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One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Law School Curriculum

by Sherri Lee Keene*

An expert is a man who has made all the mistakes which can be made in a narrow field.¹

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For the title, the Author was inspired by Neil Armstrong's statement on July 20, 1969, from the surface of the moon: "That's one small step for man, one giant leap for mankind." Neil Armstrong, *Apollo 11: That's One Small Step for (a) Man*, NASA, <http://www.nasa.gov/connect/sounds/#.UznDV87sLyV>.

1. Niels Bohr (quoted in Mark J. Friedman, *A Bittersweet Silver Anniversary for the Bonded Porcelain Veneer Restoration*, 21 J. ESTHETIC & RESTORATIVE DENTISTRY 1, 1 (2009)).

INTRODUCTION

While the practice of law is often equated with writing, many law courses involve little or no writing during the semester, and often only require writing in student assessment. While accredited law schools are required to offer both first-year legal writing instruction and a rigorous writing experience during the second or third year,² few law schools infuse legal writing throughout a student's three years of law school matriculation. While significant attention is given to the breadth of law taught in law school, more attention must be given to the depth of this knowledge and the application of this knowledge to discrete legal problems. Legal writing, particularly writing in a practice context, is a unique tool for learning about the law and building professional competence. Through writing, law students engage themselves, and often others, in discrete legal matters and are afforded an opportunity for individual critique and instruction. As such, the process of legal writing helps those new to the practice of law to further their knowledge of law and enhance their development as legal professionals.

This Article is prompted by the recent debate in the legal community, often played out in public forums, about the increasing demand from law firms, other legal employers, and even clients, that recent law graduates be "practice-ready" when they complete law school.³ The cry for practice-readiness can best be understood in the context of the present legal market. In 2008, widespread economic changes prompted reductions in client spending, which in turn led to significant cutbacks at law firms and increased attorney unemployment and self-employment.⁴ Since that time, the legal market has become extremely

2. ABA Section of Legal Educ. and Admissions to the Bar, *2012-2013 ABA Standards and Rules of Procedure of Approval of Law Schools* 19-20 (2012).

3. See, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?r=1&pagewanted=all>.

4. Some major law firms have found it necessary to let go of significant numbers of attorneys or have had to close their doors completely. See Dan Slater, *Dewey & LeBoeuf Near Collapse—Are Other White Shoe Law Firms in Peril?*, DAILY BEAST May 3, 2012, 4:45 AM, <http://www.thedailybeast.com/articles/2012/05/03/dewey-leboeuf-near-collapse-are-other-white-shoe-law-firms-in-peril.html> (discussing what would soon be the biggest law firm collapse in history); Brent Smiley, *Dewey & LeBoeuf Files for Chapter 11 Bankruptcy Protection*, DAILY INTELLIGENCER, nymag.com/daily/intelligencer/2012/05/dewey-leboeuf-files-bankruptcy-chapter-11.html (last visited Oct. 27, 2013) (announcing that the international law firm Dewey & LeBoeuf filed for Chapter 11 bankruptcy protection on May 28, 2012); see also Karen Sloan, *A Dismal Job Market for Law Grads Got Even Worse for Class of 2011*, NAT'L L.J. (June 7, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jspx?id=1202558291685&A_dismal_job_market_for_law_grads_got_even_worse_for_class_of

demanding, with law graduates facing increased competition from both peers and more experienced attorneys and law firms expecting more from new hires.⁵ In light of the current legal market, opportunities to receive on-the-job legal training are dwindling. Many new attorneys have found themselves hanging out a shingle or joining small law firms with no formal training programs. Large law firms have also cut back on attorney training after many law-firm clients insisted that they will not continue to underwrite new attorney development. Some clients have even gone so far as to prohibit recent law school graduates from working on their cases.⁶ Sadly, many doubt that the legal market will recover anytime soon, and some observers predict that the very structure of legal practice has been forever changed.⁷

In response to this situation, the legal bar and some legal observers have put increased pressure on law schools to put more emphasis on teaching practical skills in order to better prepare law students for legal practice. The current standard law school curriculum weighs heavily in favor of teaching legal doctrine and theory, with significantly less attention given to teaching practical skills and professionalism.⁸ Recent changes in the legal market and external demands have resulted in much dialogue in the legal academy about the purpose and goals of legal education and the balance between theory and practice in the law school

2011_&slreturn=20120730133943 ("[National Association for Law Placement executive director Jim] Leipold attributed the decline of private practice jobs largely to large law firms curtailing new associate hiring. A larger percentage of graduates are finding jobs at smaller firms . . .").

5. See Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, 10:18 AM, <http://online.wsj.com/article/sb10001424052702304458604577486623469958142.html>.

6. See, e.g., Segal, *supra* note 3 ("[F]or decades, clients have essentially underwritten the training of new lawyers But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: Teach new hires on your own dime.").

7. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (Posted July 1, 2011, 4:40 AM), http://www.abajournal.com/magazine/article/paradigm_shift/ ("The legal profession is undergoing a massive structural shift—one that will leave it dramatically transformed in the coming years."); Claire Zillman, *Law Firm Leaders Survey 2010: The New Normal*, AM. LAW. (Dec. 1, 2010), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202475032294> ("[M]any of the changes implemented during the recession . . . are here to stay . . .").

8. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW: SUMMARY 8, at 4 (2007), available at http://www.carnegiefoundation.org/sites/default/files/Publications/elibrary_pdf_632.pdf [hereinafter CARNEGIE SUMMARY].

curriculum.⁹ Some law schools have significantly reformed their curriculum in response to recent economic changes, but most law schools at this point have done little to change the status quo.¹⁰

It is no surprise that the recent debate has prompted only moderate change. The aspiration of having law schools graduate students who are fully prepared to practice law is ambitious and arguably impossible. Indeed, this goal underestimates all that is required for a legal novice to gain professional expertise, and the value of real-life, legal practice experiences. Moreover, it fails to take into account the breadth of legal jobs, the variety of challenges that lawyers encounter in modern legal practice, and the scope of the skills that lawyers will need to confront them successfully.¹¹ While it is doubtful that full practice-readiness can be achieved in the law school setting, much remains that law schools can do to better prepare their students for the responsibilities of legal practice. Beyond the practice-ready debate lies a more fundamental question that needs to be answered: What is the legal market now demanding of law school graduates, and how can we, as legal educators, better prepare the next generation of lawyers to meet this demand? Even more, given current economic realities including reduced post-graduate training opportunities, how do we ensure that law graduates receive the guidance they need to become competent and ethical attorneys who can effectively represent clients?

In this context, this Article discusses the key role that legal writing can play in legal education. Contrary to the current "practice-ready" debate in legal education, this Article focuses less on *who* is to train our next generation of lawyers and more on *how* new attorneys can best be prepared for modern legal practice. The question of *how* can best be answered by taking a close look at how lawyers learn in practice. For many new attorneys, legal writing assignments play a key role in their professional development as the writing process itself provides an opportunity for them to engage deeply in the study of substantive law and procedure and to apply their knowledge to a client's legal problem.

9. Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 717 (2009).

10. Some law schools have made significant curricular changes with the goal of better preparing law graduates for practice. See, e.g., *id.* at 732-49 (describing how a number of law schools have made changes to their curricula, including New York University School of Law, Northwestern Law School, Washington and Lee University School of Law, Yale Law School, and Harvard Law School).

11. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 8 (2007) [hereinafter BEST PRACTICES] ("The conundrum that law schools face is that even the most well-designed program of instruction will not prepare students to provide a full range of legal services competently upon graduation after three years.").

Moreover, while the transfer of knowledge from a legal expert to a legal novice can be challenging to facilitate,¹² work on discrete projects provides a natural opportunity for meaningful conversation on specific legal issues. Lastly, writing assignments can provide new attorneys with much-needed opportunities to apply their knowledge and test their professional judgment, and to then receive feedback that will help them to further develop their analytical skills and make adjustments to their practice where necessary.

This Article discusses how legal educators can make better use of legal skills practice, specifically legal writing practice opportunities, to expedite the professional development of those new to the practice of law. While there has been significant discussion about expanding the existing law school curriculum,¹³ consideration should also be given to ways that law schools might improve upon current methods of teaching. Part I will define what law firms¹⁴ mean when they say that graduating law students should be more practice-ready, and consider whether this is in fact a viable goal. Part II will define "good legal writing"¹⁵ and explain what is required for a writer to achieve a high level of proficiency. Part III will discuss how legal writing practice helps legal novices not only to improve their basic writing abilities, but also to develop their professional expertise. Part IV asks legal educators to rethink the role of meaningful practical legal writing opportunities with expert guidance and critique as a tool for building practice competence. It further urges law schools to take a fresh look at the role of legal writing instruction in the law school curriculum, and to consider how they might make better use of legal writing opportunities to bridge the perceived gap between legal education and practice.

I. WHAT DOES IT MEAN TO BE "PRACTICE-READY"?

In recent dialogue, the term "practice-ready" has been used broadly to describe the ability of law school graduates to meet the challenges that lawyers face in practice (and therefore require less on-the-job training).

12. Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems in Using Teaching Assistants: Hard Lessons Learned from Peer Teaching Theory and Experience*, 13 *LEGAL WRITING* 269, 276-77 (2007).

13. *E.g.*, CARNEGIE SUMMARY, *supra* note 8, at 8-10.

14. In this Article, the Author often uses the term "law firms" to refer primarily to large law firms but understands that the sentiments attributed to large law firms may apply as well to other legal employers.

15. In this Article, the Author uses the terms "legal writing" and "practical legal writing" to refer to any form of legal writing used in a practice context. Other forms of legal writing are specifically identified (for example, "scholarly writing").

The scope of these challenges is uncertain, with some proponents of this idea focusing narrowly on increased practical skills training, while some opponents focusing more broadly on an attorney's ability to adapt to the ever-changing demands of legal practice. Even where the focus is on skill building, however, the specific skills that are required for client representation in today's diverse legal practice are rarely identified and, where they are, the list is understandably incomplete.¹⁶ An effort to compile a list of specific skills quickly reveals that it is an impossible task to introduce law students to every skill they might need in practice. Given the breadth and diversity of legal jobs, we soon discover that legal educators can no more meet this goal than a goal to introduce law students to every area of law or legal concept that they will subsequently encounter.

While the recent call for practice-readiness has failed to identify a feasible goal for legal education, the *Carnegie Report*¹⁷ provides some guidance.¹⁸ In contrast to much of the debate about practice-readiness, the *Carnegie Report* speaks not only of increased skills training in legal education, but also calls for law students to have more opportunities to integrate theory and practice.¹⁹ Viewed in this frame, practice-ready attorneys would best be described as those who both possess a deep knowledge of the law and know how to apply this knowledge to solve their clients' legal problems. A more productive conversation about the latter would require us to take stock not only of all that is required for a legal novice to develop a sufficient level of professional expertise, but also to consider how we might help law students develop a process for further acquiring knowledge.

Though pressure from the practicing legal bar has increased in recent years, the debate about the perceived gap between legal education and law practice is longstanding. Over the past twenty years, several

16. Indeed, if we take a look at the multitude of law school course offerings and post-graduate educational opportunities, including Continuing Legal Education ("CLE") courses, we can begin to appreciate the myriad of skills and the depth and breadth of knowledge that can be required for the practice of law.

17. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSOR OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

18. *Id.*

19. *Id.* at 3, 8 ("Recommendation 1 Offer an Integrated Curriculum. To build on their strengths and address their shortcomings, law schools should offer an integrated, three-part curriculum: (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth; (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession. Integrating the three parts of legal education would better prepare students for the varied demands of professional legal work.").

prominent reports have advocated for increased practice training in law schools. For example, in 1992, the *MacCrate Report*²⁰ addressed the stated desire of members of the legal community to narrow the gap between legal education and the legal profession.²¹ The *MacCrate Report* stressed the importance of legal education in beginning the process of professional development.²² Specifically, the *MacCrate Report* challenged law schools to provide an educational program designed to prepare law students to participate effectively in the legal profession.²³ More recently, in 2007, *Best Practices for Legal Education*²⁴ challenged law schools to “significantly improve their students’ preparation for their first professional jobs.”²⁵ That same year, the *Carnegie Report* spoke of an “increasingly urgent need [for law schools] to bridge the gap between analytical and practical knowledge.”²⁶ The *Carnegie Report* identified legal analysis, practice competence, and professionalism as the three key goals of legal education.²⁷ The report notes that legal analysis is currently the main focus of modern legal education and comments that more emphasis needs to be placed on practice competence and professionalism.²⁸

While there has been much recent criticism suggesting a lack of emphasis on practical skills and professionalism in modern legal education, since the *MacCrate Report* was written, the standard law school curriculum has been expanded to include more opportunities for law students to actively engage in the integration of theory and practice, sometimes in the context of experiential learning.²⁹ Consistent with current ABA standards, all first-year law students engage in the study of legal writing.³⁰ Beyond the first year, however, student exposure to

20. E. Eugene Clark, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 4 LEGAL EDUC. REV. 201, 202 (1993) [hereinafter *MacCrate Report*].

21. *Id.*

22. *Id.* at 214.

23. *Id.* at 214-15.

24. BEST PRACTICES, *supra* note 11, at 8.

25. *Id.* at 13.

26. CARNEGIE SUMMARY, *supra* note 8, at 8.

27. *Id.* at 8-10 (offering seven recommendations intended to promote legal analysis, practice competence, and professionalism, including recommendations to offer an integrated curriculum and to join from the start “lawyering,” professionalism, and legal analysis).

28. *Id.*

29. See ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 2, at 19-20 (setting out Standard 302 and requiring law schools to offer substantial opportunities for students to engage in “live-client or other real-life practice experiences”).

30. See *id.* at 19 (stating that all law schools must provide substantial instruction in “writing in a legal context, including at least one rigorous writing experience in the first

practical legal writing opportunities varies significantly by law school and law student. Many law schools provide some advanced legal writing courses, but only a limited number of schools require students to engage in practical legal writing beyond the first year.³¹ During their second and third years, some law students have the opportunity to participate in legal clinics, with some clinics providing opportunities for live-client representation and court appearances.³² Modern law schools also award credit for legal externships in which students work in the legal field under the guidance of a legal practitioner and faculty supervisor.³³ Despite these practical learning opportunities, however, the reality of legal education today is that many recent law graduates are not fully prepared to function as lawyers when they graduate.³⁴ (Indeed, many would argue that while they are of great value, experiential learning opportunities such as clinics and externships are not a substitute for post-graduate, entrenched, "real-world" legal practice experience.)³⁵

In this tough legal market and practice environment, the perceived gap between legal education and attorney practice has become increasingly significant, particularly to law school graduates and potential legal employers. Law school graduates can no longer count on receiving legal-

year").

31. ASS'N OF LEGAL WRITING DIRS., LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 2012 (2012), available at http://www.alwd.org/surveys/survey_results/2012_survey_results.pdf [hereinafter LWI SURVEY 2012]. In response to question 33 of the survey, out of 184 law schools, 78 indicated that students were required to engage in scholarly writing as their upper-level writing requirement, and 42 indicated that students were required to engage in some form of practical legal writing. (Four respondents did not specify the type of legal writing required.) *Id.*

32. CARNEGIE REPORT, *supra* note 17, at 87 ("These lawyering courses cover a wide range, from research and legal writing in the first year, through trial advocacy and practice negotiation to clinical experience with actual clients.").

33. *Id.* at 88 ("In recent years, the American Bar Association has advocated more use of supervised externships and now provides standards for linking such experiences to the formal curriculum.").

34. BEST PRACTICES, *supra* note 11, at 19 ("Most law school graduates are not sufficiently competent to provide legal services to clients or even to perform the work expected of them in large firms.").

35. See Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 335 (2010-2011) (arguing that clinics "provide only the training" for the eventual situation in which a lawyer must solve problems without heavy supervision and hand-holding). *But see generally* Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & SOC. JUST. 247, 253 (2012) (explaining that law school "clinics introduce students to the skill of life-long learning that professionals need"); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1929-30 (2002) (claiming "that the law school clinic is the primary place in the law school where students can learn to be competent, ethical, socially responsible lawyers").

practice training on the job, and legal employers have found it increasingly difficult to dedicate resources to new-attorney training. While it seems an impossible goal to prepare students fully for practice before they graduate, this does not mean that we cannot work to better prepare our students for practice by introducing them to some of the skills that have been identified as highly important to practice and to methods of learning that can be easily transferred to new challenges. If this is in fact our goal, legal educators should appreciate the importance of not only making sure that our students leave law school with sufficient knowledge about the law, but also a method for efficiently acquiring new knowledge and for applying their knowledge (old and new) to solve a client's legal problem. This Article focuses on the important role that legal writing practice can play in attorneys' professional development, beginning in law school and extending into law practice.

II. WHAT IS "GOOD LEGAL WRITING" AND WHY IS IT IMPORTANT?

The current "practice-ready" debate suggests that the learning of legal theory and practice are separate and distinct activities, with each needing to occupy a separate space in the law school curriculum.³⁶ However, to the contrary, most legal skills cannot be easily segregated from legal theory and doctrine, but instead require attorneys to apply their knowledge of the law to accomplish specific tasks in the course of client representation. The effective execution of many skills utilized in the course of legal practice (such as brief writing, oral argument, negotiation, and even engaging in pre-trial discovery), require just what the *Carnegie Report* promotes—the integration of legal theory and practice.³⁷

Legal writing provides a particularly good example of a skill that requires both a deep understanding of the law and an ability to apply this knowledge to a client's legal problem. Legal research and writing is almost always found at the top of the list of identified legal skills needed for the successful practice of law.³⁸ Good legal writing is valued in law practice, however, not only because of the importance of effective

36. See, e.g., Barry, *supra* note 35.

37. CARNEGIE REPORT, *supra* note 17.

38. See, e.g., BEST PRACTICES, *supra* note 11, at 57-58 (discussing a survey of members of the Arizona Bar Association in which lawyers and judges identified skills as "essential" or "very important" to legal practice, prioritized as follows: legal analysis and reasoning, written communication, legal research, drafting legal documents, listening, oral communication, working cooperatively as a team, factual investigation, organization and management of legal work, interviewing and questioning, problem solving, recognizing and resolving ethical dilemmas, pretrial discovery and advocacy, counseling, and negotiation).

communication skills to legal practice, but also because good writing is often thought to be indicative of a lawyer's overall practice competence. To be sure, good legal writing is often the culmination of many skills important to legal practice (such as legal analysis, legal research, factual investigation, advocacy, and problem-solving). Good legal writing requires the writer to make not only mechanical writing choices, but also thoughtful, often strategic, professional decisions in the course of practice. The writing process, therefore, is informed by a writer's understanding of the law, as well as their good professional judgment. Put simply, good legal writing is reciprocal to good lawyering. A strong correlation often exists between practitioners' perceived writing abilities and their professional reputations.³⁹

To better understand the relationship between good legal writing and practice competence, it is helpful first to define this term. "Good legal writing" is probably best described as a document that helps the reader "make the decisions they need to make in the course of their professional duties."⁴⁰ As such, the quality of legal writing is judged not only by whether a document is mechanically well-written, but also by the document's effectiveness.⁴¹ Undoubtedly, a legal document can be both technically well-written and yet ineffective (and thus not "good legal writing").⁴²

A. *Clarity and Conciseness*

For a document to be effective, thus meeting the definition of good legal writing, it must be clear, concise, and credible.⁴³ At first glance,

39. Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1, 18 (2009) (discussing how judges weigh an author's reputation in determining how persuasive a brief might be).

40. Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 422 (2012).

41. When a group of twenty-three federal trial judges in the Northeast United States were asked to evaluate the quality of legal documents, the judges' comments focused largely on the content of the writing, though some comments related to presentation. Vorenberg & McCabe, *supra* note 39, at 12. For example, the judges spoke of the need for good authority and complained that even where lawyers find accurate authority, "authority is not used and applied effectively." *Id.*

42. See Osbeck, *supra* note 40, at 423-24 (explaining that a document may be technically well-written but not good legal writing if it is not useful to the reader).

43. *Id.* at 451-52, 465. Osbeck addressed the concept of "elegance" as a quality "aesthetic in nature" that distinguishes the very best writing in the field, but that quality is not included here. Moreover, while Osbeck did not include credibility, it is the Author's belief that any list of fundamental qualities is amiss if it does not include credibility. While credibility often cannot be judged from the document's surface, any legal writing that

one might assume that these fundamental qualities are achieved primarily by the application of good writing techniques. Indeed, there are a number of writing "tools" that good legal writers use to enhance the clarity and efficiency (and correspondingly, the apparent credibility) of their writing.⁴⁴ However, to be clear and concise, a legal document must also articulate a direct and focused message.⁴⁵ A legal document can only be effective, therefore, if the writer is able to develop (and then articulate and advocate) a thoughtful and appropriate idea. For example, a brief that neglects or overstates the client's best legal argument, no matter how well it fares grammatically, is poorly written because it does not effectively assist the reader. The writer's message might be loud and clear, yet not beneficial. While good basic writing skills can help the legal writer to relay a message, many early legal writers struggle with the process of determining the best way to approach a client's legal problem and to formulate an effective message, not just to communicate it.⁴⁶

When legal professionals refer to clarity, they are not only speaking of the superficial readability of the text, but also how well the legal document defines the legal issue and presents an appropriate, feasible solution. Clarity requires not only that the document be logically organized and the text easy to follow; it also requires that the document address the genuine issues in the case.⁴⁷ A clear document does not obscure the real issues that the court will grapple with, but instead tackles them. Instead of ignoring or downplaying negative authority, a

is not credible cannot be described as well-written. *Id.* at 417, 451-52 (explaining that readers "judge a document to be well written if the writing helps them make the decisions they need to make in the course of their professional duties").

44. See *id.* at 439.

45. Verbosity is not just an inconvenience to the reader; it can negatively impact the effectiveness of a legal document by obscuring the writer's point. Amy Vorenberg & Margaret Sova McCabe, *Verbose, Disorganized Documents Taint Quality of Legal Analysis*, N.H. BAR NEWS, Oct. 8, 2004, www.nhbar.org/publications/archives/display-news-archive.asp?id=128.

46. It has been the Author's experience that English majors and former journalists are as likely as any other law students to struggle with first efforts at legal writing. Given all that is required for legal writing, basic writing generally degrades when the concept of legal writing is first introduced. For further discussion, see Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING 1 (1991). That said, once the writer grasps the basic concept of legal writing, a strong, basic writing ability is often a significant asset.

47. See Osbeck, *supra* note 40, at 428-36 (discussing clarity within legal writing and stating that, in addition to writing with understandable organization, "[t]he legal writer must consider carefully the purpose of the writing, as well as the needs, interests, and background knowledge of the intended audience").

clear document will address it head-on and explain why it does not impede the reader from reaching the decision the writer has proposed. A clear document gets to the nub of the case, articulates the client's legal problem precisely, and offers a logical solution that is considerate of relevant legal authority the decision maker is required (or likely) to consider.

When legal professionals refer to conciseness, they are not only speaking of the length of the document, but also of its ability to keep the reader focused on pertinent information and to explain why this information is important.⁴⁸ While brevity is a worthwhile goal given the volume of cases on court dockets, conciseness requires not only that the writer use an efficient writing style, but also that the writing be narrowly focused.⁴⁹ A document that provides a short explanation of the cases may not be judged to be concise if it includes explanations of case precedent that are largely irrelevant to the decision maker or whose relevance is not clearly identified for the reader. That said, a concise document may contain lengthy case explanations so long as the information provided is of use to the reader and the relevance of this information is readily apparent.

The bottom line is that a document is clear and concise if it is not only easy to read and efficient, but also presents a precise and focused message. At the core, an effective document requires sound legal analysis that draws upon the writer's knowledge of the law, including the writer's understanding of legal doctrine and theory.

B. *Credibility*

Likewise, while a legal document's physical appearance (and the reputation of the writer) may contribute to (or detract from) its perceived credibility, credibility is also largely about content. The choices that a writer makes are not only mechanical writing choices, but also strategic and ethical decisions requiring specific, and often nuanced, professional decision-making. Good legal writing requires not only good basic writing ability, but also well-tuned professional judgment that implicates the

48. *See id.* at 439 ("So conciseness is fundamental to good legal writing because it helps readers make effective use of their limited time. That promotes efficient decision-making by allowing legal actors to devote the appropriate amount of time to each of their decisions, rather than spending an excessive amount of time on one decision and having to shortchange another as a result.")

49. *See id.* at 436-37 ("Conciseness is often confused with brevity, but concise writing is not merely brief, or brusque. Rather, it is efficient. Concise writing conveys the writer's points succinctly, without superfluous words, and with an appropriate level of detail." (emphasis omitted) (internal citations omitted)).

writer's knowledge and understanding of both law and legal practice. In making a writing decision, writers may draw upon their knowledge of relevant substantive law and legal concepts, legal process and methods of decision-making, and professional norms and conventions, including ethical rules.⁵⁰ No matter how nicely presented or technically well-written, a document cannot be effective if it misleads the decision maker, or causes the decision maker to question the writer's knowledge or integrity.

For example, attorneys may find themselves struggling with whether to cite to negative case precedent in their clients' briefs that is clearly favorable to the opposing party and not included in their opponents' briefs.⁵¹ The fact that a case is not favorable does not end the inquiry as to whether to bring it to the court's attention and may not justify its exclusion from a court document.⁵² In deciding whether to address a specific case, the writer may need to evaluate closely the hierarchical level of the court that made the decision and the specific facts of the case to determine whether it is binding precedent that either counsel has an obligation to disclose. Beyond this technical assessment, the writer must also consider how the judge might react to the writer's decision and decision-making process. Legal writers must carefully consider whether a decision to omit the case is defensible and the impact a wrong decision could have on their professional reputations and client representation.

As this example demonstrates, good legal writing requires writers to apply their knowledge, as well as exercise sound professional judgment. It follows, therefore, that the process of becoming a good legal writer not only deepens writers' knowledge of law, but also helps writers to develop an awareness and method of professional decision-making that they can later apply in practice.

50. Even the presentation of a legal document requires knowledge of professional norms and conventions. Indeed, a legal document is effective not only because it presents the argument in a logical fashion, but also because it presents the argument in a manner that is consistent with the reader's expectations. See *id.* at 426.

51. The ABA's Model Rules of Professional Conduct require that a lawyer "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012).

52. See generally Beverly J. Blair, *Ethical Considerations in Advocacy: What First-Year Legal Writing Students Need to Know*, 4 LEGAL WRITING 109 (1998) (discussing ethical considerations in adversarial brief writing).

III. WHY IS LEGAL WRITING PRACTICE A USEFUL TOOL FOR ATTORNEY DEVELOPMENT?

Once we acknowledge all that good legal writing requires, it is easy to see why the process of learning to become a better writer fosters attorneys' professional development. The *Carnegie Report* acknowledges that learning legal writing engages students in the integration of theory and practice and supports cognitive, practical, and professional development.⁵³ Indeed, the *Carnegie Report* provides that legal writing teaching can help students "to cement basic patterns of legal thinking" and "serves as a bridge between the learning of legal thinking and the mastery of the skills demanded in order to practice law."⁵⁴

To make the best use of legal writing practice in law school teaching, we must look beyond the final product, and consider the process that attorneys employ to complete a legal writing assignment. As discussed above, an effective legal document is a document that helps readers "make the decisions they need to make in the course of their professional duties."⁵⁵ Legal writing practice involves the process of synthesizing law and facts to formulate, and then communicate, a purposeful message to the legal audience. Basic to legal writing, therefore, is an understanding of legal decision makers (including their specific roles and methods of decision-making) and the role of the attorney in the decision-making process (together, the legal document's audience and purpose). Moreover, to formulate an effective message, writers will need to be knowledgeable about the law and legal practice. Writers will need to apply this knowledge to their clients' factual situations to determine the best way to approach and offer solutions to their clients' legal problems.

Guided legal writing experiences (real or simulated) afford writers meaningful opportunities to integrate theory and practice by using their knowledge of law to identify and solve a range of discrete legal problems while acting in the attorney role.⁵⁶ Indeed, legal writing has already proven to be a useful tool for integrating theory and practice in legal education.⁵⁷ After law school, legal writing practice continues to be an

53. CARNEGIE REPORT, *supra* note 17, at 104-11.

54. *Id.* at 108.

55. Osbeck, *supra* note 40, at 417.

56. CARNEGIE REPORT, *supra* note 17, at 109-10 ("The pedagogies of legal writing instruction bring together content knowledge and practical skill in very close interaction.")

57. For further discussion, see Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 LEGAL WRITING 23 (2004); Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its*

effective tool for “bridging the gap,” as it assists new attorneys to further their knowledge of law and legal practice, while continually sharpening their professional judgment. Put simply, legal writing practice helps the writer to gain expertise: first, the act of writing itself promotes learning; second, close work on legal writing provides a rich opportunity for less experienced attorneys to engage in meaningful dialogue with more experienced attorneys that invokes the more experienced attorney’s knowledge of law and legal practice; and third, feedback on legal writing provides an opportunity for the more experienced attorney to evaluate and critique the less experienced attorney’s understanding of substantive law, legal concepts, and professional decision-making. Through feedback, the experienced attorney can also introduce the writer to professional norms and conventions.

A. *The Recursive Writing Process*

The legal writing process itself can be a learning tool as writing can enhance one’s thinking. By writing in a practice context, the writer’s depth of understanding of relevant substantive law and legal concepts can be greatly enhanced.⁵⁸ The process of writing helps writers to better understand and connect with the material they are writing about and to gain a deeper level of understanding of abstract legal concepts. For many years, legal writing scholars have recognized the connection between writing and thinking. A shift has been made in the legal writing community from the idea that writing is instrumental—a method of recording our thoughts—to a shared understanding that writing is a recursive process through which thoughts are formed and better understanding is often achieved.⁵⁹ Indeed, writing can be a transfor-

Wake, 10 SEATTLE J. SOC. JUST. 49 (2011).

58. CARNEGIE REPORT, *supra* note 17, at 105 (noting that in the observed legal writing courses, “[t]he emphasis was on learning legal doctrine by putting it to use in drafting legal documents”); BEST PRACTICES, *supra* note 11, at 125 (“There is no more effective way to help students understand what it is like to be a lawyer than to have them . . . perform the tasks that lawyers perform or observe practicing lawyers at work.”).

59. See Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 85-86 (1982) (explaining that the new paradigm for teaching writing focuses on the process of writing, which is intuitive, not a methodical, linear motion, from the start to a final product); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49-51 (1994) (stating that a revolution in legal instruction in the 1970s led to an emphasis on the process of writing and curbed the influence of the formalist view, which relied on an instrumentalist approach to language).

mative process that brings about deeper understanding and longer retention.⁶⁰

Early in their first year of law school, students begin to act as lawyers and to attempt to answer clients' legal problems in their legal writing courses. Through this problem-solving process, students begin to consider how they might approach real legal problems.⁶¹ As in a casebook classroom, significant attention is given to legal analysis in first-year legal writing courses. However, the goals and methods of teaching in the casebook classroom and legal writing classroom tend to vary significantly.⁶² In the casebook classroom, significant attention is given to teaching law students about a broad scope of substantive law on a particular legal topic. The law is taught largely in the abstract, with law professors frequently posing brief, hypothetical factual scenarios to the class and soliciting responses from individual students through the Socratic Method.⁶³ By contrast, in the legal-writing classroom, a hypothetical legal problem serves as a focal point, with students learning about a narrow body of case law and then applying this knowledge to the facts of the client's case to solve a discrete legal problem.⁶⁴ Typically, during their first-year legal writing courses, law students work through legal problems of increasing complexity, first with the goal of assessing their client's legal problems and later with the goal of advocating a position on their client's behalf. As a result, students encounter diverse legal documents with varying audiences and

60. Laurie C. Kadoch, *The Third Paradigm: Bringing Legal Writing "Out of the Box" and into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine*, 13 *LEGAL WRITING* 55, 69 (2007) (explaining that writing about a particular doctrinal subject increases students' understanding because writing requires them to engage critically with the complexities of the subject); Carol McCrehan Parker, *Writing is Everybody's Business: Theoretical and Practical Justifications for Teaching Writing Across the Law School Curriculum*, 12 *LEGAL WRITING* 175, 177 (2006) (noting that writing provides the context necessary for the acquisition and development of knowledge).

61. *CARNEGIE REPORT*, *supra* note 17, at 107 (describing the perspective of writing instruction as a "form of simulated practice").

62. *Id.* at 104 (concluding that legal writing courses "provide a pedagogical experience that in many ways complements what is missing in the case-dialogue classes that make up most of the students' first year").

63. Some casebook professors employ the problem-based method of teaching, which involves the use of more complex, practical legal problems in teaching and requires students to consider the cases in the context of legal problems.

64. The use of a hypothetical client has both advantages and disadvantages. Students often have limited appreciation of the central role of the client in the legal matter when the client is fictitious. When using a simulated problem, however, instructors do have the benefit of being able to manipulate case facts to provide for a certain analytical challenge or to teach a particular skill. Moreover, the students' learning is the primary focus, and this goal does not have to be subordinated to the needs of the client.

purposes, as well as varying legal and practice issues. In their preparation of legal documents, beginning with office memoranda, law students begin to apply their limited, but expanding, knowledge of law and practice to discrete sets of facts for specific purposes related to their clients' representation. To complete a legal writing assignment, students must begin to learn how to navigate a number of abstract legal concepts—from jurisdiction and court hierarchy to legal methods and judicial deference.

The process of writing legal documents in law school necessarily provides students with an early opportunity to integrate doctrine and theory, and practice. Through the process of writing, students apply and stretch their knowledge of law. Before writing, a law student will need to formulate a message to relay to the legal audience that serves the purpose for which the legal document is being written. The law student may begin to write, trying to put ideas on paper or computer. However, it would be exceedingly rare for students to simply gather their thoughts, write them down, and be finished. Most law students will instead engage in a process of writing, thinking, reading, rethinking, rereading, and revising, often over and over again. Through the process of writing and reflecting, the law student will work from a point of chaos to one of clarity. Instead of having to consider the many factors that go into their writing all at once, writers are encouraged to organize their thoughts as they write and revise, and then consider these thoughts, often focusing on a particular aspect of the overall legal problem.⁶⁵ Through this process, writers can break a large problem into discrete issues and work through each issue one at a time and ultimately synthesize this information to reach a comprehensive solution.

The benefits of legal writing teaching extend well beyond the legal writing classroom.⁶⁶ Legal writing teaching has the potential not only

65. In first-year legal writing courses, students are often encouraged (or required) to use a legal paradigm (for example, IRAC or CREAC) to organize their legal discussion. When using these analytical formats, law students will begin by breaking down the legal rule into elements and then organizing the legal writing accordingly. Students then analyze each individual element separately, stating a conclusion, discussing the law, explaining relevant case precedent, and then applying the law to the client's case facts, before restating the conclusion for each. Approaching legal analysis in this manner can provide students with a process for organizing a legal issue and isolating its various parts.

66. CARNEGIE REPORT, *supra* note 17, at 104 (discussing the frequency with which students raised the topic of legal writing to report researchers and noting that students suggested that "writing should be 'more integrated into courses on doctrine' in order to speed up students' learning of legal reasoning"); *id.* at 108 ("Many students with whom we spoke noted the ways in which their writing courses accelerated their progress in legal reasoning in their doctrinal courses . . .").

to improve law student writing in a legal practice context, but also by engaging in the process of integrating theory and practice through writing, students deepen their understanding of the law and practice.⁶⁷ Moreover, beyond the first year of law school, legal writing can continue to provide a method for enhancing learning of substantive law and legal concepts. In their second and third years, students will continue to expand their knowledge of the law and practice, learning about new areas of substantive law, methods of resolving legal issues (such as negotiation and alternative methods of dispute resolution), and different types of legal writing (for example, contracts and pleadings).⁶⁸ Beyond law school, the process of engaging in legal writing can further promote, and even accelerate, new attorneys' learning processes as they consider new areas of law and aspects of legal practice.

B. The Dialogue Between Expert and Novice

While novice legal writers can learn much from their internal conversations during the recursive writing process, much can also be learned from the external conversations with more experienced practitioners that accompany the writing process. Conversations that surround a legal writing assignment can provide an opportunity for legal experts to share their expertise with legal novices. By allowing writers to access the expert's knowledge prior to completing their written drafts, the writers' learning process is enhanced as writers benefit from the expert's advice and incorporate it into their current assignments. Through the process of thinking, articulating thoughts, and hearing the recipient's reaction, writers further their knowledge and expertise during the writing process and facilitate their efficient and successful completion of written drafts.⁶⁹

67. See Dauphinais, *supra* note 57, at 102 ("Moreover, the Carnegie Report notes that the import of legal writing's emphasis on critical thinking is felt beyond the legal writing classroom, reporting that many interviewed students found that their writing courses in turn fostered the development of their reasoning skills in their casebook courses.") (citing CARNEGIE REPORT, *supra* note 17, at 108); Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMPLE L. REV. 885 (1991).

68. See CARNEGIE REPORT, *supra* note 17, at 110 (stating that in more advanced courses "writing . . . become[s] less a simple demonstration of content mastery and more a supple, pervasive device for developing reflective capacities to do legal research, critique and construct arguments, and draft legal instruments").

69. *Id.* at 109-10 (describing the process of the legal writing professor "guid[ing] the analysis, providing feedback, and modeling the use of . . . prompts in constructing a well-honed document").

As discussed in the prior section, the process of learning to become a good legal writer requires the writer to gain both knowledge of the law and general expertise in the legal field.⁷⁰ The professional novice gains expertise by engaging in legal work under the direction of a professional expert.⁷¹ The transfer of knowledge from the expert to the novice, however, is often difficult. Exchanges between professional experts and novices can be fraught with communication gaps, as experts are not always conscious of the extent of their knowledge and novices often do not understand enough to know what questions to ask.⁷² Experienced legal practitioners are professional experts, entrenched in a professional "community of discourse."⁷³ As such, they perform almost unconsciously in accord with the norms and conventions of their profession.⁷⁴ Law

70. Rideout & Ramsfield, *supra* note 59, at 72 (1994) (stating that students "see how the choices they must make in any act of legal writing are rhetorical choices, choices that are best made when fully informed by the social contexts surrounding any act of writing and by the conventions and practices of legal discourse"); Williams, *supra* note 46, at 9 (asserting that good thinking and good writing are a "set of skills that can be deliberately taught and deliberately learned in a context that we can describe as a 'community of knowledge' or a 'community of discourse'").

71. See Sherri Lee Keene, *It Was the Best of Practice, It Was the Worst of Practice: Moving Successfully from the Courtroom to the Classroom*, 18 DUQ. L. REV. 533, 536 (2010) (stating that an attorney's development of good critical thinking and writing skills "is a consequence of expertise gathered by working with others more experienced" in the legal discourse community" (quoting Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1993)); Williams, *supra* note 46, at 9.

72. Becker & Croskery-Roberts, *supra* note 12, at 276 n.30 (concluding that experienced professionals are often so used to doing a given professional task that they fail "to 'understand the nature of the cognitive problems students [are] faced with in attempting to master the subject matter'" (quoting Diana H.J.M. Dolmans et al., *Trends in Research on the Tutor in Problem-Based Learning: Conclusions and Implications for Educational Practice and Research*, 24 MED. TEACHER 173, 176 (2002)); Lisa Eichorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 LEGAL WRITING 143, 150 (1999) ("Th[e] difference between novices and experts leads to communication gaps that can play themselves out between new associates and their supervising attorneys, who fail to recognize that new associates are not yet immersed in the legal culture."); Bernadette T. Feeley, *Training Field Supervisors to Be Efficient and Effective Critics of Student Writing*, 15 CLINICAL L. REV. 211, 232 (2009) (discussing the wide gap of knowledge between law students and attorneys with even limited practice experience); Keene, *supra* note 71, at 534-35 (discussing the challenges of legal experts teaching legal novices, and offering suggestions for how to bridge communication gaps between professors and students).

73. Williams, *supra* note 46, at 9.

74. Becker & Croskery-Roberts, *supra* note 12, at 277 ("Experienced professors sometimes are so familiar with a subject that they unconsciously omit information or procedural steps needed for complete understanding by less-experienced (or completely inexperienced) first-year students."); Sheila Rodriguez, *Using Feedback Theory to Help*

students and new attorneys are professional novices, who are not only unfamiliar with professional norms and conventions, but also often unaware of what they do not yet know. “[A] novice lacks certain characteristics and competencies: the novice does not yet have the knowledge of an expert in a community or yet have the habits of thinking or the tone of voice.”⁷⁵

Close work on a legal document, however, can facilitate the transfer of knowledge between the legal novice and expert. Legal novices benefit greatly when they have opportunities to discuss their ideas with a legal expert and receive the expert’s feedback during the writing process.⁷⁶ Through their dialogue with the legal expert, legal novices formulate and then refine the messages that will underlie their writing.⁷⁷ While working on a legal writing project, legal novices and experts often engage in nuanced discussions about various aspects of legal practice in the context of a specific legal problem, including relevant substantive law, legal procedure, legal methods, jurisdiction, court hierarchy, judicial deference, factual application, client representation, case strategy, factual investigation, and professional considerations including ethical rules.⁷⁸ Persuasive documents often provide additional opportunities for experts to dialogue with novice writers about their strategic choices and professional decisions. Legal writing assignments provide a unique opportunity for legal experts to teach legal novices about the law and legal practice, with each assignment presenting its own set of unique challenges. Similar to early legal apprenticeships, legal novices benefit from individualized guidance, tailored to address their particular needs.⁷⁹

Novice Legal Writers Develop Expertise, 86 U. DET. MERCY L. REV. 207, 212-13 (2009) (“With extended practice, performance in any given discipline becomes fast, effortless, automatic, and seemingly inaccessible to introspection.”).

75. Williams, *supra* note 46, at 31 (emphasis omitted).

76. CARNEGIE REPORT, *supra* note 17, at 109, 111 (“The teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.”).

77. *Id.* at 109 (noting that through class presentations about a legal writing assignment, “students learn to make their thinking visible in writing so that it can be worked over and improved under the instructor’s guidance”); *id.* at 110 (stating that guided legal-writing practice “allows the communication process to be stopped for a while to enable students to observe and analyze the discourse being developed”).

78. *See id.* at 105 (stating that “[b]y learning to analyze facts and construct arguments in use, students were also being taught how to strategize as a lawyer would” and “beginning to cross the bridge from legal theory to professional practice”).

79. Legal apprenticeships were a traditional method of indoctrinating new attorneys into law practice. Historically, a typical legal apprenticeship consisted of observation and conversation with an established lawyer, as well as readings and routine labor. *See Jared Lamb, The Path of the Law School: Three Implementable Law School Reforms*, 3 FAULKNER

In the legal writing classroom, students actively engage in the process of learning as they are not only required to produce legal writing documents, but also to engage in discussions with their professor about the legal writing assignments throughout the writing process. Many legal writing professors have moved from an approach that focuses on the final legal writing product to one that focuses on the process of writing (such as how to create the desired product).⁸⁰ As students work through the process of crafting an effective document that aids the legal reader, they engage in a series of discussions with their professors and fellow students in an effort to formulate an effective and appropriate message. Through classroom and individual discussions, professors guide their students through the process of analyzing increasingly complex legal problems and break the activity of writing into discrete steps, prompting their students and helping them to shape their own thinking along the way.⁸¹ At each step, legal writing professors will engage in a dialogue with their students about the students' ideas, as students have an opportunity to articulate their thinking out loud and hear professors' reactions.⁸²

L. REV. 343, 349 (2011-2012). A tradition inherited from England, American attorneys trained in apprenticeships through the mid-1800s until, in 1870, Christopher Columbus Langdell introduced the casebook method at Harvard Law School. See Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 256 (2006). While law schools have moved away from the apprenticeship model in an effort to improve legal education, there are some benefits of the apprenticeship model that are not adequately addressed by the casebook method. Legal-writing teaching brings to legal education an improved version of the traditional apprenticeship model. See Beazley, *supra* note 57, at 23-25.

80. See Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 74, 106 (2004) (arguing that the process of legal writing increases students' understanding of certain doctrinal concepts and legal discourse, as well as gives insight about how they learn); Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING 1, 21 (2000) (assessing "writing assignments that help students either to integrate new information into their existing knowledge structures or to create new knowledge structures").

81. See Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 652, 672 (2007).

82. See *id.* (comparing benefits of oral versus written feedback and praising oral feedback for giving the student the opportunity to hear the teacher's tone); Alison E. Julien, *Brutal Choices in Curricular Design . . . Going Live: The Pros and Cons of Live Critiques*, 20 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 20 (2011) (explaining the process of live critiques, as well as the benefits of engaging in a dialogue of feedback); Amy Vorenberg, *Strategies and Techniques for Teaching Legal Analysis and Writing*, WOLTERS KLUWER LAW & BUSINESS (2012), <http://ssrn.com/abstract=1988519> (stating the importance of feedback throughout the writing process and explaining how to engage in a feedback dialogue).

While a student's confusion may go unnoticed in a large casebook classroom, due to the typically smaller size of legal writing classes and the nature and methods of legal writing teaching, analytical and conceptual issues often become apparent and can be isolated and addressed in the legal writing classroom. For example, students may be asked to consider a set of cases from a particular jurisdiction to analyze a legal problem. Students may be asked to analyze the issue on their own and then share their ideas during the following class. Through class discussions, the professor may learn that (despite earlier teaching on jurisdiction and court hierarchy) some students are wrongly treating all cases as if they are of equal weight, while some cases take precedent over others. It is also possible that students may develop their analysis around a favorable case from a lower court or another jurisdiction, and ignore binding decisions (positive or negative) from their own jurisdiction. Dialogue simultaneous to the writing process can detect this type of error and provide a valuable teaching opportunity. Not only will students be able to adjust their thinking as they move forward with the current assignment, but also they should remember this lesson (given the contextual manner in which it was learned) and apply it to the next assignment.

The dialogue about a legal writing assignment will often go beyond the more objective aspects of legal analysis, engaging writers in discussions about more subjective matters such as case strategy. For example, novice legal writers may have difficulty organizing a document not because they lack an understanding of the law or the technical steps needed to devise a proper structure, but because they lack the depth of experience needed to decide what information the document's decision maker will find most useful or persuasive. While writers may understand that they should lead with their best argument, writers' errors in not doing so may reflect misjudgments on the more subjective decision as to which argument is in fact the best. A determination of what is the best argument may vary by jurisdiction, by level of court, and even by particular courts and individual judges. To create a well-written document that helps the reader "make the decisions they need to make in the course of their professional duties," writers must have a good understanding of what decision will be made and how the decision maker will likely go about making the decision.⁸³ Indeed, more specific and thoughtful consideration of the legal audience and the document's purpose will aid the legal writer in making this type of decision. Where legal writers have the benefit of engaging in discussions with more

83. Osbeck, *supra* note 40, at 417.

experienced attorneys during the writing process, they can benefit from the attorneys' knowledge and experience, rather than being limited to their own. Through dialogue, writers can also begin to develop their own professional identities by learning how more experienced attorneys deal with strategic decisions and ethical matters.

While the nature of a writer's errors should evolve as a novice attorney gains experience, law school graduates can continue to benefit from engaging in conversations with more experienced attorneys about their cases. New attorneys will experience new challenges as they begin to practice full-time, with all of the additional considerations that then come to bear on the attorney decision-making process (such as client input and goals, financial considerations, and time constraints). New attorneys may need assurances that they are approaching a case the best way and identifying their best arguments. (Indeed, even experienced professionals at any level can benefit from engaging in dialogue with their colleagues in which they can articulate their ideas and receive specific guidance.) Like law students, many new attorneys may not know what questions to ask and will benefit from sharing their ideas and receiving feedback from a more experienced attorney. While discussions may take additional time in an already busy work day, they can ultimately save time as new attorneys should produce better drafts and improve their knowledge of practice in the process.

C. *Feedback on the Written Draft*

In addition to the oral discussions that surround the writing process, law students can learn about the law and legal practice from receiving specific comments from an experienced professional on their written drafts.⁸⁴ The process of gaining professional expertise inherently involves significant trial and error. A draft of a legal document can serve as a medium through which learning can occur. The legal writing product lays bare writers' thoughts and reveals their thinking processes.⁸⁵ Feedback on legal writing is not limited to legal analysis, but can also address matters of case strategy and professional judgment. Through their writing, legal novices reveal to their more experienced

84. Feeley, *supra* note 72, at 216-17, 222-23 ("Legal writing experts believe that individual feedback and critique is of critical importance to improving legal writing skills."); Nancy Levit & Douglas O. Linder, *Happy Law Students, Happy Lawyers*, 58 SYRACUSE L. REV. 351, 360 (2008) ("A wealth of educational research demonstrates that prompt feedback about the success of an activity is tied to critical thinking, concept mastery, and educational satisfaction.").

85. See generally Kearney & Beazley, *supra* note 67, at 885-86.

reviewers not only their knowledge and understanding of law and practice, but also their strategic and ethical choices.

Novice legal writers gain significant knowledge and expertise from receiving effective feedback on their written work, and they can begin to develop their overall practice competency.⁸⁶ To be effective, feedback must be specific and explain not only what adjustments need to be made to the draft, but also why these adjustments are necessary. For law students and less experienced attorneys, it is important that the reviewer have sufficient knowledge of the case facts and relevant law, as errors may be more than superficial.⁸⁷ Specific feedback that addresses not only surface errors, but also the legal document's content, is most useful to the legal novice and provides comments at what is often the appropriate level. It is not unusual for a novice writer to make analytical errors as well as poor professional decisions.

Where specific feedback is given by legal experts, novices have the opportunity to see where they have erred in their analysis. Where more experienced attorney reviewers comment on writers' strategic and professional choices, writers will benefit from knowing the decisions that the legal experts would have made and then comparing their own choices and decision-making processes to those of the reviewers. For example, a reviewer may believe that the writer's second argument should lead or that more attention should be given to particular authority. By learning how reviewers would have organized and presented the argument and why they would have made those choices, writers can reflect on their own decisions with the benefit of this additional information. Where writing reveals faulty professional judgments or ethical choices, specific feedback becomes all the more important. Through the guided process of trial, error, and input, writers begin to learn more about the various factors they should consider the next time they need to make a similar decision.⁸⁸

86. CARNEGIE REPORT, *supra* note 17, at 109, 119 (concluding that where writing approximates practice it "allow[s] for careful correction and improvement of learners' skills").

87. Many articles have been written on the subject of providing feedback on students' written work. See, e.g., Barnett, *supra* note 81, at 653-74, (exploring the skills that a professor needs to comment effectively on students' legal writing assignments); Feeley, *supra* note 72, at 217-37 (discussing "ten concrete techniques for legal writing critique").

88. CARNEGIE REPORT, *supra* note 17, at 108 (describing "knowledge transforming" writing that "represents a highly sophisticated set of metacognitive practices through which students can learn to transfer the insights gained in one experience to other writing tasks").

IV. HOW CAN LEGAL WRITING PRACTICE BE USED MORE EFFECTIVELY AS A TOOL FOR BUILDING PRACTICE-COMPETENCE?

The “practice-ready” debate in the legal community presents an opportunity for law schools to reevaluate their goals and to determine the most effective means for achieving them. The debate has challenged law schools to take a closer look at what it means for a legal graduate to be ready for legal practice, and whether this is an attainable and desirable goal. Through this process, many legal educators are evaluating what skills are required for practice, as well as how best to prepare students for its many challenges.⁸⁹ Moreover, given the increased responsibility of law schools to prepare law students for practice, law schools must also consider how they can best prepare their students to be competent, ethical lawyers.

While legal writing is fundamental to good lawyering and arguably one of the most important skills for practicing lawyers, the many benefits of legal writing practice have not been fully realized in legal education. The absence of pervasive writing in legal education is somewhat perplexing if we consider that the benefits of the writing process have long been appreciated among legal scholars. Law professors often engage in all three aspects of the writing process when engaging in scholarly writing—writing to learn, speaking and listening to expand knowledge, and receiving feedback with specific comments and criticisms. Indeed, legal scholars have long enjoyed the connection between researching and writing about a scholarly topic and gaining knowledge and deeper understanding through this process. For law professors, one of the many stated benefits of engaging in legal scholarship is that it furthers knowledge of the subject matter and, as a result, often improves teaching. Law professors expand their knowledge and learn from the expertise of their peers by discussing scholarly drafts before working groups and providing feedback to one another on written drafts. This feedback usually goes well beyond superficial writing to the content of the draft, including the underlying thesis. As law professors have long enjoyed the benefits of the writing process, the benefits to law students of additional writing opportunities should be readily appreciated.

89. See R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1516 (2012) (discussing the need for comprehensive reform, but also suggesting nine concrete actions that can be employed in the interim); Bobbi McAdoo et al., *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J.L. & POL'Y 39 (2012); Rhee, *supra* note 35, at 338 (suggesting that law schools adopt a model loosely based on that used in medical schools).

Much can be gained if practical legal writing is viewed with a broader lens, as not only an important practice skill or means of assessment of law student learning, but also as a useful tool for increasing the depth and breadth of the writer's knowledge and for building practice competence. The *Carnegie Report* emphasized the need for law students to be engaged in the process of integrating theory and practice to help them bridge the gap between law school and legal practice.⁹⁰ Legal writing provides students with an opportunity to engage in complex problem solving that requires careful consideration of not only the more objective aspects of legal analysis, but also the professional considerations that an attorney would make in practice. Legal writing's benefits extend well beyond legal writing courses—and even beyond law school—by accelerating the writer's learning of new areas of substantive law and legal concepts, and, with expert guidance and feedback, affording opportunities for writers to cultivate their professional judgment.⁹¹

Given the significant role that legal writing practice can play in helping legal novices acquire knowledge and build practice competence, now more than ever, it makes good sense for law schools to invest in legal writing teaching. Ideally, law students should have expanded opportunities to engage in legal writing opportunities through legal writing offerings that vary in type and focus, as well as engage in writing in other non-legal writing courses. In many cases, this investment would require law schools to hire additional legal writing professors to offer more opportunities for students to engage in meaningful, practical legal writing experiences after their first year of law school, and to act as resources for, and work collaboratively with, other law school faculty who incorporate writing into their teaching.⁹² Moreover, while discussions of teaching pedagogy are infrequent among some law school faculties, this type of discussion needs to take place if law schools are to move forward and better help students to meet the demands of modern legal practice. So that students can take full advantage of any writing opportunities, all professors, both legal writing and non-legal writing faculty members, need to be familiar with the best

90. CARNEGIE REPORT, *supra* note 17, at 105.

91. *Id.* at 108.

92. The Author recognizes that comprehensive reform may require a law school administration to make significant changes, including reallocating resources and even rethinking how a law school will approach future teaching appointments. While not discussed in depth here, the Author acknowledges that in a legal institution such a change would take significant time and require study, reporting, and planning.

practices for guiding and providing feedback to students working on legal writing assignments.

In the long run, increased legal writing opportunities in the law school curriculum will not only better prepare law students for practice, but also better engage students generally in the study of law. As such, law schools will take a significant step toward bridging the gap between theory and practice if they improve the quantity and quality of legal writing practice opportunities in their curricula.

A. *Increase Opportunities for Legal Writing Practice in the Law School Curriculum*

Over the past few decades, increased attention has been given to the importance of legal writing opportunities in legal education. The ABA now requires that all law schools provide a rigorous first-year and upper-level writing requirement for students.⁹³ Many schools, however, have allowed (or required) students to fulfill the upper-level requirement by engaging in scholarly writing, and many do not require students to engage in practical legal writing beyond their first year of law school.⁹⁴ While both forms of writing deepen the students' knowledge and facilitate learning, more focus needs to be placed on practical legal writing opportunities if law schools are to help students become more prepared to meet the demands of the legal market. In addition to improving a law student's technical writing skills, practical legal writing has many additional educational benefits if one considers the knowledge, skills, and professional judgments that are required for successful writing and the learning experiences attendant to the writing process.

Practice-readiness cannot be achieved through first-year legal writing courses alone. As those who teach legal writing know well, students still have much to learn when they complete their first-year legal writing courses. Experienced legal writers often remark that the process of improving one's writing is a continual one; writing can always be improved upon, and new assignments invoke new areas of the law and present new challenges. It follows that first-year legal writing courses can be expansive in scope as they seek to accomplish a number of competing teaching goals, frequently resulting in a packed agenda. The content of a first-year legal writing course extends well beyond technical writing instruction, also focusing on legal analysis and reasoning, and,

93. ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 2, at 19 (stating in Standard 302(a)(3) that "a law school shall require that each student receive substantial instruction in: . . . writing in a legal context, including . . . at least one additional rigorous writing experience after the first year").

94. See generally LWI SURVEY 2012, *supra* note 31.

frequently, research. During the writing process, legal writing professors often find it necessary to incorporate substantive law, legal methods, legal process, procedure, statutory interpretation, and ethics and professionalism into their courses in order to meet the needs of a given problem. Many first-year legal writing courses incorporate a variety of other legal skills as well, such as oral argument, client counseling and interviewing, and even negotiation. Others require students to create not only office memoranda and briefs, but also other legal writing documents like client letters or negotiation documents. Moreover, throughout the many stages of the writing process, legal writing professors both engage their students and model their own professional habits and methods of decision-making.

A first-year law school legal writing course is often year-long, with the first semester focusing on objective writing and the second semester focusing on adversarial writing. A typical course may require students to produce drafts and rewrites of office memoranda, client letters, pretrial briefs, and appellate briefs. While the number of major writing assignments varies, it is challenging to have more than three or four major writing assignments in a given semester. Thus, it is not uncommon for a first-year law student to complete a handful of objective memoranda and a few persuasive briefs in the first year of law school.⁹⁵ In a first-year legal writing course, students engage in increasingly difficult legal problems, but they are exposed to a relatively small number that may only reach a moderate level of complexity. To facilitate the completion of legal writing assignments and keep students focused on the stated objectives, legal problems for writing assignments are often carefully selected (to include issues with a legal or factual conflict) and limited in scope (to one or two discrete issues). Particularly in schools where students are not exposed to research during the first semester, law students are provided with all or some of the relevant legal authority for their legal writing assignments. Even where students do their own research, the legal issues that should be addressed in the writing assignment are often identified for the law students or agreed upon by the class. During the writing process, for students to progress on assignments, first-year law students necessarily work closely with their professors, and often collaboratively with their peers on many aspects of their legal analysis, including the content and organization of legal discussions.

If law students' legal writing practice experience in law school is limited to the first year, they not only miss out on the opportunity to

95. See generally *id.*

further develop this skill, but also to receive the many benefits of engaging in the writing process. Additional practical legal writing opportunities during the second and third years of law school can provide students with an opportunity to continue to perfect the types of legal writing that they have already been introduced to and engage in new types of legal writing in different practice contexts (such as drafting contracts, negotiation documents, and pleadings). As students engage in new legal problems, they will expand and deepen their knowledge of new areas of substantive law and aspects of legal practice as they confront new writing challenges and professional choices. Drawing upon their existing knowledge, students will reinforce what they have already learned and have the opportunity to apply their existing knowledge to new and different assignments.

Exposure to more complex problems allows students to synthesize this existing base of knowledge as they work through a new legal problem. For example, the preparation of a criminal appellate brief may cause students to consider and bring together the law that they have been taught in other courses (such as Criminal Law, Criminal Procedure, Constitutional Law, Evidence, and Professional Responsibility). In subsequent legal writing practice, students will have significantly more knowledge and experience to draw upon (from law school course work and outside practice experiences), and can take on additional responsibilities, engaging in more complex problems with more challenging law and facts. Students may explore new areas of law requiring other types of authority (for example, complex statutes, regulations, administrative law, and legislative history) and more advanced research. They may also take on more responsibility with respect to identifying legal issues, developing case theories and strategy, and crafting legal arguments. Along the way, law students will benefit from observing and learning from additional legal experts during the writing process.

Legal writing scholars have suggested a number of ways to bring more legal writing practice into the law school curriculum.⁹⁶ Regardless of whether a law school increases the number and scope of its upper-level

96. See Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 *LEGAL WRITING* 325, 328 (2011) (explaining the legal-writing program at the University of Maryland School of Law, which integrates legal writing into the law school curriculum in two ways: integration at the faculty level by having traditional casebook faculty teach legal writing classes and legal writing professionals teach traditional casebook classes, and integration of writing with doctrine); see also Beazley, *supra* note 57, at 66-71 (explaining how professors can integrate legal writing into casebook classrooms without writing projects); Lysaght & Lockwood, *supra* note 80, at 100-07 (describing the elements of a writing-across-the-law-school-curriculum program and its benefits for students).

legal writing course offerings, incorporates more legal writing practice opportunities into non-legal writing courses, or both, students will greatly benefit from these additional opportunities to integrate theory and practice through writing, particularly if they receive sufficient guidance and feedback.

B. Improve Upon Existing Legal Writing Practice Opportunities

In the modern law school, many practical legal writing opportunities take place outside of the legal writing classroom—in other law school courses and clinics, externships, clerkships, summer associate positions, and extracurricular and co-curricular activities, including writing and moot court competitions. Many of today's law students, often motivated by the competitive job market, seek out these additional practical legal writing opportunities inside and outside of the law school. While students have the benefit of acquiring additional opportunities to engage in practical legal writing through externship placements and other activities outside of the law school curriculum, the value of these opportunities is significantly diminished when students do not receive appropriate assignments or sufficient guidance and feedback. Indeed, these activities are not always a good substitute for in-class legal writing instruction.

Legal writing practice is most beneficial when students are engaged fully in the writing process—receiving sufficient guidance to work through legal problems successfully, including an opportunity to dialogue with a more experienced attorney during the writing process, and receiving substantive feedback that addresses the writer's thinking and professional choices. Students work best on writing assignments when they work closely with supervising attorneys on select assignments, and are not left to work independently and in isolation. As they work to gain professional expertise, novice legal writers should be expected and encouraged to ask questions and should receive the benefit of thoughtful answers. If writing assignments are to facilitate learning, it is imperative that we provide a learning environment where legal novices are expected to have some gaps in knowledge and more experienced attorneys are willing and able to share the benefit of their expertise. Unfortunately, this is not always the case as competing work demands can make it difficult for supervising attorneys in practice to engage fully with students. Moreover, extra-curricular and co-curricular activities are more beneficial if they are well-supported by faculty.

When sufficient guidance and feedback is provided, legal writing can be a useful learning tool that encourages law students to reflect on their professional judgments and consider the choices they will make in the future. Law students are often surprised, however, about the limited

opportunities they find to receive critical feedback on their writing outside of their legal writing classes and some clinical courses, and even these experiences can vary. While some other non-legal writing upper-level courses and co-curricular activities such as moot court can provide excellent writing opportunities, the quality of these experiences is not always consistent, and these opportunities are rarely available to all law students.⁹⁷ Moreover, especially where law students are working on cases with real clients or in practice, supervisors are often inclined to do more editing than commenting on the drafts as the first priority is, understandably, client representation.

Legal writing professors are well aware of the challenges of providing good comments on student writing. Writing issues are often difficult to diagnose, and meaningful comments that address more fundamental problems can take significant time to prepare. The process of writing the comments themselves can be time consuming as many legal writing professors provide brief comments in the margins of the student's draft, as well as a narrative summary prioritizing the issues that the writer will need to address. In document margins, legal writing professors often provide comments from the perspective of the reader, responding to the document while acting in the role of the intended recipient of the document and asking questions that are not answered by the text. In prioritizing issues for the writer, legal writing professors often take a "triage" approach, focusing on big-picture issues first (for example, organization and legal analysis) and ultimately working down to more superficial errors once there are less comprehensive issues to address.⁹⁸

Given the excellent learning opportunity that legal writing experiences present when students are provided with appropriate guidance and feedback, students will benefit greatly if they can receive this instruction from full-time legal writing professionals. Where this is not possible, law schools should encourage all legal professionals who work with students on their writing, whether inside or outside of the law school, to adopt best practices for instructing students on their legal writing. Legal writing scholars have published a wealth of scholarly articles about how to teach writing and give feedback effectively, and there are a number of scholarly journals that focus specifically on legal writing teaching pedagogy. National legal writing organizations, like the Legal Writing

97. See ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 2, at 20 ("A law school need not accommodate every student requesting enrollment in a particular professional skills course."); *id.* ("The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student . . . requesting enrollment . . .").

98. See generally Barnett, *supra* note 81, at 654-55.

Institute, also provide significant support to legal-writing teachers and provide a wealth of additional resources and publications.⁹⁹ Indeed, there are several published articles that are directed to practitioners and non-legal writing professors (such as casebook faculty, externship supervising attorneys, and so forth).¹⁰⁰ Moreover, in this and other contexts where non-legal writing faculty teach writing to students, for students to receive the greatest benefit, law schools should, of course, have designated full-time legal writing faculty available to act as resources for these other professors.

CONCLUSION

While legal writing is often acknowledged as a fundamental skill for lawyers, law schools have not taken full advantage of the link between the writing process and the acquisition of knowledge of the law and attorney development. Without sufficient opportunities to write their way into deeper understanding, dialogue with experienced practitioners about discrete legal issues, or receive meaningful feedback, law students and new attorneys miss real opportunities to become more practice-ready. If we recognize and take advantage of the many benefits of guided legal writing practice and feedback, we are taking a substantial step in the right direction of bridging the gap between legal education and practice.

One of the greatest impediments to increasing legal writing practice in the law school curriculum is the existing attitudes about practical skills training and legal writing teaching in law school. Before any change can occur, it will be important for law schools to adopt a new attitude about legal practice and specifically legal writing teaching. While there are a number of impediments to this change,¹⁰¹ one of the

99. See THE LEGAL WRITING INSTITUTE, www.lwionline.org (last visited Oct. 6, 2013).

100. See, e.g., James Kent Gionfriddo et al., *A Methodology for Mentoring Writing in Law Practice: Using Textual Clues to Provide Effective and Efficient Feedback*, 27 QUINNIPIAC L. REV. 171, 172 (2009); Joel F. Henning & Mindy A. Friedler, *Training Senior Lawyers to Be Better Trainers*, 19 LAW PRAC. MGMT. 60 (1993); Rodriguez, *supra* note 74.

101. See Morrissey, *supra* note 79, at 259 (2006) (observing that law schools' increased employment of legal writing professors has forced "law school budgets to include a greater salary allocation to them," resulting in an increase in the overall expenses of schools' operations despite the "enhanced pedagogical experience for the students"); Rideout & Ramsfield, *supra* note 59, at 47 (1994) (explaining that traditionalists view writing instructors as anti-intellectuals and seek to exclude writing instructors from the academy); Graham C. Lily, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1455 (1995) (explaining that the relatively small number of writing instructors in law schools impedes the impact that these instructors can have on the appointment of faculty and the governance of the law school).

most significant is the misconception that the learning of practical skills must be separate and distinct from theoretical learning in the law school curriculum.¹⁰² Indeed, the integration of practical skills and legal theory is beneficial to the learning of both. Not only can knowledge of theory assist in practice, but also practice experiences can deepen one's understanding of the law. Legal theory and doctrine is often better understood if it is considered not only in the abstract, but also in the context of a legal problem. However, we need not imagine what the result will be if law is taught without meaningful practical application, as teaching in law schools too often occurs in just this manner—with teaching focusing largely on the learning of legal rules and too infrequently engaging students in meaningful assignments that require them to apply this knowledge in a practice context.

While law schools cannot introduce students to every challenge they will face in legal practice, law schools can, and should, better prepare law students for practice by establishing more opportunities for students to integrate theory and practice in meaningful ways and to learn processes for acquiring new knowledge. Moreover, these opportunities should mimic practice and afford students the opportunity to engage in activities in which attorneys regularly engage. These opportunities should take into consideration the complexity and breadth of legal problems attorneys confront in practice and the methods that practicing attorneys employ to address them successfully. If law schools consider legal writing for what it is, a unique opportunity for students to not only improve their writing but also build practice competence, it is easy to see how further legal writing practice can help bridge the existing gap between legal education and practice by providing these opportunities.

102. See generally Dauphinais, *supra* note 57 (discussing impediments to legal writing professionals and programs gaining higher status and recognition in the legal academy).