More has been said about the writing of lawyers and judges than of any other group, except of course, poets and novelists. The difference is that while the latter have usually been admired for their writing, the public has almost always damned lawyers and judges for theirs. If this state of affairs has changed in recent times, it is only in that many lawyers and judges have now joined the rest of the world in complaining about the quality of legal prose.

In response, many law schools are now adding programs in legal writing, or are reforming and expanding existing programs. Even the legal profession has responded with calls for better legal writing, with an increasing number of seminars and CLE forums on improving legal writing, and with legislative efforts at language reform, including plain English statutes. Some large law firms have even hired full-time writing specialists.

This growing attention to the quality of legal prose is laudable. But more fundamental inquiry into legal writing and its associated activities, research and analysis, is needed as well. Before we can offer more comprehensive attention to legal writing, we should understand more about what the characteristics of legal writing are, how it is written, and how it is used. This journal calls for the inquiry to begin and offers one forum for publishing the results. I should add that inquiry into legal writing should not be conducted solely in response to perceived needs for reform. Legal prose itself, in its history, in its complexity, and in its uniqueness, deserves more careful attention than it has received. What follows are a few of the initial questions, then, for this investigation and research.

**What Is Legal Writing?**

Perhaps the first question to ask is, what do we mean by legal writing? Legal language is often treated as a special kind of discourse by philosophers and linguists. As any layperson would tell you, lawyers and judges do seem to write in their own specialized language. To the extent, then, that legal discourse is specialized, we need to know how its features might make unusual demands on the writing done within it. For example, of what consequence for legal writing are the well-established formulas for statutory language and interpretation, or the formulaic nature of many pleadings?

Another important inquiry is into what is called legal reason-
ing. Just as legal discourse has specialized features, is legal reasoning also a specialized form of argumentation, and, if so, how does it differ from other forms of analysis and argumentation? In addition to needing a comprehensive model for legal reasoning, legal writing teachers also need to know how students learn, or acquire, legal reasoning. What relationship exists between mastering legal reasoning and learning to write for legal settings? Attention to such questions is valuable because, given the nature of legal discourse, the structure of legal reasoning is central to other issues in legal writing. Furthermore, these inquiries can benefit from recent, more general work on writing and thinking: from the attention being paid to critical thinking, to research in cognitive psychology, to problem-solving models for thinking and writing, to studies in the social nature of thinking and writing.

How Is Legal Writing Read and Written?

Much of the existing literature about legal writing focuses on the written text, offering fairly prescriptive advice about organization and style. Very little of this advice, however, is based on research into the ways in which legal documents are actually written or read. Rather, it largely depends upon time-honored, general maxims for writing, translated into the language of legal writing (e.g., "avoid the passive voice" becomes "the passive voice is less persuasive in brief writing"). In this respect, research into legal writing lags far behind research into many other areas of writing.

This lack is especially distressing given the common and often unavoidable complexity of legal prose. We need to know what a judge responds to stylistically in a brief, or a client in reading an opinion letter, a will, or a contract. Research is also needed into the composing processes of both law students and legal professionals. What differences exist between the composing habits of novice writers, say first-year law students, and those of more expert legal writers—third-year students, for example, who are more socialized into legal discourse, or practicing professionals? Do certain writing habits transfer into legal writing classes from previous writing experiences, whether in college or at a job? Similarly, do legal writers vary their writing practices according to the writing task—does an attorney make the same kinds of composing choices when drafting a will as when writing a pleading?

These questions are worth asking because the answers will provide direction and purpose to the teaching of legal writing. We need to understand better the kinds of choices that legal writers make, in a variety of situations, as well as how readers respond to
the various kinds of legal documents, before we can offer instruction that does more than rehearse the accepted, but often unexamined, platitudes.

**WHAT BROADER ISSUES EXIST FOR LEGAL WRITING?**

The last decade saw a number of state legislatures pass plain English laws for consumer documents, a movement that has come to the attention of the legal profession. Several American and Canadian institutes actively promote plain English, and the use of plain English is often advocated in law school writing courses. Conversely, others have questioned whether plain English can be meaningfully defined, or have criticized the usefulness of the so-called readability formulas used to produce plain English. The issue of plain English—how to define it and how it can be used—calls for further discussion, then. At the same time, plain English should be examined as an outgrowth of broader historical efforts at the reform of legal language, going back at least to the nineteenth century. One question that both proponents and opponents of the current plain English movement might consider is the achievements and failings of earlier reform movements and what can be learned from them.

Another area of inquiry involves examining the contexts within which legal writing is done. The varied settings for legal writing offer an excellent opportunity for studying the ways in which it is shaped by social, political, and bureaucratic influences. One of the most common settings for legal writing is the law firm, where the writing of new associates is often scrutinized by the partners; in many firms, perceived deficiencies in writing abilities are grounds for dismissal. At the same time, many firms operate a mentor or apprentice program, in which the partners will review and guide the associates in their writing. What are the differences between the writing of these “mentors” and of their “pupils”? How does this mentor system alter the character of writing within the legal profession, and in what ways does it perpetuate certain practices—for example, in style and use of language? Since this mentorship also applies to law students, who often are given writing advice during clerkships and internships, one might well ask how this system compares with the legal writing instruction that those students receive simultaneously in law school.

**HOW SHOULD LEGAL WRITING BE TAUGHT?**

Much of the preceding discussion has alluded to the consequences that this kind of research will have for the teaching of le-
gal writing. Other teaching issues remain, however. One problem that looms for all law schools is that of the level of writing proficiency with which students enter law school. What differences exist among the respective writing proficiencies of individual law students and how transferable are their existing writing skills to the kinds of writing they will be doing in law? Answers to questions like these are important if legal writing programs are to offer more useful instruction in both basic and advanced writing skills.

These questions also bear on the design of legal writing curricula. To what extent can “generic” legal writing skills be taught, under the guise, for example, of the office memorandum? On the other hand, what is the place of more specialized courses, for example, in appellate writing or in drafting? If the need for the latter kind of writing courses is strong, are these subjects better taught as separate courses, or as part of a trial advocacy program, or as part of advanced law seminars?

Even a traditional, first-year course in legal writing does not address the disparity in the levels of writing proficiency mentioned above. How is remediation best offered: through special courses and workshops, through individual consulting and writing centers, or through writing programs conducted the summer before students enter law school?

Other questions are triggered by some of the points made earlier. Any investigation of the relationship between legal writing and legal reasoning will raise the question of whether legal reasoning is in any way separable from legal writing. Should legal writing courses also focus on what might be called critical thinking or problem-solving skills, as is increasingly being done in undergraduate curricula? Or should legal writing courses be taught in conjunction with, or as adjuncts to, targeted first-year courses in doctrinal areas? To what extent would this pairing between a legal writing course and a doctrinal course provide any better exposure to legal reasoning than first-year students currently receive?

Discussions such as the one above presume that legal writing is taught primarily in law schools, and yet much legal writing instruction exists in other settings. The value of undergraduate courses in writing deserves further investigation. To what extent are their goals the same and different? In what ways do they offer preparation for law school-level writing and analysis? In a similar fashion, the goals and curricula of writing courses for legal paraprofessionals, who often receive only stripped down versions of law school writing, deserve examination.
This foreword cannot begin to ask all of the questions related to the emergence of legal writing as a field of teaching and research, but it does attempt to establish some starting points. Our knowledge of legal writing, and how best to teach it, is still at the pre-paradigmatic stage, despite the four decades in which it has found some place within the law school curriculum. Both the teaching of legal writing and the limited inquiry into it so far are still very much characterized by a plurality of approaches and descriptions, a fact that speaks to the rich potential of the work ahead.

The articles offered in this inaugural volume should, I hope, encourage a continuing conversation about legal writing and demonstrate the plurality of approaches possible. The first, "On the Maturing of Legal Writers," by Joseph M. Williams, discusses two models for the growth of students as legal writers and notes the consequences of our choice of a model. It employs theoretical research in psychology, linguistics, and education. "Teaching Lawyers to Revise for the Real World," by James F. Stratman, examines the reading processes of appellate judges and applies the results to the teaching of legal writing. The work for the article is based on a form of empirical research known as protocol analysis. The third article in this issue, "The Professor and the Professionals," by George D. Gopen, demonstrates the usefulness of key rhetorical principles for teaching writing to lawyers and judges.

This first issue of Legal Writing ends with two pieces important to the identity of legal writing as a field of teaching and research. The first, "Legal Writing: A Bibliography," by George D. Gopen and Kary D. Smout, presents a bibliography of books and articles published on legal writing up to Summer 1991. The second, "Legal Writing in the Twenty-First Century," by Jill J. Ramsfield, offers the results of a survey of legal writing programs taken in 1990. It shows where the field is now and hints at the work to be done.

I hope that all of these articles will interest you, will be of value to you in your work, and will encourage you to make your own contribution to this growing and important field. To that end, this journal will dedicate itself.

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On the Maturing of Legal Writers: Two Models of Growth and Development

Joseph M. Williams

I. A Sad State of Affairs

Given the increasing number of writing courses in law schools, we might conclude that college graduates are writing—and perhaps thinking—less well than they once did. Either that, or there is a new concern with raising the general quality of writing in law schools and in the profession. While one might wish that the cause were the latter, a few moments’ conversation with law faculty suggests that many think it’s also the former—the perception that first year law students seem to be writing less well than they once did and that law schools ought to be doing something about it.

If that’s true and not just one more chronic complaint that things are not as good as they once were, it’s not clear whom we should blame, much less what we should do. One obvious target is the English professor. When collared in the hall, freshman composition instructors are for most of us a legitimate object of abuse, particularly when we are asking about one of our upper-division students who apparently can’t write—at least well enough to suit us. Of course, college English teachers can in turn point down to high school English teachers who failed to teach their students to write before they got to college. Looking in the other direction, those of us in graduate and professional schools complain that the undergraduate faculty are no longer teaching their students how to write, regardless of field. And then along with businesses of all kinds, law firms regularly complain that the law schools aren’t teaching their graduates how to write or think critically. We might conclude that the entire educational establishment is failing to teach students how to write or how to think.

In fact, there is more going on here than bad teaching. We should notice first that most of the complaints about writing and thinking come at predictable points in a student’s educational life: at points of transition—from high school to college, from the general education of freshman composition to some academic concentration, from college to graduate or professional school, from professional school to a profession. One could respond that life is
nothing but transitions, so we have said nothing particularly interesting. In what follows, though, I want to suggest that, in fact, it is no accident that these points of major academic or professional transition are predictably the period when a person's writing and apparent thinking may seem especially bad. I also want to argue that this kind of seeming incompetence is not only predictable, but for many students probably inevitable; indeed, it may be evidence of intellectual growth.

To support those claims, I want first to sketch some recent work in cognitive development, critical thinking, and expert thinking. Then I'll offer an account of development that proposes a more useful and interesting explanation for why we complain so much about bad writing at just the times we do. This may seem like the long way around, but I want to locate this problem of teaching legal writing in the widest possible educational context—the context of the central aim of liberal education: to train all of our students to think well and write well, with law students merely a sub-set of that larger group. Those who are ready to consider these matters from this different point of view may reconsider some of their views about teaching thinking and writing.

II. Higher Order Thinking: Two Models for Growth

We can approach the matter of critical and analytical thinking and writing from two not mutually exclusive points of view: (1) mature, competent thinking is the natural and, ideally, inevitable goal of human development, as the end of a teleologically guided process of growth, or (2) good thinking is a learned skill, acquired as a result of experience and education. The developmentalists argue that as we grow physically, we also grow cognitively, not steadily in small increments, but through discrete transitions from one identifiable cognitive state to the next, finally to some highest level that cognitive destiny intended. The experientialists, on the other hand, emphasize the development of critical thinking, problem solving, and higher-order thinking skills not as the natural and predictable growth of the human organism, but through learned experience and training, through socialization into a world of expertise in which well-organized knowledge is the base out of which cognitive skills emerge.

I would like to sketch these two positions in some detail, because they imply two metaphors for development, one of which virtually all of us take for granted. In what follows, I want to argue that the other metaphor for development might be more useful as we think about what we are up to in education of any kind.
A. Cognitive Growth as Destiny

There are many models of cognitive and academic development, but most of them assume that there is a beginning point to growth and a goal to be reached. Not all of them assert by any means that this growth "just happens," but when it doesn't, something has gone wrong in the development of the whole person.

*Three Models of Growth:* Two of these models have seemed particularly useful to curriculum planners, and a third is relevant to my purposes, because I want to use it later in this essay, modified to suit my purposes. The three models are those of Jean Piaget, William Perry, and Lawrence Kohlberg.

The best known developmentalist was Piaget, a Swiss child psychologist. He argued that just as we develop through distinct stages of physical growth, so do we rise through structurally distinct cognitive levels. The infant grows through the first two stages rather quickly: sensory-motor and pre-operational. The third and fourth stages are rather more drawn out and more complex. Piaget called the third stage concrete-operational; he claimed that it lasted from roughly the age of six or seven to middle adolescence. The fourth and highest stage he called formal-operational (Inhelder and Piaget, 1958).

Quickly (and very crudely) put, the difference between concrete and formal operational thinking turns on the ability to manipulate abstractions derived from concrete experience. Most of Piaget's research involved scientific concepts, but he argued that the general principles held for all kinds of thinking: Can the person juggle multiple hypothetical variables and then combine and recombine them to predict different outcomes? Can the person project probabilities? Can the person reason from the intersection of logical sets and from empty sets?

Though Piaget claimed that this growth from concrete to formal operational thinking predictably occurred during adolescence, some American researchers have claimed that up to 50% of our first-year college students are still rooted in concrete-operational thinking (Kangas and Bradway, 1971). And a study by the American Accounting Association claimed that half of the graduate students studied were still either concrete-operational thinkers or barely in transition (Shute, 1979). If that is the case, then we ought to wonder whether those law school students who seem unable to think critically, imaginatively, flexibly about the law may be at a similarly low stage in their cognitive development. If so, legal education would face a challenge rather different from merely improv-
ing its educational practice. It would have to rethink its selection processes.

Two more recent proponents of stage-based, holistic views of development are William Perry and Lawrence Kohlberg. Because their stages of development extend well into adulthood, they have attracted more attention among curriculum planners at the college level.

Perry, a counselor of Harvard undergraduates, proposed a scheme of development that has become particularly attractive to curriculum planners because it directly addresses the development of college students (Perry, 1970). During the several years he devoted to student counseling, he observed that different students would respond differently to the same instructor, one finding him or her open-minded, receptive to discussion and different points of view; the other finding the same instructor undisciplined, ready to put up with the useless opinions of badly informed students rather than dedicated to setting forth "the truth." Perry also noted that students did not adopt these positions randomly, but rather sequentially. If students preferred an instructor who allowed everyone to express an opinion, to discuss rather than to lecture, they seemed not in subsequent years to change their preference and seek the more structured, authoritarian instructor. On the other hand, those students who did prefer the more authoritarian instructor would in later years predictably come to prefer the more open instructor.

From this and other systematic changes he observed in the behavior of Harvard undergraduates, Perry inferred a regular course of development that consisted of four stages: dualist, multiplist, relativist, and committed. Like Piaget's theory, Perry's scheme begins with a cognitive stance entrenched in the concreteness of immediate authority: the dualist wants from the teacher/authority the single, right authoritative answer. Eventually, after realizing that the authorities may really disagree, the student moves through a multiplist period in which she believes that if experts really do disagree, then "all opinions must be equal"; then on to the relativist's realization that while there may be legitimately different points of view, some are better founded than others. Finally, the student accepts that different people can legitimately hold different positions, but that finally one must commit oneself to one of them.

Like Piaget, Perry describes a development that roughly traces a movement from concrete to abstract: Perry's dualist is entrenched in the need for "hard" knowledge, "concrete" [more on
such metaphors in a moment] facts. But as that student grows, he or she moves toward the ability to live with multiplicity and ambiguity, to an appreciation of process over fact.

Lawrence Kohlberg was a developmental psychologist interested in the development of moral reasoning. He proposed a system of moral thinking that roughly resembles Piaget's developmental scheme (Kohlberg, 1984). He argues that our moral thinking evolves through three stages, each consisting of two stages (which I will ignore). He calls the lowest and earliest stage pre-conventional. It is based roughly on a kind of pragmatic eye-for-an-eye morality in which one does what is right because of the threat of immediate consequences. Kohlberg would not assert that this first stage is the same as Piaget's concrete-operational thinking, but it does share the authoritative priority of the immediate presence of reward and punishment as the basis for projecting consequences of acts.

Kohlberg calls his second stage the conventional stage of morality. It is roughly that stage of morality whose principles derive from the community of one's peers: first the family, then the community, finally the nation. The moral values are immediately enforced not by reward or punishment, but by a more abstract sense of approval and duty.

The third and highest stage Kohlberg calls post-conventional. At this stage, the person is not directed in his or her behavior by the rules of a community but rather refers to higher principles of behavior transcending all communities, abstract principles of universal moral behavior derived from concrete, social experience. In essence, Kohlberg's scheme describes the growth of a person from moral behavior defined by individuals immediately present, by the larger society that a person eventually joins, and then by the community of human beings who, despite their local differences, share a set of universal moral principles. (I should point out that Kohlberg's system of development has been strongly criticized as oriented toward male values and behavior, that it assumes that the final stage in the development of many men is by nature better than the final stage in the development of many women. (Gilligan, 1982))

I should emphasize here that I am interested only in the broadest outlines of similarity among Piaget, Perry, and Kohlberg. Their schemes are more complex and more finely-grained and elaborated than my account of them. But all three describe a course of development that begins with deference to the authority of concrete experience and evolves toward the ability to derive and ma-
nipulate higher-level abstractions based on lower-level abstractions. What all three of these schemes have in common is the development of a person's increasing ability to free him or herself from the authority of the concrete to a point where that person has inferred higher-order principles. It is the ability to imagine something other than what is, to imagine and then manipulate hypothetical variables, to combine and recombine them, to accept multiple possible answers and the final uncertainty of all answers, valuing the process of inquiry more highly than the outcome of the inquiry. (I understand that one cannot simple-mindedly conflate Piaget, Kohlberg, and Perry into a single scheme. But I am not conflating them. I am abstracting from them what will be relevant to what follows. I also understand that all three appreciate the critical role of experience and socialization in development and that development may be uneven, further ahead in some areas of a person's life, behind in others.)

*The Metaphor of the Moving Line on a Graph:* Each of the theories I have sketched is susceptible to a tacit metaphor that underlies almost all of our ideas about growth and development as improvement: it is the metaphor of the upward moving line on the graph. This moving line may be a straight diagonal, a smooth curve, or a stairstep. Ordinarily, we do not like to visualize this "growth" line as a staggered series of increasingly higher peaks and less deep valleys. That is, we do not get lighter before we get heavier, shorter before we get taller, less intelligent before we become more intelligent, less competent before we become more competent, less moral before we become more moral, less good at solving problems before we become better.

In the form of a stairstep, it is the model we use to account for the movement of a person who achieves a series of increasingly higher stages, not regularly to be sure, but over time (measured left to right) predictably ("naturally," given normal intelligence and the right environment), moving upward and onward, toward a goal located somewhere in the upper-right quadrant. To be sure, most developmentalists build into their schemes a period when children/students may seem to show some decline in their cognitive skills as a result of conflicts between what they have assimilated and what they are experiencing, but that regression is only a prelude to further growth. Thus, if we lay a solid foundation and then reinforce growth, the students will both maintain what they have learned and steadily build on it toward greater cognitive maturity.

But metaphors influence not only how we talk about such
matters, but how we think about them. We speak of anger, for example, in images of liquids boiling inside sealed containers: "I was so boiling mad that I blew my lid. But after I let off steam, I felt better" (Lakoff, 1986; Johnson, 1987). Had our historical circumstances been different, our culture might have adopted for such emotions the metaphor of the machine: "I was so racing mad that I was already running too high for my specs, so I knew I had to lower my rpms or burn out my bearings. After I cooled the system down, I operated better." Under our presiding metaphorical frame, we often encourage — or at least condone — the expression of anger because we consider its "release" therapeutic. But under another metaphorical system, we might have considered the expression of anger damaging because it could lead to systemic breakdown; I would have exceeded my specs.

The language that I used to describe cognitive growth before was (deliberately) full of that metaphor: "raise the general quality of writing," "upper division student," "point down to high school English teachers," "intellectual growth," "the highest stage," "knowledge is the base from which cognitive skills emerge," "rise through structurally distinct cognitive levels," "rooted in concreteness," "highest abstract principles," "higher abstraction based on lower level abstractions," "higher order principles." This language is so easy to fall into and so easy to accept without noticing it that I will boldface it for the next few paragraphs.

The metaphor of development as a line on a graph is an appealing one because it allows us to account for so much of our experience with students: lower level students seem to be locked in concrete thinking; upper level students deal with higher abstractions. It also provides us with a ready rationale for criticizing apparent failure to develop toward higher levels of cognitive skill. If any of our students do not seem to have achieved the level of development we expect at some point in our classes, we can blame the student for not working hard enough to move on. Or we can criticize those undergraduate teachers who should have prepared that student to work at our higher level of performance or at least built a solid base that we could build on. Thus, if we think our first year students can't think and can't write at a level we expect, we can blame high school teachers. If we teach undergraduates who can't construct an argument and write clearly, we can blame teachers of freshman composition. If we teach graduate students who can't construct a coherent argument, we can blame their undergraduate teachers. At whatever level, we can blame
the failure of our students to develop on their lack of motivation or incompetence or on those who did not provide them with the foundation, the basics that they need to perform at our higher level of instruction.

It is metaphor that may also encourage us to understand ourselves and our students in ways that affect our perceptions of our responsibilities toward them. When we locate our students on a graph, we can categorize them by giving them the name of the point or the level on the graph defined by the system of measurement—thus our students are “eighth decile IQ,” or “concrete-operational,” or “dualist,” or “conventional.” We chart their growth as they rise or progress through subsequent stages, as they “become” those higher stages. When they do not develop, we might wonder what they need to grow—perhaps a richer intellectual environment, more stimulation, etc. But however we might define our responsibility to the student on the graph, we stand in an observer’s third dimension, disconnected from the metaphor that represents the student and her progress. We may go back to the classroom and change the environment to encourage growth, but as we think through the problem, our students remain essentially “others.” They perform and we measure. The metaphor of the graph does not encourage us to put ourselves into the figure as part of the measurement.

Most crucially for my eventual point here, the metaphor does not encourage us to look upon regression as desirable. With Piaget, Perry, and Kohlberg, we may know that regression is predictable, but once students have achieved a higher level of performance, any decline in their level of performance is something that usually dismays us, that indicates their failure, because self-evidently, we have done nothing to cause them to fall back.

On the basis of this description, we can easily understand the temptation to place many first-year law students at a level of cognitive development still embedded in the concrete: They find it difficult to manipulate the abstract legal principles behind individual cases; they have a difficult time freeing themselves from the most visible and concrete signs of legal thinking—the arcane language of the law, when arcane legal language is inappropriate; they have a difficult time freeing themselves from slavishly imitating individual models of analyses, syntheses, briefs, etc. that they happen to read. They neither read nor write flexibly, imaginatively, even competently. In short, someone failed them earlier—high school teachers or college teachers. Or they just don’t work hard enough. Or they just can’t cut it. Under any circumstances, we
often find ourselves having to make up for prior failures.

B. Good Thinking as Successful Socialization

There is another way to think about these matters: Good thinking and good writing are not the natural outcome of natural growth but rather 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." Good critical thinking/writing in general or good thinking/writing in a particular field does not simply happen as a result of a person's mind maturing, but is a consequence of experience gathered by working with others more experienced in some particular discourse community. This view of good thinking may seem to be a superficial restatement of a model of cognitive development: we simply substitute training for development, and we come out in the same place. Our students still aren't prepared, and we can blame those who failed them earlier. But in fact, when we look at some recent research done in this area, we come out in a different place with a very different metaphorical model.

Critical Thinking: Skill vs. Knowledge: There are two modes of skilled critical thinking: productive and analytical. We deploy the productive mode when we create sound arguments, formulate a central point of our argument, and then find good reasons to support it; when we construct a logical argument that avoids the fallacies of the standard rhetoric text books: post hoc ergo propter hoc, overgeneralization, undistributed middles, etc. We deploy analytical critical skills when we recognize the fallacies in someone else's argument (or in our own after we have created it), when we recognize the central point of someone else's argument and what is and is not relevant to it, when we recognize unstated assumptions, when we recognize and thereby are not seduced by its fallacies. (A good recent example of a textbook on the topic is Kelley, 1988.)

In particular, the skilled critical thinker is not constrained or dominated by the concrete presence of the object of attention. By virtue of having seen a good many arguments, good and bad, the skilled critical thinker can see what is absent in a bad argument: sufficient evidence, a clear point, consistent logic. The skilled critical thinker can identify the assumptions that are not manifested in but are tacitly behind the text. The skilled critical thinker is no longer persuaded by singular anecdotes, individual cases, etc., but rather evaluates the evidence in the argument on the basis of evidence available but lacking, evidence that the critical analyst knows exists and that might counter an argument. The skilled crit-
ical thinker does not defer to the concrete authority of the text, but rather because he has seen so many good arguments, he can imagine an alternative, one that would be more convincing. For the skilled critical thinker, what is absent is at least as important as what is present. Thus, the unskilled critical thinker is like the concrete-operational thinker, the dualist, the pre-conventional moral reasoner: all are cognitively limited to the authority of the concrete. Indeed, a term that should complement "critical thinking" is the term "critical imagination": the ability to recognize what is lacking and to imagine a text/argument/case with it.

How does one become a good critical thinker (or imaginer)? Certainly, one has to learn universal "rules" of thinking: what counts as good statistical reasoning, as a valid deduction from valid premises, as using evidence correctly. But while all this is necessary, learning good critical thinking as a generic skill is made difficult by two problems: (1) what counts as the rules of good thinking differs from field to field, and (2) what different fields count as good evidence also differs from field to field. Every teacher of legal writing has had to teach new habits of thinking to counter the habits of everyday thinking that students bring with them from their undergraduate training in literature, philosophy, history, chemistry, sociology, etc. What counts as good thinking in a literary analysis of Iago's criminal behavior in Othello would not count as good thinking in the analysis of alleged criminal behavior in a courtroom, and vice versa.

More than that, understanding what counts as "good evidence" depends not only on thinking about evidence in different ways in different communities, but on knowing how different communities of decision makers—judges and literary critics—have dealt with evidence of different kinds in different contexts at different times. Whether any evidence is "good" in any field depends not on evidence as such, but on evidence in the context of knowledge that the community believes should be imparted through experience. Being a good critical thinker depends on knowing a lot about what one is thinking about.

If we emphasize specific knowledge as a prerequisite to good critical thinking, we may seem to contradict a principle that we have been pushing about concreteness and abstraction. In fact, it supports it, because by knowledge, we do not mean a mound of separate bits of information, but a structured array of knowledge consisting of higher and lower levels of generality—indeed, abstract knowledge derived from concrete knowledge. This conclusion is supported by the research of those who have tried to mea-
sure whether courses in generic critical thinking do any good. Although some researchers have claimed to find that such courses do teach students how to think better after they leave the course and although others are optimistic that ways can eventually be found (McMillan, 1987; Perkins, 1989), it is, I think, fair to say that the overwhelming number of researchers have failed to find any strong effect. In short, it is not at all obvious that critical thinking can be learned as a generic skill. Rather, it must be taught in a particular field, embedded in a particular community of knowledge. (And some research into expert and novice thinking suggests that even when it is learned in one field, it does not easily transfer to another (Glaser, 1984)).

**Expert vs. Novice Thinking:** While research into critical thinking tends to focus on generic problems of argumentation and analysis, research into expert problem solving has focused on the ways that experts reason differently from the ways that novices reason. The research is conducted by asking experts and novices to talk aloud as they think through a problem and solve it. Researchers then study the protocols that the subjects produce for clues to how those subjects thought through the problem (Newell & Simon, 1972; Simon & Simon, 1979).

The single common finding in the research has been that as novices start to formulate a solution to a problem, they tend to seize on the components of the problem statement that are most concrete, most visible. When the novice in physics is given a problem that has a straight-forward, right-or-wrong solution (these are called in the literature “well-formed problems”) and the problem statement contains, say, the picture of a spring, then the novice assumes the problem is a “spring-type” problem. On the other hand, because the expert has seen and solved countless problems of this kind and others, he is able to transcend the concrete representation of the problem and categorize it at a more general level. At that point, the expert knows which algorithms to plug in to find the solution (Chi, Feltovitch & Glaser, 1981; Larkin et al, 1980).

Other researchers have explored what are known as “ill-formed problems,” problems for which there is no algorithmic solution, problems that have no easy and obviously correct and incorrect solutions. This research into ill-formed problems is more interesting than that into well-formed problems, because ill-formed problems are the sort that the world of the law wrestles with every day, the kind of problem that has no obvious right and wrong answer, the kind of problem that in fact is ill-defined as to its very nature, much less its solution (Voss, Greene, Post, and Penner,

And the same findings result: In one study, when experts in Soviet affairs were given the problem “How would you improve agricultural output in the Soviet Union?” they ignored the concrete representation of the problem and redefined it, decomposed it into subordinate problems related to the larger problem. They did not base their solution on the concrete representation of the problem as given. When along with the problem they were given a specific list of concrete items to consider in their answer, they did not take that list as defining the problem space, but instead reformulated the problem according to their own understanding of it, frequently ignoring the list altogether.

Furthermore, when they began to solve the problem, they rephrased it into a problem of a more abstract character: the problem of Soviet agriculture is one of capital investment, history, ideology, etc. And then when these experts constructed their arguments, they created chains of related arguments that subordinated some problems to more general problems. In short, the expert thinkers were not tied to the concrete representation of the problem; they spent a substantial amount of time redefining it, making it more abstract.

The novices, on the other hand, took the problem as it came. They spent relatively little time decomposing the problem into a set of problems. And when they were asked to consider a series of specific factors in solving the problem, they predictably addressed each of the factors in turn, each thereby organizing his answer around the most concrete elements of the problem statement. Further, unlike the experts, the novices attacked the solution at a relatively concrete level: the way to improve agricultural output is more fertilizer, more tractors, more roads, etc. And finally, the novices did not construct chains of arguments that subordinated some reasons to others. In short, like the dualist, like the concrete-operational thinker, like the pre-conventional moral reasoner, like the unskilled critical thinker, and in particular unlike the expert thinker, the novices seemed locked in the grip of the concrete.

And here is perhaps the most important finding of all: The research elicited protocols from experts in Soviet affairs and from novice students taking their first course in Soviet affairs. But two other groups were also studied: advanced students in Soviet affairs—subjects who had considerable knowledge about the Soviet Union but little expertise; and faculty in a chemistry department—subjects who had little knowledge of Soviet agricultural affairs, but who were highly expert in their own different field. The
researchers included this last group, because they wanted to determine (1) whether those who had developed highly expert skills of thinking in a field distant from Soviet affairs would provide any signs, any evidence that they could transfer skills they had acquired in their own community to a different one and (2) whether, when they formulated and solved a problem that might be locally strange to them, they would nevertheless give signs of behavior that appears to be generic to experts when they are thinking about a problem locally familiar to them.

The outcome is important for our purposes: the experts in chemistry behaved more like the novice students than like the experts in Soviet affairs. In short, when experts in one field were confronted with a problem remote from their own community, they seemed not to deploy whatever skills of analysis that we might think were generic to all experts. Expertise seems not to travel well (a conclusion that further supports those who have questioned the value of generic courses in critical thinking) (Glaser, 1984).

C. Expertise and the Community of Experts

Before we move on to the specific consequences of this way of thinking for education in general and legal education in particular, we must emphasize this: Expertise does not exist in a vacuum; it is a social construct. The concept of expertise cannot exist independently of a community of knowledge. The knowledge about which one is considered by others to be expert is developed, defined, evaluated, maintained, and transmitted by those in the community who are qualified to make judgments about what counts as expertise. If that is so, then we acquire expertise not in a vacuum, but as novices who must be socialized into a community of knowledge, into a community of discourse by those who constitute the community. The process of becoming an expert is at least as much a social process as an exercise of individual effort and intellect. Put this way, expert thinking is successful socialization.

And at this point, perhaps, we can see the wider relationships among the schemes of development, the skills of critical thinking, and the skills of expert thinking: they all emphasize the movement from the concrete to the abstract, from visible presence of a singular instance to the more general and abstract category, from concrete singularity to abstract multiplicity. But they have something else in common: Earlier we described the research that argued for distinct phases of cognitive change as seeming to characterize a person's whole intellectual character. But we did not point out then that in recent years, other developmental psychologists have
argued that differences in performance on which Piaget based his claims about concrete and formal operational thinking seem to depend strongly on the way the problem is posed to a child, particularly on the experience that the child has had with the content of the problem and on the context in which the problem is set. In some cases, young children who theoretically should not have been able to think in formal-operational terms displayed characteristics of that kind of reasoning when the problem they were reasoning about was matched to their knowledge.

In this regard, it should also be noted further that Perry was working with students just entering particular fields of study. The dualists were also novices. The most casual inspection of our own experience underlines the fact that whenever any of us enters a new field, our first move is to seek out the authority in the field, to defer to received opinion. (We ordinarily do not repeat the multiplist position of assuming that all opinions are equal, because it takes only once or twice to realize that it is intellectually foolish to argue that all the so-called experts in a field are equally authoritative.) In other words, the more schematically-minded curricular planners who want to take developmentalists at face value may be mis-identifying a learned set of skills and the acquisition of a body of knowledge as generic development. What they call generic higher-order thinking may simply be the product of accumulated generic expertise in life.

D. On the Matter of Seeming Incompetent: A Predictable Phenomenon

There is one more issue that we might view differently if we think about growth not as a line moving onward and upward, but as socialization into a community of knowledge and discourse about it. It is the issue we opened with: why do so many writers at points of transition seem to write so badly?

Whenever we face the task of joining a new community, we have to manage a number of demanding tasks. We have to acquire a new body of knowledge, including both the current state of knowledge and the history of how that knowledge came about; we have to master new ways of thinking that may conflict with ways of thinking to which we have already habituated ourselves and which work just fine in some other community. We also have to find the voice of the community, and since the voice of a fully-socialized member is defined at least as much by what is not said as by what is said, by absence as much as by presence, capturing that voice is a difficult matter. And, of course, all of this is compounded by the
anxiety, insecurity, strangeness, etc. that accompanies all ventures into new social space.

It is no surprise that as novices struggle to acquire new skills, many—perhaps most, to some degree—temporarily lose skills they seem to have once mastered. One of the most common problems in freshman writing courses is that after winter vacation, students return to their second semester seeming to have forgotten everything they learned in the first. Teachers offer a plausible explanation: “They forgot what they learned.” In fact, there is an explanation more interesting. Typically, freshman composition courses are organized around “narration and description” in the first semester, “explanation and argumentation” in the second. To write competent narratives and descriptions, a first year student need only map his or her discourse directly onto the remembered (or fabricated) story, the object to be described—not a simple task, to be sure, but a kind of discourse that requires a writer to manipulate words referring to once concrete events, referents perhaps still visible to the mind’s eye.

When we ask a student to write explanations and arguments, however, the student is dealing with more abstract matters: evidence, data, logical sequence. The student has no pre-defined form—story—in which to cast the discourse. Given these new cognitive demands, it is predictable that in many cases, skills of grammar and sentence structure that were seemingly mastered earlier will seem to deteriorate. The cognitive burden is too great for many students to maintain once-mastered skills at earlier levels. There is evidence from a variety of fields on the degradation of once mastered skills under the pressures of cognitive overload, and the evidence for the degradation of writing performance has been often demonstrated: among very young children (Jacobs, n.d.); among high schools students (Hake and Williams, 1985); among college freshmen (Nielson, 1979); among medical students (Jacobs, 1982).

If this evidence is credible, then we need not necessarily be dismayed when many of our students seem not to be able to function at a level we might hope. If our students are entering a new community of discourse under trying circumstances, we ought not be surprised at a brief period of seeming incompetence. They may in fact be incompetent. But that is something we cannot determine simply by looking at the surface of their performance.

A somewhat revised version of Kohlberg’s model of moral thinking would reflect this pattern of socialization: Read “pre-conventional” as pre-socialized, “conventional” as socialized, and
“post-conventional” as post-socialized (a matter we will address at the end), and we offer a different—though still geographical—account for the stages of community membership: not lower left to upper right, but outside to inside to beyond. Graphically, it is the difference between the two figures on p. 17.

This is not to deny that some students in fact have been badly educated before they come knocking at the door to our community. Nor do I claim that in some important sense (more of this later) many students are in fact intellectually unable to handle a demanding education. In the worst cases, students who are attempting to join a new intellectual community are both intellectually incapable and badly educated. What I will argue in what follows, however, is that if we entertain the metaphor of successful entry into a community of discourse as another point of view, we will not offer generic incompetence or inadequate preparation as the inevitable default explanation for apparent incompetence.

III. Some Implications of the Community of Discourse Metaphor

If we understand the development of “higher order thinking” not just as a matter of cognitive growth but as socialization into a community of discourse, then we must change substantially how we view the process of education in general, and the teaching of writing in particular. First, the model would have to include those of us who constitute the community, its already socialized members. We would have to measure our students’ failure and success not in terms of whether they move onward-and-upward, but whether we successfully bring our students into our community. We have to know and we have to show concretely—not explain in general—how we want them to behave so that they will behave like us.

Nothing identifies an outsider more quickly than the way a person talks. The problem is that it is not just what a socialized person says and how she says it that so identifies her, but what she does not say, because what a person does not say is what the community takes for granted—the common knowledge of the community. No one doing English literary history has to say that Shakespeare was a prominent Elizabethan playwright. Were this piece directed to readers in cognitive psychology, it would have been wholly inappropriate for me to have written earlier,
Other researchers have explored what are known as “ill-formed problems,” problems for which there is no algorithmic solution, problems that have no easy and obviously correct and incorrect solutions.

Everyone in the cognitive sciences knows what an ill-formed problem is; I would have seemed amateurish to have defined it. Thus, membership in a community of discourse is defined at least partly by the absence of discourse, by silence.

Now imagine the writer who is novice to the community of the law: Assuming that what I have described above might plausibly predict that writer’s history, how would we expect that writer to write?

a. First, we would expect the writer to display what we have called concrete behavior. When we pose a problem in any detail, the writer will not redefine, rephrase, restructure the problem statement or its form. The writer will instead seize on those features of the problem that seem most concrete and will incorporate them into the solution.

b. The writer will write what we will take to be self-evident banalities, things that need not be said in the community.

c. We can expect that, because the novice will be trying to manage several cognitive demands simultaneously, the quality of his writing may seem less than entirely competent. Specifically, it will seem to be “bad” in two ways: (1) it will tend toward concreteness as a kind of default behavior, and (2) it will tend toward episodes of incoherence.

d. Related to (c), the writer will seem not to be able to use the language of the law itself with any dexterity, will seize on the most prominent, i.e., concretely present features of the “dialect” of the law and probably exaggerate those features.

Not all writers will display all these characteristics. Indeed, some will display none of them. But enough of them do to dismay those of us who expect that mature college graduates ought to do better. I would like to examine each feature in a bit more detail.

A. Concreteness

In seminars I have given for new teachers of legal writing at the University of Chicago School of Law, I have tried to prepare them for how many of their students are likely to respond to the
first few assignments (usually closed and open memoranda). To a new teacher of legal writing, the most dismaying characteristic of papers is that "they are all summary and no analysis." (In fact, no complaint is more common than that in all classes in all fields.) Given what we now know about the way novices behave, it is also the most predictable.

My explanation goes like this: I first lay out everything I have discussed thus far. Then I ask what are the most concrete features of the problem that they have given their students. There is first the language of the assignment. They can expect to see that language perhaps repeated word for word in the first paragraph of their papers. If the problem is simply stated, the novice does little to call attention to his novice behavior if he weaves it into the first paragraph. It is when the instructor gives a list of questions, problems, issues, points for the student to "think about" that the concreteness of the problem statement becomes a problem for the novice, because many novices will predictably go through each of those points, in turn, in the memorandum. (Recall how the novices responded in Voss et. al., 1983.)

A more significant kind of concreteness is the text of the decision they use in their memoranda. Once past a restatement of the problem in the introduction, many new law students will march through the text at their side, summarizing each paragraph in turn until they reach the end. And again, the reason for this kind of concrete behavior is predictable: these students do not yet control the knowledge expressed in those decisions; it is for most of them a kind of knowledge wholly alien to their experience. If they have no prior knowledge into which they can integrate this new knowledge, they cannot retain it easily. And so they translate the knowledge in the texts they are reading into their own language, thereby gaining over it some measure of cognitive control.

There is a theory of learning that we might call the "velcro theory of knowledge." The more old knowledge we have about a subject, the more new knowledge we can retain about it: (1) because we integrate new knowledge with old knowledge, and (2) because if we are rich in knowledge about a subject, we probably have organized that knowledge in a way that allows us to incorporate new knowledge into it quickly and efficiently (Glaser, 1985). But if we are novices, if we do not yet have that rich and well-structured base of knowledge, we are more likely to feel that we have to instantiate and rehearse that knowledge on a page before we can get it under control in our minds. (And even if we are knowledgeable in a field, we often find it easier to get new knowl-
edge under control by writing it out; most of us, however, know better than to use that summary in our final draft.)

Having no richly organized knowledge about matters of court decisions, new law students will find it difficult to get control over the content and implications of any specific decision. Their predictable reaction is to write out in summary form what is in the decision: it is a way of getting that knowledge under control. But once the writers have filled up a few pages with that summary, it may seem to them that they have completed the assignment. The better student will have mastered the content of the decision—one way or another—before doing the last draft of the memorandum. And it will show in the kind of text that student produces: it will not be a running summary of the text of the decision, but rather a memo that uses that decision in the analysis of a problem.

Thus, one common feature of bad first-year legal writing is predictable: a text that seems to be all summary and no analysis. It is the default move of many novice writers when they attempt to solve a strange problem: seize on its concrete features—in this case the text—and map it directly into the answer. We should be surprised and pleased when any of our students do otherwise.

And finally, this kind of writing strategy frequently leads to a paper that we might characterize as “Point-last,” a paper in which in the last paragraph the writer finally discovers, formulates, states the claim that would count as an answer to the question proposed. This sort of organization reflects another kind of concreteness: the sequence of the paper reflects the actual events of the night before—start out at 10 PM with an opening paragraph that includes most of the language of the problem statement; from 11 PM to 4 AM, read, study, and then summarize the decision; at 4 AM, finish the summary and find a conclusion that reflects the thinking that should have been reflected at at the beginning of the paper. The organization of the memo is that of an intellectual autobiography, reflecting the writer’s narrative sequence of thought and discovery.

B. Self-evident Banality

The typical novice does not know what to take for granted, what to remain silent about, because she has not been specifically instructed in that matter, an impossible task under any circumstances, and because she has not yet read enough legal texts to establish a body of knowledge that would allow her to recognize what is absent in the texts that she is reading.

Here, for example, is the first paragraph from the first paper
written by someone who was no novice to writing but who was a novice to the community he was joining. He was a first-year law student at a very selective school of law, a student who had the June before graduated very nearly at the top (that metaphor again) of his class from a prestigious college and who in that community had been perceived as a competent writer (I know because I looked up his record):

It is my opinion that the ruling of the lower court concerning the case of Haslem v. Lockwood should be upheld, thereby denying the appeal of the plaintiff. The main point supporting my point of view on this case concerns the tenet of our court system which holds that in order to win his case, the plaintiff must prove that he was somehow wronged by the defendant. The burden of proof rests on the plaintiff. He must show enough evidence to convince the court that he is in the right.

To his first-year legal writing instructor, this paragraph was a tissue of self-evident banality, all redundant, all “filler.” Obviously if the original ruling is upheld, the appeal is denied; obviously the plaintiff can win his case only if he can prove he was wronged by the defendant; obviously the burden of proof rests with the plaintiff; obviously the plaintiff has to provide the court with evidence. But at this point in his academic career, the writer had not yet so thoroughly assimilated that knowledge that he could unselfconsciously resist stating it.

Two common features of bad thinking are summary and self-evident banality. It is easy to charge with generic incompetence those who do not know the difference between what is important and what is not, who do not seem to know the difference between summary and analysis. Indeed, they may in fact be generically incompetent. But they may also be novices behaving in ways that novices predictably behave.

C. Less than Competent Performance

I have occasionally discussed these matters at seminars on teaching legal writing. At the end of one, a woman volunteered that I had recounted her academic history. She said she had earned a Ph.D. in anthropology, published several books and articles, and been judged a good writer. But, she said, she became bored with anthropology and went to law school, where during the first few months she thought she might be developing a degenerative brain disorder: She could no longer write clear, concise English
prose. She was in fact experiencing a breakdown like that experienced by many students taking an introductory course in a complex field—a period of cognitive overload, a condition that predictably degrades our powers of written expression.

Here is a passage from the first paper written by a first-year law student who as an undergraduate had been evaluated as a superior writer (again, I know because I checked):

The final step in Lord Morris's preparation to introduce the precedents is his consideration of the idea of conviction despite the presence of duress and then immediate pardon for that crime as an unnecessary step which is in fact injurious for it creates the stigma of the criminal on a potentially blameless (or at least not criminal) individual.

At first blush, this seems to be merely a tangle of inarticulate syntax. But in fact it means something intelligible:

Before Lord Morris introduces his precedents, he considers a final issue: If the court convicts a defendant who acted under duress and then immediately pardons that defendant, the court may have taken an unnecessary step, a step that may even injure the defendant, if it stigmatizes him as criminal when he may be blameless.

This writer had to juggle several related actions, few of which he entirely understood, much less how they were related. When he tried to express these ideas, he dumped onto the page all the concepts that seemed relevant, expressing them in abstractions loosely tied together with all-purpose prepositions. His prose degenerated under the pressure of cognitive overload.

D. Infelicitous Use of Professional Language

Now here is a great irony: As this student struggled with his ideas, his prose predictably degenerated. But he was probably also trying to imitate the voice in most of what he had been reading for the first time. And what he was reading typically suffers from the same clotted abstraction:

Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth
and Fourteenth Amendments to the United States Constitution.

Sandra Day O'Connor, concurring, California v. Albert Greenwood Brown, Jr., No. 85-1563.)

This means,

When the jury assesses whether a death penalty is appropriate, it must not respond to mitigating evidence emotionally; rather, it must inquire into the defendant's moral culpability. I therefore agree with the majority: When a court informs a jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," the court has not violated the defendant's rights under the Eighth and Fourteenth Amendments.

As a novice in a field reads its socialized prose, he will predictably try to imitate those features of style that seem most prominently to bespeak membership, professional authority, expertise. And in legal prose, along with the terms of art, no feature of style is more typical than clumps of Latinate abstractions derived from verbs (they are called "nominalizations," one of my terms of art):

individualized assessment of the appropriateness of the death penalty . . . a moral inquiry into the culpability of the defendant.

The irony is that if a writer new to a field does not entirely control her ideas, her own prose will often slip into a confused style characterized by those same clumps of abstraction (Williams, 1988):

consideration of the idea of conviction despite the presence of duress and then immediate pardon.

What we should find astonishing is not that so many novice writers write badly, but that any of them writes well.

IV. A REFORMULATION OF THINKING AND WRITING

As I said earlier, I would like to reformulate the matter of cognitive development and more particularly the acquisition of skilled problem-solving/critical-thinking abilities as a pattern of socialization along the lines proposed by Lawrence Kohlberg for moral reasoning. Instead of pre-conventional, conventional, and post-conventional, I propose reformulating those stages as pre-socialized, socialized, and post-socialized. (I do not assert that these stages have the discrete structural properties that Piaget or Kohlberg at-
tributed to their developmental descriptions.) In what follows, I will extend the description to include the practicing lawyer, pre-socialized, socialized, and post-socialized.

A. The Pre-Socialized Writer

The typical pre-socialized writer/thinker who behaves in ways that suggest generic incompetence has all the characteristics of Piaget’s concrete-operational thinker, Perry’s dualist, Kohlberg’s pre-conventional moralist, and the generically ineffective critical thinker/problem solver. First, he or she is not yet aware of the tacit conventions of a community’s discourse. It is the equivalent of a freshman who writes in a research paper, “I began my research by going to the library.” In law school, it is the inappropriateness of referring to the court as “you” in one’s first brief. In a law firm, it is the inappropriateness of “I looked everywhere in West Law and Lexis, but I couldn’t find any cases to use,” rather than “There appears to be a lack of case law on this matter.”

A pre-socialized trait more difficult to overcome is the excessive deference to the authority of the concrete. In both law school and law firms, it manifests itself in all the ways that we described earlier. In the early memos of the new lawyer, it often manifests itself as the tracking of the concrete language of the law into the concrete language of the memo or brief, an inability or unwillingness to paraphrase the literal words from a law or a decision because, as one new lawyer put it, “the law is the law, and you can’t paraphrase the language of the law.” In another form, it is the research memo that the writer maps onto his or her history of researching the problem, the memo whose narrative structure is drawn from the literal story of the research, rather than from the structure of the problem and its solution, a structure that should model the abstract issues of the law pertinent to the concrete problem at hand. This “tyranny of the concrete” combines with a tyranny of someone else’s authority when the inexperienced lawyer takes the structure of a reply brief point by point directly from the structure of the brief replied to, instead of restructuring the argument to fit his or her own theory of the case.

More interestingly, it also manifests itself in the general quality of writing. As a novice, the student can “see” only that which is manifestly present in the discourse of the law. The most concretely manifest features of legal writing are, first, the terms of art and the archaic usages and, second, the often excessively complex style. It is another version of being locked into the concrete. New law student typically overindulge in the “heretofore,” “aforementioned,”
“witnesseth” kind of jargon.

In a law firm, this combination of confusion and degradation of skill is most easily identified in the inability of new associates to dictate their memos, letters, and briefs. Experienced lawyers who are skilled in dictation control the content of their field, the tacit conventions that make them sound like a lawyer, and the tacit conventions of structure that allow them to decompose a discourse into manageable series of sub-problems while maintaining a sense of the overall structure and end-goals. The problem is not that dictating *qua* dictating is a learned skill (though it partly is). For the experienced lawyer, the content and structure of the discourse being dictated is not strange, the content not confusing, the conventions at least tacitly understood. Once those matters are relatively automatized, the experienced lawyer can direct all of her attention to the problem before her and the language she will use to solve it.

B. The Socialized Writer

Once socialized, the law student or new lawyer exhibits a kind of behavior Kohlberg attributes to the conventional moral thinker. He or she behaves in accord with the values of the immediate social universe. Indeed, the major problem of the thoroughly socialized writer is that the tacit assumptions that were entirely covert and strange are now part of the unstated cognitive universe, so much so that the outsider, the non-lawyer, may find the discourse of the socialized writer opaque. The writer takes too much for granted, fails to anticipate what the non-lawyer audience does not know. And so the ordinary citizen finds legal prose opaque, aloof, complex. Since every reader of this journal would find a legal example less than compelling on this matter, let me offer a pair of passages from a different field. These two passages have the same information, but in one, the information can be inferred by a socialized member of the community; in the other the information is explicitly stated for those who are not. Which one is which is no mystery.

An appreciation of the effects of calcium blockers can best be attained by an understanding of the activation of muscle groups. The proteins actin, myosin, tropomyosin, and troponin make up the sarcomere, the fundamental unit of muscle contraction. The thick filament is composed of myosin, which is an ATPase or energy producing protein. Actin, tropomyosin, and troponin make up the thin filament. There is a close association between the regulatory proteins, tropomyosin
and troponin, and the contractile protein, actin, in the thin filament. The interaction of actin and myosin is controlled by tropomyosin. Troponin I, which participates in the interaction between actin and myosin; troponin T, which binds troponin to tropomyosin; and troponin C, which binds calcium constitute three peptide chains of troponin. An excess of $10^{-7}$ for the myoplasmic concentration of $C^{++}$ leads to its binding to troponin C. The inhibitory forces of tropomyosin are removed, and the complex interaction of actin and myosin is manifested as contraction.

When our muscles contract, they depend on calcium. Once we understand what calcium does, we can understand how muscles are affected by drugs called calcium blockers.

The fundamental unit of muscle contraction is the sarcomere. The sarcomere has two filaments, one thin and one thick. These filaments are composed of proteins that either cause contraction or prevent contraction. Two of these proteins cause a muscle to contract. One protein is in the thin filament, the protein actin. The other protein is in the thick filament, the protein myosin, an energy producing or ATPase protein. When actin in the thin filament interacts with myosin in the thick filament, they cause a muscle to contract.

The thin filament also contains proteins that inhibit contraction. They are the proteins troponin and tropomyosin. Troponin has three peptide chains: Troponin I, Troponin T, and Troponin C.

a. Troponin I participates in the interaction between actin and myosin;

b. Troponin T binds troponin to tropomyosin;

c. Troponin C binds calcium.

When a muscle is relaxed, tropomyosin in the thin filament inhibits actin, also in the thin filament, from interacting with the myosin in the thick filament. But when the concentration of $C^{++}$ in the myoplasm in the sarcomere exceeds $10^{-7}$, the calcium binds to troponin C. The tropomyosin then no longer inhibits actin and myosin from interacting. When actin and myosin interact, the muscle contracts.

The second is easier to read not because it consists of short sentences or even because it has information the first one does not
have. It is easier to read because it makes explicit what the first took for granted:

... the sarcomere, the fundamental unit of muscle contraction. The thick filament is composed ...

... the sarcomere. The sarcomere has two filaments, one thin ...

When a lawyer takes for granted the knowledge of his audience and simultaneously suffers from syntactic breakdown, the outsider audience will find his discourse unreadable because it will be both badly written and directed entirely toward other socialized readers, excluding those who do not share the universe of legal learning. And so we find sentences of this next kind, entirely grammatical, but so dense with syntactic presuppositions that, except for someone entirely familiar with the content, they are almost opaque (not a concocted example):

The Internal Revenue Service in Private Letter Ruling 81-9041, in the course of a ruling which concluded that a sale of mortgages between members of an affiliated group filing a consolidated return, followed by a pledge of the mortgages to secure mortgage-backed bonds, was a deferred intercompany transaction and not a disposition of the mortgages which triggered the recognition of installment gain, also applied and relied upon Revenue Ruling 76-269 to hold that the use of a wholly-owned subsidiary of the builder-parent to originate the mortgages in the manner contemplated under the proposed arrangements would not cause the builder to be considered to have received purchase price from the purchasers.

This writer was so thoroughly socialized into his world that he was wholly unaware of the effect of his language on his reader. There is a bit of pre-socialized writing here, as well: the writer was staying very close to the concrete regulatory language he found in his authoritative texts.

C. The Post-Socialized Writer

The next stage in the development of the thoroughly socialized writer is in some ways no less traumatic or risk-laden than the transition from presocialized to socialized. The risk is best captured by one young and very new lawyer in a prestigious East Coast law firm. At the end of a training program, he said to me, quite seriously and resentfully, "We've just spent three years learning to sound like lawyers, and now you want us to sound like
ordinary people.” And he was right. We were being unreasonable. These young lawyers had struggled successfully to join a social and intellectual community in law school that required them to master a form of discourse that was strange and threatening, and to outsiders still is. It was now familiar and supportive. Or at least so it seemed. And here we wanted them to give it up at the very moment that they had entered yet another new world, the world of their law firm.

In fact, the senior partners had become convinced that their junior associates did not write well, did not communicate with clients clearly and easily. In short, these senior partners wanted their juniors to become post-socialized, or rather socialized again into a new and wider universe, to go beyond—outside—the social/professional community of the law and write in ways that would communicate with ordinarily intelligent clients. Had the writer of the advice letter quoted from above been able to go beyond his community, give up the mystery of the language, rely on his own ability to explain the matter in a way that did not compromise his own position but did communicate with the reader, he might have written something closer to this:

In Private Letter Ruling 81-9041, the Internal Revenue Service ruled on members of an affiliated group that sought to file a consolidated return. The Service held that if you sell mortgages to one another and then pledge the mortgages to secure the bonds that you back by those mortgages, you would not have engaged in a transaction between companies. Therefore, you would not have to recognize any installment gain. In this ruling, the Service also relied on Revenue Ruling 76-269. In that ruling, it held that if you are the parent of a builder and you use a wholly-owned subsidiary to originate mortgages, you would not be held to have received the purchase price from the purchasers.

But the risk in writing like this is manifest. First, the writer must be confident that he understands the law well enough to give up its concreteness. Indeed, he must be ready to give up the mystery of the law, in general. But give up the mystery of the discourse, and one risks losing the authority of one who understands the mystery of the profession. I proofread this manuscript while returning from a conference with a committee of senior lawyers in a very large West Coast corporation, where one of them said that their non-lawyer clients within the corporation explicitly insisted
on opaque legalese under the belief that it would protect them against litigation. It is the risk that every writer/communicator takes when he or she gives up the jargon, the freedom to take for granted what the "in-group" shares, the seeming authority of professional language.

And it is here that the model proposed by Lawrence Kohlberg is illuminating. You will recall that the third stage of Kohlberg's scheme of moral development was a kind of reasoning he called post-conventional, the kind of reasoning of a person who understands that moral behavior is not directed by rules, but rather guided by principles. In our matter, let me simply state, naively of course, that the transcendent value of a wholly decent community must be that of guileless communication, communication whose intent is to express as clearly as possible what it is the writer wants the reader to feel, understand, believe, do. (I appreciate how utopian this claim must seem.) Such an objective may require discourse of great complexity; its vocabulary, its style may place great demands on the reader. Indeed, only a few readers may have the prior knowledge necessary to understand it. Nevertheless, within the system of communication available to the writer, the writer will make open communication her primary value. This objective carries with it great risks, because it requires the writer to find the right compromise among the demands for language that is clear, language that is persuasive, and language that signals authority without depending for its power on mere verbal opacity; i.e., the writer must keep tacit some shared knowledge if the writer is to be recognized as a member of the discourse community, but that tacit knowledge cannot remain tacit when one audience of a multiple audience requires it. Imagine yourself as the writer of the passages about calcium blockers. Which would have been appropriate for an audience of medical peers? One immediately says the first, but the second is clearer, more readable for any audience.

Given this system of values, the legal writer in particular is put at risk, because what he says may be sayable in deceptively simple language. And those who want the authoritative answer may find its simplicity insufficiently authoritative. Nevertheless, we ought not encourage in our audience whatever dualist impulses are latent in their attitudes.

Now, what I have attempted to lay out here is by no means the invariable development of every writer. Some students never tumble to the conventions of a particular discourse, never learn how to sound like a native. Some, once socialized, never give up their jargon and opacity. And some are able to maintain a high
quality of discourse under the most trying circumstances. They enter college writing well and never stop. What special skill do they have? They must have the ability to control the fundamentals of writing so well that those skills are virtually automatized under all circumstances; they must have the agility of mind to gain quick control over a new body of complex knowledge; they must have the insight to infer from reading the tacit conventions of a new universe of discourse and the confidence to express themselves clearly enough not only to communicate their good ideas, but to risk revealing their bad ones as well. Indeed, a research project of very considerable interest would be the contrastive history of those who never learn to write well, the history of those who learn to write well, and the history of those who seem always to have written well.

Lacking that history, however, we are left to our intuitions about the development of competent professionals. But it should be an informed intuition, especially for those who are responsible for teaching others. Uninformed, we are left with folklore, the same kind of folklore that made some believe that the foundations of a logical mind lay in Latin, or geometry, or traditional grammar, or philosophy. The folklore about the first-year students in schools of law is that they write badly because they were badly educated. The reality is often otherwise.

V. RECONCILING METAPHORS OF DEVELOPMENT AND SOCIALIZATION.

I have laid out two apparently conflicting metaphors: the metaphor of the graph and the metaphor of the community. In fact, I do not believe that they must conflict. If we believe that at some level of our multiple selves there is an enduring, developing, growing central self (a good many do not so believe), and if we know that we are behaving like novices—or dualists, or concrete-operational thinkers, or pre-conventional moral reasoners—then we are not those categories, but only behaving like the behavior predicated of those categories. It is when we behave in those ways and we are not conscious of so doing that we “become” a dualist or a concrete-operational thinker.

This is a matter called “meta-cognition”—being aware of the act of thinking, monitoring our behavior, understanding it as we behave it. Once we understand that we are likely to behave in certain ways in certain contexts under certain conditions, then the fact that we may experience episodes of seeming regression, bad thinking—concrete thinking, ought not dismay us as inexplicable.
We may find them frustrating, exasperating, even humiliating, but if we are comfortable with the idea that those episodes do not be-token some kind of permanent incompetence, we can live through them. Now translate that into teacher-talk. "If you understand that you are likely to behave in certain ways . . . ."

In fact, we should add to the idea of cognitive growth the capacity to engage in exactly this kind of meta-cognition, the ability to monitor thoughts and behavior, and not to take our apparent failures as characterizing who we are, but rather only what we are doing. The word "novice," after all, is simply a term that defines a relationship to a particular context. It is not like the terms "dualist" or "concrete-operational thinker" or "post-conventional moral thinker," terms that define a condition of being.

True, 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. But that is a lack only in relation to the community at the moment the novice is in that relation. We are all novices in some communities and experts in others. What we define as novice behavior is only that: local behavior. That behavior is the behavior of every person who stands outside a community of knowledge wanting to come in. It is behavior as predictable as feeling sad or confused or angry. It is not a condition of being, so long as we are aware that we are behaving in that way.

My intention here has been to suggest that we ought not judge writing or the progress of our students by a metric of development that we can simply map onto some age or grade level, any more than we can map it onto weight or height. Indeed, we may measure the progress of some of our students as much by the degradation of a skill as by its improvement. The degree to which we can escape—or help our students escape—being pigeon-holed depends on how self-aware of their own behavior we can help them become. Once they are aware that they are behaving in wholly predictable ways, they free themselves from "being" the name of that way.

But before they can do that, we have to do it for them.
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Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols

James F. Stratman

I. INTRODUCTION: LEGAL READING AND LEGAL WRITING

Whatever lawyers know, and they must know a great deal, they often do not know much about how they or their peers read. This is not exactly to say lawyers don’t know how to read. Certainly they do. But like most people they are not conscious of the sorts of information-processing problems that people encounter while reading. The popular conception is that the language lawyers write is difficult to read because lawyers “think” differently than the rest of us, and that because they “think” differently lawyers probably also read differently. Contrary to this popular conception, however, there is little evidence that lawyers do read in fundamentally different ways than other professionals.¹ Their eyes do not move more quickly across a line of text or across the page; there is no evidence that they search for information in a text in ways that are radically different from the ways that, say, a medical scientist searches a text. Indeed, the troubles lawyers themselves have understanding legal texts are often not much different from those of the rest of us. What is important to stress is that, like most of us who read on the job, lawyers do so with specific goals in mind. They read in order to accomplish certain tasks — to prepare an answer to an interrogatory, to help a client with a problem, or to screen an argument on appeal. In all these tasks, they are less likely to be concerned with the quality of the prose they read per se, and more likely to be concerned with how that prose does or doesn’t help them — in the famous words of Garrison Keillor — “to do what needs to be done.”

To make such “apple-pie” remarks, however, does not mean that all our assumptions about lawyers’ reading processes are correct or that we know all that would be useful to know. In fact, little empirical research exists describing how lawyers accomplish “real-world” legal reading tasks.² In particular, we know little about what we might call the “on-line,” or “in-process” goals and constraints of lawyers as they read specific documents on the job, i.e., as part of a court, administrative agency, or law office. Reading in
this sense is "embedded" in other kinds of legal tasks, but the relationship between what goes on during reading and the task itself has received little attention. Certainly reading constitutes a critical subprocess within what is ordinarily meant by "legal" research, i.e., the process of choosing and locating proper records, authorities, cases, and so on. Given all the interest in methods of assessing lawyer "competency" in recent years, it is rather striking that so little attention has been paid directly to how lawyers read, especially since they spend so much time doing it.³ How lawyers read on the job has or should have direct implications for legal education. For instance, how should law students be taught to read to most efficiently complete various legal tasks? What processes or practices characterize the "expert" legal reader?

Perhaps these questions will seem irrelevant to teachers of legal writing. Some might ask why writing teachers should particularly care about how lawyers read. After all, isn't the writing instructor's goal to teach students to produce readable and persuasive prose — prose that gets the job done? The presumption is that one doesn't really need to know much, if anything, about lawyers' reading processes per se in order to accomplish that goal. It's enough to know what good "legal prose" is, and what are the correct legal document forms and conventions. At least, such is the impression that one receives by surveying the way legal writing is currently taught. In most first-year programs, so much grueling attention is paid to citation form, to the jurisdictional rituals of format, and to the fundamentals of library research, that little effort is expended in looking into how the writing that lawyers do is read, interpreted, and mentally processed by other lawyers as they "use" it.⁴

However, the underlying argument presented by this article is that to make students better legal writers, they must be led to explore actively how lawyers and law "consumers" think while they read. Detailed knowledge of how legal prose is read "on the job" is crucial for students who wish to become successful legal writers and, hence, successful lawyers. Unfortunately, gathering this detailed knowledge has not been an aim of legal writing programs, largely because neither reading nor writing research has been recognized as legitimate "legal research." But as this article will demonstrate, classroom investigation of legal reading processes is a powerful means of teaching legal "thinking," presumably the raison d'etre of any law school.
A. How Knowledge Of Reading Processes May Help Writers

First we need to establish the relevance of understanding readers' cognitive processes to the teaching of writing. For all the rhetorical research on audience and audience analysis within the last fifteen years, comparatively little has actually focused upon reader comprehension processes. Only recently has empirical research on composition skill begun to examine in detail what things writers need to know about reader processes in order to write clear, "functional" prose. We now have a celebrated term for this kind of "functional" prose, namely, "reader-based" prose, that all of us have long wished was more prevalent in the legal world. Some writing teachers, in law schools and elsewhere, may sneer at this term as just another buzzword fed to a market of hungry composition pariahs: "Isn't that what good prose has always been?" But in this case to sneer would be a mistake, because the term "reader-based" has its roots in substantial research — research aimed at describing precisely how knowledge of audience reading processes is used by, and therefore useful to, writers at work. The research suggests that knowledge of reader processes is important in all phases of the writing process, but that it may be particularly crucial during revision, when writers are trying to "improve" what they have already put on paper or what someone else has written. While some of the results of this research may apply to legal writers and legal writing, few specific efforts have been made so far to establish their relevance and applicability. For instance, there is very little empirical research directly investigating the reading, writing, or revision processes of lawyers "on the job." In particular, there is very little research investigating how they read in order to write, or how knowledge of how other lawyers read might help them to write and revise better.

B. The Lawyer As Revisor

Indeed, much of the writing our law students will do in their careers will actually be re-writing and revising the work of others. They may receive on their desks a wide variety of documents that, for any number of reasons, do not do what they need to do. For instance, a young lawyer may receive a directive from chief counsel to "improve" the disclosure shown in Appendix I, yet be provided with little or no specific information concerning what is wrong with it. Perhaps a senior partner will comment, "There is too much legalese." Even if the young lawyer knows what legalese is, the senior partner's comment still gives the lawyer very little information
to "revise" with. What "legalese" is present may be only the tip of the iceberg. Thus, to really improve the document, the lawyer must first find out what its real problems are — in other words, she must find out, by hook or crook, what specific goals and problems the intended reader(s) had in the course of using or interpreting it.

In the case of the disclosure notice shown in Appendix I, the young lawyer might get lucky and find an angry, but well-informed letter from a bank customer who also just happens to be an experienced lawyer — see Appendix II. Such a letter begins to provide some useful diagnostic information. But how would one revise in the absence of such a detailed complaint? And what about all those non-lawyers who received the same disclosure, who lacked the knowledge to ask such pointed questions? So goes "revision" in the "real world."

Clearly, revision skill is a very important part of "legal writing" skill. It is really a "lawyering" skill in its own right. In a busy law office or appellate court, much of what gets written there is in fact really "revision" of what someone else began under different circumstances and perhaps with different readers and goals in mind. Memoranda are passed back and forth in the hope that between various readers, the writer who carries the final responsibility will get an accurate "simulation" of the intended audience. Nobody would think to question the value of such casual feedback to the writer. However, while we may safely presume that people do learn to write better from such feedback, educational researchers have not yet established what they learn from it, or how, or why. Certainly little is documented regarding what makes such feedback good or useful to the "real-world" legal writer. 11

A particular problem for students on the threshold of entering a profession like law is the validity of feedback they receive. How often will they receive a reading as "functional" and detailed as that given in Appendix II? To use a hypothetical example, when central staff attorney Mr. Slip reviewed my memorandum to Judge Smooth, did Slip tell me what he really thought about while reading? What happened when he read my careful accumulation of points about Quank v. Quack? More importantly, did he read this accumulation the way the judge, my intended audience, will read? If Mr. Slip's hints are to be of use to me, I need to have confidence that they anticipate accurately how someone else — in this case Judge Smooth — may read the memorandum. Or suppose I am a young corporate lawyer writing to advise legally naive business clients how to handle a complex tax problem: how can I anticipate the clients' problems in using the documents that I send so I can
avoid receiving any nasty letters later, like the one in Appendix II?

In fact, once we have written or revised a "real-world" document, we rarely gather detailed answers to questions about our readers' comprehension processes. Perhaps many times we simply don't need to know about these processes. The deeper trouble is that even if our readers do send us feedback about any problems they have using a document, we are still faced with assessing the validity of their feedback. As a variety of psychological studies indicate, retrospective reports about what we were thinking about during a task such as reading are often unreliable. We tend to construct a description of what we think happened, instead of recalling events veridically. On the other hand, getting "on-line" feedback is difficult. But that doesn't mean such feedback would be useless to us as writers if we could really have it. Important recent research on revision skill suggests that a major difference between expert and novice writers lies in their ability to simulate and predict audience goals, needs and responses to a text. There is also evidence that expert writers know specific things about the relationship between text-structure and reading processes per se that novices don't know — knowledge that helps the expert produce better, more "reader-based" revisions. A continuing question for educational researchers is where such knowledge comes from and what are the best means for helping student writers develop it.

As adult readers, we may think we know a lot about others' reading processes merely from personal introspection. We may be able to apply some of this knowledge intuitively while composing, to "test" our drafts or "role play" our intended reader. But the problem of "validity" remains, in our own private models of how readers behave. Frequently, our intuitive notions about how the reader will interpret our writing are skewed by our own strong commitment to our texts, so that whatever "model" of the reader we have is distorted by what we would like to see. Because the text closely corresponds to our inner mental representation of it, we do not see its flaws. That this "colored glasses" phenomenon negatively affects writers' efforts to revise is nicely confirmed in recent studies reported by Elsa Bartlett and by J.R. Hayes, et. al. Bartlett's work, for example, shows that while novice writers may be able to point to faults in someone else's text, they cannot "see" the same faults in their own. More generally, novice writers have difficulty applying the skills they have as critical readers while they are writing or revising their own prose; on the other hand, expert writers seem able to draw on their knowledge of reading processes more easily while composing. Thus, often what less experienced
writers need is not only to possess more fine-grained information about readers’ in-process goals and constraints, but also feasible methods for applying this information while writing and revising rough drafts.

C. Helping Law Students Model Their Readers

The “validity” of the feedback writers receive from readers, and the presence of “distortions” in their “models” of reader behavior, have major implications for how we teach law students to revise both their own documents and those of others. First-year law students have much trouble understanding how the documents they are being taught to write will actually be read. In particular, they lack the experience needed in order to anticipate the specific goals, processes, and constraints their readers will bring to such documents. They are often shown fine professional examples, which are certainly necessary and useful as models. But students rarely see the “reading” of these examples that goes on as they might, if they had the chance, actually “overhear” a private reading in a judge’s chambers, or in a law or business office. Here the readers do not read-to-criticize, the way the writing teacher might; instead, they read to complete a task, to do what needs to be done. Law students rarely get to see the way their meaning is conditioned and possibly restructured by the exigencies associated with these tasks and with the environments where the tasks are carried out. The professional examples of briefs, opinions, memoranda and regulations they are shown do not reveal these exigencies, nor the way “real-world” readers resolve them. A teacher’s written comments, while certainly valuable, may leave out a great deal. Students cannot imagine exigencies that they have not seen and tried to deal with themselves.

In fact, most law school instruction in writing, and especially revision, demands that the student take critical reader feedback several steps removed from important events that actually occur in the “real-world” reading process. In lieu of detailed information about moment-by-moment, or “on-line” reader difficulties with their texts, law students receive a mixture of anecdote and dire warnings from their teachers: “do this, not that, or else.” Or they might simply be told, “Read the blue-book — again.” Of course, the infamous blue-book\textsuperscript{18} doesn’t tell them how the professionals they are ostensibly being taught to write for in the “real-world” actually read and get meaning out of their document. Similarly, the legal guides to “plain language” and the handbooks for stylistic revision, while they are indispensable aids, may never explain or
describe the task-specific goals and constraints that guide "real" legal readers. Law students may look high and low for a single textbook that shows them what a "real" reader — whether judge, lawyer, or "law consumer" — was actually thinking while he read an important document. It seems rather incredible that no exhibit of legal reading processes is available in any current legal writing textbook — so strong is the legacy of "product-centered" composition pedagogy.

D. Preview Of The Remainder Of The Article

In view of legal writers' need for a valid picture of reader behavior, this article will demonstrate a powerful method for helping legal writers better focus on their readers' actual goals and constraints. The method is particularly useful when students are revising, either their own document or one initially composed by someone else. The method requires that students employ a form of protocol analysis, a psychological research tool that has been used successfully to investigate a wide variety of thinking processes, including those associated with writing and reading. However, since many law professionals and teachers of legal writing are probably not familiar with protocol analysis, it will be helpful to first define protocols here (Part II) and to briefly describe some of the uses to which they are commonly put. Following this introduction to reader-protocols, I will offer a specific rationale for integrating such protocols with first-year legal writing courses (Part III). This rationale discusses weaknesses in approaches currently taken to teach the revision of legal documents and suggests how reader-protocols may compensate for these weaknesses. In addition to citing research that shows the immediate positive benefits of reader-protocols for revising a document, this rationale will also discuss how the use of reader-protocols might have a more general, long-term impact on students' "legal thinking" skills. Finally, I will present some principles to be observed when requiring students to collect reader-protocols, including an outline of a specific reader-protocol exercise which might be implemented in a first-year legal writing course. This sample exercise includes notes for both teacher and student (Part IV).

II. WHAT IS A PROTOCOL?

There are many kinds of protocols in use by researchers today. Most simply defined, a protocol is a tape-recording of someone thinking out-loud. A "concurrent protocol," the type I will focus on
here, is a tape-recording of a person thinking aloud while she works at a task. Another type is called a “retrospective protocol,” a verbal report that someone makes after completing a task. The tape-recording of both kinds is later transcribed and analyzed in a variety of ways for the information it contains. For example, in psychological experiments, a researcher may ask a college student to solve a physics problem or mathematical puzzle. The student is provided with certain kinds of information and deprived of other kinds. As the student proceeds, she says whatever she is thinking, and the researcher does not interfere. Researchers later analyze her transcription to see what information she used or perhaps failed to use in the problem-solving process.

In the composition research literature and elsewhere, protocols have been criticized for a number of reasons. They have been criticized for not providing complete information about mental processes, for distorting or changing the “normal” thinking processes which an individual might use to solve a problem, and for being too “subjective” or inaccurate for scientific purposes. While under certain experimental conditions one or more of these criticisms may be valid, empirical research actually confirming these criticisms has been scant. On the other hand, a massive number of empirical studies has demonstrated the validity of protocols as a research technique, in particular their value in tracing the information used during thinking processes. More specifically, while certainly never providing “complete” traces of thinking processes, concurrent protocols do increase substantially the temporal density of observations we can make while someone completes a task. For many sorts of complex thinking tasks, concurrent protocols may slow down to a greater or lesser degree the experimental subject’s progress, but for many sorts of tasks no other “distortion” of subjects’ “normal” thinking process has been evidenced. Finally, the charge that comments made in protocols are too “subjective” to be used as “data” has been laid to rest by carefully circumscribing the sorts of inferences one can and cannot make from them.

Protocols are now increasingly used to study reading and writing processes. In particular, valuable data about reading comprehension processes may be obtained by asking students to “think-aloud” while they read, i.e., by asking them to “say everything that comes to mind” and to interrupt themselves whenever they wish. The purpose is to find out what helps or hinders the readers in their effort to comprehend and use the text — not necessarily to have the readers criticize or evaluate what they read, though they
may do so spontaneously at times. As researchers using the think-aloud method have noted, the reader must have a real purpose for reading. Otherwise, the protocol may be “thin” and lack comments, hence providing less information. Thus, for example, if the document is a set of instructions that calls for a reader to actually complete a task while reading — such as running a computer program or completing an IRS form — the protocol may provide rich information about the reader’s difficulties and the possible origin of these difficulties in the text itself. Professional document design specialists increasingly use reader-protocols to help them diagnose readers’ problems in understanding legal documents, especially those intended for consumers and other non-legal audiences. For instance, some insurance companies use think-aloud reader protocols to test consumers’ understanding of the benefits and protection afforded by their policies. Writers for such companies examine protocols for evidence showing that readers are making erroneous inferences about coverage or eligibility conditions. On the basis of protocol comments, company writers may then adjust headings, include charts or diagrams, or make other text changes to help the reader understand. Reader “think-aloud” protocols thus serve as powerful diagnostic tools.

My thesis is that requiring first-year law students to collect and analyze such protocols from readers other than themselves will help students revise documents more effectively. Not only do protocols help students spot and correct “immediate” text problems, including things like vague pronoun references and poorly defined terms, but protocols may also improve students’ understanding of basic reader processes so that on subsequent writing tasks they may make more valid assumptions about readers’ goals and constraints. The protocol makes visible how a document functions in a real legal situation.

Suppose, for example, students were asked to draft — or revise — a guide to help clients prepare a simple will. After completing a draft, they might then collect “think-aloud” reader protocols from persons who were at that time actually interested in making a will and who were looking for basic legal advice. In addition to providing specific information about problems with their text, these protocols could also be used to teach students about the kinds of expectations that real clients bring to such a document. The protocols would provide a context for discussing techniques of communication in the lawyer-client relationship that might not otherwise surface. Students thus learn about their client’s purposes and needs for this kind of guide, as well as their client’s misconceptions
— information that will be valuable to them later on in their legal practice.

III. **Why Use Reader Protocols in Teaching Law Students to Revise? A Rationale**

Though teachers might agree that reader protocols serve a valid and important function in research, the discussion so far may not convince them that having law students collect and analyze reader-protocols is really useful. After all, a protocol exercise of this kind can consume a substantial amount of time and energy in an already crowded curriculum. Indeed, with so much about law and legal practice to teach, an important question to ask is how using reader-protocols might help advance the broader goals of first-year curricula, with their emphasis on basic “lawyering skills.” Answering such a question requires a closer look at what kind of information reader-protocols may provide and examining how this information might contribute to the development of students’ legal thinking skills. Therefore, in this section I would like to provide a more explicit rationale for integrating reader protocols with current methods for teaching the writing and revision of legal documents.

Most first-year law school writing and research programs emphasize the importance of “revision.” Usually, revision is instigated by some form of feedback — from the professor, peer, or senior student instructor — concerning deficiencies. The feedback may be written or oral. However, as noted above, it is likely to be offered at some distance from the actual reading process itself. As a result, the teacher’s post hoc summary of problems in, say, a draft memorandum, may or may not closely correspond to the difficulties that actually surfaced in the course of her reading. More importantly, the underlying goals of most academic readers, particularly in the context of a first-year legal writing course, are not likely to accurately represent those of a real legal “user” — i.e., a “user” outside the academic environment, for example, a judge, an attorney in charge of central staff, a corporate client, and so on. The reason is that the “real-world” reader is often less interested in improving the document than in using it to do something else that needs to be done. Reading to evaluate is not necessarily the same thing as reading to comprehend or reading to perform a task. Thus, as argued earlier, the feedback the student receives may lack a certain amount of “ecological” validity. However, the basic point is not that reader-protocols should replace current forms of feedback to students, nor that an academic critic’s feed-
back is not helpful. Rather, the point is simply that, carefully used, protocols provide exceptional insight into how legal documents function in “real-world” settings. Close-up scrutiny of readers in these settings can be enormously helpful in teaching students how to create “reader-based” prose. Specifically, there are three potential advantages to using reader-protocols as a method of feedback for revision:

1. Reader protocols reveal document problems that often escape other means of detection. For example:
   - They show where texts may be missing information that the reader needs to draw an inference or answer a question.
   - They show where texts miscue the reader and lead the reader to draw inappropriate inferences. Frequently such miscues lead the reader to draw mistaken inferences about the document’s underlying purpose, as well as mistaken inferences about its structure or content.
   - They show where texts introduce too much unfamiliar information, so that the intended readers are often overwhelmed.

2. Useful revision strategies are often directly suggested by reader comments in protocols. These strategies may be forgotten by the reader by the time she gives her feedback to the student.

3. Some research evidence — discussed below — suggests that writers who use reader-protocols produce better, i.e., more “functional” revisions than writers who do not use such protocols.

Here I will elaborate upon these specific advantages and discuss their significance for the development of students’ lawyering skills.


Recent composition research suggests that a basic problem facing the student revisor lies in simply “detecting” text faults. Obviously, you can’t fix what you can’t see. The interesting fact is that novices have more trouble detecting in their own texts the same problems that they are able to detect in the texts of others. While this fact provides no specific argument for the value of “think-aloud” reader-protocols in comparison with other tradi-
tional types of critical feedback, i.e., teachers' written comments, it does suggest that asking students to make “think-aloud” reading-protocols of their own drafts is not likely to be very helpful — certainly not, at least, as a tool for detecting problems in their texts. Protocols given by readers other than the author are almost certainly more useful for this “detection” purpose.

Perhaps the key advantage of reader-protocols lies in the kinds of reader problems that surface in them — problems that often may be screened out, or simply forgotten, in a reader's retrospective assessment. Below I discuss three significant problems, each illustrated with an excerpt taken from a concurrent reader-protocol. In these illustrations, appellate judges are thinking aloud while reading the actual opposing briefs submitted in a recent Pennsylvania Supreme Court case, here identified by pseudonym as Magic Mining Co. (“MAG”) v. Commonwealth of Pennsylvania. Specifically, the judges in these illustrations are reading the appellant's brief. The appellant is claiming that the prepayment of certain penalties assessed against him by the Commonwealth, as preconditions for an agency hearing, are unconstitutional under Article V, Section 9 of the Pennsylvania constitution and its implementing statutes. Article V, Section 9 addresses conditions on the right of appeal.

(1) Missing Information. In the “real-world,” judges as readers may deliberately attend to certain types of information contained in briefs and ignore others. Given that their task is to both decide a case and to justify that decision, they are likely to criticize the “writing” of a brief only when it interferes with this task. On the other hand, an ordinary academic reader without judicial experience on the bench may attend to and ignore entirely different information. Protocols are valuable for accurately tracing the effect that a real-world reader's goals may have upon the information that is attended to or ignored.

Here a judge is reading the Procedural History section of the appellant's brief. He has already read the Questions Presented For Review. Keep in mind that he has never seen the brief before, nor any other information connected with the case. His goal in this early stage is to get a clear picture of the procedural posture of the case, which is rather complex. Notice how apparently missing information slows him down:

(Reads) On August 9, Counsel for all parties, recognizing the state-wide importance of the issues presented, filed with the Commonwealth Court a stipulation and joint motion for stay and order which, among other things, tolled for a period of 60
days the running of the 30 day period, within which MAG would be required to prepay the amount of the civil penalty or post security with the Secretary of the Department to perfect its appeal.

81 I guess they're talking about the statutory requirements -
82 only, they really haven't been set out -

(Continues reading) On August 9, 1983, the order proposed by the parties was approved and entered by Judge (X). On September 6, 1983, MAG was granted a leave to file an amended petition for review in an order by Judge (X). The amended petition for review raised the statutory challenge to Section 605 (b) (1) of Clean Streams Law and Section 18.4 of Surface Mining Control and Reclamation Act raised in Question II of the Questions Presented for Review On Appeal - (re-reads) - the amended petition for review raised the statutory challenge -

83 Okay - I wonder if they did that?
84 Where do they do that?
85 I guess in the Commonwealth Court . . .

To write better briefs, it helps to know how judges read them. More precisely, it helps to know how judges read them while actually deciding a case. The fact that all appellate briefs are supposed to have the same canonical structure does not mean that merely following that canon to the letter guarantees success. It is important to observe how the judge uses that canon, what his corresponding expectations are, as his deliberation process unfolds. In effect, the brief read by the academic may not be the same brief read by the judge. For unlike the law school teacher who may be extremely well-informed about the case she has given to students, the judicial reader above must assemble a picture of the case from scratch.

Above we see a judge’s need for information to quickly fill in his picture of the procedural history. Episodes like these are widespread in the protocols I have collected in my judicial research. By comparing such protocol episodes from different readers, law students can see not only where information is missing, but also the effect that different ways of presenting the procedural history may have on judges. From the location and specific focus of the judges’ questions, students can infer methods of presentation that more effectively meet “real-world” judicial needs. For instance, here are the protocol comments of a second judge reading the same
portion of the appellant's brief:

(Reading) On August 9 . . .

75 that's not too long after they filed their action

(continues reading) counsel for all parties, recognizing the statewide importance of the issues presented, filed with the Commonwealth Court a stipulation in joint motion for stay and order which, inter alia, tolled for a period of 60 days the running of the 30 day period within which MAG would be required to prepay the amount of the civil penalty or post security with the Secretary of the Department to perfect its appeal —

76 This was — the parties agreed on stipulation to toll —

(re-reading) the 30 day period within which MAG would

76a (paraphrase) have had to pay the civil penalty or post security in order to perfect its appeal

77 It cites, on August 9, that's the same day of the order —
78 it was proposed by the parties, was approved, and answered by, that was the Court.

(Continues reading) On September 6,

79 approximately a month later

(Continues reading) MAG was granted leave to file an amended petition for review in an order by —

80 let's see what the amended petition said —

(Continues reading) The amended petition for review raised the statutory challenge

81 Okay, so that's when they assert that —

(Continues reading) to Section 605 (b) (1) of Clean Streams Law and Section 18.4 of Surface Mining Control And Reclamation Act raised in Question II of the Questions Presented For Review On Appeal. On September 8, following the submission of memoranda of law by all parties, MAG's petition for preliminary injunction was heard before Judge (X). No testimony was taken —

82 It said here — that's unusual
83 it may be — to this period — just a question of law —

(Continues reading) However, the parties orally argued their respective positions based on the pleadings, memoranda, and
one stipulation of fact entered into by the Department and MAG.

84 What was that stipulation of fact?
85 It would have been better if they could have just told us what the stipulation was —

As it turned out, the stipulation of fact was trivial. But there were numerous episodes in this protocol in which the judge felt information was missing, and there is suggestive evidence that these omissions, cumulatively speaking, led the judge to suspect the appellant's confidence in his own arguments more than he would have had these omissions not occurred. Certainly they did not help the appellant. Protocol episodes like these provide a "window" through which to view the impact of textual features upon judicial decision-making. As much as legal writing teachers and textbooks may exhort students to provide all of the relevant procedural history in an appeal case, the exhortation may be less than convincing unless the student sees what "relevant" means in practice. Observing actual, in-process reactions like these can help students appreciate how judges read and how differently they may read than the academic who has already thoroughly researched the case.

(2) Miscues. In the next two protocol segments, a judge deciding the same mining case draws erroneous inferences as a result of miscues in the appellant's brief. These miscues are legally significant, because they confound the judge's understanding of the nature of the issues. The errors that result, even though eventually corrected by the judge, work to the disadvantage of the appellant's argument. There is evidence elsewhere in the protocol, for instance, that these errors reduce the judge's belief in the credibility of the appellant's argument.

In the first example (lines 551 - 560 below), the judge is about to read the appellant's arguments regarding two key precedent cases. Notice the appellant's strong claim at the start of this sequence, and how the judge reacts:

(Reading) However, no decision of the appellate court of this Commonwealth has squarely addressed this issue of whether a legislative requirement of security —

551 okay, good —

(Continues reading) — can serve as a jurisdictional prerequisite to the perfection of appeal from an administrative agency adjudication.
Okay, so we've never seen this before.

It's a reading of their interpretation of these cases. Now they're going to specifically discuss —

(Continues reading) — the Philadelphia Eagles and Barsky cases. Two decisions of this Court address the operation of such a requirement —

I assume that means a security requirement —

(Continues reading) — in cases arising both before and after the effective date of Article V, Section 9.

As it turns out, the appellant's claim at the start of this episode, i.e., that no appellate court has addressed the present issue before, is contradicted a short while later in his brief. The claim is thus a miscue, creating the erroneous impression in the judge that we see above (see line 552). Notice what happens to the judge a short while later when, after reading the appellant's arguments about the Philadelphia Eagles case, he comes to the appellant's contradictory interpretation of Barsky:

(Reading) In Commonwealth v. Barsky & Sons, this Court was once again confronted with Section 1104. However, the appeal in the Barsky case from the Board of Finance and Review had been taken after the enactment of Article V.

Okay, so Barsky's post Article V, Section 9 —

(Continues reading) In Barsky this Court was squarely confronted with the claim raised herein, whether the security for the amount in controversy —

amount of controversy?

(Continues reading) — amount in controversy for the appeal costs as a jurisdictional prerequisite violated the right to appeal guaranteed unconditionally by Article V, Section 9.

But before they said none —

did they say none of these cases?

(Re-reading) No decision of the appellate court of this Commonwealth —

yes, on page 34 —

(Continue re-reading) has squarely addressed the issue

Okay, now they're saying that this Court was squarely con-
fronted with the claim raised herein — well —

The ambiguity the judge encounters here certainly did not further the appellant’s position, since this ambiguity may have aroused the suspicions of the judge about the real relevance of the Barsky case to the appellant’s claims. This kind of miscue can occur even for experienced writers, especially if the case is as technical as this one was.

In our second example below, we see the same judge encounter a more serious miscue. Here the judge observes with some chagrin that the appellant failed to make a crucial point in a portion of his brief where it might have been both more logical and persuasive to do so. Indeed, this miscue leads the judge eventually to question whether or not the appellant really presented the argument he should have. The judge is now further into the appellant’s arguments:

(Reading) Additionally, the interest of the public, as shown in Barsky, can be protected adequately without the necessity of denying the appeal for the failure to post security. Both statues require a surface mining operator to post surety bonds prior to the commencement of surface mining to insure the Commonwealth against the operator’s failure to comply —

915 That’s interesting — they are required to post surety bond

(Continues reading) prior to the commencement of surface mining — insure the Commonwealth —

916 This seems to say there are general surety bonds in place.
917 Now, why didn’t MAG raise this issue earlier in their argument about double security?
918 I don’t recall them mentioning this general type of surety bond —
919 Wonder if these bonds are in fact as they say, to insure the Commonwealth against the operator’s failure to comply?
920 and that if this means that the Commonwealth is able to draw on that bond, where it does in fact assess the penalty for violation of any of the statutes or the rules or regulations?
921 Boy, this is very confusing!

In fact, the appellant’s point here that surety bonds are required to commence operations and that their purpose is to protect the Commonwealth in advance against violations is one that the appellant tried to make previously, in the very argument about
“double security” that the judge mentions in line 917, above. Indeed, earlier the appellant had tried to argue that the Commonwealth did not need the prepayment-of-penalty provisions, because these provisions constituted a form of “double security”; he cited Barsky where the court ruled against such “double-security.” But in this earlier argument he failed to make clear exactly what the two forms of security were. As I will now show, the appellant’s language in that earlier part of the argument was ill-constructed. Let’s look at what the appellant wrote:

the Commonwealth has two mechanisms simultaneously available to it for the security and collection of a civil penalty assessed for violations of the mining provisions of the Clean Streams Law and the Surface Mining Control and Reclamation Act, i.e., the right to take judgment and execution thereon and the right to prepayment or a surety bond.\(^32\)

That this language obscured the crucial point the appellant wished to make we can demonstrate by looking at the judge’s earlier protocol comments, when he encountered this very language:

(Reading) The Commonwealth has two mechanisms simultaneously available to it for the security and collection for a civil penalty assessment for violations of the mining provisions — The right to take judgment and execution thereon and the right to prepayment for a security bond —

620 Okay, I’ve got a question right there —
621 that’s a part I’m not clear about —
622 Little note here, question —
623 This seems to be pinpointing my fundamental difficulty with their position so far —

(Continues reading) However, unlike the statute in Barsky, Section 605 and Section 18.4 explicitly require the security as a jurisdictional prerequisite or condition to the right of appeal. The Barsky Court’s finding that there was no reason to impose the double security provisions of the Fiscal Code in connection with the tax appeal, warrant the conclusion in this case that the double security requirements of the Clean Streams Law and the Surface Mining Control and Reclamation Act are an unreasonable burden on the right of appeal guaranteed by Article V, Section 9. The soundness of this conclusion —
As the judge continued reading, he did not comment further about the “double security” point. The judge needed here (at 620 - 624) to see that the surety bond required before commencement of mine operations was one form by which the Commonwealth’s interest was protected and that the prepayment of penalties required for an agency hearing was a different form. But the syntax, perhaps the use of the disjunctive “or” in the phrase “right to prepayment or a surety bond,” may have prevented the judge from seeing properly this distinction. Notice how the judge misreads this phrase: he says “prepayment for a security bond,” instead of “prepayment or a surety bond. When he later discovers this distinction between forms of security (see 915 - 921 above), he is naturally confused and suspicious. Perhaps what the appellant needed to write was something more like the following, to emphasize the difference between the surety bonds and the prepayment of penalties:

...the Commonwealth has two mechanisms simultaneously available to it, i.e., the right to take judgment on the surety bond required before mining operations may begin and the right to prepayment of a penalty in the event violations are alleged.

In examples of “miscues” like these we begin to see the relevance of reader-protocols for teaching not merely error detection, but legal thinking itself. The protocols identify the tacit criteria the judge is using to make sense of the case, and dramatically illustrates the influence of textual choices upon those criteria.

(3) Too Much Information At Once. When readers are forced by the length of sentences or by the “density” of information within sentences to attend to too many things at once, their reading process breaks down. They begin to re-read, often to try to pinpoint sources of difficulty, such as unfamiliar terms. Protocols are very useful for indicating this type of “overload.” In an appellate context, they are also useful for indicating what we might simply call precedent overload, i.e., when a judge or staff attorney must plow through more citations and cases than seem relevant or necessary. For example, here again is one of the judges reading the appellant’s brief in Magic Mining Co. v. Commonwealth. At this point he is nearing the end of the appellant’s effort to draw a complex analogy to a very old case (Commonwealth v. McCann, 1896) — an analogy which he is trying very patiently to grasp:

(Reading) This Court noted that prior to the adoption of the
Constitution of 1874, the appeal from a judgment for a penalty would have been regular —

827 Okay

(Continues reading) . . . Court also noted, however, that there were many other cases in which the judgment of the Justice of the Peace for a summary conviction or civil penalty was final. (Re-reads) . . . the Courts noted, however, that there were many other cases in which the judgment of the Justice of the Peace for a summary conviction or civil penalty was final —

828 Okay, is that the problem here?
829 because it wasn’t final?

(Re-reads) suit to collect a civil penalty before the Justice of the Peace —

830 I’m assuming here in McCann there had been no determination made for the Justice of the Peace at the time the appeal was taken —
831 he was just trying to bypass the Justice of the Peace proceeding
832 I don’t know —

(Reading) To correct this lack of uniformity, the drafters of the Constitution of 1874 —

833 There’s a lot —
834 This brief goes on at length about a lot of cases
835 and I’m not really sure —
836 It seems to do this often —
837 It goes on at length about cases the significance of which I’m not really clear —

Convinced of the viability of one’s own argument, it is frequently impossible to tell where that argument loses the reader, where it runs away from the questions which serve the reader’s real goals. As often as law teachers and legal writing textbooks tell the student not to overload a brief with remotely useful citations and cases, the point is often not convincing because the results of such overloading are invisible. The beauty of protocols is that they show directly how this tendency affects even the most patient judicial reader. Above we can begin to see how the real-world reader responds.
The preceding examples should demonstrate that protocols can be useful for “detecting” a range of problems in drafts that might not be detected otherwise. In particular, the examples we’ve seen illustrate how these problems affect the “real-world” reader who, often unlike the academic reader, reads in order to do something beyond correcting the text. In these examples, the readers were judges trying to find a basis for deciding a case.

I would now like to focus upon a second, closely related advantage of reader protocols. While I have shown evidence above indicating how protocols can be used to detect problems that derail the reader, we did not look at examples showing how readers try to solve the organizational or evidentiary problems they encounter. Yet there is some empirical evidence that the spontaneous solutions of readers to such problems may provide a basis for effective revision strategies — strategies that may be generalized to apply to more than just the document from which the protocol was taken. Here I will discuss some of that evidence.

Flower, Hayes, and Swarts, for example, conducted a study in which they observed readers with varying backgrounds and interests try to use a federal regulation. In particular, using protocols the researchers studied how readers try to “translate” dense regulatory prose. A significant, consistent feature of the readers’ process was what the researchers termed a “scenario,” i.e., an attempt by the readers to generate hypothetical test cases in which the readers themselves played a role. They often tried to restructure information by reversing the “If — Then” sequences in the prose, so that the actions or “then” clauses would precede the conditions, or “if” clauses. They also tried to make the regulatory rules more concrete: as they thought-aloud, they spontaneously recasted sentences with human agents as subjects, i.e., I, we, you, they, etc.; they also changed nominalizations like “deprivation” back into verbs, “deprive.” These kinds of spontaneous solutions to difficult prose would be particularly useful to writers trying to revise any legal language for non-legal readers.

In a related study, Swaney, Janik, Bond, and Hayes showed that protocols reveal solutions to problems that readers experience in managing the flow of their attention. Here, protocol data was used to examine readers’ understanding of a variety of legal documents, including a product-quality guarantee, an explanation of workmen’s compensation benefits, a consent-to-surgery form, and
a car insurance policy. The study indicated that when readers’ short-term memories became overcrowded with details in certain passages, they spontaneously vocalized a “summary.” Sometimes this summary took the form of a “review,” i.e., if it followed a passage, and sometimes a “preview,” if it preceded a passage. After identifying those places in a document where readers spontaneously create these summaries, writers attempting to revise might consider providing explicit summaries at or near those places. Moreover, providing frequent summaries, i.e., previews and reviews, is a writing strategy that generalizes to many kinds of legal documents.

An extended example may further show how reader-protocols often directly suggest useful revision strategies. The protocol excerpts discussed here suggest a range of such strategies, some for improving the choice and definition of terms, others for improving organizational structure. The excerpts were taken from business graduate students. They were thinking-aloud while reading a corporate lawyer’s memorandum addressed to non-lawyer managers, also with the corporation. The memorandum attempts to explain the legal requirements and procedures involved in making a successful corporate acquisition. See Appendix III.

A fundamental problem with the memorandum is that its structure is poorly adapted to the business readers’ purposes. Although the lawyer evidently wants to instruct his corporate peers in the correct steps or procedures to follow in buying a business, he organizes his information around the actual sections or format of a formal acquisitions agreement. The problem with this organizational strategy is that the temporal sequence of procedures managers are to follow in officially closing such an agreement are not clearly reflected in the order of parts in the formal agreement itself. As a result, readers indicated in their protocol comments that they were confused about the lawyer’s underlying goals. In other words, did the lawyer want to tell the managers what procedures to follow, and when and how to execute them? Or, did he simply want to tell them what information is contained in a formal agreement, and why that information is there? This ambiguity of purpose confounded readers’ expectations. In fact, even when the readers’ comments suggested a “local” revision strategy to be applied, such as using a more familiar term, they did not feel confident they had really grasped the lawyer’s goal.

For example, the following comments were made by a reader after sentences 2 — 3:

*(Reading)* Much of the memo relates to the acquisition
Agreement itself. Acquisition agreements, since they serve the same purpose, generally have the same features.

8 Agreement itself?
8a I guess that means written contract.
9 Same features as what?
10 As each other?
11 All acquisition agreements must have the same features?
12 I don't know what the hell they are talking about —
13 I see there is a basic type of format that they use and has a certain logic to address the problems that you see again and again, but —

Two problems with the lawyer's memorandum are evidenced here, one syntactical, the other contextual. Moreover, the reader's comments actually imply the solution the lawyer needs. First, the reader is obviously unsure about the implicit comparison being made between different acquisitions agreements. In other words, what is being compared with what? Or, as this reader asks, "Same features as what?" The reader uses the term "all" to try to determine the precise set of acquisition agreement being compared. If the lawyer had said, All acquisition agreements...", the sentence would perhaps be less confusing. The "generalizable" writing strategy to be recovered here is that comparisons need to be explicit, with all parts of the comparison clearly indicated in the text. More to the point, the episode suggests that writers should always ask themselves, "Why am I making this comparison here? Have I told the reader why I am making it?"

Indeed, the reader's comments in this episode suggest the deeper problem with the lawyer's purpose I mentioned above. This problem surfaces as the reader apparently wrestles with the connection between sentences 2 and 3. The lawyer writes, "Much of the memo relates to the acquisition agreement itself." But the verb, "relates," is not very concrete: how does the memo relate to these agreements? What is the point of the "explanation," referred to in sentence 1, offered by this memo? It seems clear that the reader is not merely looking for a transition between sentences 2 and 3, but also looking for a more explicit statement of purpose expressed in terms of the reader's function. The generalizable strategy implied here is that writers should provide an explicit statement of purpose up front, with no punches pulled, even at the risk of being "dull." In particular, tell your reader why reading your memo is necessary for the reader to do what he or she needs to do. Tie the purpose statement to a relevant purpose or function
of the reader.

The writing and revision strategies suggested in protocol data are naturally enriched when the protocols of several readers, responding to the same segment or sentences, can be laid side by side. Below, for instance, are the comments of several readers immediately after reading sentences 32 and 33. The sentences are as follows:

*Tax considerations play an important role in the decision as to the form of the transaction (32). Tax considerations aside, however, the buyer is usually best served by structuring the transaction as a purchase of assets of the seller along with the assumption of enumerated liabilities of the seller (33).*

Reader 1. “I don’t understand that (paraphrases sentence 32) . . . The buyer is better off purchasing . . . assets along with assumption of enumerated liabilities of the seller.”

Reader 2. “Why doesn’t . . . Why aren’t you going to pick out one of the things you talk about in the first paragraph? . . . Okay, um, aside from taxes the best way for a buyer to structure taxes is to purchase assets of seller and enumerate the liabilities of the seller.”

Reader 3. “Okay, we have to consider taxes . . . I don’t know what enumerated liabilities of the seller are . . . Oh, I see, okay, the buyer — ignore taxes — the buyer is usually best — gets the best deal if they buy the assets along with certain described liabilities . . .”

Considered together, these comments point to two problems in the lawyer’s memorandum. The first of these is lexical. Reader 1 indicates that he does not understand what “enumerated liabilities” are, suggesting that the lawyer should provide a definition. More interestingly, Reader 2 “translates” the meaning of “enumerated liabilities” in a way that may not be intended by the lawyer; this Reader infers that the writer is directing him to “enumerate the liabilities of the seller,” that is, to do something with the seller’s liabilities. Reader 3, after stumbling over the term, apparently interprets it to mean known or, as he puts it, “described” liabilities. But the lawyer may not mean that “enumerated liabilities” are the same as “described liabilities.” For example, described by whom — the buyer or the seller? The generalizable strategy suggested by all these comments is that in memoranda of this kind, definitions should be clearly presented in terms of the
reader's possible function. In particular, the comments of Readers 2 and 3 imply that definitions ought to be presented in terms of actions that the reader may or may not take.

The second problem evidenced by these comments is structural in character. This problem surfaces most clearly in the remarks of Reader 2, though Readers 1 and 3 may also have encountered it. Note Reader 2's question: "Why aren't you going to pick out one of the things you talk about in the first paragraph?" Her question points to a textual "miscue" that creates expectations that are not met — the same sort of miscue shown earlier in the appellate brief. To find the source of the miscue, we need to inspect the paragraph immediately preceding sentences 32 and 33, especially sentence 31. This paragraph reads as follows:

The first issue that seller and buyer must agree upon is whether the purchase of the business is to be in the form of a purchase of the assets of the business, the stock of the owners of the business or a merger of the business or a merger of the business into either ACME or into a subsidiary of ACME.

We can see here what motivates Reader 2's question. This sentence, which begins the section titled "Form Of Acquisition - Purchase Of Assets, Stock Or Merger," implies the order of topics subsequently to be dealt with inside the section. Focusing on this structural cue, Reader 2 evidently assumed that each paragraph in this section would treat a different form of purchase: first assets, then stock, and finally a merger. In particular, Reader 2 looked for a "topic" sentence that would mention "purchase of assets." But, as she saw, the first sentence (32) begins, "Tax considerations play an important role. . ." and she must wait until the second part of sentence 33 to see that the topic "purchase of assets" will be discussed.

So what is the solution or strategy to be generalized here? The obvious lesson is that lawyers should use parallel structure, not only within sentences, but between larger units of text as well, such as between paragraphs. Perhaps some teachers at this point will say, "But we've always advised students to use parallelism." Quite so. But the advice may be less than convincing unless students see the direct effects of a failure to use parallelism; protocols show that such effects are psychologically real and result in erroneous reader "predictions" about text structure. Parallelism is not just a decorous convention, it serves a cognitive function. Moreover, students who use reader-protocols as sources for writing
strategies may gradually become more consciously aware of their readers' efforts, through devices like parallelism, to predict text structure in advance of reading. Earlier I noted that inexperienced writers, while they may know much about their own reading process and requirements, often are unable to bring this knowledge to bear while they are writing. Asking students to try to define the problems and "generalize" the solutions that surface in protocols may help them to apply this knowledge while composing or revising.

C. Do Writers Who Use Reader Protocols Produce Better Revisions Than Writers Who Only Use Traditional Diagnostic Tools?

In the preceding section, I suggested that when readers stumble over difficulties in texts, they may implicitly work out a "revision" on the spot. Where different readers consistently work out the same revision, we may be able to infer a generalizable revision strategy for writers to use. Unfortunately, to date no research directly investigating the effectiveness of protocol-aided revision has been carried out using standard legal documents — such as briefs, memoranda, opinions, contracts, and so on.

However, a recent study of how readers comprehend insurance forms by Swaney, Janik, Bond, and Hayes seems promising. They found that revisors who analyze protocols tend to produce substantially better revisions than revisors who only apply traditional textbook precepts and "readability" principles. In fact, the finding that protocol-based revisions were "better" was not a weak holistic one, based upon impression scoring. Rather, the finding here was based upon actual "user-testing" of the insurance forms. Users were asked to complete questionnaires regarding the conditions under which they were covered by the policy. The users of forms revised with the aid of protocols had an error rate of only, on average, 22%, whereas users of forms revised without protocols had an error rate of about 50% — a significant difference. Though the researchers do not report data explaining precisely how the protocols helped the revisors, their results, nonetheless, are encouraging.

A careful, just-completed study by Karen Schriver provides more powerful evidence that reader protocols improve not only the finished document, but also have more general, long-term effects upon student writers' skills. In this study, classes of college students taught to revise with the aid of protocols were compared with classes taught to revise with more traditional methods (but with no reader protocols). The students who were taught with the aid of protocols performed markedly better on a series of "revi-
Teaching Lawyers to Revise

Post-tests following the classes. Specifically, the post-tests showed that these students detected significantly more problems in new sample texts than control group students did. As Schriver noted,

Students got much better at detecting and diagnosing problems of omission. Protocols helped experimental students to identify problems such as lack of context, missing examples, ambiguous definitions, and the need for analogies. They became especially proficient at pinpointing where the writer neglected to provide purpose and/or goal statements. . . (the) data help to confirm that the skill developed in detecting problems in texts with the help of reading protocols seems to transfer to new texts without the aid of protocols. 40

To summarize, the goal of this section (III) of the article has been to illustrate three benefits of using reader-protocols as part of a legal writing program. We have shown the following: (1) protocols reveal “read-world,” or “user” problems that often escape “academic” readers or other traditional means of feedback and detection; (2) protocol comments often directly suggest “generalizable” strategies for revision — i.e., strategies that can apply to other documents besides the one from which the protocol was taken; (3) writers who use protocols as diagnostic aids may produce better revisions than writers who do not. More generally, we have seen through different examples how protocol data can provide unique insights into the process of “legal thinking” — insights that help law students to understand how a document functions in a real legal situation.

Mention also should be made here of the role that teachers, by collecting reader-protocols, can play in research on both legal reading and legal revision processes. For instance, if teachers and students collect a sufficient number of different reader-protocols for the same type of document — for example, a staff-attorney memorandum — they will eventually be able to “profile” a range of legal-reading problems that real “users” of that type of document are likely to confront. The profiles, together with the protocols, could provide a rich set of materials for teaching legal writing and revision, and complement the product-oriented textbooks and style-guides currently in use. Building a library of such protocols is an activity that will pay large dividends for any legal writing program.

Against this favorable evidence, however, we should remember that more comparative studies of the value of protocols in relation
to other teaching methods are needed. It would be tragic if so promising a method were "oversold" before its real value and place could be substantiated. Protocols should not be seen as a panacea, or as replacements for other methods of teaching revision. Some researchers have cautioned against using reader-protocol data as a basis for designing procedural models of the drafting or revision process.41 This caution is appropriate, because models of writing and revision processes are probably better created by making detailed process studies of writers and revisors at work.42 Indeed, the point of this article is not that reader-protocols should be used to make models of the revision process. Rather, the point here is that reader-protocols can be used to help law students make better models of their readers — models that have what we might call "ecological" validity.

IV. IMPLEMENTING A READER-PROTOCOL ASSIGNMENT IN THE FIRST YEAR LEGAL WRITING COURSE

There are many ways to make use of reader-protocols in the first-year legal writing course. Certainly there is no limit to the kind of documents from which reader-protocols might be collected. Two principles, however, should be adhered to regardless of the type of document chosen:

(1) As far as possible, reader-protocols should be collected from "real-world" readers who are actually trying to use the document in the offices or other environments where they would normally do so. Such readers should never be given to believe that they are to read as critics per se. Thus, if the teacher requires students to have reader-protocols made of a brief or memorandum, the best readers might be clerks, staff attorneys, or judges trying to use these documents just as they would under, say, appellate screening and review conditions. If such real-world "users" are simply unavailable, there are artificial methods for giving readers a "user-like" purpose. Suggestions for such artificial methods are contained in the sample exercise directions below.

(2) Students should have other readers make protocols of their drafts; students should not make reader-protocols of their own drafts, for reasons discussed earlier in this article (see the beginning of Section III, above).

Testing And Revising A Legal Document: Directions For a Semester-Length Reader-Protocol Project43

This project is a "revision" assignment that calls for students
to make and analyze reader protocols. This assignment is actually a semester length project and might be completed by students working alone, in pairs, or in groups of three. I have used this assignment in training graduate business students to revise various types of legal and quasi-legal documentation. Though I have conducted no independent evaluation of my students' work, I have always been impressed with the improvements students have made - often with extremely technical, even intractable documents. To complete the project, the student(s) must complete the six (6) steps listed below. (Following this list, each step is described in detail and contains notes for the instructor as well as directions for the student.)

1. Select a legal document in which you are interested, but which you have found difficult or confusing to read or use.
2. Record one or more reader-protocols of the document by a qualified reader.
3. Diagnose the problems in the document using the reader protocol(s) and the editing and revising procedures taught in the course.
4. Revise the document, working from "global" to "local" problems.
5. Test the effectiveness of your revision with a second (new) reader protocol.
6. Write a five-page analysis of the results of your diagnosis and final test protocol(s).

Project Directions

Step One. Select a current legal document in which you are interested, but which you (or others you know) have found difficult or confusing to read and use. For example, you might select one of the following:

- A piece of recent legislation, proposed legislation, or amendment to existing legislation;
- A description of a legal procedure written for a non-legal audience (for example, how to file for a bankruptcy);
- A federal, state, or local regulation;
- An appellate brief, opinion, agency or administrative pleading, or memo of law;
- Consumer contracts (e.g., bank loan forms, leases, warranties);
- Instructional or "user" manuals for legal data-processing on the computer.
Teacher's Notes. I have found that allowing students to select their own “target” document increases their motivation and interest — though, as teacher, you can bring in your own “library” of samples from which students may choose. For example, consider giving students portions of two regulations on the same legal issue, each enacted at a different time. If these two versions are not too long, students may collect a number of protocols and consider differences in readers’ interpretation, then identify (and remedy) the comprehension problems posed by each version.

For a semester-length project, I usually require that the document selected equal eight to fifteen double-spaced, typewritten pages. However, students must first obtain my approval before going to work on the document they have selected, because the exact length I require will depend upon the density or complexity of problems apparent in the original. For example, some computer manuals for operating legal software may require far more revision and correction than first meets the eye. Therefore, for these and similar kinds of documents, I direct students simply to select a section or small chapter for revision. Moreover, when making protocols of “instructional” or “procedural” documents, the protocol should be made as the reader actually tries to use the instructions to complete the task (for instance, while attempting to run the computer program).

Step Two. Record one or more reader-protocols of the document by a qualified reader. By “qualified” reader I simply mean an adult reader whose age and educational, professional, and/or technical background approximates the background of the audience who might be expected to normally encounter that kind of document. In addition, you must simulate, as far as possible, the sort of conditions under which the reader would normally work. Let’s look at how you want you reader to behave.

Most of us who read “on the job” do so with specific goals in mind. We read in order to do certain things, i.e., to get an answer to a question or solve a problem. Unless we are planning to actually revise the document, we do not read like “critics.” Therefore, you should not give your readers the impression that you want them to “criticize” the document or point out its faults. In other words, their criticisms should follow from their attempt to use the document. At the same time, your readers must have a realistic purpose. If you merely tell your readers to “say aloud whatever they are thinking” and do not offer them some specific motivation (or purpose), then you might obtain only a few comments in your protocol. You want to get as many comments in your protocol as
you can, because the more comments you have, the more information you will have to guide your revision. Therefore, in addition, you should try to simulate or induce a realistic "motivation" in your reader.

There are a number of ways to induce readers to read with a purpose. One way is to find readers who are actually trying to use a document (for example, a friend in law school is about to buy real estate and is having trouble grasping the contract). If you cannot find this type of "ready-made" situation, there are some simple artificial ways to motivate your reader. One easy method is to tell your readers that, when they are finished, you will give them an "open-book" comprehension test, to see what they understood. Your prepare a list of, say, ten questions that focus on what you believe the difficult or murky areas of the text. While answering these questions, the readers are allowed to go back and look at the document. In addition to tape-recording their comments as they read the document the first time, you also record everything they say while answering the questions in this "test." Again, if the document asks the reader for information (as in a tax form or loan application), this artificial "testing" procedure for creating a sense of purpose may be unnecessary, as the document will have its own built-in purpose. When preparing to make a protocol, be sure to remember these two things:

1. You will use your protocols as one means for detecting and diagnosing problems in your document. Therefore, be sure your readers say aloud everything they are thinking as they read, including what they are thinking when they "back-up" to re-read, or when they skip ahead, or merely express their pleasure or disgust. You want your readers to think-aloud as continuously as possible. If they fall silent for more than 10 seconds, you should prompt them by saying, "Please keep talking."

2. As far as possible, you want readers to think and behave as they normally would when working with your type of document. Give them a realistic purpose for reading, but do not "bias" them by telling them there may be something "wrong" with the document. Simply tell them that you are interested in "reading processes." You don’t want your readers to read more "critically" than they normally would. If possible, have your readers work in the location where they normally would.

Once you have made your protocols, have someone transcribe
them verbatim. A practical transcription method is to skip a line between each of your reader's spoken sentences. This spacing makes for easier reading and note-taking later. Number each line for reference. Underline the original text being read, and place in parentheses whatever your reader says — comments, criticisms, questions, hunches, etc. without underline. Pay close attention to both what your readers say and where in the text they say it. You are required to turn in at least one protocol transcription with the project.

Teacher's Notes. If students find that collecting and transcribing their protocols is too costly and time-consuming, as teacher you may opt not only to select the document to be revised, but also to provide students with several unanalyzed protocols of the document. If this procedure is followed, then students actually begin the project at Step 3, below. Another cost- and time-saving method is to have small groups of students collect and transcribe a single protocol, then analyze its contents individually, producing individual revisions. Of course, the students in these groups must agree on the type of document they wish to investigate. In my experience, student motivation is somewhat greater when individual students choose their own document and conduct their own protocols.

Step Three. Diagnose the problems in the document using the transcribed reader protocol(s) and the revision procedures taught in this course. Having recorded and transcribed your protocols, you now analyze them to find out where your readers had trouble — and, most importantly, why they had trouble. Based upon your own inferences and the diagnostic materials provided in this course, try to categorize the problems you find. Then make a "hierarchical" inventory of these problems, so you can work from "global" to more "local" ones. (You will also use this inventory as a plan for guiding your work in Step 4.) For each problem, begin making notes about what may need to be done. That is, you first need to consider the document as a whole: Is its purpose clearly stated? Is its audience clearly defined? Does it create appropriate expectations regarding structure and content in the reader? Look for protocol comments in your transcript that suggest the document has these sorts of "global" problems. Then look for comments that suggest more "local" problems with headings, with section divisions, with paragraph structure, and lastly sentences and terms.

There is an important reason for proceeding in this "top-down," or hierarchical manner when "diagnosing" problems. The reason has to do with your overall efficiency as a revisor. For in-
stance, sometimes you may need to "translate" sentences before you can even understand what the document is saying. As a result, you may find some initial editing necessary just to comprehend the prose. But a risk is involved in making too many "local" repairs right away. If you get too involved in repairing sentences or polishing the prose style, you may inadvertently ignore much more important problems, e.g., the document includes irrelevant information in a section, or information belongs elsewhere. If you later determine that sweeping "global" changes are necessary, your earlier efforts to make "local" improvements may be wasted and of no use. So try to diagnose global problems first, to save energy and effort.

Teacher's Notes. Students should not be sent into the jungle of a protocol unarmed or unprepared. I have found it helpful to show students the broad range of comments possible in sample protocols. I have also given them portions of a protocol and asked them, as a class, to account for the comments readers are making. For instance, I may show them comments like those I presented earlier, along with the original document, and ask them to speculate about what happened to the reader at particular points. In this way, I demonstrate the kind of analysis I want them to undertake later, on their own. In particular, I show them how to look for symptoms of "global" problems first, before looking for the readers' "local" troubles with sentence structure and terminology. Sometimes these "local" difficulties are obvious and easy to spot in protocol comments. Symptoms of other difficulties, however, as in examples presented earlier, require a bit more sleuthing and comparison of multiple protocols. Moreover, students should be encouraged to use their own experience in reading the document to help with the "diagnosis" process, along with whatever editing textbooks you happen to be using in your course.

Step Four. Revise your Document. Here you work down the hierarchy of problems you diagnosed and make the necessary improvements. Depending upon the nature and extent of the difficulties you detect, you may wish to rewrite as well as revise parts of the document. You are to make the document as professional in quality as you possibly can. You will be required to turn in your completed revision along with a copy of the original version.

Teacher's Notes. Sometimes students choose legal documents with extremely complex problems, or which involve a far greater range of problems than could be adequately addressed in the time-frame for the project. As noted above, in these cases I encourage students to select only a portion of the document for revision. In-
deed, I direct students first to make a complete "problem inventory" of that portion and then to tackle only the major problems, to put their efforts where they will accomplish the most good.

Step Five. Test the effectiveness of your revised version with a second (new) reader protocol. When you believe your revision is complete, record a second think-aloud protocol from a different, but comparable reader-subject. As before, study this protocol carefully and make a hierarchical inventory of the problems the reader is experiencing, from "global" to "local." Try to pinpoint the source of each in your revised text. Then compare the results of this protocol with the results of your original protocol. Does the new reader experience fewer problems than the previous reader? Though your final test reader is still likely to encounter some problems in understanding or using your revision, you should find that many problems do not recur. Carefully note any remaining problems and try to correct them.

Teacher's Notes. If the time-frame of your course is short, you may wish to omit this step as well as Step Six below. In such a shortened version, students would then simply turn in to you their protocol(s), the original document and their revision. However, I have found that this step provides a powerful learning experience for the student because it involves the assessment of the student's revision by someone other than the teacher. Moreover, I have also found that students are very eager to test their "new, improved" version. Such testing gives them the sense that revision is a "public" and not merely "private" process. But they also remain in charge of this process, as both test interpreters and test managers. The second protocol helps confirm how the revision procedures you have taught actually lead to better comprehension on the part of a "real-world" reader. In other words, students learn more dramatically that revision does make a real difference.

Step Six. Write a five-page analysis of the results of your diagnosis and final test protocol. This analysis must be turned in with the final revision and will be weighted equally with your revision in determining your grade for the project. Your analysis should be organized as follows:

1. Carefully list and explain, in hierarchical order, each of the problems you found in your document. In "identifying" the problems, you must do two things: (a) quote verbatim from relevant portions of your initial protocols, explaining what document problem your readers' comments imply; (b) explicitly "label" or categorize these problems, using the criteria and terminology presented during the course. Do not
give the reader a "walking-tour" of the document, merely starting at the beginning and working to the end. Instead, be sure to work "top-down," starting with "global" or whole document problems (purpose and audience), then focusing on section and paragraph problems, and concluding with a discussion of sentence and terminological problems. Explain the significance of each problem in terms of your readers' needs and expectations.

2. Explain how you attempted to solve the problems you found. In this section you demonstrate what revision procedures you used and explain why these procedures were appropriate. That is, along with offering "before-after" samples, explain exactly what you changed and why your revision appears better. Note: provide your "before-after" examples in the analysis - do not merely refer the reader (me) to the relevant pages of the original or your revision to see what you did. In this way, your analysis will be largely "self-contained."

3. Explain the results of your final revision test. Here, in the final part of your analysis, answer these three questions in as much detail as possible: (a) Did your revision succeed in removing the initial problems detected in your first protocol diagnosis? Why or why not? (b) What old problems remain? What new problems have appeared? (c) How would/will you solve these remaining problems; that is, what strategies or procedures might be appropriate?

Teacher Notes. Again, if time is short, this step may be omitted. But I have found that, along with the second protocol "testing" the student's revision, writing the analysis provides a powerful learning experience. In effect, the analysis leads students to a better awareness of the complexities of the revision process itself. Students learn the importance of revising "hierarchically," or "top-down." The analysis also forces them to be articulate as critics, to explain the relation between specific text structures and content, on the one hand, and reader understanding and expectation, on the other. And, of course, to the extent that the text problems in their document create legal problems, the analysis sharpens their legal thinking processes as well. So that students take the analysis as seriously as the revision, I usually provide a "split grade," one for the quality of the revision, and one for the quality of the analysis.
NOTES


3 See R. Martineau, Appellate Litigation Skills Training: The Role Of The Law Schools Report And Recommendations Of The Committee On Appellate Skills Training, Appellate Judges Conference, Judicial Administration Division, American Bar Association (Draft, April, 1985); see generally, 3 Learning And The Law, Section Of Legal Education And Admission To The Bar, American Bar Association (Summer, 1976). This entire summer issue was devoted to the "lawyer competency" issue.

4 Consider, for example, the focus of most programs represented at the Teaching Legal Writing Conference held at the University of Puget Sound School of Law, sponsored by the National Endowment For The Humanities (NEH) in 1984. See the compilation of program descriptions provided by the Conference.

5 For recent reviews of the literature on audience, see L. Ede, Audience: An Introduction To Research, 35 College Composition And Communication 140 (May, 1984), and L. Ede and A. Lunsford, Audience Addressed/Audience Invoked: The Role Of Audience In Composition Theory And Pedagogy, 35 College Composition And Communication 155 (May, 1984).


10 See M. Kennedy, The Composing Process Of College Students Writing From Sources, 2 Written Communication 434 (October, 1985).


13 The precise meaning of these terms will vary depending upon goals of the research cited. Throughout this article, they are used to refer to "more" vs. "less" experienced writers.

14 Hayes, Flower, Schriver, Stratman and Carey, Cognitive Processes In Revision. Advances In Applied Linguistics: Reading, Writing And Language Processing. S. Rosenberg, Ed. (1987); Flower, Hayes, Carey, Schriver and Stratman, Detection, Diagnosis And The
Strategies Of Revision College, Composition And Communication 37 (1986).
18 D. Rubin, supra, note 8.
20 Scardamalia and Bereiter, supra, note 8.
21 A Uniform System Of Citation (13th Ed., 1981).
24 Ericsson and Simon, supra, note 20, at 63 - 107.
28 For theoretical and empirical support for this distinction, see Hayes, Flower, Schriver, Stratman and Carey, supra, note 14. See also Waern, supra, note 23.
29 Hayes, Flower, Schriver, Stratman and Carey, supra, note 14.
30 Id. at 169 - 220.
32 For obvious ethical reasons, the real judges hearing the case were not involved. However, the surrogates were each experienced appellate clerks working in the chambers of real judges; moreover, they performed the task of adjudication under lifelike conditions. In particular, they were instructed to read the briefs and any other materials they thought appropriate, including precedents, statutes, rules, and so on, and also to compose an opinion, all the while thinking aloud. No time limits were imposed, and they performed the work at their own pace, taking many days to complete the task. Identities of the actual clients and lower court judges involved in the case were carefully excised and replaced with pseudonyms, and the surrogates did not begin their review until shortly after the Supreme Court had actually reached its decision. For more information concerning the methodology used, see Stratman (1990) supra, note 2.
33 In this episode and those that follow, the text that the judge is reading is italicized. Comments are parsed into clause-length segments and numbered in sequence.
35 Italics added.
37 Swaney, Janik, Bond and Hayes, Editing For Comprehension: Improving The Pro-

36 Second year students in the MSIA Program, Graduate School Of Industrial Administration, Carnegie-Mellon University.

37 Scardamalia and Bereiter, supra.

38 Swaney, Janik, Bond and Hayes, supra., note 34.


41 Id. at p.5.


43 Hayes, Flower, Schriver, Stratman and Carey, supra, note 14.

44 The time required to complete this project can be shortened by a variety of adjustments, indicated in the Teacher's Notes.
THE MORTGAGE SERVICE CENTER
0001 Notown, Ohio

Dear Mortgage Customer:

As you are aware, your ABC Bank mortgage is being serviced at The Mortgage Service Center in Notown, Ohio. As a result, the information that you are accustomed to receiving will be somewhat different this year.

Your new year-end statement from The Mortgage Service Center will be a summary of transactions for your account for 1985.

Included in this summary, if you escrow for property taxes and/or insurance, will be the amounts paid in 1985. Tax receipts will no longer be available for your account. However, if you need confirmation of tax bill disbursements, you can contact your county, school district, or local tax collector. Confirmation of insurance policy payments is available from your insurance agent.

If, after you receive your year-end statement, you have any questions, please call the special phone numbers shown below or write us at the address on this letter. Because of the large volume of mortgages serviced by The Mortgage Service Center, our phones are often busy. We recommend that you write to our Customer Service Department for a quick response.

Thank you for your cooperation.

123/456/7890
APPENDIX II

OOO Shady Ave.
Pittsburgh, PA 15213
February 4, 1986

Re: Mortgage on Shady Avenue

ABC Bank
XYZ Street
Pittsburgh, PA

Ladies and Gentlemen:

Here enclosed is a copy of a mailed piece we have received. It is not dated. (We received it in mid-January 1986). There is no name of any human being sender. It is apparently from no human being. Indeed it had no salutation to us by name. It is from no place, but uses a post office box. It addresses no one; it is from no one. There aren't any people anymore! This is enormously dehumanizing.

Further, the piece addresses "Dear Mortgage Customer." But we are a mortgage customer of ABC Bank; we have entered no agreement with any post office box in the Western Reserve.

This would merely be usual "junk mail" and ludicrous, except that this is the entity to which you have told us to send our mortgage payments and our escrow deposits to pay our real estate taxes!

So we read it: "Tax receipts will no longer be available for your account. [If you want] confirmation of insurance policy payments [you can jolly well run around on your Senior citizen Transit Identification Card and see if you can find them!]

How do we know that this distant post office box, non-address of non-persons, will make the real estate tax payments at the right places and in time to avoid penalties? How do we know that these ghosts, robots, or apparitions can or will send our money to the right place at the right time? Shouldn't there be some requirement of disclosure or receipt wherever other people's money is being handled by utter strangers? Shouldn't there be some law or regulation about this?

Indeed, where such an organization handling substantial funds of others is unwilling to disclose its payments, should they not be required to do so?

Other important questions come to mind. What do they do with the funds they collect and hold? Are there any limitations
upon their choice of investment risks? Have they any oil well drill- ing loans from Hope Square Bank? What would happen if this outfit went bankrupt?

Is this piece we got in the mail portent that some entity has failed to make the necessary payments - and that is why “... receipts will no longer be available...”? Has somebody gone to Costa Rica with our escrow funds - maybe the guy who used to be there to sign letters?!

We have had mortgage loan arrangements with your good bank for thirty years. We have never been delinquent; we did our part. You did your part — until now. (Have you considered that our mutual reliance on our usual course of previous dealing for so many years may manifest a recognition of a binding relationship which you should not have altered, perhaps may not alter?)

This house from which we write to you is our life’s savings as well as our home. We are now what are denominated “senior citizens,” “elderly.”

This anonymous notice has caused us great trepidation. We do not want a tax lien on this, or to pay a tax penalty. We do not want our escrow deposit to be lost.

There must be many like us.

What should we do? What can we do?

We do not want to send our savings off to mysterious post office boxes here and there in Ohio. Obviously whoever prepared and mailed this piece has no regard for us at all, does not care to service us at all.

So we wish to arrange to pay our real estate taxes directly.

We wish to arrange to pay principal and interest mortgage payment obligations to you directly.

Please promptly let us know how to so arrange.

Very sincerely and sadly yours,

Jane C. Doe

John C. Doe
APPENDIX III

ACQUISITION AGREEMENT

Introduction

This memo constitute a lawyer's attempt to provide for non-lawyers a practical explanation of some of the legal problems that typically arise in the purchase of a going business. Much of the memo relates to the acquisition agreement itself. Acquisition agreements, since they serve the same purpose, generally have the same features. The format of a basic acquisition agreement has been developed as a result of innumerable transactions over many years and embodies a logic designed to address the recurring problems applicable to acquisition. Each part of the agreement serves a purpose which is not always self-evident. Hopefully, this memo will be of some assistance to understanding how it all fits together.

The buyer and the seller of a going business bring opposing objectives to the same issues. In this memo, I have emphasized the buyer's point of view.

I have not attempted to cover the highly complex antitrust questions often raised by the purchase of a going business. In view of my objective to be practical, I flag one antitrust concern. If the transaction is large enough to require a filing under the "Antitrust Improvements Act of 1976" (the Hart-Scott-Rodino Bill), any person preparing a report which relates to such transaction and which may be seen by a corporate officer should have the same reviewed in draft form by the Antitrust Section of the Law Department as every such report must be included among the documents filed with antitrust enforcement authorities.

The technical questions resulting from government regulation of business — OSHA, EEOC, ERISA, labor laws, and environmental laws — are also not treated in this memo, though they may have an important bearing on an acquisition. Likewise, the Tax Department should advise with respect to the tax aspects of any acquisition. Finally, I have not attempted to deal with the questions of internal corporate procedure — contact approval, SPRC approval, Management Committee approval, and approval by the Board of Directors. The Corporate Development Department is best equipped to advise on these matters.

Overall Considerations

The non-price terms and conditions of an acquisition agreement should be given close attention. Like pricing provisions,
they affect the cost of acquiring or of operating the business to be purchased; consequently, they affect the return on buyer's investment. (17)

Buyer should establish with the seller at the outset of the negotiations that price is related to the non-price terms and conditions. (18) To achieve a satisfactory relationship between price and non-price provisions, both parties should abide by the proposition that until everything is agreed to, nothing is agreed to. (19) Buyer should not be maneuvered into the position where issues are settled and disposed of one at a time. (20) When this happens, every concession made at an early stage is likely to be held up as morally binding regardless of developments at a later state of the negotiations. (21)

A seller's negotiating team may sense that the authority of buyer's team is limited. (22) They may surmise that as long as the price is right, the buyer's team is under instructions to take a soft line on contract terms. (23) If this happens, seller's team has an incentive to, and generally will, insist on burdensome terms indeed. (24) Hard terms expose buyer to hidden costs. (25) One bit of wisdom from the field of labor negotiations is applicable here — don't go to the table if you aren't prepared to walk away. (26)

It goes without saying that buyer's negotiating team should avoid open disagreement among themselves in the presence of seller. (27) If this possibility becomes apparent, participants should caucus. (28) Excessive use of caucuses alerts seller to the fact that buyer's representatives are not in agreement or have not fully prepared. (29) Caucusing, even when excessive, however, is preferable to the alternative of open disagreement. (30)

Form of Acquisition - Purchase of Assets, Stock, or Merger

The first issue that seller and buyer must agree upon is whether the purchase of the business is to be in the form of a purchase of the assets of the business, the stock of the owners of the business or a merger of the business into either ACME or into a subsidiary of ACME. (31)

Tax considerations play an important role in the decision as to the form of the transaction. (32) Tax considerations aside, however, the buyer is usually best served by structuring the transaction as a purchase of the assets of the seller. (33) Usually, ACME tax considerations reinforce the strategy of structuring the transaction as a purchase of assets. (34) As a memory device, at least, the aphorism — sellers sell stock, buyers buy assets — has some merit. (35)

A purchase of assets offers to the buyer more opportunity for
legal protection than does a purchase of stock, from liabilities of the seller which may either be unknown or undisclosed at the time of the sale.(36) Refer to page 10 “Unknown Liabilities” for an explanation of the importance of contractual provisions limiting responsibility for unknown liabilities.(37)

In view of the forgoing, the initial proposal by a buyer of a business usually should be in the form of the purchase of seller’s assets.(38) If during the course of negotiations buyer is persuaded to change the form of the transaction from a purchase of assets to the purchase of stock or a merger, buyer then can take the position that he is making a concession.(39) As a result he will have more leverage to negotiate into the stock purchase agreement those terms and conditions that are required to protect himself against unknown liabilities.(40) To put it another way, if the buyer starts negotiations by offering to purchase stock, he has conceded something of value without trading it for an off-setting benefit.(41)

Every rule has its exceptions.(42) In at least two common situations, the buyer may want to structure the acquisition agreement as a stock purchase or as a merger.(43) In one such situation the seller may have important non-assignable franchises.(44) To acquire the benefit to these non-assignable rights in an asset purchase deal, the consent of a third party is required.(45) To avoid the necessity to obtain such consents, it may be in buyer’s best interest to structure the deal as either a purchase of stock or as a merger.(46) A second common situation in which buyer may wish to purchase stock arises where the seller has a usable “tax loss carry-forward.”(47)

In addition to the question whether the transaction should be structured as an asset purchase, stock purchase, or merger, the question arises whether the buyer will pay for the business with cash, with stock, or with something else of value.(48) This memorandum relates primarily to cash acquisitions, though most of the same issues are present in stock transactions.(49) The additional matters that should be considered in stock transactions will be treated in a separate memo.
The Professor and the Professionals: 
Teaching Writing to Lawyers and Judges

George D. Gopen

And so the training ends. High school had long ago faded into college, which had crescendoed into law school, which had lingered the desire like to a stepdame or a dowager long withering out a young man's revenue. All the while, training in rhetorical skills had continued. All was accomplished as a single continuous act of preparation. What kinds of problems await the legal writer who has left off preparing and has started to practice? What happens when court is no longer moot?

In recent years, continuing legal education programs have turned their attention increasingly to legal writing. Those teachers who venture out of universities and law schools to consult with lawyers and judges find themselves confronted with a distinctly non-academic set of needs, fears, difficulties, strengths, and opportunities. That set is the subject of this article.

I. LAWYERS AS WRITERS

Professional communication is always task-oriented. In contrast, the task of academic students for the most part is only to please the intended audience, usually an instructor. As the instructor's assignment is almost always synthetic ("Write a paper on this just as if someone besides myself were going to read it"), the students' efforts are usually correspondingly synthetic. Even should the students care deeply about the topic, there is no escaping the academic nature of the task. Should they persevere long enough to write a Ph.D. thesis — a magnum opus created with the real world just pulling into view — they will still have to revise the manuscript substantially if it is to become that related but distinct entity, a book.

As soon as law students become practicing lawyers, they find the writing task significantly transformed. The need to please is replaced by the needs to document, to inform, to explain, to convince, and to defeat. Of these, the need to document strikes me as the most pervasive and the most misunderstood. Lawyers document their reading and their thinking in almost every kind of legal
writing task — letters to clients, letters to adversaries, memos to colleagues, memos to files, agreements for parties, and briefs for courts. When the prose of these documents becomes typically opaque and overburdening, it is often due to the lawyer’s having misconstrued the nature of “documenting.”

One would think the purpose of documenting was clear: to record on paper the facts of a situation and the results of a lawyer’s research and reasoning so that readers of those documents would be able to make use of all that information in the lawyer’s absence. However, lawyers more often than not are directed (mostly unconsciously) by quite a different sense of purpose: They do not strive primarily to communicate but rather to disburden themselves of all the knowledge they have of a particular situation, with the intent of leaving a careful record of their having done the task for which they have billed the client. In other words, they have reverted to their academic days, when they wrote because writing had been assigned and not because they needed to communicate. The more complex and unwieldy the prose, the harder, it appears, the lawyer has labored.

Another way of viewing the same problem: Lawyers function under such pressures of time and demand for service that the writing task seems a post-operative burden, something to indicate that the real work (fact-gathering, strategy-conceiving, and theory-constructing) had already been done. Only a small percentage of lawyers, in my experience, have really believed that the writing process is a thinking process. Most of their writing effort, then, is done out of a sense of requirement on behalf of the client (“this needs to be in writing”), not of opportunity on behalf of the writer (“since I need to think this out clearly, I will write it out”). Since the writing task — that is, the recording task — is to be performed for the client’s sake, it seems rather much to expect that a sur-task of communication be added. If the words are down on paper and “correct,” that should suffice.

What then do lawyers mean by “correct”? Surely the facts must be as accurate as is possible to ascertain; the law cited must be to the point; and the theories invoked must be logically applicable. But in my experience most lawyers seem to feel that “correct” more significantly means “interpretable in the way the writer intended.” As long as the text could conceivably be read in the way its writer would choose to have it read, the text suffices to fulfill the requirement of its being correctly written. Consequently, most lawyers might well prefer to remain unaware of recent interpretation theory, which convincingly argues that, once out of the au-
tor's hands, texts belong to their readers, who will make of them individually what they choose to make of them.

On the other hand, lawyers do seem to be aware of another problem of interpretation — the one caused by the passage of time. No matter how unambiguous the interpretation of a text might seem at the time of its creation, lawyers recognize that time has a way of changing the context of the writing, thereby breeding unforeseeable ambiguities. The fear of the unimagined and the unimaginable drives many a lawyer to pack into a document not only that content that is necessary to the present argument, but all other content which might be of use at some future time to handle the unforeseeable.²

With all this concentration on whether the document contains all that is correct and necessary, the lawyer often loses sight of the communicative and persuasive purposes of the prose. Writing consultants can be of great help to lawyers, therefore, by giving them the power to estimate when communication is most likely to have taken place. This observation suggests that most of the strategies traditionally used in composition classrooms, aimed as they are at enriching the invention process, will be ineffective in the law office. Lawyers do not work under the assignment of filling four pages by Tuesday; they work to communicate with readers. To a great extent, teaching legal writing to lawyers means teaching lawyers how readers read.³

If lawyers better understood not only the substantive needs of their audiences but also their psycholinguistic needs, those lawyers would be far better able to persuade their readers to interpret any document according to the intentions of its author. Conversely, an awareness of these reader needs would help force the writer to a clearer understanding of what those intentions actually are. Lawyers, like all other writers, can never hope to succeed in turning out prose that can be interpreted only in the way they intend, because there is no way of controlling the interpretive powers of all possible readers. However, by understanding how the majority of contemporary readers tend to respond to certain structural, stylistic, and logical choices, the writer can greatly increase the odds that the text will persuade most readers to interpret along the lines of the writer's intentions. Better odds are all that an author can hope for.

II. LAWYERS AS STUDENTS

Elsewhere I have described at some length what I perceive to be the reasons lawyers write the way they do.⁴ Without repeating
most of that material, I will try to describe here the kinds of stu-
dents I have found lawyers to be when they are in their own
workplace.

They are not college freshmen. They know a great deal more
than you do about the tasks they must do. They have their own
agenda of needs, to which you must adapt yourself. If anyone is
being graded, it is you, the teacher. They will be able to detect in a
matter of minutes the consultant who (consciously or uncon-
sciously) confines them with freshmen.

They are not high school students. But they may well feel
themselves being put back into that position, since that may well
be the place they last studied the subject you come to reteach
them. The distaste that would accompany such a reversion might
make them unwilling to give you a fair hearing from the start.
When you add to that their conviction that they long ago should
have learned "to write" (conceived of as a skill, having something
do with grammatical correctness), you have yourself a poten-
tially unreceptive audience. It is essential that from the start you
construct for them a context that makes what you have to say
adult, sophisticated, and professionally relevant.

They are busy. Whatever it is you have to give to them, you
must give it quickly, directly, and with mnemonic devices that al-
low them to recall it without further "study." If they seem hostile
about your very presence at first, recall that you are that most
threatening of economic disasters to them — unbillable time. They
have no client hours to present at the end of your session. To add
to that, the firm pays you a fee. To add to that, the firm pays them
their salary, even though they are not spending those hours lawy-
ering. If you do not produce something to outweigh this prodigious
expenditure of time, money, anxiety, and intellectual effort, you
have done everyone a great disservice — and you will not be in-
vited back. In other words, you are faced with that rarity in the
academic world, real accountability.

They may be disdainful of you. You have entered a world in
which success is measured mostly in terms of money. The best law-
ners get the best pay. Even if you are a veteran academic, the
 chances are that you earn one half the wage the legal rookies earn
straight out of law school. You might well be earning less than
10% of the senior partner's salary. In a world that measures com-
petence in terms of income, you do not start out with good creden-
tials. Your academic affiliation may help gain you respect from
some, but will trigger a teaches-therefore-can't-do response in
others.
They may be scared. What if they find out from you that they have been "doing it wrong" all these years? What if in following your advice they interfere with the successful document-producing procedures on which they have always relied? What if your meddling will cause them to distrust their ear and their instincts? I have often had lawyers (usually over 50 years old) approach me during a coffee break with a private, nervous question: "Is it really necessary to make a careful outline before you write something?" I suspect that half of them fear I will say yes (they having ceased outlining upon graduating high school); the other half fear I will say no (they having spent many hours of their authorial existence moving around A's and B's, with their subsidiary 1's, 2's, and 3's). I would advise not underestimating the destructive power of such fears.

Aside from these fears and anxieties, lawyers have legitimate and overwhelming writing problems endemic to their profession, none of which should be taken lightly:

— The pressure of time is constant and often debilitating; too late often means not at all. If the brief is due on Thursday, it had better be ready on Thursday. Pre-writing processes must be kept to a minimum; revisions should be swift and local.

— Collaborative writing often takes place vertically. A document gets passed up and down the ladder of control. Each new recipient, in order to demonstrate the possession of power, is tempted to make some kind of change before sending it on. It can arrive back in the author's hand with parts of it looking like it had been through the party game of "Telephone."

— In case we forget: The substantive matter with which many lawyers deal is of immense complexity and difficulty. Difficult thought necessarily produces difficulty in the writing process. Moreover, lawyers often must deal with previously established language (contracts, statutes, regulations, common law cases, form books, etc.) that inhibits the hand of free expression. In a field that depends to such a great extent on precedent, one cannot avoid being burdened with someone else's thorny language. The invention task often becomes inseparable from the task of interpretation, forcing the lawyer into the uncomfortable position of having to manipulate language by using language, which will in turn be susceptible of being manipulated by someone else.

— Perhaps most difficult of all is the hostile nature of the law-
yer's usual audience. That hostile audience, I believe, makes legal writing the most difficult of all writing. For comparison, consider the writing of a medical doctor: medical memos, patient reports, and suggested treatments receive the conspiratorial co-operation of most of their readers. Almost everyone in the doctor's audience is willing to bend over backwards to understand exactly what the doctor intended. But for whom does the lawyer write? — the senior partner, who refuses to let anything out of the firm until it is free of potential flaws; the judge, who while impressed with your persuasive prose may be equally impressed with the persuasive prose from the other side; or, worst of all, the adversary, who, fully cognizant of your intended meaning, will bend over backwards to demonstrate that it might not or could not or cannot mean what you would have it mean. Lawyers must learn to write offensively and defensively at the same time. No wonder they insert qualifications within their qualifications, spin out lists exhaustingly, and shrink from simplifying anything which might be susceptible to adversarial manipulation.

When all the problems have been acknowledged, one glowing advantage remains undimmed: these lawyers are likely to be the best learners you will ever encounter. If they perceive that you have something to give them and that they have a need for it, they are likely to domesticate your offerings with great spirit and remarkable speed. They are well trained in grabbing what is available and making the most out of it. The same time pressures that might make them unwilling to listen to you will make them listen all the harder once they commit themselves. They will be task-motivated ("How can I do this better?") rather than hurdle-motivated ("What do I have to do to please the teacher?"). Most interestingly, they will furnish you with insights on your own offerings at a much faster rate and with much greater sophistication of thought than will your academic charges. There is much to be gained by this activity, on all sides.

III. ADVISING LAWYERS

I will be bold enough to offer a few words of advice.

— Teach reader-based prose whenever possible.
— Teach defensive writing.
— Teach offensive writing.
— Use individual conferences whenever possible.
— Use their own material as much as possible. They will recognize it and admit its relevance.

— Get to know their prose, their forms, their structures, their expectations, and their problems. Legal prose has no particular need that cannot be found in other kinds of prose; but it does have a highly specialized combination of needs, with which the consultant must become intimately familiar.

— Help them write long sentences better, rather than trying to get them to write shorter sentences. The complexity of the concepts involved often requires the longer constructs, in order to make manifest the multiple interrelationships of the material. Forget about the false conclusions based on the true statistics of readability formulae. Longer is not worse; longer also is not better; but better is often longer.7

— Help them, above all, to make the structures of things emphasize and communicate the substance of things.

— Do not play the role of the English professor. Leave the love of ambiguity home with the tweed jackets.

— Teach grammatical points only when requested.

— Reject the conventional whenever it comes in conflict with the pragmatic.

— Resist invoking style for its own sake. Seek it out only insofar as it has a relationship to clarity and forcefulness, not to artfulness alone. Keep metaphor away from logic.

— Do not underestimate the complexity of their materials or the likelihood that a change in articulation will result in a change in signification.

— Let them know that your goal is not that they be brought into sweet concord with the language but rather that they be empowered over it.

IV. Judges

In teaching both lawyers and judges to write, it is important to teach them how not to write like each other. They have different tasks to perform and, therefore, must often behave like different kinds of rhetorical beings. When acting as advocates, lawyers have the burden of arguing upwards; judges, on the other hand, have the responsibility of concluding downwards. Advocates must take great pains to persuade judges; judges often must take pains only to make it clear by what they have been persuaded.

For the most part, judges can abandon the forcefulness of advocacy and adopt the firmness of judgment. By their prose they
perform the godlike task of creation — if not of general law then at least of particular holdings. For the purposes of this article, we need not enter into the heated debate of whether judges merely interpret law or actually create it. At the very least, they decide cases; in doing so they bring into being something (the particular holding) that did not exist before — which is the definition of "creation." They are constantly in the position of the (probably legendary) baseball umpire who, when prodded by a batter to hasten his decision whether the last pitch had been a ball or a strike, growled "It ain't nothin' 'til I call it."

When lawyers state the facts of a case, they are (or should be) silently making a part of their argument. They should be telling the story from a perspective that will move the court to see the problem as they do; they are constructing a context from which they will be best able to form their argument. In contrast, when judges restate the facts of a case, they need only proclaim a context which will clarify their conclusions. Lawyers offer a construction of what they wish to be considered the facts; judges proclaim what they have concluded the facts to be. Therefore judges, like oracles, can afford at times not to be persuasive.

The same is true for stating the legal context of a case. Take for example the following paragraph from *O'Callahan v. Parker*, a case deciding whether or not it was appropriate for a court-martial (as opposed to a civil court) to take jurisdiction of a case in which O'Callahan, a sergeant in the Army, was convicted of housebreaking, assault, and attempted rape, all committed on a single victim in a hotel in Honolulu in time of peace while O'Callahan was off his military base on an evening pass. The opinion is that of Mr. Justice Douglas.

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.
Note the pervasiveness of the verb "to be" — three main verbs and two passive constructions in four sentences. The paragraph tries only to state what a court-martial is and how it differs from what a civil court is. It does not hurry towards the use to which this information is to be put. The paragraph that follows might conceivably have started either with "As a result of these distinctions, . . ." or with its opposite, "Despite these differences . . . ." Mr. Justice Douglas need not have been concerned with where the audience might be persuaded to go from here, because he had the power to lead the audience wherever he saw fit. He spoke as oracle, not as advocate.

A few sentences later:

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty.

In concluding the first sentence with "few would deny," he ran no risk of being attacked for using hyperbole. Had one of the advocates in the case made that statement, the opposing advocate could have rejoined that some or many or at least she would be quick to deny the point. Some moot court participant probably has written a lengthy brief on the proposition that "It is not necessary to an effective national defense to give military courts certain powers that civil courts lack." Mr. Justice Douglas need not have entertained that argument; he spoke for the Court.

Similarly, the Justice could appropriately lecture us on what "history teaches." For an advocate to do that would be to risk deflation at the hands of a judge who was not interested in a history lesson from the bar.

These distinctions become even more important when a judge begins to articulate the grounds for a ruling. A few paragraphs further on in O'Callahan v. Parker, Mr. Justice Douglas brushes aside one of the government's arguments. They had cited precedents to establish that courts-martial have no jurisdiction over non-soldiers; from that they argued that courts-martial conversely should have jurisdiction over all soldiers, no matter the nature of the offense. Mr. Justice Douglas's response:

The fact that courts-martial have no jurisdiction over
nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially *Kinsella v. Singleton*—establish that liability to trial by court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces.’” 361 U.S., at 241. But that is merely the beginning of the inquiry, not its end. “Status” is necessary for jurisdiction; but it does not follow that ascertainment of “status” completes the inquiry, regardless of the nature, time, and place of the offense.

He decides — he does not argue — that the precedents cited do “not necessarily imply” the conclusion the government sought to establish. He can state (in the final sentence) “it does not follow,” without having to argue why it does not follow. It does not follow because he says it does not follow.

Still later on, at the resolution of his ruling, he makes the following statement:

> The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.

Again he makes a judge-like judgment that might be fatal to an advocate arguing for the very point being resolved: “we can see no way of saving . . . .” To defeat this, if offered as an argument, the opposing advocate would have only to offer a reasonable “way of seeing” the opposite conclusion.

In court opinions, judges often have the luxury first to contextualize, then to summarize, and then to conclude. Note the progress of Mr. Justice Douglas’s penultimate paragraph:

> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

Every sentence of this paragraph could be the issue for a paragraph or two or three in the advocates’ briefs. None of these
sentences undertakes the task of answering the pesky question “So what?” that might come from above; for Mr. Justice Douglas, there was no “above.”

In teaching judges to write uncontested opinions, therefore, one should stress these freedoms from present reproach. This is a different kind of writing task than that which faces the advocate. Exposition (clarifying where you have come from) makes different demands on the writer than does Persuasion (convincing someone else to come along with you).

However, judges often have writing tasks that demand different skills. What I have been describing applies to judicial opinions in cases where the court speaks more or less with one voice. When there is significant dissent, then at least the dissenting opinion (and sometimes the majority opinion or concurring opinions) must descend again to the mode of persuasion. A new “above” has been created: the courts and advocates of the future. In order for the dissent to prevail at some future time, the argument must be explicit, well-formed, and as complete as possible. One cannot efficaciously “hand down” a dissenting opinion; it is an appeal, even from the court of no appeal. As such, it must be intellectually appealing.

The trickiest of all judicial writings are rarely if ever published. They are the intra-court memos and drafts that attempt to achieve a double purpose: (1) They demonstrate how a final opinion might be structured, handing down the conclusions of law; and at the same time (2) they try to persuade other members of the court to concur in those conclusions. In other words, they must be judge-like and advocate-like simultaneously. They seem to speak down to one audience while they are simultaneously speaking across the table to another. Most trying of all, the audience across the table is aware of the game and is probably equally expert at it. The more judges understand about the rhetorical nature of their different tasks, the more able they will be to handle them with skill and speed.

Judges who have clerks face another problem, never tackled by Aristotle, Ramus, or Perelman: They often must incorporate the prose and thought of several people into a single, unified opinion, making the final product cohesive and coherent not only in substance but in style. One of the present Supreme Court justices has told me that a disappointment he suffered in being raised to the highest court was the resultant lack of opportunity to have the time to write all of his own opinions. It seems that some judges nowadays must become as expert in editing as they have always
needed to be in writing.

In order to help judges improve their writing abilities, a consultant has to become fully aware of the special problems judges face. That cannot be done without a great deal of good listening. Judging is not a commonly understood activity. Not only do most of us not have the opportunity to do it, but we rarely have the opportunity even to watch it happening: It has not yet been made the subject of many sensitive movies, television shows, documentaries, docudramas, or novels. Like legislators, judges know that their words will be scrutinized by others with uncommon interpretive vigilance and imagination. Unlike legislators, they will have to turn out an astounding number of words per year, each of which has the potential to set off unexpected, unintended, and unforseen landslides of interpretation. Teaching judges how to write better is teaching them how to be aware of the rhetorical pitfalls that surround them and how to cope with future, unseen, adversarial audiences.

To teach judges and lawyers more about their language, I would submit, is to teach them how to know their audiences and how to predict reader response to their rhetorical choices, on all levels. In order to be effective at that task, the consultant has to become as knowledgeable as possible about the legal audience involved in that instruction. It is a challenge to work with highly educated peers (not students in the ordinary sense), who are confronted by the same rhetorical needs that have existed since the ancient Greeks began to write about the subject. The legal profession is a fascinating forum for the professor of rhetoric, precisely because nowhere else in our society is rhetoric more centrally the issue.

NOTES

1 Cf. William Shakespeare, A Midsummer Night's Dream (L,M.1-6.)

2 I have been present at a deposition during which the lawyer for one side formally objected to nearly every statement given in testimony. He explained that he had no particular objections in mind, but that he wished to keep open the possibility of sincere objection when the testimony was used later in the trial. (That state's law forbade objections to be raised at the trial which were not raised during the deposition.) The same approach is often used in the creation of legal documents.


My standard answer to the question: It is absolutely necessary to create a thoroughly detailed, hierarchical, lettered and numbered outline before you start writing — if you can’t write without one. Otherwise, don’t.

A specific problem here is the presence of the comforting yet burdensome form book, filled with sacrosanct boilerplate prose. Lawyers delight in relying on these unreadable compendia. They reason that anything that has worked before should work again. I have actually found it possible to convince some lawyers that their learning to gain greater control of prose will relieve even more anxieties than does the presence of the supportive book of ancient legalisms. I have described this in some detail in “The State of Legal Writing: Res Ipsa Loquitur,” pp.335 ff.

Rudolph Flesch, through his readability formula, argues that readers have difficulty with any sentence over 29 words. We are asked to conclude that we should never write sentences that exceed that length. My own informal statistics, taken over a period of twenty years, indicate that the average sentence of a college freshman is 13-15 words long; the average sentence in a published text I have found to be from 24-26 words long. Think how many sentences of more than 29 words there must be in these published texts to balance off all the sentences of 12, 14, and 16 words. I think Dr. Flesch came to the wrong conclusion. Sentences of more than 29 words are not harder to read; they are only harder to write. Instead of teaching lawyers to write shorter sentences (a major goal of the Plain English movement), we need to teach lawyers to be better able to construct and control their necessarily longer sentences.


It is interesting to note that a large proportion of the most famous judges are most famous for their dissents. Holmes, Cardozo, and Brandeis made whole careers out of it. It makes sense that a judge who is forced often to play the role of advocate would eventually become the hero of advocates.
Legal Writing: A Bibliography
George D. Gopen and Kary D. Smout

If the quantity of publications produced in a field is directly representative of the professional interest it has attracted, then there must be a strong and growing interest in legal writing. Simple statistics demonstrate the recent surge of interest in the field. We list 409 articles and 103 books. Of the books, 21 were published before 1970, 20 were published in the 1970's and 62 were published from 1980 through the Summer of 1991. The articles were published as follows:

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<th>Period</th>
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<tr>
<td>before 1960</td>
<td>67</td>
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<tr>
<td>1960-1969</td>
<td>52</td>
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In particular, articles on the teaching of legal writing, on the Plain English movement, and on readability have proliferated in recent years. Of the 160 articles on these topics, 117 (73%) have been published since 1975.

This bibliography is by no means exhaustive. We have restricted ourselves mainly to American publications; we have omitted almost all articles of fewer than three pages; and we have excluded some of the older books which seemed uninspired copies of each other. This still leaves a good amount to read.

The entries are divided into nine categories:

A. Books
B. Articles on the Teaching of Legal Writing
C. Articles Concerning the Plain English Movement and Readability
D. Articles on the Drafting of Laws and Legal Documents
E. Articles on the Writing of Briefs
F. Articles on the Writing of Judicial Opinions
G. Other Articles Concerning Law and Writing
H. Bibliographical Works on Legal Writing
I. Periodicals Devoted Primarily to Legal Discourse

—Articles that seem to demand inclusion in more than one category have been cross-listed.
—We have treated pamphlets as articles.
—Abbreviations:

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<td>State Bar Journal</td>
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<td>University</td>
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———See [C].


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Legal Writing in the Twenty-First Century: The First Images

A Survey of Legal Research and Writing Programs

Jill J. Ramsfield

In 1983, in response to the first waves from the “Big Bang” to hit the earth’s atmosphere, astronomers began the process of inventing technology to extend human sight. What lay beyond our sight, beyond the distortions created by our atmosphere, were precise views of space that might explain our origins by revealing images and dimensions of space previously unseen, perhaps even allowing us to see our future. What was needed was a telescope that would function in space, sending accurate images back to earth.

In the same year, waves of unrest arose in the Legal Research and Writing community, indicating that a profession previously thought of as temporary was here to stay. The Legal Writing Institute formulated a Statement of Job Security for Legal Writing Professionals, demanding treatment equivalent to other full-time professionals in legal education. Since that time, Legal Research and Writing programs have come and gone, some growing red hot, then exploding and disappearing into black holes, while others sparkled consistently and steadily throughout the last decade. Our present vision of these programs and their origins has been dim, distorted by an atmosphere that has made communication among schools haphazard, anecdotal, and random. What was needed was a national survey.

In response to this need, the Legal Research and Writing (LRW) professional community called for data, a new telemetry to focus our blurry vision. At its 1988 convention, the members of the Legal Writing Institute voted to survey all law schools: first, to gather data on the structure, content, demographic context, and resource allocation of current LRW programs; second, to gather together complete LRW program descriptions. This data would then be catalogued and shared for efficient development of both new and existing programs. The scope of this project would exceed anything previously done in the field. Earlier surveys had
been quickly outdated because of the rapid turnover in LRW personnel\(^7\) and the meteoric nature of new LRW program models.\(^8\) The survey reported in this article, then, is the most recent and comprehensive survey of its kind.\(^9\)

Further, this survey was designed to allow legal educators to move beyond the data to new visions of legal education. From this data, educators might extrapolate ideas for restructuring programs in the future, for reinforcing teaching methods and techniques, and for evaluating the treatment of LRW professionals in the legal education community. Educators might also gain insights into transforming legal curricula at large, which must prepare law students for twenty-first century practice and scholarship. As technology increasingly informs and invades legal education, Legal Research and Writing courses will provide the means through which students develop skills in analyzing, information-sifting, synthesizing, translating, and documenting. With the growth of this technology, LRW courses must be developed, integrated with all courses, expanded, and properly funded.

This article explores how the legal education community might use these findings to improve twenty-first century law curricula. Reported here is current information about LRW programs, using mirrors ground as precisely as possible, considering the diverse nature of LRW programs. This article does not exhaustively explore each of the survey’s 108 questions, some of which received only two or three responses; rather, it concentrates on those questions that received a response rate of greater than fifty percent. In doing so, it attempts to bring into focus the first images.

A subsequent article will look to our LRW origins to suggest other images for the future. Those images of twenty-first century legal education suggest long-term changes that will better prepare the next generation to analyze, research, and write effectively.

I. Gathering the Data

The survey was launched in January 1990, at the AALS\(^10\) convention. Subsequently, surveys were mailed to those schools in the AALS directory that had not received one at the convention and to those schools that requested replacements. Volunteers phoned schools who had not returned a survey by April; some schools updated surveys later in the spring and summer. Those updated versions have been included here. Surveys were triple-checked for accuracy once the data had been entered.

Formulating questions uniform to all LRW programs was impossible. Some schools responded by tailoring the survey to their
programs, sometimes answering the same question with more than one response. In these instances, the responses were averaged; otherwise a response was randomly chosen and entered. Some questions were not asked at all. For example, the survey did not ask for a comparison of the LRW budget to an institution’s overall budget because many LRW professionals do not have access to budget information. Also, the survey could not take into account the varied permutations and combinations of personnel that many schools use in structuring their programs. For example, some schools might have a full-time, tenure-track director, instructors hired for one-year contracts, and students who give some feedback on papers. Other schools might have an “Adjunct” model that also uses students and has a tenured director. Historically, the driving force in creating LRW programs has been to find the cheapest, not the best, structure and method.11 The survey therefore asked schools to categorize themselves into one of five models, according to who teaches LRW: Full-Time, Tenure-Track faculty, Full-Time, Non-Tenure-Track professionals, Adjuncts, Law Students, or Graduate Students. Because of the hybrid nature of certain programs, some schools filled out questions pertaining to more than one category. To clarify the results, the tabulation here is redefined as follows:

1) “Full-Time, Tenure-Track” refers to programs that have only full-time tenure track personnel;

2) “Full-Time, Non-Tenure-Track” refers to any program that checked Full-Time, Non-Tenure-Track on the survey, even if that program also checked Full-Time, Tenure-Track and any other category;

3) “Part-Time Adjuncts” refers to any program that checked Part-Time Adjuncts and any other program type, but did not check Full-Time, Non-Tenure-Track;

4) “Students” refers to any program that checked either graduate students or law students but did not check Full-Time, Non-Tenure-Track or Part-Time Adjuncts.

The tables that follow the text break down the information by program type, by school type - public or private, and by school size. These tables may thus be used to design new programs or to update current ones. As an exploring probe, this survey joins its predecessors in sending some descriptive signals to legal educators about LRW programs and raises questions that future missions will have to explore more accurately.
II. Summary of Findings

Most LRW programs are confined to the first year. Thus, most training in retrieving, sifting, analyzing, organizing, and translating information is confined to a time when students are also being introduced to the socio-linguistic culture of legal discourse. Further, few schools require any research and writing, nor do students receive feedback from professors, beyond the first year. Many schools offer the option of taking upper-level courses, but few require them, so many students can escape without further training or reinforcement of analysis, research, and writing techniques beyond the law school exam.

Legal Research and Writing professionals carry the load for individual feedback on writing, through written feedback and conferences. Most LRW professionals comment on 75%-100% of the papers. Legal Research and Writing professionals do most of the commenting on papers, even in programs that include student assistance. Combined with the student-faculty ratio, this creates a staggering amount of work. Most schools show a high student-teacher ratio, and over half show a ratio of over fifty students to one LRW professional, a number that is far above the optimal class size for teaching writing effectively.

Further, many schools show a high turnover in LRW professionals, who stay between two and five years. This turnover may be the result of the heavy workload combined with low pay and status. Most LRW professionals earn between $20,000 and $30,000 a year. Status is usually temporary, with only ten schools offering LRW professionals tenure track positions or long-term contracts. Low pay and status persist despite a significant number of years in practice or teaching: LRW professionals average six to eight years of legal practice before they teach legal writing. Most law schools determine starting salary of faculty by years since graduation and by scholarly achievement, yet these criteria seem to be ignored when hiring LRW professionals.

LRW programs are also plagued by small budgets - the average is less than $50,000 - regardless of the size of the law school or its status as public or private. Consequently, LRW professionals have few resources and little encouragement to develop new programs or to expand their programs into the second and third years.

The survey reveals, then, that current law curricula do not emphasize practice in translating analysis into effective communication, nor do they emphasize techniques for efficient retrieval of in-
formation. The result is that law school graduates are not only ill-prepared for immediate practice or scholarship, but are also ill-equipped to continue developing professionally. Law firms, for example, should not have to "pick up the difference" in training new associates; public interest jobs cannot. Future legal practice and scholarship require more expansive training now.

III. Survey Results

A. Participants

Surveys were sent to schools listed in the AALS directory, including ABA-accredited and unaccredited schools. Of the 163 AALS members to which surveys were sent, 130 responded, a return rate of eighty percent.

Over half of the schools surveyed showed a law school population of between 400 and 800 students; thirty-four percent had populations of 400-600, and twenty-three percent of 600-800. Fifteen percent had fewer than 400 students, and twenty-nine percent had more than 800. Forty-two percent of the schools were private and fifty-eight percent public. Of the 130 that responded, ninety-six percent were ABA-accredited institutions.

B. Choice of Faculty for LRW Programs

Five models were chosen for categorizing types of LRW faculty. The models were based on information received from the Legal Writing Institute's semi-annual conferences. Of these five models, Full-Time Professionals on Non-Tenure-Track Contracts is the most prevalent: fifty-eight percent of the schools hire full-time, non-tenure-track professionals to teach LRW. Eighteen percent use full-time, tenure-track faculty, and seventeen percent use adjuncts. Seven percent still use only students to teach LRW.

C. Structure of Programs

The survey revealed a wide variety in the structural designs of LRW programs. Whatever the design, LRW courses are still largely concentrated in the first year. Seventy-nine percent of the schools responding require a two-semester course in LRW. This is the traditional structure. Nine schools have a one-semester requirement, and only seventeen schools require more than two semesters of LRW training.

Half of the schools responding reported that they teach legal research as a separate course. Half of those schools teaching legal
research separately do so through librarians. 26

Programs are generally structured with a high student-teacher ratio, but nevertheless require extensive individual feedback to students from the LRW professor. 27 Forty-two percent of the schools reported a student-teacher ratio of over fifty students to one LRW professional; almost half of that number showed a ratio higher than seventy-five to one. 28 Thirty-two percent of the professionals meet in class once a week with students; the rest meet two or more times per week. 29 Thus, LRW professors have frequent face-to-face hours with students, to whom they must also give individual feedback.

D. Grading and Integration of LRW with Other Courses

Seventy-five percent of the schools reported grading the first-year LRW course and averaging that grade with all other courses. 30 Only twenty-two schools reported a Pass-Fail or Honors-Pass-Fail system that was not averaged in with other grades. Only thirty percent of the schools showed substantive integration of LRW assignments with those of other courses. 31 This separation of LRW from the rest of the curriculum may send the same mixed message to students that a separate research class does: that active library research and legal analysis are separate intellectual functions.

E. Content of First-Year LRW Courses

The content of LRW courses falls into at least three categories: researching, writing, and speaking. Legal analysis is integral to all three areas, and so it was not singled out as a separate category.

In teaching research, LRW courses showed a rich variety, but could barely cover the tip of the legal research iceberg in the first year. While almost all schools responding used open research problems, 32 research on specific tasks, 33 Westlaw and Lexis training, 34 and citation training, 35 fewer than forty percent introduced research in legislative history or administrative law. 36 In teaching writing, LRW courses still prefer the legal memorandum 37 and the appellate brief. 38 But the choices have expanded: some programs also require client letters, 39 pretrial briefs, 40 drafting documents, 41 trial briefs, 42 and law review articles. 43 Most schools require rewrites of written projects, now a widely accepted methodology for effective teaching, 44 but seventeen schools still do not.

Responding to these papers and rewrites, LRW professionals and their assistants provide a great deal of feedback, a superhu-
man task. Eighty percent of the programs provide for written feedback on more than four assignments per year, and in eighty-eighty percent of the schools, commenting is done by the LRW professional. That professional comments on seventy-five to one hundred percent of the papers in seventy percent of those schools. In addition, LRW professionals hold numerous conferences with the students: three or more per semester in forty-eight percent of the schools. Thus, the potential for burnout is enormous; this is an astronomical amount of work to require of any one professional, which is exactly the reason other faculty members wish to avoid commenting. That burnout leads to frequent turnover, a disruption that prevents LRW programs from evolving effectively.

Most programs still require the appellate brief, or moot court, argument. Seventy-five percent of the programs formally include moot court as part of the LRW program. Eighty-three percent include an appellate brief argument. Some programs require additional speaking skills, such as arguing a pretrial motion, making in-class presentations, and giving objective arguments or some other presentation, thus broadening the range of oral skills required.

F. Upper-Level Courses

Only seventeen of the schools surveyed have upper-level LRW requirements. Sixty percent of the schools, however, offer optional upper-level LRW courses, including courses in legal drafting, appellate advocacy, specialized writing, and advanced research. Of those that do require upper-level writing courses, only fourteen schools require professors to give students comments on more than one draft of their paper. Absent required upper-level LRW course work, second- and third-year students can graduate from most law schools in the United States without doing any intensive writing beyond the first year and without getting any feedback. Beyond the first learning stages of thinking, then, students’ ability to sift information and translate it effectively goes unguided.

G. LRW Faculty

Professionals teaching LRW courses come to the job as experienced lawyers. Over half have practiced for three to five years before teaching LRW courses; thirteen percent have had six to ten years’ experience; and four percent have practiced for more than ten years. No longer the “female ghetto” of legal education, LRW courses now have almost as many males teaching as females.
Yet with this balance and with this expertise, the turnover in LRW professionals remains quite high: eighty-six percent remain for five years or less, and thirty-four percent remain for two years or less. Nineteen percent remain from six to ten years, and only five percent have remained on the faculty for over ten years. Seventy-two percent of the programs have a separate Director, thirty percent of the schools reported having full-time, tenure-track Directors, and twenty-seven percent of the schools reported using non-J.D. writing specialists.

H. Salaries and Budget

Despite their experience in practice, LRW professionals still receive extraordinarily low salaries. While eighty-five percent of the full-time, tenure-track faculty are in the $50,000 to $70,000 range, only five schools reported paying full-time, non-tenure-track LRW professionals that amount. Fifty-five percent of full-time LRW professionals make less than $30,000 per year. Another fifteen percent make between $30,000 and $35,000, twelve percent make between $35,000 and $40,000 a year, and twelve percent make between $40,000 and $50,000 a year.

Adjuncts, whose part-time jobs may vary greatly, also receive varied salaries. Only six schools reported paying more than $5,000 a year to adjuncts; five percent pay $4,000 - $5,000, and forty-four percent pay $2,000 to $4,000. Eighteen percent pay between $1,000 and $2,000, and eighteen percent pay $1,000 or less. Only one school reported paying students who are solely responsible for teaching the course.

Budget allocations beyond salaries stayed uniformly low, despite the size of the school or its public or private nature. Eighty percent of the schools spend less than $50,000 annually for legal research and writing. Four percent spend between $50,000 and $100,000, three percent between $100,000 and $150,000, and three percent more than $150,000. The logistics of teaching writing require resources similar to those in a law office: memos are disseminated, drafts turned in, examples handed out in class, supplemental course materials designed, audio-visual materials created and used, and so on. Considering the magnitude of these requirements, the resources allocated to LRW programs may be skeletal.

I. Status of LRW Professionals

For LRW professionals, jobs are not secure. Eighty-four per-
cent of the full-time, non-tenure-track professionals have only one-year contracts. While all but one school reported that those contracts are renewable, the situation still leaves professionals without the means to make long-term career plans.\textsuperscript{67} Seven schools offered two- or three-year contracts, and only four offered contracts of more than three years.\textsuperscript{68}

Adjuncts similarly operate under one-year contracts.\textsuperscript{69} Those contracts are also renewable, but probably do not affect long-term career plans for professionals who may practice and teach only one small section of students one night a week. Most adjunct model schools submitted descriptions of this nature: adjuncts teach one night a week and might have a student "contact" person on campus to assist them. Many of these adjuncts may not be trained in composition theory, linguistics, or teaching theory.

IV. SHORT TERM RECOMMENDATIONS

The survey reveals that LRW programs are becoming increasingly sophisticated and wide-reaching and are attracting professionals who bring years of practice to their classroom. A subsequent article will recommend in-depth, concrete changes law schools might consider in developing LRW for the twenty-first century. For the short term, however, legal educators might consider making the following changes to address the needs of progressive scholars and practitioners.

A. Integrating LRW with All Courses

Legal Research and Writing courses ought to be actively integrated with first-year and upper-level courses. Future scholars and practitioners should receive an integrated, institutional message: the most brilliant legal analysis is useful only if it is accurate and can be communicated effectively. Accuracy comes through mastery of sound legal thinking and research strategies; effective communication comes through steady, conscious practice of legal writing processes and techniques.\textsuperscript{70}

Integrating curricula fortifies the need for accuracy and effective communication. This message can be sent by teams of faculty members who reinforce each others’ expertise. A Contracts professor who relies primarily on in-class speaking to sharpen students’ analytical skills might introduce the LRW professor’s memo on contract law by having students write a summary of a few cases just discussed in class. Those summaries could then become the first "notes" for developing analysis, research strategies, and prob-
lem-solving in the LRW course. Similarly, a LRW professor may introduce a unit on restrictive covenants in the fall through analysis and research of a client letter, and those letters might be the opening text of a now-shortened version of that unit in Property in the spring. Better yet, the Property and LRW professors might team-teach the unit on restrictive covenants, or the LRW and Contracts professors might teach unconscionability simultaneously—one through in-class speaking, the other through research and writing. In the Contracts class, that memo might serve as a take-home exam for Contracts. In another scenario, a unit might be created that requires students to research and write on restitution, with Property, Contracts, and LRW professors team-teaching the entire unit.

Whatever the means, students will have received the appropriate message: analysis is writing. This message ought to promote more exposure to speaking, reading, and writing, including writing under pressure. For example, LRW professors might encourage their students to use writing tasks to become faster and more efficient. They might suggest that students write drafts in short time slots, practicing writing under pressure, rather than treating assignments as term papers. Building up skills in focusing quickly and communicating under pressure will make them better exam writers and more efficient practitioners. Hearing this strong message about the intimate connection between legal analysis and writing, students will be more alert to developing expertise in all courses, in the first year and beyond.

B. Requiring Upper-Level LRW Courses

Students ought to continue their development in communicating effectively through required upper-level LRW courses. These requirements ought to include more feedback from professors to students on their writing. Without steady reinforcement of analysis through advanced research and writing techniques in the second and third years, students may find research and communication techniques atrophying and may leave law school with abilities that have been crippled by neglect. This can be a disaster. Students begin to limp, and few courses are available to offer either therapy or cure. While it once may have been possible for students to “pick up” research and writing, the sheer volume of information now makes that task nearly impossible without adequate training. For example, with no advanced work in administrative law research or in skills for sifting through masses of information, students may not find the law, or may not find it quickly enough. With no ad-
Advanced work in communicating analysis with accuracy, originality, and creativity, students may not be able to do much more than summarize findings.

Advanced writing courses can take many forms. Upper-level seminars already require papers; professors might uniformly require at least one early draft of the paper and give detailed feedback in writing, through a conference, or both. Giving feedback efficiently and effectively is the expertise of LRW professors, who can hold seminars on approaches and techniques. Courses on specific subjects might be created, among which students can choose: the Law and Literature, Legislative Drafting, Transactional Writing, and Appellate Advocacy, for example. These courses can be team-taught, have limited enrollments, or be offered on a revolving basis to keep feedback quality high and burnout low. Or a course in Advanced Legal Research and Writing might be required in the second year, followed by Writing for the Scholarly Audience in the third year. Some schools offer Advanced Legal Research or Advanced Legal Writing, either or both of which can be designed to continue the steady monitoring of approaches and techniques begun in the first-year course. In whatever upper-level courses are created, students ought to be actively analyzing, researching, and writing throughout their three years.

C. Moving Beyond the Law School Exam

All courses should involve some kind of writing and research beyond the law school exam. The law school exam tests certain skills, such as issue-spotting, but may leave others wholly neglected. For example, law students may spot issues and identify the law that matches that issue, then reach a conclusion without justifying that process. How does that happen? Without rehearsal. In-class writing exercises, midterm exams, group writing exercises, and practice exams can all aid students in rehearsing the complex translation of legal analysis into effective writing.

Legal Research and Writing professionals can suggest techniques for teaching effective analysis through short writing exercises that require minimum commenting, but create maximum benefits. For example, a Civil Procedure professor might require students to draft a complaint, first talking about complaints, giving some examples, and then discussing a specific set of facts. Students can write the complaint individually or in small groups, and the professor can then read and return the complaints, accompanied by three examples of effective versions. The students will get reinforcement of not only the analytical concepts behind drafting the
complaint, but also the problem-solving techniques involved in translating the complaint into a cogent written form.

D. Compensating Professionals

Finally, the legal education community must bring the salaries and status of LRW professors into line with those of other professionals. While another article will discuss the anomaly that has led to the current situation, this suggestion comes from the information glaringly revealed by this survey. The disparity in salaries between LRW professionals and their colleagues teaching other courses undermines the message that, as lawyers, we write. Lawyers analyze, research, think, and write for a living. One ability intersects with another, and only through effective communication can we be effective lawyers and scholars. To undermine the status, the earnings, and the job security of LRW professors is to undermine communicating itself. Seeing a law curriculum that fails to invest in LRW, students may fail to invest in their own development as communicators, and that failure is a failure for law.

V. Conclusion

Legal educators need to use this survey’s first images to enhance the picture of LRW’s place in the law curriculum. Legal writing professionals need to invent new, more precise means to explore ever-changing LRW programs and their increasingly sophisticated place in legal education. Together, we need to prepare our students to use technology, invention, and imagination to see, sort out, and solve tomorrow’s problems.

NOTES

1 A survey requires the work of many minds and hands. My thanks to the following people, whose work made this project possible: Susan Keller, Dawn Tarka, Jackson Mumey, Maura Griffith, Kate Wheble, and Lorraine Corporon; Maggie Emmanuel, Nancy Schultz, and Susan Brody; Chris Fuller, Cindy Simon, Sam Jackson, and Rebecca Thompson; and Eugene Vricella. Andrew Konstantaras prepared the final version of the survey, tabulated the results, and created the tables. Special thanks to Legal Research and Writing professionals across the nation for answering the survey with care and patience.

2 Legal Research and Writing (LRW) courses include those courses designed to teach analysis, research, writing, and citation usage. These courses are concentrated in the first year. See infra Tables 3.1, 3.2 and 3.3.

3 The Legal Writing Institute was founded by J. Christopher Rideout and Laurel Oates at the University of Puget Sound School of Law in 1984. Its purpose is to unite LRW professionals intellectually, to share resources, and to monitor and encourage the development of effective LRW courses across the United States and Canada. Over 200 schools were represented at the July 1990 Conference.

4 The Institute’s Board voted to send the survey, and George Gopen of Duke University
set the stage for enthusiastic response at the closing meeting of the convention. Ralph Brill of the Illinois Institute of Technology, Chicago-Kent formulated a preliminary survey in 1989, to which this survey is indebted.

* The first purpose cannot be fully achieved in one article because the data is so diverse. See infra section III. The second purpose exceeds the scope of this article. Schools provided written summaries of their programs, and these summaries are filed with the Legal Writing Institute.


This rapid turnover continues to plague LRW programs, making long-term changes and improvements difficult, if not impossible. See infra note 68, and Tables 5.1, 5.2, and 5.3.

* See, e.g., Flora Johnson, Legal Writing Programs: This Year's Models, 8 Student Law. 11 (February 1980). Unable or unwilling to devote extensive resources to LRW programs, many law schools try new models every few years, often without the benefit of any comprehensive information about what has or has not worked elsewhere. Indeed, this survey also suffers from the rapid turnover in personnel. Some schools filed one survey; then new personnel hired for the current academic year instituted changes and filled out new surveys, which have been incorporated here.

* West Publishing Company began a survey in the summer of 1990 to evaluate Legal Research programs; its survey does not attempt to collect data on the writing aspects of programs or on the treatment of LRW professionals.

10 Association of American Law Schools (AALS). Among its many functions, this organization sponsors an annual convention and mini-workshops for legal scholars. It is divided into specialty subsections, one of which is the section on Legal Analysis, Research, and Writing.


12 See Lester Faigley, Non-Academic Writing: The Social Perspective in Writing in Nonacademic Settings, 231 (L. Odell and D. Goswamie eds. 1985). Faigley suggests that professional writing is highly influenced by its social setting. In a law office, for example, a writer may face writer's block as much from pressure to make partner as by the subject of the lawsuit.

13 See infra Section IV.C. and F., and Tables 3.1, 3.2, and 3.3.

14 See infra Tables 5.1, 5.2, and 5.3.

15 See infra Tables 5.1, 5.2, and 5.3.

16 See infra Tables 11.1, 11.2, and 11.3.

17 See infra Table 9.

18 See infra Tables 6.1, 6.2, and 6.3.

19 Id.

20 See infra Table 12. This includes all resources other than salaries.

21 See infra Tables 3.1, 3.2, and 3.3; 12; 13.1, 13.2, and 13.3.

22 See infra Table 1. Percentages reflect the number of responses to the questions. Some surveys were blank on certain questions that were not pertinent to that program. Percentages are rounded to the next whole number.

23 See supra Section I.

24 See infra Tables 3.1, 3.2, and 3.3.

25 This is surprising because legal research is an integral part of the analytical process that results in a written product. Further, legal research often occurs during the writing process as gaps in research appear, or as points must be refined. This recursive process is integral to legal thinking, and separating research from writing - even as an introduction gives a confusing message to the potential researcher and writer. Cf. Linda S. Flowers and John R. Hayes. The Cognition of Discovery: Defining a Rhetorical Problem in The Writing Teacher's Sourcebook 92 (Gary Tate & Edward P.J. Corbett eds., 1988).

26 This information does not appear in the Tables but was gathered from the responses to Questions 8 and 9 on the survey.
See infra Tables 5.1, 5.2, and 5.3; 11.1, 11.2, and 11.3.

See infra Tables 11.1, 11.2, and 11.3

See infra Tables 3.1, 3.2, and 3.3.

See infra Table 10.1.

See infra Tables 3.1, 3.2, and 3.3.

Seventy-three percent. See infra Table 4.

Seventy-six percent. Id.

Eighty-five percent. Id.

Eighty percent. Id.

Id.

Ninety-seven percent. Id.

Eighty percent. Id.

Forty percent. Id.

Twenty-seven percent. Id.

Twenty-seven percent. Id.

Twenty-percent. Id.

See, e.g., Flowers and Hayes, supra note 25.

See infra Table 5.1, 5.2, and 5.3.

Id.

See Willard H. Pedrick, N. William Hines & William A. Reppy, Jr., Should Permanent Faculty Teach First-Year Legal Writing? A Debate, 32 J. Legal Educ. 413 (1982). Law faculty have traditionally resisted commenting on individual papers, largely because of the enormous workload. This is one of the reasons separate LRW programs have been established.

See infra Tables 3.1, 3.2, and 3.3.

See infra Table 4.

See infra Table 5.

Sixteen percent. Id.

Seventeen percent. Id.

See infra Tables 3.1, 3.2, and 3.3.

Id.

See infra Tables 6.1, 6.2, and 6.3.

Sixty-one percent of the schools reported that more than half of their professionals were female (response to Question 40). Cf. Moss, Would This Happen To a Man?, A.B.A.J., June 1988 at 50, 53.

This information was gathered from responses to question 40.

See infra Table 7.1, 7.2, and 7.3

Id.

See infra Table 9.

See infra Table 9.

Id.

See infra Table 9.

See infra Table 12.

Id.

See infra Tables 6.1, 6.2, and 6.3.

Id.

Id.

This data was also compiled from answers to questions 74 and 75.

The socio-linguistic family of legal writing requires approaches and techniques unique to thinking, researching, and translating that require consistent practice, reinforcement, supervision, and criticism. On-the-job training in firms, with its inherent potential for penalty, may not be the most effective method for training lawyers to think and communicate well: too little, too late.

Law firms have fired summer associates who think all legal research can be done on a computer or who, for other reasons, simply cannot find the right authority, much less effec-
tively translate their findings. At the very least, firms are finding that summer associates do not research effectively overall. See Joan S. Howland and Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. Legal Educ. 301 (1990).

** Of the schools that require work beyond the first year, only seventeen have a separate Legal Research and Writing requirement that incorporates active feedback on both research and writing. See *infra* Tables. 3.1, 3.2, and 3.3.

"Robert Herring's course at Boalt Hall is legendary. Over 90% of all students take the course, designed to make them "research commandos," adept at finding anything. The course goes well beyond the basics, requiring students to understand how a law library is organized so that they know where to find a source or whom to ask about that source.
APPENDIX A

LIST OF PARTICIPANTS

SCHOOLS INCLUDED IN SURVEY

University of Akron, C. Blake McDowell Law Center
University of Alabama School of Law
Albany Law School, Union University
American University, Washington College of Law
University of Arizona College of Law
Arizona State University College of Law
University of Arkansas, Fayetteville, Le Flor Law Center
University of Arkansas at Little Rock School of Law
University of Baltimore School of Law
Boston College Law School
Boston University School of Law
University of Bridgeport School of Law
Brigham Young University, J. Reuben Clark Law School
Brooklyn Law School
University of California at Davis School of Law
University of California at Los Angeles School of Law
California Western School of Law
Capital University Law School
Case Western Reserve University Law School
University of Chicago Law School
University of Cincinnati College of Law
Cleveland State University, Cleveland-Marshall College of Law
University of Colorado School of Law
Cornell Law School
Creighton University School of Law
Cumberland School of Law of Sanford University
CUNY Law School at Queens College
University of Dayton School of Law
DePaul University College of Law
University of Detroit School of Law
Dickinson School of Law
Drake University Law School
Duke University School of Law
Emory University School of Law
University of Florida, College of Law
Fordham University School of Law
Franklin Pierce Law Center
Florida State University College of Law
George Washington University National Law Center
Georgetown University Law Center
University of Georgia School of Law
Georgia State University College of Law
Golden Gate University School of Law
Hamline University School of Law
Harvard University Law School
University of Hawaii William S. Richardson School of Law
Hofstra University School of Law
University of Houston Law Center
University of Idaho College of Law
University of Illinois College of Law
Illinois Institute of Technology, Chicago-Kent College of Law
Indiana University at Bloomington School of Law
Indiana University School of Law, Indianapolis
University of Kansas School of Law
University of Kentucky College of Law
Lewis and Clark Northwestern School of Law
Louisiana State University Law Center
University of Louisville School of Law
Loyola Law School
Loyola University School of Law, New Orleans
McGeorge School of Law, University of the Pacific
University of Maine School of Law
Marquette University Law School
John Marshall Law School
Mercer University Law School
University of Minnesota Law School
University of Mississippi School of Law
University of Missouri - Kansas City, School of Law
William Mitchell College of Law
Monterey College of Law
University of Nebraska College of Law
University of New Mexico School of Law
New York Law School
New York University School of Law
North Carolina Central University School of Law
University of North Dakota School of Law
Northeastern University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
Notre Dame Law School
Ohio Northern University, Pettit College of Law
Ohio State University College of Law
Pace University School of Law
University of Pittsburgh School of Law
University of Puget Sound School of Law
Rutgers, The State University of New Jersey School of Law,
    Camden
St. John's University School of Law
Saint Louis University School of Law
St. Mary's University of San Antonio School of Law
St. Thomas University School of Law
University of San Francisco School of Law
University of San Diego School of Law
Santa Clara University School of Law
Seton Hall University School of Law
University of South Carolina School of Law
University of South Dakota School of Law
University of Southern California Law Center
Southern Illinois University School of Law
Southern Methodist University School of Law
Southwestern University School of Law
Suffolk University Law School
Syracuse University College of Law
Temple University School of Law
University of Texas School of Law
Texas Tech University School of Law
Thomas H. Cooley Law School
University of Toledo College of Law
Touro College Jacob D. Fuchsberg Law Center
Tulane University School of Law
The University of Tulsa College of Law
University of Utah College of Law
Valparaiso University School of Law
Vanderbilt University School of Law
Vermont Law School
Villanova University School of Law
University of Virginia School of Law
Wake Forest University School of Law
Washburn University School of Law
Washington and Lee University School of Law
University of Washington School of Law
Washington University School of Law
Wayne State University Law School
West Virginia University College of Law
Western New England College School of Law
Western State University College of Law
Whittier College School of Law
Widener University School of Law
Willamette University College of Law
College of William and Mary, Marshall-Wythe School of Law
University of Wisconsin Law School
Yeshiva University, Benjamin N. Cardozo School of Law
APPENDIX B

TABLES

Table 1. Characteristics of Survey Participants

<table>
<thead>
<tr>
<th>Size of School</th>
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<tbody>
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<td>18</td>
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<tr>
<td>401 - 500</td>
<td>20</td>
</tr>
<tr>
<td>501 - 600</td>
<td>23</td>
</tr>
<tr>
<td>601 - 700</td>
<td>12</td>
</tr>
<tr>
<td>701 - 800</td>
<td>17</td>
</tr>
<tr>
<td>800 - 1,000</td>
<td>11</td>
</tr>
<tr>
<td>over 1,000</td>
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Graduate Programs

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<tr>
<td>601 - 700</td>
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<td>701 - 800</td>
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<td>800 - 1,000</td>
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<td>over 1,000</td>
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Type of School

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<td>77</td>
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Table 2. Characteristics of LRW Programs

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<tr>
<td>Full-Time Non-Tenure Track</td>
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<td>Part-Time Adjunct</td>
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<td>Student Taught</td>
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<td>No</td>
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Table 3.1 - Structure of Program by Program Type  
Results as of 11/07/90

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<th># Semesters Required</th>
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<th>Ten.</th>
<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
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<td>6</td>
<td>1</td>
<td>2</td>
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</tr>
<tr>
<td>Two</td>
<td>100</td>
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<td>62</td>
<td>16</td>
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</tr>
<tr>
<td>Three</td>
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<td>2</td>
<td>8</td>
<td>2</td>
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</tr>
<tr>
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<td>0</td>
<td>4</td>
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<td>0</td>
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<th>Ten.</th>
<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
</tr>
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<tr>
<td>Other</td>
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<th>Total</th>
<th>Ten.</th>
<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
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<td>Included in Program</td>
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<td>20</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Total Responses</td>
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<td>75</td>
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<td>5</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Coordination w/ Other Courses</th>
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<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
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<tr>
<td>LRW is Linked</td>
<td>39</td>
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<td>1</td>
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<table>
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<tr>
<th>Services for Students</th>
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<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
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</thead>
<tbody>
<tr>
<td>Tutorials</td>
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<td>11</td>
<td>43</td>
<td>8</td>
<td>2</td>
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<tr>
<td>Student Assistance</td>
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<td>12</td>
<td>25</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
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<table>
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<th>NonT.</th>
<th>Adj.</th>
<th>LawSt</th>
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</thead>
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<tr>
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<td>10</td>
<td>3</td>
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<td>30</td>
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<td>1</td>
</tr>
<tr>
<td>Thrice per Week</td>
<td>6</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Every Other Week</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
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<td>5</td>
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Table 3.2 - Structure of Program by School Type
Results as of 11/07/90

<table>
<thead>
<tr>
<th># Semesters Required</th>
<th>Total</th>
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<th>Priv.</th>
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<td>One</td>
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<tr>
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<td>6</td>
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<tr>
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<table>
<thead>
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<th>Publ.</th>
<th>Priv.</th>
</tr>
</thead>
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<table>
<thead>
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<th>Moot Court</th>
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<th>Priv.</th>
</tr>
</thead>
<tbody>
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<tr>
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<td>19</td>
</tr>
<tr>
<td>Total Responses</td>
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<td>77</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Coordination w/ Other Courses</th>
<th>Total</th>
<th>Publ.</th>
<th>Priv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>LRW is Linked</td>
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<td>23</td>
</tr>
<tr>
<td>LRW is Independent</td>
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<td>Total Responses</td>
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<table>
<thead>
<tr>
<th>Services for Students</th>
<th>Total</th>
<th>Publ.</th>
<th>Priv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tutorials</td>
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</tr>
<tr>
<td>Student Assistance</td>
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<table>
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<th>Student/Prof Meetings</th>
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<th>Priv.</th>
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</thead>
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<tr>
<td>Once per Week</td>
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<td>12</td>
<td>28</td>
</tr>
<tr>
<td>Twice per Week</td>
<td>40</td>
<td>15</td>
<td>25</td>
</tr>
<tr>
<td>Thrice per Week</td>
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<td>2</td>
<td>4</td>
</tr>
<tr>
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</table>
Table 3.3 - Structure of Program by School Size
Results as of 11/07/90

<table>
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<th>500</th>
<th>600</th>
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<th>800</th>
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<td>0</td>
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<td>23</td>
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<tr>
<td>Three</td>
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<td>6</td>
<td>2</td>
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<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Four+</td>
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<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total Responses</td>
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<td>20</td>
<td>23</td>
<td>12</td>
<td>17</td>
<td>11</td>
<td>25</td>
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</tbody>
</table>

<table>
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<tr>
<th>Credits Allotted</th>
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<th>500</th>
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<td>3</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Total Responses</td>
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<td>18</td>
<td>19</td>
<td>23</td>
<td>12</td>
<td>16</td>
<td>11</td>
<td>25</td>
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</table>

<table>
<thead>
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<th>Moot Court</th>
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<th>Total &lt;400</th>
<th>500</th>
<th>600</th>
<th>700</th>
<th>800</th>
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<td>11</td>
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<td>16</td>
</tr>
<tr>
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<td>6</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>2</td>
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<td>23</td>
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<td>17</td>
<td>11</td>
<td>25</td>
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</table>

<table>
<thead>
<tr>
<th>Coordination w/ Other Courses</th>
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<th>Total &lt;400</th>
<th>500</th>
<th>600</th>
<th>700</th>
<th>800</th>
<th>1000</th>
<th>1000</th>
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</thead>
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<tr>
<td>LRW Linked</td>
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<td>7</td>
<td>8</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>8</td>
</tr>
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Results as of 11/07/90

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Results as of 11/07/90

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Results as of 11/07/90

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<td>8</td>
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Table 5.3 - Treatment of Written Work by School Size
Results as of 11/07/90

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<table>
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<th>&lt;400</th>
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<th>600</th>
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<td>19</td>
<td>21</td>
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<table>
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<tr>
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<th>600</th>
<th>700</th>
<th>800</th>
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<td>6</td>
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<tr>
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<td>1</td>
<td>0</td>
<td>2</td>
<td>1</td>
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<td>Both</td>
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<td>1</td>
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Table 6.1 - Status of Professionals by Program Type  
Results as of 11/07/90

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Ten.</th>
<th>NonT.</th>
<th>Adj.</th>
<th>LawSt.</th>
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</thead>
<tbody>
<tr>
<td>Full-Time, Tenure-Track</td>
<td>39</td>
<td>25</td>
<td>11</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Full-Time, Non-Tenure-Track</td>
<td>76</td>
<td>0</td>
<td>76</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Part-Time Adjunct</td>
<td>35</td>
<td>0</td>
<td>14</td>
<td>21</td>
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<tr>
<td>Students</td>
<td>8</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>5</td>
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</table>

| Percentage Females             |       |      |       |      |        |
| 0 - 25%                        | 11    | 6    | 4     | 1    | 0      |
| 26 - 50%                       | 33    | 1    | 20    | 11   | 1      |
| 51 - 75%                       | 30    | 3    | 22    | 4    | 1      |
| 76 - 100%                      | 36    | 7    | 24    | 3    | 2      |
| Total Responses                | 110   | 17   | 70    | 19   | 4      |

| Experience in Practice         |       |      |       |      |        |
| 0 - 2 years                    | 31    | 5    | 19    | 4    | 3      |
| 3 - 5 years                    | 58    | 8    | 41    | 9    | 0      |
| 6 - 10 years                   | 14    | 2    | 7     | 4    | 1      |
| over 10 years                  | 4     | 1    | 2     | 1    | 0      |
| Total Responses                | 107   | 16   | 69    | 18   | 4      |

| Non-Tenure Contracts           |       |      |       |      |        |
| Renewable                      | 71    | 0    | 71    | 0    | 0      |
| Non-renewable                  | 3     | 0    | 3     | 0    | 0      |
| Total Responses                | 74    | 0    | 74    | 0    | 0      |

| Part-Time Adjunct Contracts    |       |      |       |      |        |
| Renewable                      | 32    | 0    | 13    | 19   | 0      |
| Non-renewable                  | 3     | 0    | 1     | 2    | 0      |
| Total Responses                | 35    | 0    | 14    | 21   | 0      |

| Non-J.D. Faculty               |       |      |       |      |        |
| Yes                            | 31    | 6    | 20    | 4    | 1      |
| No                             | 84    | 14   | 52    | 15   | 3      |
| Total Responses                | 115   | 20   | 72    | 19   | 4      |

| Student Teachers               |       |      |       |      |        |
| Yes                            | 59    | 16   | 29    | 9    | 5      |
| No                             | 68    | 9    | 47    | 12   | 0      |
### Table 6.2 - Status of Professionals by School Type
Results as of 11/07/90

<table>
<thead>
<tr>
<th></th>
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<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Full-Time, Tenure-Track</strong></td>
<td>39</td>
<td>11</td>
<td>28</td>
</tr>
<tr>
<td><strong>Full-Time, Non-Tenure-Track</strong></td>
<td>75</td>
<td>29</td>
<td>46</td>
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<tr>
<td><strong>Part-Time Adjunct</strong></td>
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<td>12</td>
<td>23</td>
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**Percentage Female**

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<td>0 - 25%</td>
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<tr>
<td>26 - 50%</td>
<td>33</td>
<td>11</td>
<td>22</td>
</tr>
<tr>
<td>51 - 75%</td>
<td>30</td>
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<tr>
<td>76 - 100%</td>
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**Total Responses**

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**Years Experience in Practice**

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<td>17</td>
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<tr>
<td>3 - 5</td>
<td>58</td>
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<tr>
<td>6 - 10</td>
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**Total Responses**

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**Non-Tenure Contracts**

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<th>Private</th>
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<td>45</td>
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**Total Responses**

<table>
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**Part-Time Adjunct Contracts**

<table>
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<th>Private</th>
</tr>
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<tbody>
<tr>
<td><strong>Renewable</strong></td>
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<td>22</td>
</tr>
<tr>
<td><strong>Non-renewable</strong></td>
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**Total Responses**

<table>
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<tr>
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**Non-J.D. Faculty**

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<th>Private</th>
</tr>
</thead>
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**Total Responses**

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<th>Total</th>
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</thead>
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**Student Teachers**

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<th>Private</th>
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<tbody>
<tr>
<td>Yes</td>
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</tr>
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**Total Responses**

<table>
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Table 6.3 - Status of Professionals by School Size  
Results as of 11/07/90

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<th>701-800</th>
<th>800-1000</th>
<th>1000</th>
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</thead>
<tbody>
<tr>
<td>Full-Time, Tenure-Track</td>
<td>39</td>
<td>5</td>
<td>10</td>
<td>11</td>
<td>11</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Full-Time, Non-Tenure-Track</td>
<td>75</td>
<td>8</td>
<td>10</td>
<td>11</td>
<td>9</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Part-Time Adjunct</td>
<td>35</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

| Percentage Females          |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| 0 - 25%                     | 11    | 1       | 3       | 2       | 0       | 1        | 2    | 2    |
| 26 - 50%                    | 33    | 3       | 6       | 6       | 2       | 3        | 2    | 11   |
| 51 - 75%                    | 30    | 3       | 5       | 2       | 5       | 7        | 2    | 6    |
| 76 - 100%                   | 36    | 7       | 2       | 10      | 4       | 3        | 4    | 6    |
| Total Responses             | 110   | 14      | 16      | 20      | 11      | 14       | 10   | 25   |

| Experience in Practice      |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| 0 - 2 years                 | 31    | 4       | 3       | 7       | 4       | 2        | 6    | 5    |
| 3 - 5 years                 | 58    | 6       | 11      | 12      | 5       | 9        | 4    | 11   |
| 6 - 10 years                | 14    | 4       | 1       | 0       | 2       | 2        | 1    | 4    |
| over 10 years               | 4     | 0       | 2       | 2       | 0       | 0        | 0    | 0    |
| Total Responses             | 107   | 14      | 17      | 21      | 11      | 13       | 11   | 20   |

| Non-Tenure Contracts        |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| Renewable                   | 71    | 8       | 10      | 9       | 8       | 12       | 9    | 15   |
| Non-renewable               | 3     | 0       | 0       | 2       | 0       | 1        | 0    | 0    |
| Total Responses             | 74    | 8       | 10      | 11      | 8       | 13       | 9    | 15   |

| Part-Time Adjunct Contracts |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| Renewable                   | 32    | 4       | 4       | 4       | 2       | 2        | 4    | 12   |
| Non-renewable               | 3     | 0       | 0       | 1       | 0       | 2        | 0    | 0    |
| Total Responses             | 35    | 4       | 4       | 5       | 2       | 4        | 4    | 12   |

| Non-J.D. Faculty            |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| Yes                         | 31    | 2       | 6       | 8       | 1       | 4        | 3    | 7    |
| No                          | 84    | 11      | 12      | 13      | 11      | 11       | 8    | 18   |
| Total Responses             | 115   | 13      | 18      | 21      | 12      | 15       | 11   | 25   |

| Student Teachers            |       |         |         |         |         |         |      |      |
|-----------------------------|-------|---------|---------|---------|---------|----------|------|
| Yes                         | 59    | 9       | 12      | 6       | 6       | 9        | 5    | 12   |
| No                          | 68    | 9       | 8       | 17      | 6       | 8        | 6    | 14   |
| Total Responses             | 127   | 18      | 20      | 23      | 12      | 17       | 11   | 26   |
Table 7.1 - Director's Status and Salary by Program Type
Results as of 11/07/90

<table>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-Time, Tenure-Track</td>
<td>38</td>
<td>10</td>
<td>23</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Full-Time, Non-Tenure-Track</td>
<td>50</td>
<td>1</td>
<td>38</td>
<td>9</td>
<td>2</td>
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<tr>
<td>Part-Time Adjunct</td>
<td>4</td>
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<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
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<td>61</td>
<td>16</td>
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<table>
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<th></th>
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</tr>
</thead>
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<td>0</td>
<td>2</td>
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</tr>
<tr>
<td>20,001 - 30,000</td>
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<td>3</td>
<td>1</td>
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</tr>
<tr>
<td>30,001 - 40,000</td>
<td>18</td>
<td>0</td>
<td>13</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>40,001 - 50,000</td>
<td>19</td>
<td>0</td>
<td>16</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>over 50,000</td>
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<td>25</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total Responses</strong></td>
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</tbody>
</table>

Table 7.2 - Director's Status and Salary by School Type

<table>
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<th>Professional Status</th>
<th>Total</th>
<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-Time, Tenure-Track</td>
<td>38</td>
<td>11</td>
<td>27</td>
</tr>
<tr>
<td>Full-Time, Non-Tenure-Track</td>
<td>50</td>
<td>19</td>
<td>31</td>
</tr>
<tr>
<td>Part-Time Adjunct</td>
<td>4</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total Responses</strong></td>
<td>92</td>
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<td>59</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Director's Salary</th>
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<th></th>
<th></th>
</tr>
</thead>
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<tr>
<td>Less than 20,000</td>
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<td>1</td>
<td>1</td>
</tr>
<tr>
<td>20,001 - 30,000</td>
<td>5</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>30,001 - 40,000</td>
<td>18</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>40,001 - 50,000</td>
<td>19</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>over 50,000</td>
<td>43</td>
<td>9</td>
<td>34</td>
</tr>
<tr>
<td><strong>Total Responses</strong></td>
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<td>30</td>
<td>57</td>
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Table 7.3 - Director's Status and Salary by School Size

<table>
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<th>800</th>
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<tbody>
<tr>
<td>Full-Time, Tenure-Track</td>
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<td>9</td>
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<td>6</td>
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<td>9</td>
<td>13</td>
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Director's Salary

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<th>500</th>
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<td>over 50,000</td>
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Table 8.1 - Support Staff and RAs by Program Type
Results as of 11/07/90

<table>
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<th>Total Ten.</th>
<th>NonT.</th>
<th>Adj.</th>
<th>LawSt.</th>
</tr>
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<tr>
<td>One Staff Person</td>
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<td>29</td>
<td>8</td>
</tr>
<tr>
<td>Two Staff People</td>
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<td>0</td>
<td>4</td>
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Number of Research Assts.

<table>
<thead>
<tr>
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</tr>
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<tbody>
<tr>
<td>One RA</td>
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<tr>
<td>Two RAs</td>
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</tr>
<tr>
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Table 8.2 - Support Staff and RAs by School Type

<table>
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<th>Private</th>
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<tr>
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<td>23</td>
</tr>
<tr>
<td>Two Staff People</td>
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Number of Research Assts.

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<tr>
<td>Two RAs</td>
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<tr>
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Table 8.3 - Support Staff and RAs by School Size

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<th>501- 600</th>
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<th>701- 800</th>
<th>800- 1000</th>
<th>over</th>
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<td></td>
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<tr>
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<td>5</td>
<td>7</td>
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<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Two Staff People</td>
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Number of Research Assts.

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<tr>
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<td>1</td>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>Two RAs</td>
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<tr>
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<tr>
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<td>11</td>
<td>14</td>
<td>6</td>
<td>8</td>
<td>10</td>
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</tbody>
</table>
### Table 9 - Salaries of Legal Writing Professionals

#### Full-Time, Tenure-Track
- under $30,000: 0
- $30,001 - 40,000: 0
- 40,001 - 50,000: 6
- 50,001 - 60,000: 15
- 60,001 - 70,000: 12
- 70,001 - 80,000: 4
- over $80,000: 2

#### Full-Time, Non-Tenure-Track
- $15,000 - 20,000: 8
- 20,001 - 25,000: 12
- 25,001 - 30,000: 29
- 30,001 - 35,000: 13
- 35,001 - 40,000: 11
- 40,001 - 45,000: 6
- 45,001 - 50,000: 5
- 50,001 - 55,000: 2
- 55,001 - 60,000: 0
- over $60,000: 3

#### Part-Time Adjuncts
- Under $1,000: 7
- $1,001 - 2,000: 7
- 2,001 - 3,000: 8
- 3,001 - 4,000: 9
- 4,001 - 5,000: 2
- 5,001 - 6,000: 0
- 6,001 - 7,000: 1
- over $7,000: 5

### Table 10.1 - Grading Scheme by Program Type
Results as of 11/07/90

<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
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<th>LawSt.</th>
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<td>43</td>
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<tr>
<td>Number, Averaged In</td>
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<tr>
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<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pass/Fail or S/U</td>
<td>15</td>
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<td>9</td>
<td>0</td>
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</tr>
<tr>
<td>Honors/Pass/Fail</td>
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<td>5</td>
<td>3</td>
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Table 10.2 - Grading Scheme by School Type  
Results as of 11/07/90

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<th>Priv.</th>
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<td>44</td>
</tr>
<tr>
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<td>0</td>
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<tr>
<td>Number, Averaged In</td>
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<td>22</td>
</tr>
<tr>
<td>Number, Not Averaged</td>
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<td>0</td>
</tr>
<tr>
<td>Pass/Fail or S/U</td>
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<td>9</td>
<td>6</td>
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<tr>
<td>Honors/Pass/Fail</td>
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<td>5</td>
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Table 10.3 - Structure of Program by School Size  
Results as of 11/07/90

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<td>10</td>
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<td>11</td>
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<td>7</td>
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<td>2</td>
</tr>
<tr>
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<td>0</td>
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</tr>
<tr>
<td>Pass/Fail or S/U</td>
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<td>1</td>
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<td>Honors/Pass/Fail</td>
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<td>2</td>
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<td>20</td>
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Table 11.1 - Student Teacher Ratio by Program Type  
Results as of 11/07/90

<table>
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<th>NonT.</th>
<th>Adj.</th>
<th>LawSt.</th>
</tr>
</thead>
<tbody>
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<td>0</td>
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<td>11 - 20</td>
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<td>4</td>
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</table>
Table 11.2 - Student Teacher Ratio by School Type  
Results as of 11/07/90

<table>
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Table 11.3 - Student Teacher Ratio by School Size  
Results as of 11/07/90

<table>
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<th>601- 700</th>
<th>700- 800</th>
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<th>over 1000</th>
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<td></td>
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Total 25
Table 12 - Budgets, Excluding Salaries, by School Size
As of 11/07/90

Dollars, in thousands

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Table 13.1 - Satisfaction by Program Type  
Results as of 11/07/90

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<th>LawSt.</th>
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<td></td>
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<td></td>
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<tr>
<td>Other Faculty*</td>
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*The Total Responses do not equal the sum of the above options because the survey contained a fourth option, “Other,” which allowed for a short comment. The varying nature of these responses made their addition to this table uninformative.

Table 13.2 - Satisfaction by School Type  
Results as of 11/07/90

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<td>20</td>
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<td>Resistance</td>
<td>16</td>
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Table 13.3 - Satisfaction by School Size  
Results as of 11/07/90

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APPENDIX C
SURVEY
LEGAL RESEARCH AND WRITING QUESTIONNAIRE
January 1990

Name: ____________________________
School: _______________________

PART I. PROGRAM STRUCTURE

A. First Year Structure

1. How many students are in your school (J.D. students only)?
   a) 100 or fewer  
   b) 101 - 200  
   c) 201 - 300  
   d) 301 - 400  
   e) 401 - 500  
   f) 501 - 600  
   g) 601 - 700  
   h) 701 - 800  
   i) 801 - 900  
   j) 901 - 1000  
   k) 1001 - 1100  
   l) 1101 - 1200  
   m) 1201 - 1300  
   n) 1301 - 1400  
   o) over 1400

2. How many students are in your graduate school?
   a) 100 or fewer  
   b) 101 - 200  
   c) 201 - 300  
   d) 301 - 400  
   e) 401 - 500  
   f) 501 - 600  
   g) 601 - 700  
   h) 701 - 800  
   i) 801 - 900  
   j) 901 - 1000  
   k) 1001 - 1100  
   l) 1101 - 1200  
   m) 1201 - 1300  
   n) 1301 - 1400  
   o) over 1300  
   p) no graduate program

3. What is the size of the first year class?
   a) 1 - 50  
   b) 51 - 100  
   c) 101 - 200  
   d) 201 - 300  
   e) 301 - 400  
   f) 401 - 500  
   g) 501 - 600  
   h) over 600

4. Your school is a:
   a) state school  
   b) private school

5. How many semesters of Legal Research and Writing (LRW) are required?
   a) none, not required  
   b) one semester  
   c) two semesters  
   d) three semesters  
   e) four semesters  
   f) more than four semesters

6. When are students required to take LRW?
   a) all of first year only  
   b) first semester of first year  
   c) second semester of first year only  
   d) all of first year plus part of another year

   Please specify: ____________________________

7. How many semester credit hours are allocated to LRW?
   a) no credits  
   b) one credit  
   c) two credits  
   d) three credits  
   e) four credits  
   f) other ____________________________

8. If legal research is taught separately, who teaches the course?
   a) librarians  
   b) legal research instructors  
   c) other ____________________________
9. If legal research is taught separately, how many credit hours are allocated to it?
   a) no credits
   b) one credit
   c) two credits
   d) three credits
   e) other

10. How is LRW graded?
   a) graded by letter averaged into GPA
   b) graded by letter not averaged into GPA
   c) graded by numbers averaged into GPA
   d) graded by numbers but not averaged into GPA
   e) graded pass/fail or S/U
   f) graded honors/pass/fail
   g) other

11. Is moot court part of the first year legal research and writing course?
   a) yes
   b) no

12. Are the legal writing assignments coordinated with assignments in other first year courses?
   a) yes
   b) no

13. How many writing assignments are coordinated with assignments in other first year courses?
   a) none
   b) one assignment
   c) two assignments
   d) three assignments
   e) four assignments
   f) over four assignments

14. What other services are provided for first year students?
   a) tutorial
   b) students helping students
   c) other

15. How many professionals teach first year LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more

16. How many first year students are there for each LRW professional?
   a) 1 - 10
   b) 11 - 20
   c) 21 - 35
   d) 36 - 50
   e) 51 - 75
   f) 76 - 100
   g) 101 - 125
   h) 126 - 150
   i) over 150

17. How many times per week does the LRW professional meet with students?
   a) once a week
   b) twice a week
   c) three times a week
   d) once every other week
   e) other

18. How many first year LRW students are there for each LRW student instructor?
   a) 1 - 10
   b) 11 - 15
   c) 16 - 20
   d) 21 - 25

19. How many times per week do student instructors meet with students?
   a) once a week
   b) twice a week
   c) three times a week
   d) once every other week
B. First Year Content

20. What assignments are required in the legal research course?
   a) open library research  
   b) closed packet research  
   c) combination of open and closed packet research  
   d) research projects on specific tasks  
   e) legislative histories  
   f) administrative law research  
   g) Westlaw/Lexis training  
   h) citations  
   i) other

21. What assignments are required in the legal writing course?
   a) client letters  
   b) legal memoranda  
   c) pretrial briefs  
   d) trial briefs  
   e) appellate briefs  
   f) law review articles  
   g) drafting documents  
   h) drafting legislation  
   i) other

22. What speaking skills are covered in the first year LRW course?
   a) pretrial motion argument  
   b) appellate brief argument  
   c) objective argument (e.g., report to partner on research findings)  
   d) in-class presentations  
   e) other

23. Do you require rewrites of assignments?
   a) yes, all assignments require at least one rewrite  
   b) yes, but not all - Please specify percentage  
   c) no

24. How many times do students receive written feedback per year?
   a) fewer than 2  
   b) two  
   c) three  
   d) four  
   e) over four

25. Who comments on papers?
   a) LRW professionals  
   b) student assistants  
   c) both  
   d) fellow students  
   e) other

26. If you answered "both" to the above, on what percentage of the papers do instructors comment?
   a) 0 - 25%  
   b) 26 - 50%  
   c) 51 - 75%  
   d) 76 - 100%

27. How many conferences with students are held per semester?
   a) fewer than 2  
   b) two  
   c) three  
   d) four  
   e) over four

28. Who conducts conferences with students?
   a) instructors  
   b) student assistants  
   c) both  
   d) other

29. If you answered "both" to the above, what percentage of conferences are conducted by the instructors?
   a) 0 - 25%  
   b) 26 - 50%  
   c) 51 - 75%  
   d) 76 - 100%
C. Upper Level Writing Courses (If not applicable please check: ___)

30. Who teaches upper level LRW courses?
   a) legal research and writing instructors
   b) full-time faculty
   c) adjunct faculty

31. How many students are there for each faculty member for upper level courses?
   a) 1 - 10
   b) 11 - 15
   c) 16 - 20
   d) 21 - 25
   e) over 25

32. What second or third year courses on legal research and writing are required?
   a) none required
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) specialized writing courses
   g) other ________________

33. If there are required courses, do papers have to be a specific length?
   a) yes
   b) no
   c) not applicable

34. If so, of what length are the papers?
   a) 1 - 10 pages
   b) 11 - 20 pages
   c) 21 - 30 pages
   d) 31 - 40 pages
   e) over 40 pages
   f) not applicable

35. In the required courses, do professors comment on drafts?
   a) yes
   b) no
   c) not applicable

36. If so, on how many drafts do students receive comments?
   a) one
   b) two
   c) one draft and the final
   d) final draft only

37. What upper LRW courses are offered as electives?
   a) none
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) legislative drafting
   g) specialized writing courses (please fill in ____________ )
PART II. PROFESSIONAL STATUS

38. How many LRW professionals are employed by your school?
   a) 1
   b) 2-3
   c) 4-5
   d) 6-7
   e) 8-9
   f) 10 or more

39. On the average, how many years do LRW professionals practice before entering the field of legal research and writing?
   a) 0-2
   b) 3-5
   c) 6-10
   d) over 10

40. On the average, how many years do LRW professionals remain on the faculty?
   a) 0-2
   b) 3-5
   c) 6-10
   d) over 10

41. What is the percentage of female instructors (excluding student assistants)?
   a) 0-25%
   b) 26-50%
   c) 51-75%
   d) 76-100%

42. Is there a separate Director of LRW?
   a) yes
   b) no

43. What is the Director's title? _____________________________________________________________________

44. What is the Director's professional status?
   a) Full-time tenure track
   b) Full-time professional on non-tenure track contract
   c) Part-time adjunct
   d) Law students only
   e) Graduate law students only
   f) Other

45. What is the salary for the Director?
   a) $0 - 20,000
   b) $20,001 - 30,000
   c) $30,001 - 40,000
   d) $40,001 - 50,000
   e) over $50,000

46. Are Full-Time Equivalents used in the program?
   a) yes
   b) no

47. If there are Full-Time Equivalents, how many are used in the program?
   a) one
   b) two
   c) three
   d) four or more

48. Are there non-J.D. writing specialists used in the program?
   a) yes
   b) no

49. If there are non-J.D. writing specialists, how many are used in the program?
   a) one
   b) two
   c) three
   d) four or more
50. How many persons are hired for support staff?
   a) one       c) three
   b) two       d) four or more

51. How many research assistants are hired?
   a) one       c) three
   b) two       d) four or more

For the following section, please choose the colored sheet that best corresponds to your situation.
52. What is the salary of tenured faculty teaching LRW?
   a) $0 - 30,000
e) $60,001 - 70,000
   b) $30,001 - 40,000
   c) $40,001 - 50,000
   d) $50,001 - 60,000

53. What percentage of your teaching load is LRW?
   a) 0 - 5%
   b) 6 - 10%
   c) 11 - 15%
   d) 16 - 20%
   e) 21 - 25%
   f) over 25%

54. Do you teach LRW on a rotating basis?
   a) yes
   b) no

55. If yes, how often do you rotate?
   a) every semester
e) every two years
   b) every year
d) every four or more years

56. What is the average yearly LRW budget (not including salaries)?
   a) $0 - 50,000
   b) $50,000 - 100,000
e) over $150,000
   f) Please specify ______ 

57. Do you use student assistants for teaching purposes?
   a) yes
   b) no (go on to Part III)

58. If yes, what level are the students?
   a) first
e) other ______ 
   b) second
d) graduate
   c) third

59. What is the compensation for student instructors?
   a) salary - Please specify
   b) credits - Please specify
e) combination of salary and credits - Please specify
   f) other

60. Do the student instructors receive a tuition waiver?
   a) yes
   b) no

61. How many semesters are students allowed to teach LRW?
   a) one
e) five or more - Please specify
   b) two
d) four

62. On the average, how many semesters do students teach LRW?
   a) one
c) five or more - Please specify
   b) two
d) four
Full-Time Professionals on Non-Tenure Track Contracts

63. What is the salary for LRW professionals?
   a) $15,000 - 20,000
e) $35,001 - 40,000
b) $20,001 - 25,000
f) $40,001 - 45,000
c) $25,001 - 30,000
g) $45,001 - 50,000
d) $30,001 - 35,000
h) $50,001 - 55,000
j) over $60,000 - Please specify

64. How long are the contracts?
   a) one year
d) four years
b) two years
e) five years
c) three years
f) over five years - Please specify

65. Are the contracts renewable?
   a) yes
   b) no

66. What is the average yearly LRW budget (not including salaries)?
   a) $0 - 50,000
c) $100,001 - 150,000
b) $50,001 - 100,000
d) over $150,000

67. Do you use student assistants for teaching purposes?
   a) yes
   b) no (go on to Part III)

68. If yes, what level are the students?
   a) first
c) third
   b) second
d) graduate
e) other

69. What is the compensation for student instructors?
   a) salary - Please specify
   b) credits - Please specify
   c) combination of salary and credits - Please specify
   d) other

70. Do the student instructors receive a tuition waiver?
   a) yes
   b) no

71. How many semesters are students allowed to teach LRW?
   a) one
c) three
e) five or more - Please specify
   b) two
d) four

72. On the average, how many semesters do students teach LRW?
   a) one
c) three
e) five or more - Please specify
   b) two
d) four
Part-Time Adjuncts

73. What is the salary for LRW adjuncts?
   a) $0 - 1,000  
   b) $1,001 - 2,000 
   c) $2,001 - 3,000  
   d) $3,001 - 4,000  
   e) $4,001 - 5,000  
   f) $5,001 - 6,000  
   g) $6,001 - 7,000  
   h) over $7,000

74. How long are the contracts?
   a) one year  
   b) two years  
   c) three years  
   d) four years  
   e) five years  
   f) over five years - Please specify

75. Are the contracts renewable?
   a) yes  
   b) no

76. What is the average yearly LRW budget (not including salaries)?
   a) $0 - 50,000  
   b) $50,001 - 100,000  
   c) $100,001 - 150,000  
   d) over $150,000

77. Do you use student assistants for teaching purposes?
   a) yes  
   b) no (go on to Part III)

78. If yes, what level are the students?
   a) first  
   b) second  
   c) third  
   d) graduate  
   e) other

79. What is the compensation for student instructors?
   a) salary - Please specify  
   b) credits - Please specify  
   c) combination of salary and credits - Please specify  
   d) other

80. Do the student instructors receive a tuition waiver?
   a) yes  
   b) no

81. How many semesters are students allowed to teach LRW?
   a) one  
   b) two  
   c) three  
   d) four  
   e) five or more - Please specify

82. On the average, how many semesters do students teach LRW?
   a) one  
   b) two  
   c) three  
   d) four  
   e) five or more - Please specify
Law Students Only

83. Who supervises the students?
   a) tenure track faculty - non-LRW professional
   b) tenure track - LRW professional
   c) contract track faculty - non-LRW professional
   d) contract track faculty - LRW professional
   e) no one
   f) other

84. Does the supervisor have a J.D.?
   a) yes
   b) no

85. What level are the students?
   a) first
   b) second
   c) third
   d) other

86. What is the compensation for student instructors?
   a) salary - Please specify
   b) credits - Please specify
   c) combination of salary and credits - Please specify
   d) other

87. Do the student instructors receive a tuition waiver?
   a) yes
   b) no

88. How many semester credit hours do law student instructors receive?
   a) one
   b) two
   c) three
   d) four

89. What is the percentage of female graduate student instructors?
   a) 0 - 25%
   b) 26 - 50%
   c) 51 - 75%
   d) 76 - 100%

90. How many semesters are students allowed to teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - Please specify

91. On the average, how many semesters do students teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - Please specify

92. What is your average yearly budget (not including salaries)?
   a) $0 - 50,000
   b) $50,001 - 100,000
   c) $100,001 - 150,000
   d) over $150,000
Graduate Law Students Only

93. Who supervises the students?
   a) tenure track faculty - non-LRW professional
   b) tenure track - LRW professional
   c) contract track faculty - non-LRW professional
   d) contract track faculty - LRW professional
   e) no one
   f) other

94. Does the supervisor have a J.D.?
   a) yes
   b) no

95. What is the compensation for student instructors?
   a) salary - Please specify
   b) credits - Please specify
   c) combination of salary and credits - Please specify
   d) other

96. Do the graduate student instructors receive a tuition waiver?
   a) yes
   b) no

97. What is the salary for graduate student legal research and writing instructors?
   a) under $10,000
   b) $10,001 - 15,000
   c) $15,001 - 20,000
   d) over $20,000

98. What is the percentage of female graduate student instructors?
   a) 0 - 25%
   b) 26 - 50%
   c) 51 - 75%
   d) 76 - 100%

99. How many semesters are students allowed to teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - Please specify

100. On the average, how many semesters do students teach LRW?
    a) one
    b) two
    c) three
    d) four
    e) five or more - Please specify

101. What is your average yearly budget (not including salaries)?
    a) $0 - 50,000
    b) $50,001 - 100,000
    c) $100,001 - 150,000
    d) over $150,000
PART III. DESCRIPTIONS

102. In general, how do the LRW professionals view the other faculty members?
   a) general feeling of support  c) struggle for resources
   b) resistance to changes in program  d) other

103. What are the two most significant changes in your program in the last five years?

104. What are the two most significant changes that you hope to achieve in your program in the next five years?

105. Do you expect to achieve those goals within that time period?
   a) yes  
   b) no
   c) Please explain:

106. What are the two most significant changes that you hope to achieve in your program in the next ten years?

107. Do you expect to achieve those goals within that time period?
   a) yes  
   b) no
   c) Please explain:
Below, please write a summary of your LRW program. Please include: 1) length of course; 2) credits allotted; 3) research assignments given; 4) writing assignments given; and 5) rewrites and conferences required.
Notes on Contributors

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George D. Gopen was educated both in the law and in graduate English studies at Harvard University. He is Director of Writing Programs and Professor of the Practice of Rhetoric at Duke University. His publications focus on the analysis of Rhetoric and on the rhetorical analysis of literature. He also serves as a consultant to a large number of academic institutions, law firms, and corporations.

Kary D. Smout holds a Ph.D. in Rhetoric from Duke University, where he wrote his dissertation on the creation/evolution controversy. He is presently an Assistant Professor of English and Director of the Writing Program at Washington and Lee University.

Jill J. Ramsfield is currently an Associate Professor of Law and Director of the Legal Research and Writing Program at Georgetown University Law Center. She is also president of her own consulting firm. She received a B.A. from Wellesley College and a B.M. and J.D. from the University of Wisconsin. Ms. Ramsfield has created an approach to research, writing, and time management that is geared to the legal writer who must shorten the amount of time spent without sacrificing quality.