

# Gathering opinions on new legal writers

BY WAYNE SCHIESS

*The author's survey was done a few years ago. It would be interesting to know how AI would figure into the consultants' responses today. —JK*

During the summers of 2022 and 2023, I had lunch meetings with 28 local lawyers in Austin, Texas. I was seeking input from practicing lawyers about how I could improve my teaching of first-year legal writing. These lawyers (my “consultants”) worked for commercial law firms both large and small, public-interest organizations, and government agencies.

Before meeting with them, I asked them to consider these four questions:

1. What kind of writing projects do you ask new lawyers to do?
2. What do you think of the writing abilities of new lawyers?
3. What do you think of new lawyers' ability to manage research-and-writing projects?
4. What are some additions to law-school legal-writing instruction that you would recommend?

## 1. WRITING PROJECTS

I learned that the type of writing that new lawyers are asked to do varies widely—much more widely than I realized, especially when the new lawyers work for government or public-interest organizations. The typical building blocks of legal writing in first-year courses are objective analysis (in a memo) and persuasive argument (in a brief). But new lawyers are asked to do numerous kinds of writing.

Many supervising lawyers assign these kinds of projects:

- Traditional research memos, email memos, email correspondence, case summaries, CLE or presentation papers, PowerPoint presentations, editing others' writing.

But in certain practice areas, the following:

- Administrative law: correspondence with complainants and complainees, demand letters, petitions, discovery documents, motions, settlement agreements, closing arguments, enforcement orders, administrative rules.
- Civil litigation: demand letters, petitions, discovery documents, pretrial motions, trial motions, proposed orders.
- Criminal cases: pretrial motions, trial motions, proposed orders.
- Judicial writing: bench memos, recommendation memos, drafting judicial opinions, one-page assessments of a case, summaries of a petition's grantworthiness, oral-argument questions.
- Legislative work: statutory reports and history documents.
- Web-based legal advice and information for nonlawyers.

I think my first-year legal-writing course does a good job of covering legal analysis and professional writing, but my course does not and cannot address the wide variety of legal writing my consultants described.

## 2. WRITING ABILITIES OF NEW LAWYERS

I was pleased to learn that, according to my consultants, the writing ability of new lawyers these days is okay. No one was gushing about it—after all, new lawyers need lots of practice and experience to become skilled legal writers. But I was pleased that I didn't hear any “the sky is falling” or “sound the alarm” reports.

I think that's partly because formal legal-writing instruction in U.S. law schools, once almost nonexistent, has been transformed in the last 30 years. At many or even most schools, legal writing has moved from a low-credit, pass-fail course taught by teaching assistants to a graded course taught by full-time faculty.

Still, there's room for improvement, and the most common concerns

expressed about new lawyers' writing fell into three categories: tone, concision, and organization.

**Tone.** My consultants said that new lawyers sometimes write too formally, with a stiff or stilted tone. They guessed that new lawyers might be trying to sound lawyerly. This is understandable, of course, and it's a phase that nearly every lawyer passes through. You've entered a learned profession, and you've become a licensed attorney, so you want to sound like one.<sup>1</sup> Yes, writing with an unduly formal tone is a flaw, but it's not a major one. With some good feedback about audience and purpose, new lawyers will adapt to expectations and begin to adopt a readable tone.

Occasionally, new lawyers overqualify their conclusions or hedge too much—they may be worried about taking a strong position. My consultants encourage new lawyers to be bold and let the senior lawyer ask questions to test the conclusions.

**Concision.** New lawyers' writing is sometimes wordy and verbose, my consultants said. They see long sentences, complex structures, and big words. But mostly, they said, they see documents that are too long. A memo that the assigning lawyer thought would be five pages is ten; an email message that could be two or three paragraphs is five. New lawyers need to weed out extraneous details and unnecessary background and deliver the key information or analysis efficiently.

Although I agree that concise writing is a challenge for new lawyers, my perspective as a teacher of first-year students makes me aware of a risk to keep in mind. If you apply pressure on novice legal writers to be concise, they might cut useful or necessary content just to achieve concision. In other words, to get the five-paragraph email down to three paragraphs, the beginner might just cut two paragraphs in total—perhaps removing a key legal standard or an important piece of the analysis.

What we want, of course, is for the writer to carefully edit all five paragraphs, removing a few words here, dropping an unnecessary comment there, and then consolidating so that we end up with three paragraphs. Ideally, the new lawyer learns to achieve concision by a series of small edits that add up.

**Organization.** Even a concise piece of legal writing that uses the right tone still needs to be well organized, and in this area my consultants had two key comments: First, they wanted more up-front, bottom-line summaries in nearly everything they read. Spill the beans: get to the point first and put the background second, they said. It's a good recommendation for all legal writing.<sup>2</sup> Second, the rest of the document should be sensibly ordered, with headings if necessary and strong topic and transition sentences.

These two key comments—the need for an up-front summary and the importance of a sensible, discernible order—highlight the reality

of law practice: that lawyers are busy. These two techniques help busy lawyers read and understand efficiently.

### 3. NEW LAWYERS' ABILITY TO MANAGE RESEARCH-AND-WRITING PROJECTS

The responses to this question fell into three categories: getting assignments, checking in, and following up.

**Getting assignments.** I practiced law before the internet, cellphones, and email, so I got assignments by going to someone's office with a pen and pad in hand. I sat and took notes. That's still a good idea, according to my consultants.

If possible, the assigning lawyer and assignment-receiving new lawyer should meet in person to discuss the assignment. The new lawyer should have something to write with—probably not just a cellphone or laptop.

Even when getting an assignment by email (the most common method, according to my consultants), it's usually a good idea to drop by and talk. The new lawyer should ask about the assigning lawyer's expectations on timing, depth, length, and so on to be sure they understand the assignment.

**Checking in.** After some initial work, the new lawyer should check in with the assigning lawyer to be sure they're on the right track. Based on my meetings in both summers, I learned that finding the right amount of checking in is a small but recurring problem—certainly understandable behavior by novices who don't know much about the law or the way that the employer's organization works.

Some new lawyers might hesitate to ask questions for fear of looking uninformed. In fact, some new lawyers and law students tell me that they sometimes avoid checking in with questions because they don't want to seem inept or ignorant.

But my consultants said that, in fact, not checking in with the assigning lawyer is a bigger problem than checking in too much. Although it doesn't happen often, doing the research and writing up a project that isn't what the assigning lawyer wanted is a serious problem. And it's best to check in only after completing at least some research, to have something concrete to report.

Actually, inadequate follow-up is a common enough concern that several of my consultants told me that their organization has built-in policies or systems for encouraging or requiring the new lawyer to check in with the assigning lawyer before completing the project.

**Following up.** According to my consultants, new lawyers should aspire to do more than merely answer the question; one recommendation is to include a short report on the best cases for and against the outcome predicted. In addition, new lawyers should invest in the problem: ask about it, care about it, try to get involved.

Some new lawyers make the mistake of assuming that it's a senior lawyer's job to get them involved and pull them into projects. But getting involved is a new lawyer's job. The new lawyer should become invested in the problem, ask follow-up questions, and care about the result for the client.

#### 4. RECOMMENDED CHANGES OR ADDITIONS TO LAW-SCHOOL LEGAL-WRITING INSTRUCTION

My consultants had lots of ideas, and I've listed some below. There are some great suggestions, but given that my focus is on first-year legal-writing courses, I've categorized them into two groups:

(a) Good ideas that my colleagues and I are already doing, are hoping to do more of, or are planning for the future:

- Oral assigning of projects.
- Assignments given and responded to by email only.
- Assignments that ask, "The client has done [or wants to do] X. What do you recommend?"

(b) Good ideas that might become part of an upper-division course or clinic but that would be difficult to implement in the first-year legal-writing course:

- Assignments to adapt a template motion or brief into a motion or brief on a different topic.
- Assignments to find motions, briefs, and other pleadings prepared by opposing counsel.

- Training in transactional drafting.
- Assignments to boil down a complex transaction into a concise report.

Ultimately, the most important thing I learned is that new lawyers' writing is not terrible or weak. It is generally good, is rarely poor, and is sometimes excellent. That was wonderful to hear.

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#### ENDNOTES

1. Schiess, *The Sound in Your Head*, *Austin Lawyer* (Nov 2009), p 6.
2. Schiess, *Legal Writing Nerd: Be One* 25–29, 30–36 (CreateSpace Independent Publishing, 2018).

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