE EISENBERG PLAN

A concrete example of the graduate teaching assistant model is provided by a program instituted at The University of California at Berkeley in 1971. The program has not yet proven to be totally successful.

A study committee in 1971 recommended a new legal writing model. It was meant to accomplish two goals. First, each student would be given direct contact with a professor. Second, a basis would be provided from which the graduate teaching assistants could handle the legal writing course effectively.

The first year class at Boalt Hall was divided into halves. Each half had its own set of the five first year courses (property, procedure, contracts, torts and crimes), usually with different professors than the other half. The five courses were taught in "large sections" of about 110 students. Each of these sections had a corresponding "small section" of about 30 students.

It was the small sections with which the associate was concerned. Each associate worked with two small sections. The writing part of the course was, in theory, a part of the substantive "small section" and it was thus lumped together with it for unit credit. Consequently, the small sections had four units of credit rather than the three assigned to the large section classes.

The consolidation was intended to achieve a coordination between the writing and substantive law courses. The supervision of the writing course was given to each small section professor. The idea was to blend writing and substance by the use of problems relevant to what was being taught in the small section.

The Eisenberg Plan has been successful in one respect. The anonymity of law school has been substantially reduced. Students now have a professor who they know personally and to whom they can go with questions and to ask for recommendations. They also have a close working relationship with their associate.

The scheme has proven only moderately successful in relationship to the writing program. All of the small section professors have been

willing to offer the teaching assistants suggestions on possible writing topics. Most of the professors have not felt that they had the time to make up or analyze the first year writing problems, nor have most of them been willing to teach part of their substantive course through the use of research problems. The situation has meant that the teaching associates, who have neither subject matter expertise nor experience in the techniques of legal writing, have been left adrift. Even when the graduate teaching assistants developed some interesting teaching ideas, there was often considerable difficulty in relating those ideas to the particular substantive law area assigned.

7. SUGGESTED IMPROVEMENT

The civil procedure course at Boalt Hall has been the one in which the coordination and consolidation between the writing assignments and the substantive law has worked the best. This experience suggests several ways of improving this graduate teaching assistant model. The focus of the writing course should be transferred from the different small sections to the larger one. The civil procedure professors are highly sensitive to the need for clear, precise and legalistically correct writing. These professors' daily practices have conditioned them to the pitfalls of inadequate communicative skills. It should not be difficult to convince the civil procedure faculty to structure their courses in a coordinated manner. The natural flow of the course should then be used for setting up writing assignments.

A coordinated program would make it possible for students to have a series of on-going procedural questions to research and write. This could take some of the time pressure off the procedure course itself, and give the professors a chance to teach certain topics in depth.

The teaching associates would make up the problem. They would then be reviewed by the procedure professors and integrated into the course. When the students' written assignments were due, they would be corrected by the teaching assistants. At strategic intervals, the students' grasp of the subject material would generally be reviewed by the professor.

If only civil procedure problems were included in the writing program, the course would be a bit "thin." Role playing, similarities to actual practice and a feeling for the full litigation process requires that substantive questions also be incorporated. This incorporation could be done in one of several ways. First, the director of the writing program should have introduced the teaching assistants to substantive law professors during orientation week, which might lead to a series of relationships with first year professors. This relationship could result in these professors being willing to review proposed student problems. The civil procedure professors should be given an incentive, such as a teaching unit credit for their efforts in behalf of the writing program.

Another possibility is that the writing director, himself, be a first

year substantive law professor. For example, the director could be a torts professor. He would receive part of his teaching credit for torts, part for reviewing the substantive law aspects of the teaching assistants' problems, part for coordinating the writing program with the civil procedure course and part for directing the legal writing program itself.

Another suggestion would take several years to implement. The director would make a conscious effort to gain expertise in selective topics in several of the first year courses, such as conveyances in property, proximate cause in torts and murder in crimes. As he mastered each topical area, he could compile a file of effective material to be used by future teaching assistants. This would mean that the director's ability to transmit legal writing skills as well as his ability to review substantive questions would increase with time. Therefore, the teaching assistants' options would also increase.

E. *The Student Teaching Assistant Model*

This format requires a strong, organized director. The program must be well-defined and have extensive pre-existing files before the teaching assistants are hired. Otherwise, time constraints will cripple the program.

There are, at most law schools, second and third year students with sufficient intellectual background, a fair amount of free time and a sensitivity to people, so that an adequate staff can be assembled.[33] Moreover, it may be possible to find students with a summer or two of legal experience or with a background in rhetoric or English. What is needed is a sufficiently developed program, so that there is time for the program director as well as the teaching assistants to exchange information and expertise. Even if no particular student has all the qualities of a good legal writing instructor, the group, as a whole, will possess such knowledge.

1. ADVANTAGES

One of the major advantages of the student teaching model is an opportunity to extensively and personally interview the candidates. This interview can concentrate on the student's academic achievement, his reasons for wanting to be an instructor, his writing ability and his general rapport with people. The director's conclusions can easily be checked with the student's former teachers and legal writing instructor.

Another positive feature of this model is the low student ratio. The teaching assistant can be given a section with as few as 10 to 12

33. Few upper division law students are going to be sophisticated in teaching legal analysis or synthesis. However, if students in the top third of the class are hired, the odds are in favor of finding people with sufficient intellectual capacity to do an adequate job. The director should avoid people whose time commitments are extensive. This usually rules out members of the Law Review and students who spend a substantial amount of time on outside work.

students. This is possible because their services are relatively inexpensive. A stipend of $500 per semester is usually adequate. If it proves not to be a sufficient incentive, paying the students on an hourly basis would still be a practical alternative. Furthermore, providing the student with 3 to 6 units of classroom credit is relatively inexpensive and gives the teaching assistant extra time for the program.

There should be a concerted effort by the faculty to provide the student with non-monetary incentives. A guaranteed letter of recommendation should be put on file for any student who does a satisfactory job. The faculty should make an effort to provide the legal writing program with a positive image. If this is effectively done, being a legal writing instructor may rival moot court and law review as a law school accomplishment.

The writing director should stress other advantages of being a good legal writing instructor. First, the student's writing and research skills will be improved and refined through the teaching experience. Second, the prospective law teacher will get an opportunity to see if he is really interested. Third, many third year students suffer from the "graduation syndrome." They are bored with law school. The opportunity to teach and do a good job oftentimes turns boredom into interest.

Another positive feature of the student teaching arrangement is the proximity of the students to the institution and his students. He knows the law school, the teachers and the library. He remembers the panic and anxiety of his own first year, and therefore, can be very helpful to entering students.

If the student assistant is chosen in the spring semester, he can take an active part in designing the problems. This is particularly valuable because it gives the teaching assistant some idea of how difficult they are and approximately how long it would take to research and write them.

Many law schools have both day and night sessions. The problems of night students are unique. They often have substantially more motivation, but less time. It is often possible to find former night students who are now full-time day students who can be hired to handle night sections. They are more likely to have a sensitivity to the night students' problems.

The second and third year format has another positive feature. The student teaching assistants have had no opportunity to develop bad teaching techniques. They tend to be aware of their lack of knowledge of both teaching and writing methodology, therefore, they are more open to positive directions than personnel in the other formats.

2. DISADVANTAGES

A lack of time is the single major defect in the above format. There is no time to teach the student assistants "how to teach," nor to

sensitize them to the nuances of good writing. There is no time to give them sufficient in-depth knowledge of the substantive law areas, nor does the director have time to read all of the students' papers to insure uniformity. And, lastly, there is no time for the teaching assistants to be helpful to the students when they need them the most—at exam time.

Many of these time constraints can be partially alleviated. Certain student assistants can be assigned to master specific writing and research skills. They can then teach the other assistants these skills. The director and the fellow instructors would then gently criticize the chosen individuals' efforts. This interplay would increase the insight of the person chosen and the group in general. Lack of uniformity can be mitigated through the director reviewing a certain percentage of the papers. Moreover, student teaching assistants with the same problem can be required to exchange papers and ideas during the correction process. The director can introduce the assistants to the new developments in the field by giving lectures and critiqueing short assignments written by the instructors. Lastly, the course can be staggered so that three or four weeks are left at the end of the semester for teaching assistants and students to prepare for exams.

There are several negative aspects to having students teach students. Some of the first year students may doubt the credibility of the teaching assistant. Some teaching assistants will grade papers too easily or too harshly. This is an outgrowth of their own inexperience in substantive law and writing technique. But, it is also a product of the teaching assistant's sense of insecurity on the one hand, and his sense of empathy on the other. He is neither student nor teacher. It is up to the director to convince these teaching assistants that they do not need to know all the answers; and that what insights they give to first year students in both legal training and in relationship to "learning law school" are highly valuable.

3. GOAL ACHIEVEMENT

The second and third-year students' lack of practical experience and time to learn teaching techniques and the other skills would make it inadvisable to conduct an "extended case method" program. Whether student teaching assistants could find enough time to become relatively skilled in teaching legal drafting is debatable. The indications are that the critical insights needed for useful feedback would be lacking.

Student teaching assistants should be able to do an adequate job in most aspects of a first semester "getting to know law school" course and the second semester, appellate level moot court program. The assistant's forte will, of course, be his constant and direct contact with his students. This will make the law school socialization process relatively easy and painless. The director and the student assistant will

have no difficulty in teaching examination technique and the student assistants are capable of handling case briefing. Their competency to handle analysis and synthesis is more debatable, although they should be able to teach these two skills at a rudimentary level at least. A series of lectures and assignments by either the course director or the civil procedure professor would deepen the understanding of these skills. It must be remembered that the teaching assistant lacks time to learn a great deal of detail about any particular legal form. If the teaching assistant is going to have something to talk to his students about, the variety of legal instruments discussed should be kept to a minimum.

The director and his staff can put together a highly successful moot court program. Designing mock transcripts and reading books on appellate advocacy are beneficial to the teaching assistant's learning process as well as that of his students.

It would be impossible for any one teaching assistant to master all of the major research tools. Many of the specialized reporters are not even known to practicing lawyers. Different teaching assistants should familiarize themselves with the unique aspects of different research tools. There should be a series of weekly meetings in which each research tool is discussed with all the associates. This will make it possible to have adequate coverage of most of the major research books and services.

How does one sensitize, in six months, teaching assistants to grammatical and linguistic problems if they are not already so sensitive? Time constraints make it difficult to turn out good English teachers, but an effort should be made to make teaching assistants aware of language problems. If the assistant runs into a particularly difficult student problem, the individual should be referred to the director. If that is not effective, then a further step should be taken. In this area of the learning process, it would make good sense for the law school to employ, on a part-time basis, a language consultant. That consultant could come from the English Department or the School of Education.

V. Conclusion

This paper has advocated an increased intellectual and financial commitment to legal writing and research. It has advocated a positive attitude toward the writing program. Lastly, it has advocated a willingness to experiment.

If the suggestions of this article are followed, the existing negative attitudes of the senior faculty and the resulting attitude of the entering students can be changed. With that change, the students will learn more, and the program will be more successful. A successful legal writing program has its own rewards. First, it will turn out students better able to cope with law school. Second, it will turn out students

better able to adjust to the demands of law practice. Third, it will reduce the inordinate amount of hassle and confusion that the writing course has caused in the past. Future faculty meetings will not be devoted to extensive discussions on whether the program should be dropped, modified or changed.

The sense of relief among the faculty that a good legal writing program produces is illustrated by one professor's comment at a school that has had a successful program for several years. He was asked if the other first year professors felt that his program was interfering inordinately with the activities of their courses. He said:

> No, not at all. The first year professors as well as the whole faculty are so relieved to have a writing program working efficiently that they would give us almost anything we asked. We could make the program more ambitious, we could increase its unit requirement, we could ask for more teaching credit. I suspect they would give us anything we wanted.

APPENDIX A

Complex Memo—Criminal Law

SETTING

You are an Assistant District Attorney in a small California town. The Chief of Police enters your office and drops a file on your desk. He tells you that he has a man named Ted in custody. He says that he believes that this man is responsible for a long series of burglaries, but he admits that he can only prove Ted's presence at the November 1 burglary. Therefore, the Chief of Police says that he would really like to "nail this guy to the wall" in relationship to that crime. He wants to know if it would be legally possible under California law to convict this suspect of one or all of the following: Homicide, burglary, and/or one or two counts of "burning." After the Chief leaves your office you go next door to see your boss. He says that he wants you to write a memorandum on this potential case that can be both useful to answer the Chief's "layman questions" and provide the legal foundation for any action the District Attorney may decide to take against the suspect. He wants you to discuss, with relevant penalties, the criminal aspects of homicide, burglary, "burning" and "stealing" that this potential defendant may have committed. He instructs you to be careful of any causation problems.

FACTS

On November 1, 1971, Ted decided to break into the Smith Granary Silo. He believed that a lot of money could be made by pulling up a truck to one of the silo's wheat unloading spouts and simply carrying away a few tons of grain.

Early the following morning, just as the sky in the east began to change color, Ted backed a truck up to one of the loading platforms at the Smith Granary. He got out of his truck and wrapped the hammer he was carrying in a cloth. He did this so as not to disturb any watchman who might have been sleeping in a small shed that was set next to, but not flush against the granary silo. The suspect then reached up and pulled down the wooden spout that is used to convey grain from the silo to waiting trucks. He attempted to remove the protective metal spout cap with the hammer but was not successful. He then used a blow torch that he had brought with him to burn off the cap. Then he began to fill the truck with grain.

While the truck was filling, a series of events took place. (1) The blow torch that Ted had placed on the ground caused the small shed next to the silo to catch fire. The accused had forgotten to turn off the blow torch when he placed it on the ground after having removed the spout cap. Ted noticed the fire. However, he decided to let it burn rather than to risk arrest by taking the added time necessary to put the still controllable flames out. (2) Gale, a passerby, saw the fire in the shed. He believed that he heard someone calling for help from within the shed. Gale ran to the shed and dove through the window. The force of his entry dislodged a 10 pound can of lard and some cans of baked beans on a high shelf in the shed. The can hit Gale on the head. He was knocked unconscious. By the time the fire department arrived, Gale had been burned to death. In fact, there was no one in the shed whom Gale could have rescued. (3) Since the fire increased in size and became very visible, Ted decided to get out of there fast. He got into the truck, but before he could turn the key in the ignition, the police arrived and arrested him.

ADDITIONAL INSTRUCTIONS

You may assume that the arrest was lawfully made. You may assume that California statutory and case law is the only law that must be considered. However, out-of-state or federal cases may be used when their facts are relevant and appropriate. You need to provide a slightly more detailed analysis of the elements and background of homicide, first and second degree burglary, "burning" and "stealing" than you might normally do because the Chief is a layman. He must understand at least generally why the District Attorney's office is or is not going to take certain actions.

Be very careful of the concept of "lesser included crimes." The fact situation has intentionally been made somewhat ambiguous. Therefore, make all assumptions of law and fact explicit.

GIVENS

You may assume the following:

1) There is no direct passageway between the shed and the silo.
2) The value of the grain in the truck at the time Ted was arrested was $160.
3) The value of the burnt spout cap was $100.
4) Do not fight the facts as given.

FURTHER SUGGESTIONS

1) Do not wait until the last week to work on this difficult and complex problem. You have until the 22nd of November to turn in your first work on this memorandum.
2) Maximum length of the memorandum is 13 pages.
3) A full analysis of this problem would include a vast number of issues. Therefore, you need only consider in detail the following aspects of the problem unless your handling of the problem requires an analysis of other possible crimes.
   (A) You are to consider all possible homicides, emphasizing especially felony-murder and misdemeanor-manslaughter.
   (B) You must consider first and second degree burglary and "burning" in detail.
   (C) Make sure you understand why theft may be important in our case. Be careful of the issue of "degrees" under California law.
   (D) Consider misdemeanors only as they relate to the misdemeanor manslaughter rule.
   (E) Judges often define statutory crimes in terms of the elements of older common law crimes. The judicial interpretation of a word may be substantially different from its common usage. Be careful that you do not take too much for granted.