

BOOK REVIEW

A REVIEW OF THE SECOND EDITION OF *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES, AND LAW REVIEW COMPETITION PAPERS*

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Most legal educators would agree that legal writing is a critical component of a law school's curriculum. While historically inconsequential, legal writing courses have become increasingly important to the educational mission of academia for at least three reasons. First, legal educators better recognize the value of professional skills, including legal writing, research, and analysis. Second, legal educators better appreciate the relationship between legal thought and legal writing in both doctrinal and practice-oriented courses. Third, legal educators better understand that legal writing courses teach the methodology of legal problem-solving and therefore compliment doctrinal courses and the law school's academic mission.

For these reasons, law schools typically offer students many opportunities to study legal writing, including first-year legal writing and research courses, advanced practice courses, seminars, law reviews, law journals, and independent research courses. These legal writing opportunities, however, have not translated into a variety of legal writing texts or teaching supplements, particularly for advanced writing courses. It is then with some satisfaction that this law school professor reviews a text on scholarly legal writing written for the upper-class law student.

Elizabeth Fajans and Mary R. Falk have written the second edition of a text that focuses on scholarly writing for law students.¹ Scholarly writing, as opposed to practical writing, requires students to analyze critically law, legal history, or jurisprudence without

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1. Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers* (2d ed., West 2000).

regard to advocacy or “the client.” It is a written analysis of the law in its purist academic form. While some would argue that legal scholarship is best left to academicians, student scholarship is still legal writing and thus pedagogically valuable.

Scholarly writing, however, differs from practical writing in a few important ways. First, the intended audience for legal scholarship is neither courts nor clients, but academicians and other interested legal readers. Second, the purpose of legal scholarship is to inform or to educate the reader about a particular law-related thesis or to share ideas about legal trends, not to predict a client’s legal result or to advocate on behalf of a client’s legal issues. Third, scholarly writing permits students to select topics, whereas practical legal writing “comes with the client.” Both scholarly and practical writing require, however, thorough research, keen analysis and argument, and an uncompromising attention to detail.

Fajans and Falk’s book has significant merit. The authors discuss the scholarly enterprise and the process of scholarly writing. The book demystifies the law review competition and the law review editorial process and explains the proper role of a law review editor. Divided into ten chapters, the book describes each step in the scholarly writing process.

Chapter 1 introduces students to scholarly writing and law reviews. The authors define scholarly writing as “critical writing,” which is distinguished from “instrumental writing” or writing associated with the practice of law.² This distinction could be viewed as artificial. While I agree that scholarly writing requires critical analysis of the law, so does “instrumental writing.” The authors would have been better served by explaining the similarities between “instrumental writing” and “critical writing” instead of drawing neat lines between these two highly cerebral forms of legal analysis. In any event, the authors nicely introduce the various types of scholarly writings, including the comment, the casenote, and the law review competition paper. The chapter also reviews the accepted formats of the various forms of scholarly writing and introduces a process of scholarly writing that takes students through six steps toward a finished product.³ Each step is explained fully in later chapters. At the close of the chapter, the authors include an appendix of student-written scholarly pieces to serve as

2. *Id.* at 1.

3. *Id.* at 14–15.

examples of well-researched and well-analyzed scholarship — a useful addition to the chapter.

The most valuable section in Chapter 1 is a detailed list of potential theses for each type of scholarly writing.⁴ For example, when writing a casenote — the analysis of a single court’s opinion — the authors suggest that students consider the following theses: the court’s result was correct, but it failed to articulate a clear legal standard, which could be *x*; the court’s result was incorrect, because the court relied on repudiated constitutional tenets; or the court’s result was correct, but it misapplied established precedent.⁵

While most law students can appreciate the format requirements of a law review competition paper, few will have the intellectual flexibility to develop a thesis or analytical framework for a writing. The authors could expand this section and perhaps develop it into its own chapter. This would allow the authors to fully develop the analytical aspects of scholarly writing.

Chapter 2 tackles two difficult aspects of student scholarship — choosing a subject and developing a thesis. The authors offer excellent suggestions for identifying good scholarly subject matter, such as circuit court “splits” and emerging trends in the law.⁶ They also offer sound advice in narrowing broad and unmanageable topics.⁷ Most important, Fajans and Falk stress the significance of critical reading, reading between the lines of judicial opinions or legal commentary to recognize the implicit — and sometimes explicit — flaws in the author’s conclusions or reasoning.⁸ Critical reading requires students to recognize the type of argument imbedded in a judicial opinion or law review article and to diagnose its flaws. The authors include a useful checklist that identifies and explains the varieties of legal argument, including argument from precedent, interpretive argument, and normative argument.⁹ Finally, the authors recommend that students keep a research journal — a time-consuming but ultimately useful exercise.

Chapter 3 discusses research strategies. While students have a variety of legal research texts from which to choose, this chapter offers a useful, although cursory, review of contemporary research tools.

4. *Id.* at 6–7, 11.

5. *Id.* at 11.

6. *Id.* at 20–21.

7. *Id.* at 24–27.

8. *Id.* at 28–34.

9. *Id.* at 30–31.

Chapter 4 details the scholarly writing process. Here, the authors further develop the step-by-step approach to scholarly writing first introduced in Chapter 1. The authors recommend the use of “dump” or “zero” drafts.¹⁰ These types of predrafts allow students the latitude to begin organizing their thoughts and research on paper without the “pressure to polish,” which sometimes comes with a first draft.¹¹ These predrafts also help students organize their thoughts and research into a workable outline. The authors also explain the benefits of charts and diagrams to help students visualize a coherent and comprehensive outline. Finally, the authors discuss the first draft. In this section, the authors offer suggestions to help students convert an outline into a working draft. For example, the authors suggest that students begin writing anywhere in the draft. Often, writing an “easy” section of a paper, even if not in proper analytical order, will help a writer develop a working draft.¹² While writing methodology or strategy is difficult to teach students because writing is such a uniquely individual exercise, the authors do a commendable job of demystifying the first draft.

Chapter 5 continues the discussion of the scholarly writing process, focusing primarily on revising and polishing the draft. The authors introduce the idea of “audience” and wisely instruct students to revise their writing with a keen eye focused on the reader.¹³ While a discussion of “audience” might be better placed in earlier chapters on the purpose of scholarly writing and thesis development, the authors do an admirable job of explaining this important writing precept. The remaining sections of the chapter offer additional suggestions on revising and editing. The authors examine macro organization, small-scale organization, transitions and topic sentences, roadmapping, paragraph structure, and line edits. The authors also emphasize the importance of maintaining perspective, and they encourage novice legal writers to take time off between revisions.¹⁴

Chapter 6 examines footnotes. It discusses the attribution of legal sources, fair use, and plagiarism. The chapter also briefly discusses the use of “textual” footnotes, those lengthy notes that

10. *Id.* at 64–68.

11. *Id.*

12. *Id.* at 78.

13. *Id.* at 82–83.

14. *Id.* at 83–84.

purport to further examine an idea raised in text or to discuss an idea tangential to, but not directly pertinent to, the text. While law students likely have visited these topics before, the “textual” footnote may be a novel concept and thus a good place to offer more substance. To better illustrate the types and uses of footnotes, the authors extensively utilize footnotes throughout the chapter — an interesting and valuable teaching tool.

Chapter 7 examines some of the accepted conventions of grammar and punctuation. Chapter 8 discusses style. While these two chapters may help students, or at least remind them of effective style and English composition, they cannot offer the substance and finesse of the many excellent texts devoted to this topic that are already available.¹⁵ And though Chapter 8 offers some useful stylistic suggestions, which may aid the novice scholar-student, it labors to explain the stylistic conventions unique to scholarly writing. Law students might be better served if the authors focused their text on the unique aspects of scholarly writing, such as format, process, and analysis, and left a discussion of grammar to others.

Chapter 9 explores the law review editorial process. It discusses the distinct roles of peer editing (editing student scholarship) and expert editing (editing professional scholarship). One section in this chapter explains how student editors can develop constructive editorial techniques. This section discusses various types of editorial feedback, including exploratory feedback, descriptive feedback, prescriptive feedback, and judgmental feedback. While not pertaining to the scholarly writing process per se, the chapter offers a very useful examination of the law review editorial process and serves a valuable role in teaching novice student editors how to edit.

Chapter 10 discusses the many writing competitions sponsored by various organizations and explains how students can submit their scholarship for publication. It offers useful information about law review article selection and helps students locate organizations that sponsor writing competitions. While helpful, the information provided is only tangential to the true purpose of the book — writing scholarly papers. The purpose of the book might better be served if this chapter were included as an appendix.

15. For a more in-depth discussion of writing style, see *The Chicago Manual of Style* (14th ed., U. Chi. Press 1993), Laurel Currie Oates, Anne Enquist & Kelly Kunsch, *The Legal Writing Handbook* (2d ed., Aspen L. & Bus. 1998), and Tex. L. Rev., *Manual on Usage & Style* (8th ed., Tex. L. Rev. Assn. 1995).

The book concludes with three appendices. Appendix A reprints a sample law review competition paper. I am not sure I see the value of reprinting a single piece of writing that exemplifies only one type of scholarship. To truly add value to this appendix, the authors might have been better served to offer citations to various articles that demonstrate the various forms of legal scholarship, each under a separate heading identifying the type of scholarship listed. This appendix could be further refined by dividing each group by the type of thesis discussed, thereby offering examples of the argument strategies first discussed in Chapter 1.

Appendix B offers sample answers to the three exercises found in the book. Appendix C discusses scholarly writing workshops and courses. It suggests four extracurricular workshops intended to better acquaint students with scholarly writing. The appendix also includes three sample syllabi for teachers interested in developing scholarly writing courses. This section, while useful, could have been drafted as part of a teacher's manual or supplement. Despite the fact that the authors consider law teachers a "secondary audience," including teaching materials in a student text is problematic for a variety of reasons. Finally, the book concludes with a well-developed descriptive word index.

"How to" books can be wrought with danger, particularly when they purport to describe a complex and subjective process, such as scholarly writing. The authors, however, maintain a good balance between broad generalizations and specific suggestions on developing and writing legal scholarship. This book is concise and well written, despite the frequent use of parentheses (if it does not belong in the text, then omit it) and the appearance of the exclamation point! And while this reviewer would have preferred more substance on analysis and thesis development, Fajans and Falk have written a comprehensive text on scholarly writing that is a useful addition to the legal writing field.