The Legal Writing Program in the Law School

By Harry Kalven, Jr.

The legal writing program, as presently constituted, is a five-quarter sequence running all through the first year and through the Winter and Spring quarters of the second year. It carries five credit hours in the first year and four credit hours in the second year; it represents in curriculum ratios a unit of work roughly comparable to Torts in the first year and to Trusts or Equity or Administrative Law in the second year.

The first-year sequence has centered on legal analysis, research, and exposition; the second year has moved on to counseling and drafting in the context of commercial transactions.

The second-year work, which is under the supervision of Professor Roscoe Steffen, will be described in detail in a subsequent issue of The Law School Record. I shall therefore limit my comment chiefly to the first year and to the teaching fellowship program through which the work in both years is staffed.

I

It comes as a mild but pleasant shock to me to realize that the legal writing program is now in its fifteenth year at The Law School. The program which began as an avowed experiment has now become part of the orthodoxy. It has been widely copied at other schools, and perhaps the surest sign that it has been basically successful is found in the fact that neither we nor the student body any longer regard it as a novelty.

The program has been based on the simple conviction that an important way to teach the future lawyer is to provide him with an intensive opportunity to write about law under the supervision and stimulus of an interested and critical reader. This year we contemplate that each first-year student will do some ten assignments calling for the writing of approximately 17,500 words and the expenditure of approximately 200 work hours. Each assignment will receive the benefit of detailed written and oral criticism from the staff of teaching fellows. That in a paragraph is the program. I should like to elaborate, first, on the needs it is designed to fill; next, on the teaching fellowships; and, finally, on the content of the particular assignments.

The program has arisen as one response to a series of frequently voiced observations about legal education. It is universally agreed that, whatever else a lawyer is to be, he must be a man trained in the use of language, an expert at the job of presenting complex materials in concise, clear, effective fashion; yet for many years the only writing experience the average law student was likely to receive was in writing examinations. Again it is widely agreed that a lawyer must be self-reliant and able to work alone; yet law schools, unlike other disciplines at a comparable educational level, have relied almost exclusively on the large formal daily class. One way of making both these points has been the long noted half-truth that the best education in the law schools comes from membership in the law reviews, which are student-run, rather than from the rest of the school, which is faculty-run. It remains a reasonably accurate shorthand statement of the objectives of the legal writing program to say that it is intended to give to all the students at least some of the flavor, stimulus, and training that law reviews have given traditionally to the fortunate few.

It has also been observed with increased frequency that law schools need a more efficient method of introducing and orienting the beginner to the serious study of law. During his first year at least, he needs some complement to the fast-moving case-method dialectic of the large class; he needs some test of his competence in addition to examinations; he needs some opportunity for individualized instruction and attention. The first year of the legal writing program thus shares with Professor Karl Llewellyn's important course in Elements the job of making the transition from layman to law student.

Beyond these major considerations the program also provides some needed correctives to the case method. It makes the student conscious of the limitations the precedent pattern in any one jurisdiction actually imposes, if your case happens to be in that jurisdiction. It points up the surprising degree to which casebooks, despite their detail, are really survey courses and enables the student to get some sense of how much law there may be behind the single case in the book. Finally, the work gives the student some sense of the value of time to the lawyer, some sense of the depth to which one can advance on a given problem, and some test of whether he has the necessary appetite for the inevitable detail and uncertainty of law work.

II

The single most important fact about the legal writing program, to my mind, is that it has its own staff. As a result it can be run as an independent course and not as an adjunct to other courses in which some paper work might from time to time be required. And as a result it is possible to realize our commitment that each piece of student writing will receive painstaking criticism on an individual basis. We have found that once the student appreciates that his paper will be carefully read and fully discussed with him—one, that is, he realizes he is writing for a live audience—the battle is more than half won.

The present staff consists of Professor Steffen and myself and five Harry A. Bigelow Teaching Fellows. The
fellowships carry a stipend of $3,600 and are awarded annually to law graduates of high scholastic achievement. The program depends in the end on the caliber of the staff, and we have been very pleased thus far with our good fortune in recruitment. Since the start of the program there have been some thirty-eight fellowship appointments. Eight of these have been our own University of Chicago graduates, but the remainder have come from a wide range of schools, including Harvard, Yale, Columbia, Virginia, Pennsylvania, Northwestern, Cornell, California, Iowa, Indiana, and Utah. A special feature has been the use of English-trained law graduates from Oxford, the London School of Economics, and just last year the University of Melbourne. This experiment has proved highly successful from every viewpoint, and we are delighted this year to have two Oxford men on the staff.

The Fellowship itself has become a unique form of graduate law training. The Fellows are full-time appointees and are members of the faculty for the year. The emphasis is on teaching rather than on graduate research, and thus the writing program as a whole has the additional objective of teacher-training. Approximately one-quarter of the Fellows have gone on into teaching, but the year has proved a rich and useful experience as well for those who have moved into practice or government work.

The Fellows participate fully in the planning of the work for the year and have the primary responsibility for guiding the students through it. The Fellows thus have the opportunity of sustained informal contact with the faculty, of working together over the year as a team, and the excellent opportunity to examine the process of legal education intensively in their own interactions with their students.

This year, in addition to the heavy work load of the two writing programs, the Fellows are collaborating with Professor Sheldon Teft in two seminars and are sharing in the responsibilities of the new Graduate Seminar. This accounts for approximately 110 per cent of their time; the rest of their time, we tell them, they are free to use as they see fit.

III

The program this year can be divided rather conveniently by the three academic quarters. During the Autumn Quarter the emphasis is on analysis and exposition of prepared materials, and there are no research responsibilities. During the Winter Quarter the emphasis shifts to research. And, finally, in the Spring Quarter, the emphasis shifts to advocacy, and the student is asked to apply his skills of analysis, research, and exposition to the advocate’s task of making the best case he decently can for his side of the controversy. Each student by the end of the first year will have written several legal memoranda, an appellate brief, and a judicial opinion, drafted a statute, and made two oral arguments. Each unit of student work will receive detailed criticism in writing and in personal interview with a teaching Fellow.

I have said that the course proceeds on the conviction that a significant way to teach law is to give the student an intensive experience in writing about law for a critical reader. So long as that is done I am inclined to think that a considerable variety of particular assignments might work equally well. I shall outline this year’s proj-

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ects as illustrative only of how a series of assignments may be put together. We have varied the assignment pattern considerably over the last five years and will undoubtedly continue to experiment.

The first quarter’s work utilizes a series of cases from a single jurisdiction dealing with a single problem. The cases are given to the student in mimeographed form, with a minimum of editing by us, and are arranged in chronological order. The student is then given a series of written assignments on this material. In years past we have utilized sequences of cases from the United States Supreme Court such as those on search and seizure, right to counsel, and the representative jury. These have the advantage of being immediately exciting in their civil liberties aspects, but the constitutional doctrines have sometimes proved a bit too difficult for the beginner. This year we have shifted to a somewhat more tranquil theme—the litigation in the Supreme Court of Washington under its guest statute enacted in 1933. There have been over twenty cases under the statute, and they afford an interesting and accessible set of materials for close study. The materials come to approximately 150 mimeographed pages or about one quarter, in quantity at least, of the average casebook. Four assignments on this material are being called for during the Autumn Quarter. First, the student was given the cases up to 1940 and asked to prepare a 2,500-word legal memorandum covering them and to speculate as to what was still open for litigation. Second, he was given the cases from 1940 to date and asked to rewrite his original memorandum in 3,000 words so as to incorporate the later material. Third, he is to be given a fact situation involving suit under the statute and asked to prepare a 1,500-word memorandum supporting one side of the controversy. Fourth, he is to be asked to redraft the Washington statute so as to avoid the difficulties the litigation has disclosed and to support his draft with a concise memorandum.

This has been deliberately made an armchair assignment. There are sufficient difficulties in the analysis and exposition of legal materials to make it unwise to bring in the research function too early. And, when research is added in the Winter Quarter, the student will have a clearer sense of the additional role it plays.

The work in the Winter Quarter begins with a limited research job on a point of law designed to keep to a minimum the analytic and expository difficulties and simply to insure that the student has become acquainted with all the relevant legal research tools. Last year for this purpose we had the class research whether there is a cause of action for prenatal injuries, a point on which there are perhaps two dozen cases in the United States, the majority of which are very recent. This is to be followed by a substantial research problem arising from a statement of facts and raising several issues, some of which are well settled and some of which are quite controversial. The student is asked to consider the case in two or three jurisdictions picked to illustrate different precedent patterns and to submit a 3,000-word memorandum which is then rewritten completely after criticism. This assignment occupies the student for the remainder of the quarter.

The research problems are made up by the staff somewhat in the mysterious fashion that examination questions are created. For several years we have found it profitable to take some single area of law such as defamation, occupier liability, third-party beneficiary contracts, or misrepresentation, study it carefully together, and work out our problems from it. Making up the problems is always both fun and challenging; and it is surprisingly difficult to combine several good issues into a plausible fact story. The staff then researches the problem thoroughly before it is assigned. When the student work is finished near the end of one quarter, we then run a series of small seminar sessions on the substantive law area as a whole, thus giving each student some of the benefit of the work done by the others.

The Spring Quarter turns to advocacy and hence to brief writing and oral argument. It resembles the traditional appellate moot-court work. Each student prepares a written brief, makes a thirty- to forty-minute oral argument, sits as a judge in another case, and writes a judicial opinion on the basis of arguments presented. Emphasis is of course on the adjustments in analysis, research, and exposition that occur when one is committed to one side of a controversy as an advocate. There will be some observation of appellate trials, and Professor Llewellyn, who gives an advanced course in Legal Argument in the third year has agreed to lend us a hand in this phase of the work with the freshmen this year.

I should like to emphasize again that at each stage the student work is subject to the critical scrutiny and comment of a teaching Fellow, and it is this close criticism more than anything else that is the key to the program. Each year the Fellows find that the interviewing of the individual students is fascinating and that the articulating of one’s criticism of this student’s work is a remarkably exacting but rewarding task.

We do not view the course then either as one in legal bibliography or as one in English composition, although we expect as a result of it that the student will have thorough familiarity with the tools of the law library and that he will write more effectively and clearly than when he began. The program is not without its difficulties. Inevitably not all of the student work is as good as it should be. Nor is it easy to devise work that will be manageable for the students and rewarding for the staff at the same time. And the program is expensive in money, time, and energy. It is perhaps something of a luxury. But after fifteen years of working with it and observing it in action, we are inclined to the view that it is the sort of luxury that no first-rate law school can afford to do without.