

Preface

The Case for Undergraduate Legal Writing

I started college in 1999 as a political science major. I made the choice not because history and government were my favorite classes in high school, but because I was planning on going to law school one day. Before my first day of college, however, I attended a session with Texas A&M's pre-law advisor, the wonderful Karen Severn. Karen told me that law schools didn't care what I majored in as long as I did well in whatever I chose. Following her guidance, I switched to English. Over the next three years, I became a sharper writer and a better critical thinker, and I got to do it while reading Ernest Hemingway, Virginia Woolf and John Guare. Law schools don't expect you to know the law before you arrive, Karen told me; they're happy to take care of that themselves.

I did take one law-related class as an undergraduate: in the spring semester of my freshman year, I signed up for U.S. Constitutional Development. On my first midterm I got a lower grade than I expected; worse yet, I didn't understand *why* I'd gotten the lower grade. So I visited the professor during office hours to inquire. He reviewed my exam in front of me. I remember him saying that everything I'd written was correct and that I'd captured the substance from both the casebook and our class discussions perfectly. I was feeling pretty good at that point. He'd made a mistake, I thought, and was on the precipice of correcting it. But then, he asked a question that would haunt the rest of my undergraduate days. After he admitted that I'd reproduced everything that had been given to me, he looked me in the eye and said, "But Antonio, where's the work?"

The difference between high school and college is simple. In high school, it's often enough just to remember what happened ("The Civil War started in the year 1861.") or to recognize concepts within fixed works ("Write a five-paragraph paper discussing three literary elements in *The Scarlet Letter*."). But in college, one is expected not just to regurgitate a body of knowledge but to contribute to it. College, more than anything, teaches one how to arrive at an original thought. I'm not sure how much U.S. Constitutional Development helped me in my law school Constitutional Law class. But it did make me a better thinker and defter college student. That said, after my three years at A&M, I felt as if I understood how to approach most theoretical problems and how to communicate my

thoughts clearly and cogently. But I wasn't sure I had anything worth saying yet. So in fall 2002, I started my 1L year at Yale Law School.

At 21, I was one of the youngest people in my class, and when I looked around the room at my cohort—filled mostly with Ivy League-educated scholars—I felt thoroughly outclassed. But I was there, and I was determined. I worked harder than I'd ever worked and relied on the one skill that had set me apart as a high schooler and undergraduate. I was a writer. My senior year of high school, I was the state champion in ready writing (an impromptu essay competition). In college, I'd won top honors for my fiction and playwriting. It helped that writing is a big part of both law school and legal practice, and it really helped that my professor in the subject was Robert Harrison. Robert had a reputation as the most caring, sincere professor at Yale Law. He more than lived up to his reputation. My time at Yale was the most rigorous and formative of my academic career. I met the smartest and kindest people I'd ever met in my life, and I was challenged in a way I'd never been challenged before. Law school was also where I finally discovered what was worth saying and what was worth fighting for. Law school gave me the skills, not just to understand the world, but to advocate and effect change within it. In the spring of 2005, I graduated from Yale and accepted an offer to work in New York at Kaye Scholer LLP (now Arnold & Porter Kaye Scholer LLP) the following fall.

I worked as a corporate litigator at Kaye Scholer for five years and confirmed what I'd been told for years: that the vast majority of work for a litigator happened not in a courtroom but on a page. I wrote countless memos and motions and the occasional brief. I remember the thrill when the first motion I was ever asked to draft on my own, a motion everyone expected to lose based on the precedent case law, resulted in an unexpected win. Life at a law firm is taxing, however, and is only sustainable for a precious few. The more senior I became at Kaye Scholer, the less time I had to devote to anything other than work, including fiction and playwriting. So in 2010, I left my practice and accepted one of ten spots as a Master of Fine Arts fiction candidate at Boston University. My new professors and classmates not only made me a much better fiction writer, they taught me how to teach writing. Post-graduation, I taught at BU, then at the University of Houston for two years, until finally finding my home in 2014 at the University of Southern California.

I was hired by USC to replace my eventual mentor at the university, the late Dr. James Brecher. James had been teaching legal writing to undergraduates for over a decade and was about to retire, so the Writing Program needed a new specialist. When I was assigned my first undergraduate legal writing courses, I asked James for guidance. He handed me a 500-page course packet, filled with law review articles, classic law school opinions (like the 1928 New York case, *Palsgraf v. Long Island Railroad Co.*) and assignments (I remember one involved a contract dispute and another a landlord/tenant issue). I knew I couldn't just adopt the same packet—I always hated *Palsgraf* and contracts was my least favorite class 1L year—so I took a couple of the articles from James's packet and started almost entirely from scratch.

I'll admit: I was apprehensive about teaching legal writing to undergraduates. To teach a junior or senior in college how to refine their thinking and writing is already a tall task. Was it really possible to convert my legal argumentation training into something an undergraduate could absorb? Well, the existence of this book should tell you the answer to that question, but I imagine you might have other worthy queries, such as:

Why Should an Undergraduate (or Any Non-lawyer) Learn Legal Writing?

When I started teaching legal writing at USC, I assumed that all my students would be pre-law. After all, my course was titled Advanced Writing for Pre-Law Students. My university offered a myriad of advanced writing courses (a prerequisite for graduation), including courses in the arts and humanities, the social sciences and the natural sciences. In those courses, students write traditional academic essays and research papers but often have broad discretion on the topics of those papers. The idea is that by the end of one's undergraduate career, students should have the freedom to explore the specific subjects they're most interested in or that are most relevant to their future careers. It's the instructor's duty to help refine their students' voices and prepare them for life beyond the academy.

Advanced Writing for Pre-Law Students, which I teach as an Introduction to Legal Writing, gives very little freedom to students to explore their research interests. There's hardly any research at all. Instead, my students are given a series of cases—closed case universes revolving around particular legal issues—and assignment prompts that invite students to apply a set of law to a set of facts. My thought process was simple: who, other than a prospective law student, would be interested in developing such a specialized skill?

Let's start with the obvious population: actual pre-law students. In my view, the most important function of undergraduate legal writing isn't preparing students for law school; it's providing a means for pre-law students to determine if law school is right for them or not. Most representations of law in the news and in popular culture focus on the courtroom: opening and closing statements, direct and cross-examinations, Johnny Cochran and Atticus Finch. Trial advocacy, however, is just a small part of lawyering, even for litigators. Most matters, in fact, never make their way to trial. During my years as a corporate litigator, the vast majority of my time was spent researching and writing. Yet to this day, pre-law students imagining their futures envision themselves delivering impassioned pleas to juries and judges. How can undergraduate legal writing fill the gap between expectation and reality?

In my undergraduate legal writing class, students act like members of a law firm, tasked with the same kinds of work that young associates often do. Early in the semester, students interview a distressed client (played by me) for an advice memo they eventually craft. In so doing, they are forced to gauge that client's knowledge and state of mind and adjust their questions accordingly. Later in the

semester, they write a legal memorandum pitched to a fellow attorney discussing possible litigation strategies for a fictitious case. Students get to do the kind of work that lawyers do and hopefully gain insight into how they might one day fit into this profession. This kind of knowledge is important, especially if the student is unsure about the investment that three years of law school represents.

For students who ultimately decide to take the law school plunge, undergraduate legal writing provides them an invaluable head start on their law school career. Students learn how to read a case, how to engage in a Socratic dialogue, how to structure an argument and how to predict legal outcomes despite contradictory precedent. Former students who go to law school frequently tell me that legal writing was their first year's highest grade—an expected outcome perhaps, as practice and comfort in anything often breed good results. But undergraduate legal writing does more than just teach the conventions of a new style of writing; it prepares students for a new mode of thinking that carries over to other law school courses as well.

The benefits of undergraduate legal writing, however, extend beyond just pre-law students or students toying with the idea of law school. When I started teaching legal writing at USC, I was surprised by the number of people who took my course who were not considering law school at all. In the spring of 2017, for example, USC offered 136 sections of advanced writing. Of these, only seven were pre-law and three of the seven were mine (the only three taught as an intensive legal writing practicum).

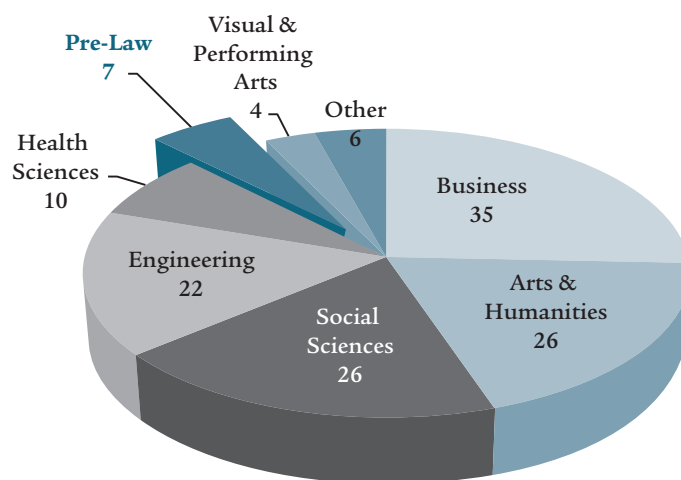


Exhibit P.1. Spring 2017 Advanced Writing Courses at USC

Prospective law students can of course come from any discipline, so in the spring of 2017, I asked my students the following question: “Are you actually considering law school?” The result (polling 52 students): 65 percent yes; 35 percent no. This proportion was in line with what I’d observed in previous classes and what I’ve observed since. It begs the question: why is such a sizeable portion

of my students who aren't even thinking about law school subjecting themselves to the very individual challenges of legal reading and writing? Here are the conclusions I've come to:

1. Students Learn How to Read and Synthesize the Law

How many of us when confronted with a contract or terms of agreement feel our eyes glaze over? As dense and sometimes incomprehensible as these documents can be, they enumerate important rights and responsibilities. Legal writing's first task is issue spotting: can a student locate the facts that potentially trigger a given law? Do they understand how to interpret that law through different lenses and perspectives? Even though legal writing classes focus primarily on case law, the skills gleaned from unpacking those cases can apply to statutes, contracts, handbooks and other kinds of legal writing.

The major most often represented in my classes is business, and while some of those business majors are thinking about law school, there is a large proportion who just want to understand the law better, so that they aren't puzzled or intimidated by its often-strange language. Making the strange—if not quite familiar—at least a little less strange can be quite the advantage in any professional setting.

2. Students Learn How to Write Professionally

Many of the documents lawyers write—memos, client letters, summaries—are documents that other professionals write as well. The class accordingly has utility beyond just the specific back-and-forth of a law firm or court. The substance may be focused but the utility for students is expansive. Former business students have used writing samples from my class when trying to get a job. A former journalism student was given a plum legal reporting assignment at NBC News because of her unique ability to understand, analyze and interpret case law. Legal writing is audience-centered; one writes differently when writing to a judge versus a fellow attorney versus a client. That kind of rhetorical dexterity is useful outside of the law as well, both in industry and even personal communication.

3. Students Learn How to Write Persuasively

Legal writing is the art of convincing another, of confronting opposition and persuading an arbiter that your position is superior. Students must understand who the arbiter is and what criteria that person is applying to their argument. They must have a command of the hierarchy of law to understand what is binding and what is merely persuasive to the deciding party. They must anticipate the opposing side's arguments and craft counterarguments. An awareness of audience and the interplay of argument and counterargument are hardly new concepts to any student who's taken a traditional composition course, but their practical application to law and the performance of lawyering gives these concepts added vitality, highlighting their real-world significance.

Advanced composition classes often task students with writing for academic, professional and lay audiences. The rhetorical strategies are different, and the rewards for success are often amorphous. Legal writing has very specific objectives: win this for your client; get this complaint dismissed. This kind of

functional, results-driven approach to rhetoric is useful in circumstances ranging from trying to get a raise at work to convincing your cell phone carrier to honor the discount they promised.

4. Students Learn How to Become More Effective Self-Advocates

It is one thing to know one's rights, but what legal writing teaches is how to fight for them. During my first semester teaching legal writing, a student driving to campus was pulled over for an illegal turn. To contest the ticket, he wrote a five-page traffic court brief detailing his understanding of the applicable law and the facts at issue. To understand the law, to know enough to demand that its application makes sense, can be an empowering feeling. People often hire lawyers not because they're not invested enough in a conflict to fight for themselves, but because they lack the vocabulary and command of the issues to advocate confidently. When an issue is complex, hiring an attorney is the safest course, but for simple issues—drafting a basic will, for example—self-education and some practical guidelines for analysis and writing may be sufficient.

In addition, legal writing classes often teach oral argument skills, using the appellate-style model whereby judges engage with the advocate directly, asking questions as the arguer presents their case. So often in academia, oral presentations are one-direction affairs: one person talks; everyone else listens. But appellate-style oral arguments invite a conversation, requiring that the presenting student both listen closely and speak carefully. At first glance, this may appear to be about the ability to speak extemporaneously, but it's also about reading a judge's questions, anticipating their concerns, and being prepared enough to handle the myriad issues that a single case can pose.

In the end, students come away from my courses able to deliver thoughtful and polished arguments—both at the podium and on the page. They learn to respect opposing viewpoints and to adjust their own thinking accordingly. They learn how to situate themselves within a society of laws and how to protect their own rights.

The skills above are essential for lawyers, but they're equally essential to many other professions, which brings me to the next question:

Who Is This Book Designed to Serve?

While the title is *Legal Writing for the Undergraduate*, I've crafted this textbook with the following populations in mind:

- Undergraduate legal writing students
- Undergraduate legal studies students
- Master of Legal Studies/Law/Jurisprudence students
- Summer pre-law program students
- Undergraduate moot court competitors
- Students taking classes where law plays a secondary role: e.g., business and law or engineering and law
- Admitted law students preparing for 1L year

My goal in writing this book was to provide enough guidance and scaffolding so that any person unfamiliar with the law could learn how to read and analyze cases and how to formulate basic legal arguments. I teach a version of my Introduction to Legal Writing class to high school students every summer, and after a mere four-week session, even at that level my students can produce credible legal memoranda.

Will Reading This Book Make Me Equivalent to a Lawyer?

While experience has proven that even teenagers can master the basic tenets of legal reasoning and argumentation, it's important to recognize the limitations of this text. *Legal Writing for the Undergraduate* is an introduction to American law and legal writing, a way to make one less afraid of reading legal documents and writing about legal issues. It's easy to be intimidated by everything from leases to case law, but at the end of the day, law is just language, and this book will make that language more accessible. But lawyers learn more than just how to write in law school. The first year of law school is all about setting a substantive foundation in legal precedent: torts, procedure, contracts, etc. This textbook utilizes several closed universes of cases, allowing you to focus on the provided law to apply to the assignments. Real lawyers, of course, must be responsible for all the relevant precedent that binds a given court; wading through thickets of statutes, regulations and opinions to discern what's relevant and what's not takes time and experience. Additionally, while this book provides the basic structures for legal memoranda and appellate briefs, it does not go into the same level of detail or nuance as an equivalent text intended for law students.

There are three basic hallmarks of legal writing that I hope you'll absorb over the course of this text: **efficiency**, **focus** and **formality**. Many lawyers bill their clients by five- or six-minute increments. As time is literally money in this industry, lawyers must be efficient both with their time and with their work product. If a client asks for a memorandum detailing their chances of winning their lawsuit against their neighbor, they likely don't want you to spend hours providing them pages and pages of background about famous court cases involving next-door neighbors. In your high school courses, there may have been times when adding these kinds of flourishes and details was rewarded. But in a field where every task is billed, you're discouraged from assuming more work than you've been asked to do.

Related to that, your work product should be as focused as possible on the task you've been given. If you've been asked to opine on the likely success of a copyright infringement suit, don't spend half your memorandum talking about the possible defamation suit that you also see in the fact pattern. As you'll soon see, almost all legal writing follows a basic structure that requires you to first reveal the law you're applying and then connect that law to the applicable facts of the case. Adherence to that structure will keep you from straying beyond the scope of the assignment. If the law you've been asked to apply is copyright infringement, isolate your analysis to that cause of action. Too often, when faced

with a complex factual scenario, students want to point out every instance of wrongdoing they see. But lawyers don't sue for violations of vague moral boundaries; they sue for violations of law. Whenever you argue, stay close to the law you've been asked to apply and you'll rarely go astray.

Finally, as law is a professional service industry, you should always try to err on the side of formality in your rhetoric. Even the aesthetic of the documents you produce will be judged. Imagine the difference between getting a letter from your attorney on sleek letterhead with a courteous greeting versus a handwritten note on the back of a piece of scrap paper. Which seems more professional? Remember that the client paid for the crafting of that note.

Your language, too, should be appropriate for a formal advisor. This doesn't mean that you shouldn't be clear and concise: formal language doesn't mean thesaurus language. But avoid overly aggressive or casual language ("We're going to rip the other side apart!"). It's good to be confident when there's reason for confidence, but it's wiser to be conservative in your expectations and then over-deliver when talking to a client ("Given the precedent case law, we have a high likelihood of success."). When talking to a fellow lawyer in an interoffice memorandum, you can be blunter, especially regarding a difficult or likely losing claim ("Based on how the statute has been interpreted over the past 20 years, we will almost certainly be unsuccessful raising suit on this issue.").

How Is the Book Structured?

I've structured the book to follow the steps I take in teaching my two-course legal writing progression at USC: from Introduction to Legal Writing (which typically culminates in mastery of the legal memorandum) to Advanced Legal Writing (which typically culminates in mastery of the appellate brief). I start with my Five Steps to Turn Any Novice into a Legal Writer:

1. Unpack the Hierarchy of U.S. Law
2. Close Read a Statute
3. Apply Law to Facts
4. Read and Brief a Case
5. Anticipate How a Court Will Rule

Through the first five chapters of this textbook, you'll get a basic overview of the U.S. legal system. You'll learn how to break down a law and then apply it to varying situations. You'll read your first case and learn how to properly summarize case law. Finally, you'll learn how to use precedent cases to predict how courts will rule in future cases.

After that, I'll turn to the fundamentals of legal writing and then to specific forms of legal writing. I'll offer a number of assignments to practice those forms. I'll offer advice on how to workshop legal writing, a key part of my pedagogy that I borrowed from my years leading fiction workshops. I will also offer an introduction to basic legal research. To close, I'll lend some practical advice for law school and beyond.

Tips for Navigating *Legal Writing for the Undergraduate*

1. Be patient. What you're learning is normally reserved for first-year law students. Not only are law students committed to learning law, their study of legal writing is supported by simultaneous doctrinal courses (like contracts, procedure and torts) that reinforce their legal reasoning and argumentation skills.
2. Pay close attention to language. Law is a field where the choice of conjunction ("and" versus "or") or even punctuation in a legal standard can win or lose your case. Accordingly, your own choice of language must be sharp as well.
3. Don't try to write like a Supreme Court justice. Many undergraduates start their college careers trying to sound smart instead of actually saying smart things; they consult the thesaurus instead of refining their argument. Clarity is key in legal writing. The law is complicated, so keep your prose simple.
4. Know the source of your law. As you'll soon read, not all law in America is treated with equal weight. You must always cite the source of a given standard, and be mindful of where that source fits within the hierarchy of law.
5. Be an active reader. If you're not highlighting and jotting notes all over this book, you're not treating it right.
6. Be courageous in your Socratic dialogue. The first time I got called on in law school, I froze. A saintly classmate named Rafael Mason jumped in and saved the day. I was humiliated and it only augmented my feeling of imposter syndrome. The truth is, however, that no one other than you will remember your wrong answers in class. One of my favorite students once said during a class discussion, "I'm not sure I have this right, so I want to try." That's the spirit! What you're learning is hard, and your success is just as dependent on error as it is on affirmation.
7. Don't be intimidated by impressive peers. Pre-law students can't help but try to measure themselves against their classmates. But just because someone always sounds like a Rhodes Scholar doesn't mean their writing is amazing. (And even if it is amazing, you get the benefit of their brilliance, too, by sharing a class with them.)