

Legal Writing in the Disciplines

Legal Writing in the Disciplines

A Guide to Legal Writing Mastery

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For Dad and Ruth

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Preface

Entering law school is like entering a foreign country for the first time. New law students do not know the language but only a few fancy catch phrases to get them through each day. Despite the friendly faces and helpful advice of second and third year law students, more seasoned travelers, new law students must figure out the terrain on their own. Professors can serve as guides, but the students must travel the journey themselves.

Legal writing serves as the passport to the legal arena. Without the ability to translate complex legal theories into clear and concise writing, lawyers cannot fully participate in the legal system. Bad legal writing is the equivalent of screaming English at someone who is not familiar with the language. The end result is the same. The screamer is amazed that their best efforts to communicate have failed. The listener smiles politely but remains totally ignorant of what the screamer attempts to communicate. Each walks away from the conversation frustrated and misunderstood.

Unfortunately, many law professors have become like the screamer in the previous paragraph in their approach to law teaching. Instead of meeting new law students at the point where they ended their undergraduate or graduate studies, we expect them to abandon their discipline-specific methodological thinking in favor of undefined, unexplored, and unexplained methodological approaches to the study of law. Most law professors do not seek to meet the students at the point of their last educational experience or to translate legal methodologies into a student's existing disciplinary methodological framework.

This misstep is also true of legal writing professionals who, despite creativity and enthusiasm in the classroom, continuously attempt to find a singular disciplinary methodological experience from which to teach legal analysis and writing. Because the analytical piece of legal writing is rooted in rule-based reasoning, many legal writing professors will seek examples of rule-based reasoning as they occur in the sciences and mathematics to analogize to legal

analysis.¹ Likewise, some professors draw examples from the deductive and inductive reasoning models used in philosophy to demonstrate how logical, structured rule-based reasoning should occur in legal writing. Still, others find examples in rhetoric to demonstrate writing for a particular audience and argument construction. None of these approaches is incorrect. The flaw in their use is that it is not comprehensive. Those professors who have strong math backgrounds may use mathematical models to demonstrate rule-based reasoning, but those students in the class without strong math backgrounds have no point of reference. The same is true for any other singular disciplinary methodological source that a professor may use to analogize to legal analysis. Those who have a frame of reference can translate legal writing instruction into the familiar disciplinary framework. Everyone else cannot.

In any law school classroom, there are students from the social sciences, humanities, arts, sciences, and business. As legal educators, we should make legal education available to students at these various points of disciplinary access. This is especially true of legal writing professors. Most of the work done by attorneys is conducted through the exchange of paper. Thus, an effective lawyer must master the art of communication through writing. Without this skill, an attorney's conversations with the client, opposing counsel, and the court end prematurely. With this skill, the attorney can provide the client, opposing counsel, and the court with a roadmap to the desired legal destination. The goal of this text is to teach students how to draw that roadmap.

1. Karen L. Koch, *A Multidisciplinary Comparison of Rules-Driven Writing: Similarities in Legal Writing, Biology Research Articles, and Computer Programming*, 55 J. LEGAL EDUC. (2005).

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Simon Reinke et al., *The Influence of Recovery and Training Phases on Body Composition, Peripheral Vascular Function and Immune System [sic] of Professional Soccer Players*, THE PUBLIC LIBRARY OF SCIENCE (Mar. 18, 2009), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004910>.

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Introduction

The “myth of transience” is the widely held belief among the academy “that if we can do x, y, and z, the problem [of poor student writing] will be solved—in five years, ten years, or a generation—and higher education will be able to return to its real work.”² Ultimately, law schools want an easy solution to the challenges facing novice legal writers without examining the institutional and structural barriers to student writing success. Not the least of these is the perception that legal education is a “free for all,” accessible to students of any major. This perception denies the existence of law as a discipline, a discourse community, into which students must be integrated. Integration into any discourse community primarily occurs through reading and writing.

This book is a book of translation for new legal writers. Its purpose is to re-conceptualize law in its disciplinary context and to give both students and professors some tools to serve as a bridge between discourse communities, the legal discourse community, and various undergraduate and graduate discourse communities. The attempt of legal education to take students out of their disciplinary contexts (undergraduate and/or graduate) and place them into another (the legal discourse community) without context or explanation is problematic and leads to many of the frustrations law students have with writing.

In reality, writing cannot be learned outside of a disciplinary matrix. Legal writing is disciplinary writing, not just another form of technical writing. Law school is a disciplinary community, a discourse community. Within a discourse community, the use of language serves as a point of inclusion or exclusion. Use language as accepted in a discourse community, and you will become credentialed and/or licensed. Fail to familiarize yourself with the

2. Mike Rose, *The Language of Exclusion: Writing Instruction and the University*, 47 COLLEGE ENGLISH 341–59, 355 (1985).

disciplinary context of the discourse community, and you will not advance.³ This book is one small contribution to you, our students, and your efforts to advance.

3. David Russell, *Writing Across the Curriculum in Historical Perspective: Toward a Social Interpretation*, 52 COLLEGE ENGLISH 52, 63 (Jan. 1990).