

ARTICLE

REQUIRING THREE YEARS OF REAL-WORLD LEGAL WRITING INSTRUCTION: LAW STUDENTS NEED IT; PROSPECTIVE EMPLOYERS WANT IT; THE FUTURE OF THE LEGAL PROFESSION DEMANDS IT

Adam Lamparello and Charles E. MacLean***

I.	INTRODUCTION	97
II.	THREE-YEAR PERSUASION CURRICULUM – THE FIRST YEAR	100
A.	<i>Persuasion I: The Amicus (or Habeas) Model or Storyline Approach (Three Credits)</i>	101
1.	<i>The Amicus and Legal Research Connection (Three Credits)</i>	101
2.	<i>The Storyline Option (Linear Model) (Three Credits)</i>	103
3.	<i>Suggested Texts (Limit Three; Consider Others for Inclusion in Future Courses)</i>	104
B.	<i>Persuasion II: The Complaint and Motion to Dismiss (Three Credits)</i>	105
1.	<i>The Complaint</i>	105
2.	<i>The Motion to Dismiss and Response (Replacing the Appellate Brief)</i>	106
3.	<i>Suggested Texts</i>	107

* Assistant Professor of Law, Indiana Tech Law School, Fort Wayne, Indiana; J.D., Ohio State University College of Law; LL.M., New York University School of Law.

** Assistant Professor of Law, Indiana Tech Law School, Fort Wayne, Indiana; J.D., *cum laude*, William Mitchell College of Law; M.B.A.-Finance, B.A., University of Minnesota.

III. THREE-YEAR PERSUASION CURRICULUM – THE SECOND YEAR	107
A. <i>Persuasion III: The Answer and Discovery (Two Credits)</i>	108
1. <i>The Answer</i>	108
2. <i>Discovery</i>	108
3. <i>Additional Two-Credit Electives</i>	109
4. <i>Suggested Texts</i>	109
B. <i>Persuasion IV: Mediation, Negotiation, and Summary Judgment (Two Credits)</i>	110
1. <i>Additional One-Credit Electives</i>	111
2. <i>Suggested Texts</i>	111
IV. THREE-YEAR PERSUASION CURRICULUM – THE THIRD YEAR	111
A. <i>Persuasion V: The Appellate Brief and Argument (Three Credits)</i>	111
1. <i>Additional One-Credit Electives</i>	112
2. <i>Suggested Texts</i>	112
B. <i>Persuasion VI: Writing and Rewriting (Two Credits)</i>	112
1. <i>Additional One-Credit Electives</i>	113
2. <i>Suggested Texts</i>	113
V. AN EVOLUTION, NOT A REVOLUTION	113
A. <i>Required Courses Are Essential—In Each Semester</i>	114
1. <i>Law Students Are Not Getting Sufficient Practice and Repetition</i>	115
2. <i>Legal Writing Curriculums Are Not Including Important Writing Assignments</i>	115
B. <i>Collaboration with Doctrinal Faculty Can Enhance the Legal Writing Experience</i>	117
VI. CONCLUSION.....	117

“Reforming legal education—an urgent societal need—is a glacial process . . . [, and] the glacier has been flowing the wrong way.”¹ The problem is not “spending too much time in law school,”² but instead an “[e]ntrenched pedagogical mediocrity . . . [that] infects even the best law schools.”³ In other words, law students “are not mastering the essential skills.”⁴

I. INTRODUCTION

Law schools—and professors—have been the target of substantial and ongoing criticism for failing to provide the type of “real-world” training⁵ that is vital to producing “practice-ready”⁶ graduates.⁷ As one recent graduate states, “[t]he big problem for many people is that law school and the practice of law are so different.”⁸

As a result, law firms have been forced to implement formal training programs,⁹ often at substantial cost. A recent survey, for example, found that 47% of law firms had a client who refused to pay for legal services rendered by a first or second year associate.¹⁰ As Georgetown law professor Deborah Epstein explains, “[c]lients at large law firms are now saying they won’t pay for new associates to work on cases because they aren’t sufficiently trained on how to do the work when they graduate from law school.”¹¹ Justice Antonin Scalia has criticized law

1. Bryan Garner, Editorial, *Three Years, Better Spent*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., Megan A. Boyd & Adam Lamparello, *Legal Writing for the “Real World”*: A Practical Guide to Success, 46 J. MARSHALL L. REV. 487, 487–88, 528–31 (2013).

6. See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247 (2012), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1009&context=jljsj>; Gerald Lebovitz, *Legal Writing in the Practice-Ready Law School*, 85 N.Y. ST. B.J. 72 (2013), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1264&context=gerald_lebovits; Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 1L Curriculum: Sequenced “Writing Across the Curriculum” Assignments as the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U. L.J. 287 (2012), available at <http://www.law.siu.edu/journal/36winter/3%20-%20Noble-Allgire-finished.pdf>.

7. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0.

8. *Id.*

9. *Id.*

10. *Id.*

11. Catherine Ho, *Group Pushes for Practical Training For Law Students*, WASH. POST, July 14, 2013, available at http://articles.washingtonpost.com/2013-07-14/business/40575393_1_law-schools-barry-currier-law-placement.

professors for producing scholarship that is of “no value to the practitioner or would-be practitioner.”¹²

There have been tangible consequences. In the fall of 2013, law school applications dropped 17.9% and the number of applicants decreased 12.3%.¹³ In October of 2013, the number of LSAT test-takers fell 11% from the previous year and 45% from the 2009 peak.¹⁴ The Law School Admission Council has reported that law school applications have dropped from 602,300 to 385,400 in the last three years.¹⁵ Stated simply, the legal academy is at a crossroads, and the time for change has arrived.

Ironically, however, these turbulent times present a golden opportunity for legal writing professors across the country to be on the vanguard of transformative change in the legal academy—and achieve the institutional parity that is much deserved and long overdue.¹⁶ Just as “narrative is a powerful tool for persuasion,”¹⁷ a “real world” legal writing curriculum can be a potent force in merging the acquisition of legal knowledge with the practice of law.

Indeed, law students, commentators, and scholars are hungry for change in legal writing pedagogy. In July of 2013, the Clinical Legal Education Association, comprised of over 1,000 law professors, drafted a letter to the American Bar Association advocating for an increased emphasis on practical skills training.¹⁸

12. A summation of Justice Scalia’s critique of legal education is available at *Scalia’s Critique of Legal Education Echoes UNH Law’s Practice-Ready Philosophy*, U. N.H. (Mar. 25, 2013), <http://law.unh.edu/news/2013/03/scalias-critique-of-legal-education-echoes-unh-laws-practice-ready-philosophy>. For a similar criticism by Chief Justice Roberts, see James B. Levy, *SCOTUS Chief Justice Roberts Criticizes Legal Scholarship for Being Out of Touch with Practicing Bar*, LEGAL SKILLS PROF BLOG (July 7, 2011), http://lawprofessors.typepad.com/legal_skills/2011/07/scotus-chief-justice-roberts-criticizes-legal-scholarship-for-being-out-of-touch-with-practicing-bar.html (quoting Chief Justice Roberts’ criticism of the “disconnect between the academy and the profession”).

13. Debra Cassens Weiss, *Law School Applications Drop Nearly 18 Percent, Benefitting Students Seeking Additional Financial Aid*, ABAJOURNAL.COM (Aug. 20, 2013), http://www.abajournal.com/news/article/law_school_applications_drop_nearly_18_percent_benefitting_students_seeking.

14. Jacob Gershman, *Number of LSAT Test Takers Is Down 45% Since 2009*, WALL ST. J. LAW BLOG (Oct. 31, 2013), <http://blogs.wsj.com/law/2013/10/31/number-of-lsat-test-takers-is-down-45-since-2009/?mod=WSJBlog>.

15. Vicki Salemi, *Law School Applications Decline Drastically*, METRO (Nov. 14, 2013), <http://www.metro.us/newyork/lifestyle/education/2013/11/14/law-school-applications-are-down/>.

16. Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 942 (2006) (“Legal writing teachers however are underpaid and under-recognized in much of the law school academy.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1357635.

17. Jennifer Sheppard, *Once Upon a Time, Happily Ever After, And In a Galaxy Far, Far, Away: Using Narrative to Fill the Cognitive Gap Left By Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 257 (2009).

18. Ho, *supra* note 11.

Professor and scholar Bryan Garner didn't mince words: "the *biggest failure* at most law schools is the dearth of seriously good skills courses, especially *training in legal writing*."¹⁹ Garner states as follows:

So what's the cure? For starters, the second and third years of law school ought to include much more research, writing and editing, with three to six short papers required in each course Each paper should be subjected to rigorous editing, then rewritten and resubmitted Law schools should get their priorities straight and better meet the needs of their students' future employers. Short of such reform, the future for new law school graduates looks dismal.²⁰

Garner states that this is "perfectly doable."²¹ The Authors agree and, in this three-part series, hope to begin a collaborative discussion with legal writing, clinical, *and* doctrinal faculty about what "change" should mean.

In Part I, the Authors rolled out a blueprint for change, which includes three recommendations: (1) more *required* skills courses that mirror the actual practice of law; (2) a *three-year* program that includes up to four writing credits in *every* semester; and (3) increased collaboration between legal writing professors and doctrinal faculty.²² In this Article (Part II), the Authors get more specific and propose a three-year legal writing curriculum that builds upon the previous generations' impressive scholarly and curricular accomplishments. In others words, the new legal writing pedagogy represents an evolution, not a revolution. The proposed curriculum includes the following:

- ***A linear approach to legal writing:*** Law students should not just learn to "think like lawyers," but should be trained to "do what lawyers do." Recent law graduates often lack an understanding of the role that various documents play in the litigation process or the specific writing skills, purposes, and strategic considerations that apply uniquely to certain documents. The lack of a linear perspective of how cases proceed from fact investigation to appeal, coupled with assignments that are divorced from their context in litigation, cause students to miss out on a "big picture" understanding of how law is practiced in the real world. The proposed

19. Garner, *supra* note 1 (emphasis added).

20. *Id.*

21. *Id.*

22. Adam Lamparello & Charles E. MacLean, *Legal Writing—What's Next? Real-World Persuasion Pedagogy from Day One*, 48 N. ENGL. L. REV. ON REMAND ____ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363108.

curriculum adopts a contextual approach, requiring students to draft the most common litigation documents from fact gathering through the appellate process as it happens in the real-world. This provides context, breadth, and repetition—essential elements of a practice-ready graduate.

- ***A required course each semester and the opportunity to take a second, skills-based elective:***
Each semester will have one required legal writing course that focuses on a different litigation document and re-enforces the persuasive advocacy skills that are characteristic of the country's excellent advocates. The proposal below includes recommendations for both required and elective courses.
- ***Suggested textbooks and supplemental materials:***
A list of suggested texts is included to guide legal writing professors.

Legal writing for the next generation will take with it the foundational and analytical skills that all writers—not just legal writers—must possess. The new approach, however, will connect legal writing and law practice and merge the classroom with the courtroom. As Harvard professor Alan Dershowitz explains, “[t]he law school of tomorrow will have to be a different place than the law school of yesterday *and* today if legal education is to prepare the next generation of lawyers for a quickly changing profession and world.”²³ In a nutshell, this requires legal writing faculty to add a story line to a developing narrative, and the tag line is “*legal writing for the real world.*”

II. THREE-YEAR PERSUASION CURRICULUM – THE FIRST YEAR

From the first day of law school, legal writing courses should engage the students in the actual or simulated practice of law. Whether through real—or hypothetical—cases, legal writing professors should present first-year students with cutting-edge legal issues involving, for example, civil liberties, race and gender equality, or political access.

From day one, law students should be trained to analyze legal problems from a variety of perspectives and propose original—and persuasive—solutions. The goal is not simply to create excellent advocates but to produce graduates who value ethics, diversity, and service.

23. *How to Fix Law School: Six Experts Tell Us What They'd Change*, NEW REPUBLIC (July 23, 2013), <http://www.newrepublic.com/article/113983/how-fix-law-school-symposium>.

A. *Persuasion I: The Amicus (or Habeas) Model or Storyline Approach (Three Credits)*

Persuasion I can be taught in two ways: (1) the amicus (or habeas) model²⁴ or the storyline (linear) approach. Professors who choose the amicus model will not, however, forfeit the linear approach because both introductory courses teach the same skills (objective writing). Furthermore, *Persuasion II*, which begins with the Complaint, logically follows from the assignments given under either option.

To begin with, the dichotomy between objective and persuasive writing is false. Like other courses in law school, legal writing should be taught in the “gray” area and take a nuanced approach. For example, different writing techniques apply to documents *within* the objective (or persuasive) category, e.g., a motion to dismiss versus an appellate brief. In addition, lawyers can still be persuasive in “objective” formats, e.g., the Complaint and Question Presented and Table of Contents or Authorities in an appellate brief.

1. *The Amicus and Legal Research Connection (Three Credits)*. The greatest movies—and novels—are not always linear. Some begin in the middle, others at the end. All of them, however, excite and inspire the viewer from the beginning. The amicus model recognizes that to have a powerful introduction (the first semester of law school) you should begin in the middle.

Traditionally, first-semester, first-year legal writing courses require students to learn the basics of legal research, citation, and drafting objective memorandums. This often involves numerous citation exercises and two or three writing assignments analyzing hypothetical legal issues. Importantly, however, this approach can be dry and theory-driven and is entirely divorced from the context and practice of law. In other words, traditional predictive writing courses fail to excite students about the writing craft—and the profession they will soon enter. It is a mediocre beginning to what should be a great introduction.

Under the amicus model, professors will focus the first semester—the opening scene—on an amicus brief of substantial public import. Under close faculty supervision, the students will participate by researching the relevant legal issues and preparing two or three memoranda that predict how a court—

24. Charles E. MacLean & Adam Lamparello, *Amicus Briefs: Friends of Lawyering Skills Pedagogy*, 20 LAW TEACHER ____ (forthcoming 2014), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1049&context=adam_lamparello1.

whether it is the United States Supreme Court or the Maine Supreme Court²⁵—will rule.

The amicus model neither conflicts with nor undermines the traditional analytical model. Classroom instruction—and assignments—will focus on paper and electronic research as well as foundational legal writing technique. Problems sets and exercises from textbooks are also essential.

First-year students will acquire the same skills as taught in traditional predictive writing courses, including the following:

- Basic citation;
- The structure of our state and federal court system;
- How to identify and interpret different parts of a judicial opinion;
- The distinction between policy and law;
- Differences between primary and secondary authority;
- The “IRAC” or “CRAC” model;
- Addressing and responding to counter arguments; and
- Writing to ensure flow, organization, grammar, and style.

Additionally, the legal writing professor can require students to prepare client letters and electronic mail communications, conduct simulated client interviews as if they were advising the actual party, and keep records of hours billed.

In this setting, students will learn skills while knowing that their work product will have a “real-world” impact. This setting can transform the classroom into a dynamic learning environment, encourage group work, and facilitate collaboration with doctrinal and clinical faculty members. For example, legal writing instructors can work with clinical faculty in a law school’s amicus or habeas project, volunteer to assist local organizations (or law firms), or simply search online for the many amicus opportunities that state and federal courts provide.

Law students should be involved in cases that matter, not only to prepare them for the practice of law, but to show students that what they do has an impact on the lives of others.

25. The Authors had the opportunity to submit an amicus brief before the Maine Supreme Judicial Court in *State v. Spencer Glover*, where we argued that a suspect’s refusal to consent to a pre-arrest, warrantless DNA sample could not be used as “consciousness of guilt” by the state at trial. In addition, we filed an amicus brief in *Hall v. Florida*, argued before the United States Supreme Court on March 3, 2013, arguing that “IQ cutoffs” violated the Eighth Amendment’s prohibition against Cruel and Unusual Punishment. See generally *Hall v. Florida*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/freddie-lee-hall-v-florida/> (last updated Mar. 3, 2014). Cases like these allow students to be involved in transformative litigation and apply their reasoning, research, and citation skills in a closely supervised environment.

2. *The Storyline Option (Linear Model) (Three Credits)*. This option teaches the skills outlined above and mirrors the actual practice of law. Students start at the beginning—the client interview—and transforms the classroom into a law firm.

On day one, students will be presented with a hypothetical fact pattern and client. The professor can serve as the “client,” or collaborate with another faculty member, preferably in the doctrinal area, to create real-world simulations that involve cutting-edge legal issues.

In addition to the skills outlined above, students would gain experience in:

- Client counseling (simulated client meetings);
- Professional email communications (between lawyer and client);
- Billing and recordkeeping;
- Basic citation;
- Legal research;
- Two or three objective memorandums; and
- A client letter.

The semester would begin with a simulated client meeting where, among other things, students gather additional facts, answer the client’s questions, and address all of the client’s relevant concerns. This is an excellent opportunity for professors to get creative, *e.g.*, including clients from diverse backgrounds and, therefore, focus on interpersonal communication.

After the client meeting, the students will perform three tasks: (1) identify the relevant legal issues, which should not be overly complex or numerous (we suggest three); (2) follow-up with the client via email; and (3) bill the client for that time.

The next phase of the course involves research and basic citation skills, followed by the first memorandum. Importantly, the first memorandum should not be lengthy. The professor can, for example, focus solely on the “Discussion,” section, emphasizing organization (*e.g.*, IRAC or CRAC), presentation of legal authority (*e.g.*, primary versus secondary authority), favorable versus unfavorable law, tone (objective rather than persuasive), and flow (*e.g.*, avoiding repetition, esoteric words, Latin, and legalese). Individual conferences should also be conducted at this time to provide feedback and individual attention, which we believe is crucial to an effective legal writing pedagogy. As three well-known legal writing scholars explain, “[s]eeking feedback earlier in the process gives both author and responder space to grow.”²⁶

26. Linda L. Berger et al., *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 *LEGAL WRITING* 521, 538 (2010).

After the first memorandum, a second client meeting will allow the student-lawyers to advise their client regarding their findings and to answer all relevant questions. A second memorandum will follow, integrating the facts (and additional components) of a memorandum, and a final memorandum will incorporate revisions (and rewrites, as necessary), and allow students to do their own research.

The semester will conclude with a letter advising the client about, among other things, the likelihood of success and recommended courses of action. The storyline approach retains the fundamental techniques taught in the traditional model, but does so in a real-world context that requires client interaction and strategic decision-making.

The Authors also believe that grading rubrics are invaluable. While good writing cannot be quantified with mathematical precisions, it can identify a student's strengths and weaknesses and be a fairer way to grade the course. With respect to weighting each assignment, we offer the following as a starting point for discussion:

- Client meetings: pass or fail;
- E-mail communications: pass or fail;
- Billing and recordkeeping: pass or fail;
- Citation exercises: 5%;
- Memorandum One: 15%;
- Memorandum Two: 30%;
- Memorandum Three: 40%; and
- Client letter: 10%.

3. *Suggested Texts (Limit Three; Consider Others for Inclusion in Future Courses).*

- Linda Edwards, *Legal Writing: Process, Analysis, and Organization* (Aspen Publishers 5th ed. 2010);
- Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (Aspen 7th ed. 2013);
- Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting it Right and Getting It Written* (West 5th ed. 2010);
- Deborah E. Bouchoux, *Concise Guide to Legal Research and Writing* (Aspen Publishers 2010);
- Bryan A. Garner, *Legal Writing in Plain English, Second Edition: A Text with Exercises* (Univ. of Chicago Press 2d Ed. 2013);
- William Strunk, Jr., E.B. White and Roger Angell, *The Elements of Style* (Longman 4th ed. 1999);

- Bryan A. Garner, *The Redbook: A Manual on Legal Style* (West Academic Publishing 3d ed. 2013);
- The Bluebook: A Uniform System of Citation (Harvard Law Review Association 19th ed. 2011);
- Manual on Usage and Style (University of Texas Law Review 12th ed. 2010); and
- Richard Michael Fischl and Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* (Carolina Academic Press 1st ed. 1999).

How should the instructor choose the legal issues? As explained below, the hypothetical should lead to a lawsuit: (1) venued in federal district court; (2) based on diversity of jurisdiction; and (3) giving rise to a motion to dismiss for either (a) lack of personal jurisdiction; or (b) failure to state a claim upon which relief can be granted. Of course, the instructor can use a hypothetical for *Persuasion II*, or create a new fact pattern (which will be required for those using an amicus model).

B. Persuasion II: The Complaint and Motion to Dismiss (Three Credits)

The second semester focuses on the complaint and a motion to dismiss. Drafting these documents in one semester will force students to analyze the law and facts from opposing points of view and encourage robust classroom discussion.

1. *The Complaint.* As stated above, the preferable approach is to venue the Complaint in a federal district court where the law school is located. This will familiarize students with the relevant federal, state, and local court rules.

In this part of the course, students will practice the writing skills that apply with particular force to a complaint. They include:

- Knowing how to draft a “short and plain” statement of the facts;²⁷
- Alleging subject matter jurisdiction, personal jurisdiction, and venue;
- Organizing factual allegations;
- Alleging facts sufficient to support each cause of action without revealing too much information;
- Pleading facts with particularity when required;
- Attaching and incorporating documents into the Complaint;
- Offering expert support for claims when required;

27. FED. R. CIV. P. 8(a)(2).

- Alleging facts sufficient to support claims for punitive damages and attorney fees; and
- Avoiding a motion to dismiss for failure to state a claim.

One of the goals is to facilitate strategic thinking, *e.g.*, developing a theory of the case and anticipating the adversary's legal and factual responses. Two drafts of the complaint should be required to ensure practice in rewriting and revising the complaint. Additionally, individual conferences should be conducted after the first draft to ensure adequate supervision and instruction.

2. *The Motion to Dismiss and Response (Replacing the Appellate Brief)*. The motion to dismiss, *e.g.*, for lack of personal jurisdiction or failure to state a claim upon which relief can be granted—and reply—will replace the appellate brief and be used for end-of-the-semester oral arguments (and selection to moot court). In this part of the course, professors have the two options: (1) omit the response and require two (or three) drafts of the movant's motion; or (2) require two drafts of movant's motion and one draft of the response. In this part of the course, students will learn, among other things, skills related to:

- Writing a strong introduction;
- Storytelling and narrative;
- Knowing the standard of review;
- Understanding the audience;
- Outlining the relevant facts persuasively but accurately and addressing unfavorable facts;
- Presenting the law persuasively and accurately and addressing unhelpful law;
- Analyzing the facts in light of the law, making your strongest argument first;
- Effectively addressing actual or likely counterarguments; and
- Creating a strong conclusion.

Under either option above, the first draft of the motion to dismiss should focus exclusively on either the "Statement of Facts" or "Legal Argument." Preferably, the first draft should focus on narrative storytelling,²⁸ and therefore require the students to craft a persuasive statement of facts. The second draft would incorporate a procedural history, introduction

28. See, *e.g.*, Linda Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 266 (2009).

(optional), and legal argument. Importantly, including a response brief would allow students to “switch sides,” cognitively, and reinforce the value of analytical thinking.

The course concludes with a section-wide moot court competition that can be administered using: (1) the same hypothetical used for the complaint and motion to dismiss (provided it was used by all instructors); or (2) a pending case, where the parties’ briefs and relevant research are provided.

In *Persuasion II*, the instructor should focus on no more than two legal issues, one procedural, *e.g.*, lack of diversity, and the other substantive, *e.g.*, defamation.

With respect to grading, the Authors suggest the following:

- The complaint: 15%;
- First draft of the motion (Statement of Facts or Legal Argument only): 20%;
- Second draft of the motion: 45%; and
- The reply: 20%.

If the professor decides not to include a response brief, the Authors suggest allocating an additional 5% to the first draft of the motion and 15% to the second.

3. *Suggested Texts.*

- Ross Guberman, *Point Made: How to Write Like the Nation’s Top Advocates* (Oxford University Press, 1st ed. 2011);
- Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 1st ed. 2008); and
- Noah A. Messing, *The Art of Advocacy: Briefs, Motions, and Writing Strategies of America’s Best Lawyers* (Aspen Publishers 2013).

III. THREE-YEAR PERSUASION CURRICULUM – THE SECOND YEAR

In recent years, law schools have added a substantial number of legal writing courses to their curriculum.²⁹ At least one school, Mercer University’s Walter F. George School of Law, has a legal writing concentration.³⁰ In most curriculums, however, the amount of *required* writing courses remains low. This should change.

29. See generally GEORGE MADER ET AL., ASS’N OF LEGAL WRITING DIRECTORS, LEGAL WRITING INSTITUTE, *REPORT OF THE ANNUAL LEGAL WRITING SURVEY* (2013), available at <http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf>.

30. Linda H. Edwards, *Certificate in Advanced Legal Writing*, 9 PERSPECTIVES 116 (2001), available at <http://info.legalsolutions.thomsonreuters.com/pdf/perspec/2001-spring/spring-2001-3.pdf>. See generally MERCER LAW, *Certificate in Advanced Legal Writing, Research, and Drafting*, <http://www.law.mercer.edu/academics/legalwriting/certificate> (last visited Mar. 9, 2014).

The second and third years should include one required course for each semester and give students the option to take one additional writing or skills-based course. In so doing, professors should continue the linear approach, provide individual feedback, and emphasize the importance of writing and rewriting. Furthermore, in the Authors' view, law schools should eliminate the scholarly paper requirement because it is too attenuated from real-world practice.

A. Persuasion III: The Answer and Discovery (Two Credits)

In the first semester of their second year, students will compete the following: (1) draft an answer; (2) draft the first set of interrogatories and document requests; and (3) conduct a simulated deposition.³¹

1. *The Answer.* This part of the course will include the following:

- Responding to each allegation in the Complaint by admitting, denying, or stating that you lack sufficient information to answer the allegation;
- Admitting or denying allegations in part;
- Responding to allegations without providing excessive information;
- Responding to each and every allegation in the Complaint;
- Raising all potentially applicable affirmative defenses (especially those Rule 12(b) defenses that may be waived);³² and
- Making counterclaims and third-party claims.

2. *Discovery.*

a. Interrogatories and Document Requests. In this part of the course, the professor can pair students into groups of two or four, representing the opposing parties, and propound an initial set of interrogatories and document requests in accordance with the relevant court rules. This will provide practical training in the following areas:

- Knowing what information you need to prove your claims or disprove the opposing party's claims;
- Defining terms;

31. Of course, professors certainly have the option to choose a different fact pattern, provided they retain the linear approach.

32. Compare FED. R. CIV. P. 12(b) (listing defenses), with FED. R. CIV. P. 12(h) (listing defenses a party may waive).

- Asking the right questions;
- Narrowing your focus to avoid objections;
- Knowing the rules about the number of discovery requests permitted, the grounds for objections, and when to file a motion to compel; and
- Using care when recycling prior discovery requests.

In this and other contexts, the importance of peer review cannot be overstated. Thus, students should have the opportunity to receive in-class feedback on their work and offer feedback on the work of others in an environment that encourages collaboration and constructive criticism.

b. Depositions. In this part of the course, students will conduct a mock deposition in which they learn, among other things, skills related to:

- Formulating the right questions;
- Asking questions that will not lead to objections;
- Knowing how and when to object (and preserve an objection);
- Understanding the value of a deposition outline; and
- Responding to questions without revealing too much.

With respect to grading, the Authors suggest that that this course can be graded on a pass or fail basis. If graded, we suggest the following grade allocation:

- The Answer: 30%;
- Interrogatories and document requests: 40%; and
- The deposition: 30%.

3. Additional Two-Credit Electives.

- Looking Ahead: Bar Exam Overview
- Ethics & the Legal Writer
- Rewriting and Revision
- Trial Advocacy
- Advanced Legal Writing: The Trial Brief
- Drafting in the Transactional Context
- Mediation and Arbitration Statements

4. Suggested Texts.

- Paul W. Grimm, Charles S. Fax, Paul Mark Sandler, *Discovery Problems and Their Solutions* (American Bar Association, 2d ed. 2010); and
- Shane Read, *Winning at Deposition* (Westway Publishing 2012).

B. Persuasion IV: Mediation, Negotiation, and Summary Judgment (Two Credits)

In *Persuasion IV*, students will: (1) conduct a simulated settlement conference or mediation and (2) prepare a motion for summary judgment and reply in which they marshal the facts gleaned in discovery to further develop their narrative and legal argument. This course will teach the following skills:

- Knowing the standard and crafting a persuasive explanation of the standard;
- Creating a theme using principles of equity, logic, emotion, and the like;
- Drafting a persuasive narrative of the undisputed facts (in a separate document if required by the local rules);
- Supporting all facts with citations to admissible evidence in the record;
- Creating a disputed fact;
- Performing an analysis of the law and facts;
- Explaining why a statute does or does not apply, a helpful case is applicable, an unhelpful case is inapplicable, and public policy or equitable principles support your client's position; and
- Summing up an argument in a concise conclusion.

This course should also require students to draft an undisputed statement of material facts to accompany the summary judgment motion. Professors may choose to do one of the following: (1) focus solely on the summary judgment motion (two or three drafts); or (2) incorporate the response. In addition, professors may choose to include an end-of-the-semester oral argument, to give students additional practice in oral advocacy.

With respect to grading, the Authors suggest the following grade allocation:

- First draft of the motion for summary judgment: 25%;
- Second draft of the motion for summary judgment (with statement of undisputed material facts): 45%;
- The response to the motion for summary judgment (if required): 20%; and
- Oral argument (if required): 10%

If the professor decides not to include a response brief, the Authors suggest allocating an additional 10% to the first and second drafts, respectively. If the response brief and oral argument are not included, we suggest adding 20% to the second draft and

10% to the first draft. If the oral argument is not used, the Authors suggest adding 5% to the response brief and second draft, respectively.

1. *Additional One-Credit Electives.*

- Looking Ahead: Multiple Choice and the Multi-State
- Judicial Opinion Writing
- Narrative Skills in the Legal Context
- Trial Advocacy
- Pre-Trial Practice: The Motion in Limine
- Criminal Law Practice: The Motion to Suppress

2. *Suggested Texts.*

- Roger Fisher, William L. Ury, Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Rev. 2011).

IV. THREE-YEAR PERSUASION CURRICULUM – THE THIRD YEAR

The third-year curriculum gives students additional practice in two areas that are essential to real-world success: (1) narrative and persuasion; and (2) rewriting and revising. In addition, for those wishing to pursue a focus on transactional work or alternative dispute resolution, we provide alternative required courses for those areas.

A. *Persuasion V: The Appellate Brief and Argument (Three Credits)*

This course mirrors the traditional appellate advocacy courses currently taught in either the second or third semester of law school. This course will now be offered in the first semester of the third year, at which time the legal writing instructor will draft a written opinion based on the factual record. The opinion should create a factual and legal basis for an appellate brief, thus requiring students to analyze their case under different standards of review (de novo and abuse of discretion). This course will impart the following skills:

- Crafting a persuasive statement of the issues on appeal, recognizing that, generally, only issues preserved for appeal may be presented to an appellate court;
- Outlining the facts—but only the facts that are found in the record;
- Beginning with the best argument but generally limiting appellate briefs to three issues;

- Considering and addressing policy implications, the impact of the ruling the student seeks on future litigants, and where the student's case might fit in the evolution of the law;
- Avoiding attacks on the trial court or the student's adversary;
- Paying attention to details, such as font size and style, characters, page limits, and the colors required on brief covers; and
- Following the local rules and including all sections required by the court's rules.

This course should require two or three drafts of the appellate brief, organized in a manner similar to the motion to dismiss, and conclude with an oral argument before a panel of judges composed of faculty members or judges from the community.

For students preferring to focus on transactional drafting or alternative dispute resolution, the appellate brief can be substituted with one of the following courses:

- Transactional Drafting;
- Arbitration and Mediation Statements; or
- Negotiation

1. *Additional One-Credit Electives.*

- Looking Ahead: Essay Strategy for the Bar Exam
- Oral Advocacy: Arguing Like the Nation's Top Advocates
- The Art of Direct and Cross-Examination

2. *Suggested Texts.*

- Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (Aspen 3d ed. 2010);
- Linda Edwards, *Reading in Persuasion: Briefs that Changed the World* (Aspen Publishers 2012); and
- Chief Justice John Roberts' Brief in *Alaska Department of Environmental Conservation v. United States Environmental Protection Agency, et al.* (Brief for Petitioner).

B. *Persuasion VI: Writing and Rewriting (Two Credits)*

In their final semester of law school, students will be required to take two courses from the following three options: (1) rewriting and revising; (2) judicial opinion drafting; and (3) voir dire and jury instructions. Students should have the option, however, to take (as an elective) the course they did not choose as a requirement.

These courses will teach the following skills:

- The macro edit (ensuring proper flow, organization, and clarity organization);
- The micro (or copy) edit (reviewing for style, grammar, and spelling);
- Analyzing arguments from opposing points of view; and
- Drafting a written work that combines objective and persuasive writing, considers policy arguments, and balances competing interests.

The Authors offer no suggestions for grading, as there are countless ways to organize these courses, and opinions will differ regarding the depth and complexity of the material.

For students preferring to focus on transactional drafting or alternative dispute resolution, the appellate brief can be substituted with one of the following courses:

- Real Estate Closings and Procedures;
- Drafting for Mergers and Acquisitions;
- Drafting for the Tax Lawyer; or
- Settlement Strategy and Negotiation.

1. *Additional One-Credit Electives.*

- The Bar Exam: Simulated Exam
- Rewriting & Revising
- Judicial Opinion Drafting
- Voir Dire & Jury Instructions
- Amicus or Habeas Project

2. *Suggested Texts.*

- Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (Oxford University Press 2d ed. 2004); and
- Steven D. Stark, *Writing to Win: The Legal Writer* (Three Rivers Press, 2012).

V. AN EVOLUTION, NOT A REVOLUTION

At first glance, it might seem that the Authors' proposed changes constitute a marked departure from existing legal writing programs. The reality, however, is that law schools around the country have been tackling this question for quite some time, by increasing the number of legal writing courses and incorporating

more practice-based skills into the curriculum.³³ These changes, of course, are long overdue.³⁴ As one scholar explains:

[A] task force of the ABA Section on Legal Education and Admissions to the Bar issued in 1992 a report (the “MacCrate Report”) that identified what it determined to be basic lawyering skills and professional values that a student should have developed by the time she is ready to represent her first client. These basic skills and values include: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organization of legal work; and (10) recognizing and resolving ethical dilemmas.³⁵

The proposed curriculum presented here seeks to do just that, is consistent with recent recommendations by both the Carnegie Report³⁶ and *Best Practices in Legal Education*,³⁷ and is the next logical step in training a new generation of practice-ready lawyers. Thus, while improvements have been made in legal writing education, more needs to be done if legal education is to evolve toward a principled—and practice-oriented—institution.

A. *Required Courses Are Essential—In Each Semester*

The 2013 survey from the Association of Legal Writing Directors and Legal Writing Institute (ALWD Survey) assembled data from 190 law schools.³⁸ The results are troubling. For example, only 5.65 credits of legal courses are *required*.³⁹ This represents a growth of only .29 credits per school over three years, or the equivalent of just “55 schools adding one credit to their required LRW programs.”⁴⁰ The Authors propose a fifteen-credit curriculum, which is identical to a proposal by the Clinical Legal Education Association asking the American Bar Association to

33. Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 421–22 (2007) (describing how, since the 1970s, legal education has experienced a tremendous growth in the number of courses devoted to teaching law students these practical skills, like legal research, oral advocacy, and negotiations).

34. *Id.*

35. *Id.*

36. WILLIAM H. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8–10 (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

37. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

38. MADER, *supra* note 29, at i.

39. *Id.* at 7.

40. *Id.*

require fifteen credits in practical skills training.⁴¹ Furthermore, as a required part of the core curriculum, these credits are separate from the limitations governing co-curricular activities, *e.g.*, moot court, law review, and clinical training.⁴² Moreover, they more fully vindicate the American Bar Association's call for "substantial instruction" in "legal analysis and reasoning . . . writing in a legal context . . . [and] other professional skills generally regarded as necessary for effective and responsible participation in the legal profession."⁴³

Importantly, a substantial number of law schools reported an increase in the variety of assignments, such as client letters, pretrial briefs, and electronic memorandums.⁴⁴ While law schools should be commended for these changes, two problems remain: (1) law students are not getting sufficient practice and repetition; and (2) legal writing curriculums are not including important writing assignments.

1. *Law Students Are Not Getting Sufficient Practice and Repetition.* Increasing the variety of assignments in required courses will not have a substantial benefit if students do not receive sufficient practice. An individual's writing skills evolve over time, and part of that evolution requires (1) repetition; (2) feedback; and (3) time (reflection). It is not enough for students to have drafted a client letter or to know the essential techniques for a client letter. They must be exposed to numerous examples of effective draftsmanship, understand *why* a particular document is well written, and be able to independently incorporate those techniques into their writing process. This is not attainable in a program that requires less than six credits in legal writing instruction or is conducted over the course of just two, three, or four semesters.

2. *Legal Writing Curriculums Are Not Including Important Writing Assignments.* While the ALWD Survey shows that students are beginning to draft more than just a legal memorandum and appellate briefs, there is no indication that

41. CLINICAL LEGAL EDUC. ASS'N, CLINICAL LEGAL ASSOCIATION (CLEA) COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES 1 (2013), *available at* <http://cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf>.

42. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS std. 304(b) & interp. 304-3 (2013-2014), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf (creating a limit on co-curricular activity credit by not counting it toward class time requirements).

43. See *id.* std. 302(a).

44. MADER, *supra* note 29, at vii, 12.

required courses included: (1) pleadings; (2) discovery; (3) a motion to dismiss (in either the civil or criminal context); (4) a motion for summary judgment or a motion in limine; (5) voir dire and jury instructions; and (6) writing and revising.⁴⁵

This, of course, is a function of an average total required legal writing credit load (5.65) that accounts for less than 7% of the American Bar Association's *minimum* 83-credit requirement for graduation.⁴⁶ This, in a nutshell, is the problem. Legal writing instructors cannot be expected to train effective writers (although many do despite all this, to their credit) with limited classroom time and a required course load that tries to do too much—and too little—at the same time.

Offering more electives, or allowing students to take a legal writing “specialization,” while commendable, is not sufficient. Students may simply decide not to take any additional legal writing classes or concentrate in other areas. The goal, however, should be to give *every* student comprehensive instruction, thereby maximizing their writing skills and, ultimately, marketability.

Of course, some may argue that clinical and co-curricular activities, *e.g.*, moot court, law review, and Amicus or Habeas Projects, adequately fill whatever gaps might exist in writing and advocacy instruction. Again, this argument raises the same problem. Not every student has the opportunity—or chooses—to participate in moot court, law review, or a clinic. Even if law schools require students to receive clinical training, it is unlikely that it will provide the comprehensive instruction necessary to train effective legal writers. For examples, in moot court, some students will draft an appellate brief, and, in a clinic, others might draft a habeas petition or a petition for certiorari. This is an invaluable part of practical skills training but should complement, not remedy, the gaps left by the legal writing curriculum.

To be sure, in schools that do have an upper-level writing requirement, the overwhelming majority mandate a *scholarly* writing course, not an advanced *legal* writing course.⁴⁷ In fact, the ALWD Survey revealed that only eleven schools require an advanced legal writing course, four require a litigation drafting course, and *zero* require a course in judicial opinion writing.⁴⁸ In other words, it's not what you offer, it's what you require.

45. *Id.* Of course, the “drafting documents,” “pretrial briefs,” and “other writing assignments” categories may include some of these assignments. *Id.* However, in light of the categories’ broad names and absence of detail in defining them, it seems unlikely that these assignments are common. *See id.*

46. *Id.* at 7; ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 42, std. 304-4.

47. MADER, *supra* note 29, at 24

48. *Id.*

B. Collaboration with Doctrinal Faculty Can Enhance the Legal Writing Experience

The ALWD Survey showed that in only 6 law schools (3%) do legal writing and doctrinal faculty collaborate in creating writing assignments and topics for discussion.⁴⁹ Additionally, 47 law schools (25%) reported that topics of assignments are coordinated with doctrinal faculty.⁵⁰

Law schools are missing an important opportunity to create a dynamic and practice-oriented law school environment. Collaboration merges the analytical and practical; it allows students to learn by thinking *and* doing. In a first-year civil procedure course, collaboration can give students the opportunity to draft a complaint in federal court based on diversity jurisdiction. In torts, they can write a memorandum on issues such as negligence, vicarious liability, or assault and battery. This experience helps to transform the law school environment into a place where theory meets practice, and students see how legal knowledge functions in the real world. It's a classic example of what separates mediocre writing from great writing: *Show, Don't Tell*.⁵¹

VI. CONCLUSION

Legal writing professors should no longer be considered a “marginalized communit[y].”⁵² These professors teach, often tirelessly, the most important skill that law students must possess before practicing law in the real world. They are the innovators of tomorrow; if there is to be change in the academy, the legal writing community must lead the transformation. The consistent criticism—from former law students, judges, and commentators—provides legal writing instructors with an unprecedented opportunity to shape the future of legal education.

Of course, our way is not the only way or even the right way, necessarily. It is, however, going in the right direction. We hope that this proposal starts a conversation and, ultimately, an evolution that incorporates more required courses into all three years of law school. Legal writing professors are eminently qualified to handle this task, and law students deserve the opportunity to meet that challenge.

49. *Id.* at 15.

50. *Id.*

51. *E.g.*, BRYAN GARNER, *THE WINNING BRIEF* 398 (2004).

52. Berger et al., *supra* note 26, at 539.