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GOING HOME: MEMORIES OF TOM

Tom Blackwell was a treasure. There was a warmth in his presence that was as true and constant the summer sun in his beloved Texas. He was a friend to all and a source of inspiration that we shall always miss.

Tom was a wonderful teacher who spent hours developing new and creative ways to reach students. What was unique about Tom was the amount of thought he gave both to each class and to each individual in the classroom. He was highly intelligent and he cared on a deep level. He wanted his students to approach the law with passion and wanted them to be happy and complete in their lives. While his acumen and experience made him a wonderful teacher of contracts, business organization and corporate finance, Tom was most at home with his students in legal writing. He loved watching the growth or personal perspective and confidence that is only apparent in a context that permits individual teaching. Our offices were next to each other at Chicago-Kent. He loved to chat after class or conferences about successes among the students. Like the Biblical shepherd, he rejoiced most for the one who had been lost and who was finally gaining confidence and self-respect.

Tom’s love for his wife and children was absolute. The most prominent items in his office were pictures of Lisa and their three children Zeb, Jillian and Zeke. Anytime he looked at those pictures (and he looked often), a smile crossed his eyes. Lisa and the children came to the law school regularly on public school holidays and Tom liked nothing better than breaking the day with a noon visit to a museum. He thought about each of his children a lot and loved to talk about how unique and wonderful each was. He was proud of them and he gave them each unconditional love.

Tom and Lisa were partners in life in every sense. When he used the word “we,” it was in a sense of complete unity and oneness. I have thought about Lisa so much. It is always tragic to lose a life partner, but that she had to lose Tom is still beyond imagining.

Tom was a generous colleague. He shared his knowledge, experience, ideas and time without reservation. He was quick to help newer colleagues and the advice was always kindly given and
gratefully received. He never lectured or argued with people. Rather, he simply helped. He was wonderful with computers and understood how they could help. When he realized that many of us did not, he offered his time and advice with humor, tact, and grace. He could give workshops on technology that were masterfully clear and helpful.

He was very devoted to his community and the community loved his for his enthusiasm, wit, kindness and energy. He was active in his church and working for his church at the moment he died. For readers who did not know Tom, be assured that he was also very funny. He sang in the church choir and took pride in posting bulletins of the concerts on his office door. When I asked him how a particular oratorio had gone the night before, he said, “Well, we got through the Bach. We got through a little better than Bach did, but it all ended at the same time.” His Texas upbringing left him with a rich repertoire of sayings. My favorite was his observation during a budget crunch that I “looked as nervous as a long tailed cat in a room full of rockers.” On observing another rebarbative colleague he worried, “Poor thing, she always seems to have a burr under her blanket.”

Tom never said an unkind word about anyone. At Chicago-Kent we had at least the usual share of collegial disputes, but Tom had a way of disagreeing with positions and not people. Personal attacks were simply not in him. He was comfortable in his skin in a way that few are and he never judged others. I have thought a lot about Tom lately while saying the Lord’s Prayer. The line “Forgive us our trespasses as we forgive those who trespass against us,” sometimes causes me (and I suspect most of us) a mental stumble. I want to forgive, but if I were honest with God, there are usually three or four held in reserve. I always hope that God can forgive and will be patient with me while I try. Tom said that prayer every day of his life and he said it without the psychological fingers crossed behind the back. He did wish everyone well and he did want grace for all humankind. If he were here, he would be the first to ask forgiveness even for the man who took his life. We are working on that Tom, because we know you would want us to try.

Tom died in January. Only weeks before he was singing carols about good will. I hope you sang loudly, Tom, because good will is what you lived. Go in peace and God speed, good friend.

Molly Warner Lien
Nestled deep within the steep mountain hollows of far southwestern Virginia is a unique new law school, dedicated to the mission of providing Central Appalachians a professional education emphasizing community service and community lawyering. The Appalachian School of Law Faculty is an eclectic group of former practitioners and academics who have struggled through the challenges of building a new institution from scratch, and successfully so, since the ABA awarded provisional accreditation to ASL during its fourth year of operations.

Thomas F. Blackwell was attracted to ASL by the challenges and opportunities provided in the need for institution building; he has left his imprimatur indelibly embedded within the fabric of the young School.

Professor Blackwell was very open about the things that were important to him. His family car, a mini-van, bore personalized Virginia license plates that proclaimed “I AM TXN.” Any doubts about what the proclamation meant were quickly dispelled on those chilly mornings when Tom strolled down the hallways of ASL protected from the cold by his Stetson and boots. But, more importantly for the students, he drew heavily upon his decade of practice experience in the Dallas area to breathe life into classroom discussions of technology and licensing issues, business entity creation and purchases, sales and financing of businesses. His undergraduate training at the University of Texas at Arlington was in Mathematics, with a Computer Science minor. With a particular interest in the interplay between technology and law (both legal issues raised by new technology and the use of technology in the practice and teaching of law), he managed to engage his students with the currency of the legal responses and to convert many of his technology-challenged (read, neo-neanderthal) colleagues. But, in one of the many delightful incongruities about the man, while extremely proficient in matters technological, he was no technology “nerd.” His approach to the law drew heavily from his training in philosophy¹ and an emphasis on the policy underpinnings of the law.

Tom’s other vehicle, a well-traveled red pickup truck (often “ridden hard and put up wet”), bore personalized plates that proclaimed “TCH LAW.” And that he did, exceedingly well! In the Spring of 2000, Tom and I co-taught an inaugural offering of Law Office Management to the School’s Charter graduating class, a four-hour practicum with a semester-long transactional skills component, including client interviewing, negotiation, financing and purchase document drafting, and third-party opinion writing, all structured around the financed sale of a mythical vineyard. I learned firsthand of the depth of Tom’s preparation, the breadth of his knowledge, the devotion to his students, and his passion for the law. While some students might occasionally risk being less than fully prepared, I did not dare to do so because Tom never did so. And while the students learned some law, we had “fun” experimenting with and developing the course.

Beginning teaching as a Legal Writing Instructor at Texas Wesleyan Law School in 1996, followed by two years as a Visiting Assistant Professor at Chicago-Kent College of Law, prior to joining ASL in the Fall of 1999, Professor Blackwell was committed to advancing recognition and respect for the unique and essential pedagogy of legal writing, legal process and skills training. That commitment was reflected in scholarship published during his tenure at ASL. He had discussed with some of his colleagues a tantalizingly, albeit tentatively, titled work-in-progress, “Sometimes Dragons Have More Heads Than You Expect: A Cautionary Tale About Equality,” which he described as analyzing issues related to discrimination against Legal Writing and other skills-oriented legal faculty. One must forever wonder what insights he intended to share with us all.

During his all-too-brief sojourn as a law teacher, Professor Blackwell taught courses in Contracts, Copyright Law, Intellectual Property, Corporate Finance, Law Office Management, Law Office Technology, and Legal Research and Writing. Those offerings were given to students in the traditional law school environment. But, “TCH LAW” could also have meant “teach lawyers,” because he was a frequent lecturer before practicing lawyers, providing numerous CLE presentations in his native Texas on topics concen-

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trating in the business entities and intellectual property fields, presenting to the 1999 and 2000 CALI Conferences, presenting before the 2000 ABA Business Law Section Annual Meeting, and speaking at the 2001 Virginia Bar Association Annual Meeting about use of technology in private practice. His interest in teaching lawyers led to a Council Membership in the Virginia Bar Association Law Practice Management Section in 2001. His interest in bettering the practice of law kept him active as scribe for the group working with the Texas legislature for improvement of corporate law, as a member of the Codification Committee for Creation of a Texas Business Entity Code.

Tom was a committed “student of the law,” but he was also a student of life in general, reveling in new knowledge, wherever found. On a weekend hike with a group of ASL students he learned from one (a talented mountain musician and maker of musical instruments) exactly how and why a fallen old-growth hemlock would make an excellent hand-carved dulcimer body. We could see in his knitted brow as he regaled us with specifics about the resonance qualities of tight-grained softwoods that he “itched” to get his hands on the finished product. While repairing the weather skirts on a house trailer for an elderly shut-in, as Faculty sponsor and hands-on participant in the ASL students community service work with Buchanan Neighbors United (a local project similar to Habitat for Humanity), another student taught him the field test for safe potability of moonshine. Again, the wry chuckle with which he described that particular lesson led us to wonder whether he had empirically validated the field test. But, he brought the same innate thirst for new knowledge, an evident exuberance for the quest, to the development of a technology policy for the School, the refinement of a dean selection process, drafting of leave and visitation policies for Faculty, chairing of the School’s Technology Committee, and a multitude of administrative tasks eagerly assumed and rapidly dispatched.

Tom Blackwell and I came to the ASL Faculty at the same time in the Fall of 1999. After years of commuting to “Big City” law practices, we both were habitual early arrivers, often compet-

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3 As one recognition of his commitment to the community at large, Professor Blackwell was elected to the Board of Directors of Buchanan [County, Virginia] Neighbors United in 1999, and became the Board’s Vice-President.

4 “If it burns blue, it’s good for you; but if it burns yellow, it will kill a fellow.”
ing to see who would turn on the lights first. Serendipitously, our offices were adjacent, separated by a hollow drywall partition. During the post-exam doldrums last Fall semester, during that point in the semester when all pointy-headed professors are looking for any excuse to delay the drudgery of actually grading those Socratic masterpieces we have inflicted upon our students, Tom began to talk casually about looking for a new vehicle to supplement (never replace — "it’s still got good miles in it") his aging pickup truck. But unlike most impulsive American consumers, contemplating the purchase of a new car became a crusade for new knowledge for Tom. Consumer Reports were just a start — the Internet beckoned and Tom dove in. I looked forward to returning from the year end holidays for a short course in the latest blandishments from Detroit.

Thomas F. Blackwell is survived by his wife and (his words) “lifelong best friend,” Lisa, his daughter, Jillian, and two sons, Zeb and Zeke. Tom was unabashedly awed by the accomplishments of each of them, and unashamedly proud of his family. As professional colleagues, the ASL community owes them our gratitude for sharing with us Tom’s time and talents.

I never learned how Tom’s contemplation of a new car turned out. On January 16, 2002, shortly after commencement of the Spring semester at ASL, Tom Blackwell was violently and inexplicably taken from our midst. Those who knew him were not surprised to learn that at the very moment of his death, Tom was on the phone with an official of his Church planning for the benefit of the Buchanan community. And, while I do not know how far his automobile research had gotten, I would not be at all surprised to hear that he had already reserved a personalized Virginia license plate proclaiming “FMLY MAN.” Because, you see, Tom Blackwell was very open about the things that were important to him.

Tom Blackwell — a husband and father, a Texan, a lawyer, a teacher, a scholar, a student of the law and of life, a colleague, and a friend.

The untimely loss of Thomas F. Blackwell has diminished both the profession and the Academy. Our colleague and friend is sorely missed.

Clinton W. Shinn
Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*

Ruth Ann McKinney**

It is no secret that law school is a breeding ground for depression, anxiety, and other stress-related illnesses.1 The literature is replete with alarming facts concerning the negative emotional and physical reactions many students experience as they pursue a law degree.2 One noted author reports that "up to 40 percent of law students may experience depression or other symptoms as a result of the law school experience."3 Another author states unequivo-
cally, "self-reports of anxiety and depression are significantly higher among law students than among either the general population or medical students."4 Others note the high risk that students will respond to the stress of law school by becoming alienated, withdrawing psychologically and intellectually from the learning experience,5 or turning to alcohol or drugs for relief.6

Authors from diverse backgrounds ranging from psychology to educational theory have speculated on what it is about the structure of law school that may be creating this problem.7 Some authors have suggested that personality characteristics common to many incoming law students vary significantly from those of their equally-talented peers who pursue other advanced degrees, and that law students may bring a predisposition for unhappiness to the classroom.8 Others have looked at the structure of the traditional law school itself, highlighting the detrimental effects of the Langdellian case method, the over-dependence on Socratic dialogue as the primary teaching tool, lack of feedback, lack of educational context in the learning process, domination of large classes and lack of personal interaction with professors, and the reliance on class rank as an evaluation and hiring tool, to explain the stress students feel.9 Nearly everyone writing on the subject of students tested scored significant elevations in scores for obsessive-compulsiveness, anxiety, social alienation and isolation, and interpersonal sensitivity, as compared to only 2.27% of the general population).

4 Dammeyer & Nunez, supra n. 2, at 55.


7 See generally supra n. 1.


9 Supra n. 1; see also, Benjamin et al., supra n. 1; Arthur Austin, One Person's Chal-
legal education agrees that the current system places enormous amounts of emotional stress on students that negatively affects, perhaps irreparably, students' self-esteem, their ability to perform, their short-term and long-term health, and their ultimate satisfaction with the profession.\textsuperscript{10}

Despite widespread, and fairly unanimous, advice from experts inside and outside of the profession that change is critical, nothing much changes in the field of legal education – and especially not in the first-year classroom.\textsuperscript{11} The Langdellian case method remains the dominant mode of learning, classroom size remains large, student evaluation rests on an end-of-year or end-of-semester exam, class rank continues to be distributed to employers who continue to limit interviews by placement in class, participation in prestigious extracurricular activities remains competitive and often related to grades, workloads remain enormous, Socratic dialogues remain intimidating or, at best, confusing, and on and on.\textsuperscript{12} As a result, in an effort to survive, students


\textsuperscript{10} An interesting trend in the literature emphasizes the long-term repercussions of the deleterious effects of law school, with numerous authorities noting that students develop unhealthy coping mechanisms in law school that follow them into the practice of law, perhaps accounting for a great deal of the dysfunction in the practicing bar. See, e.g., Carney, supra n. 1; Glesner, supra n. 1; see also Lani Guinier et al., \textit{Becoming Gentlemen: Women's Experiences at One Ivy League Law School}, 143 U. Pa. L. Rev. 1 (1994) (documenting women's underachievement in law school despite incoming admissions predictors comparable to their male peers, and attributing at least some of the differences to the patriarchal structure of traditional law schools); see generally supra n. 6.


\textsuperscript{12} Krieger, supra n. 11; Roach, supra n. 1; James Archer & Martha M. Peters, \textit{Law Student Stress}, 23 NASPA J 48 (Spring 1986).
grasp at coping mechanisms ranging from emotional withdrawal to obsessive control — coping mechanisms that are detrimental to their learning and to their growth and development as professionals. Law school continues to do harm to its own, and the profession continues to reel from the repercussions of these initial injuries.

Self-efficacy theory, a widely recognized and highly developed construct of human behavior in the field of social psychology, offers a fresh perspective on the root causes of much of this angst in law school. Even better, self-efficacy theory offers a clear, rational roadmap for implementing small (and large) changes in the law school classroom that would create potentially powerful results. For legal writing professionals, the best news is that, of everyone in the legal academy, we are in the best position to take a leadership role in experimenting with such changes. Thus, at a time when legal writing professionals are struggling for recognition and power, it might well be that we are already in the enviable position of being able to change positively the lives of those we teach in ways not as readily available in more traditional law school classrooms.

This article begins in Section I with an introduction to the basic tenets of self-efficacy theory, a brief exploration of what that theory tells us about people's feelings and behavior, and an explanation of how self-efficacy beliefs are acquired. This introduction is not intended to be an exhaustive discussion of that research, but rather a brief layman's introduction to the concepts. It is the author's hope that such an introduction will pique the interest of le-

13 Roach, supra n. 1; Archer & Peters, supra n. 13.
14 Carney, supra n. 1; Glesner, supra n. 1; Krieger, supra n. 11.
15 See supra n. 6.
16 The literature in the field of social psychology is replete with literally thousands of studies based on Albert Bandura's landmark work in the area of self-efficacy. Self-Efficacy, Adaptation, and Adjustment: Theory Research, and Application, edited by James E. Maddux of George Mason University, is an invaluable tool summarizing much of that research to date. Self-Efficacy Adaptation, and Adjustment: Theory, Research, and Application (James E. Maddux ed., Plenum Press 1995).
17 See Jenny B. Davis, Writing Wrongs, 87 ABA J. 24 (Aug. 2001) (detailing the struggle of legal writing professionals to attain status and pay comparable to those of doctrinal professors).
gal scholars and encourage others to investigate further the potential applications of this theory to legal education. In Section II, the traditional law school environment is examined through the lens of self-efficacy theory, leading to the observation that much of the emotional distress experienced by law students would be completely predictable to a social scientist versed in the theory. The article moves to Section III with an observation and an invitation: self-efficacy theory demonstrates unequivocally that the choices we make daily in our classes can and do affect our students' emotional states and intellectual achievements. We can point to the myriad of causes of the many problems in modern legal education and hope for major reform, or we can take a leadership role in legal pedagogy by instituting positive changes in our own classrooms. This third section offers concrete examples of lesson plans, program policies, and teacher behaviors that will help our students select appropriate goals and inevitably increase their beliefs in their abilities to achieve those goals. Finally, in Section IV the article concludes that by increasing those beliefs, you will reduce anxiety and depression, at least in your class, and increase the probability that your students will excel with energy and confidence.

I. An Overview of Self-Efficacy Theory

A. The Basic Tenets

The term "self-efficacy" was coined by Albert Bandura in his landmark article, *Self-Efficacy: Toward a Unifying Theory of Behavioral Change*, as a way to explain how individuals' perceptions of their competence and control develop, and to explore how those perceptions affect their ability to actually cope with the challenges they face. Self-efficacy is the personal belief that you can control an outcome – that you can achieve a desired result. Self-efficacy applies to narrow, specific, and concrete goals and each of us has widely different levels of self-efficacy for different tasks. Thus, I can have high self-efficacy with respect to my ability to ski (i.e., I believe that I can perform the tasks necessary to ski well), but have low self-efficacy in my ability to rock climb (i.e., I do not

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believe that I can do the things necessary to climb a rock face). On a more general level, I can have high self-efficacy about my athletic abilities (perhaps self-defined as my ability to perform well in most athletic events) even while I have low self-efficacy about my ability to rock climb. In this example, though, I can only have high self-efficacy about my athletic abilities, while simultaneously doubting my rock-climbing abilities, if I also believe that rock climbing is not a critical athletic skill.

It is easy to confuse self-efficacy with self-esteem. Self-esteem, while related, is a different concept entirely. Self-esteem has to do with my evaluation of my overall self-worth, not my belief about my ability to function well in specific areas. Self-esteem is related to self-efficacy in that I will value myself more highly if I believe I can do the things that a worthwhile person should be able to do. Conversely, I will devalue myself if I believe I am not competent in areas that I value highly. Thus, I can have high self-esteem while having low self-efficacy beliefs about many tasks. The key to having high self-esteem is to have high self-efficacy about the tasks that I value.

The importance of managing self-efficacy in educational settings has been examined extensively. Empirical studies show unequivocally that individuals with high self-efficacy for a specific task are significantly more likely to do the things necessary to succeed at the task and far more likely to persist in the face of adversity than are individuals with low self-efficacy in relation to that specific task. Thus, students are more likely to study efficiently and longer when they believe they will master the material than when they have doubts about their ability to learn.

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22 Id.; see also Maddux, supra n. 16, at 9.
23 See Dale M. Schunk, Self-Efficacy and Education and Instruction in Maddux, supra n. 16, at 281 (citing many specific empirical studies that have contributed to the general understanding of the relationship of self-efficacy to education); see also Bandura, supra n. 21 at 174-75, 186-87, 214-51.
25 Schunk, supra n. 23.
The relationship of self-efficacy to depression is also clear. Students who value a goal highly but develop low self-efficacy in relation to their ability to achieve that goal become despondent and depressed. Thus, if I want to achieve something very badly but feel that I will not be able to do the things necessary to get it, I can become overwhelmed with sadness. Individuals in such a situation often choose to disengage from the problematic goal, recognizing that their choice is to continue to feel depressed about their lack of power to attain the goal, or to quit caring about the goal altogether.

Research in self-efficacy theory also has established a relationship between anxiety and low self-efficacy. Studies show that individuals who believe that they lack the ability to avoid severe negative consequences and painful events experience significant anxiety. Thus, if I have low self-efficacy about my ability to do what I need to do to keep something bad from happening to me, I become afraid.

Educational studies applying self-efficacy theory have shown that the presence of low self-efficacy in relation to specific academic tasks creates a spiraling effect that significantly reduces students' chances to reach their full potential. With reduced self-efficacy, the ability to make wise choices about how to achieve the goal and the commitment to behaviors that would lead to the suc-

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26 See generally James E. Maddux and Lisa J. Meier, *Self-Efficacy and Depression* in Maddux, *supra* n. 16, at 143 (containing detailed accounting of numerous studies).


28 Obviously not everyone who is blocked from reaching a specific goal, even in law school, suffers clinical depression. The relationship of sadness to depression is complex and well beyond the scope of this article. Similarly, the relationship of sadness and perceived low self-efficacy is complex. Readers who are interested in learning more about this relationship between sadness and self-efficacy are encouraged to begin by reading James E. Maddux and Lisa J. Meier, *supra* n. 26; see also Bandura, *supra* n. 21.

29 Several authors have noted the tendency of law students to become withdrawn and disengaged from the learning environment. E.g. Glesner, *supra* n. 1, at 1-2; Student Author, *supra* n. 5.


31 *Id.*


33 Maddux, *supra* n. 16, at 13 (stating "[P]eople who believe strongly in their problem-solving abilities remain highly efficient and highly effective problem solvers and decision makers; those who doubt their abilities become erratic, inefficient, and ineffective."
cessful attainment of the goal\textsuperscript{34} are also reduced. \textit{Regardless of incoming ability levels}, students who do not believe they can achieve a goal are far less likely to do so than their peers who do believe they can achieve that goal.\textsuperscript{35} By the same token, the development of high self-efficacy for goals that are valued by an individual creates success that, in turn, not only increases self-esteem, but also the chance that the individual will continue to engage in behaviors that will allow the student to excel.

The task for educators who want to maximize our students' performance becomes clear: increase the self-efficacy of our students in relation to a specific task necessary for their ultimate success and we will increase the chance that they will not only succeed, but will excel. Without any additional effort on our part, students will become more likely to seek help when they need it, take logical steps to accomplish their goals efficiently, try harder, experiment more, be persistent in the face of early failures, and be tolerant of constructive criticism.\textsuperscript{36} Moreover, if we can convince our students that the goal is valuable while increasing their self-efficacy about being able to accomplish the goal, we will also increase their overall self-esteem. Finally, if we help students establish goals that are attainable and minimize the threat of negative consequences over which they have no control, we can rest assured that our classes will not be a breeding ground for depression and anxiety.

In contrast, when we deliberately or inadvertently lower our students' self-efficacy about a specific task, we reduce the chance that the task will be mastered. When the task is valued highly by the student, reduction of self-efficacy becomes a prescription for depression. Similarly, when we reduce our students' self-efficacy about their ability to avoid a negative or painful consequence, such as being embarrassed in class, receiving what they perceive to be a failing grade, or not attaining desired employment, we write a prescription for anxiety. It's that simple.

\textsuperscript{34} Maddux, \textit{supra} n. 16, at 12-13.
\textsuperscript{35} Bandura, \textit{supra} n. 21, at 214.
\textsuperscript{36} \textit{Supra} n. 32.
B. How Do Our Students Develop Their Self-Efficacy Beliefs?

People develop self-efficacy (high or low) for a specific task in four ways:\(^{37}\)

1. through personal or imagined experience;
2. through vicarious experiences (modeling);
3. from feedback from their social environment;
4. from physiological and/or emotional reactions to an event.

Thus, I could develop high self-efficacy for my ability to ski by (1) skiing well, imagining myself skiing well, or remembering that I have always been good at other sports and assuming those successes would generalize to skiing; (2) watching people who are a lot like me ski well; (3) hearing a ski instructor tell me I have natural talent for skiing or that I'm catching on quickly; and/or (4) feeling exhilaration or excitement while skiing. On the other hand, I could develop low self-efficacy about my ability to ski by (1) falling a lot and believing I should not be falling; (2) not seeing anyone like me ski well or seeing people like me ski poorly; (3) hearing from people I care about or respect that I am no good at skiing; and/or (4) feeling scared or being hurt while skiing.

1. Personal Experience: In an exhaustive text summarizing much of his work on self-efficacy, Albert Bandura notes that the most powerful way that people develop their sense of self-efficacy is through "enactive mastery experiences," \(^{38}\) or, in layman's terms, personal experience. According to Bandura, "Successes build a robust belief in one's personal efficacy. Failures undermine it, especially if failures occur before a sense of efficacy is firmly established. [However,] if people experience only easy successes, they come to expect quick results and are easily discouraged. A resilient sense of efficacy requires experience in overcoming obstacles through perseverant effort."\(^{39}\) Significantly, actual success is not as important as is perceived success. In other words, as we assess our experiences, it is our subjective belief that

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\(^{37}\) Bandura, supra n. 21, at 79-115; Maddux, supra n. 16, at 10-12.

\(^{38}\) Bandura, supra n. 21, at 80.

\(^{39}\) Id. (emphasis added).
we have succeeded or failed that most strongly influences the development of high or low self-efficacy about our abilities to succeed in that area. What others believe about our level of success, or even what they know to a certainty, is not what counts unless we believe what they believe.  

2. Vicarious Experience: While people are most influenced by their assessment of their own past experiences, they are also strongly influenced by the experiences of others: (1) people get a sense of their own strengths and weaknesses by comparing themselves to others -- am I better or worse than average?; and (2) people make assumptions about their abilities to succeed or fail by watching others succeed or fail. Research shows that the more closely the observer identifies with the model, the more the model's experience will influence the observer's beliefs about his or her own abilities. Moreover, the less personal experience individuals have, the more they will rely on the observed experiences of others to develop self-efficacy beliefs about themselves.

3. Social Feedback: A third way that people develop beliefs about their abilities to achieve rests in "social persuasion." Social persuasion encompasses all the ways we get feedback from others as we move towards our goals. Studies show that self-efficacy can be increased by giving people the right kind of feedback about their underlying abilities and effort, and decreased by giving the wrong kind of feedback. For example, at least one study indicated that positive feedback about ability is more effective in developing persistence than is positive feedback about effort alone, but feedback about effort is also helpful. Positive messages about underlying ability are most effective when given early on in the development of a new skill. Moreover, it is critical that such feedback be realistic. "To raise unrealistic beliefs of per-

\[40\] Id. at 81.
\[41\] Id. at 86-87.
\[42\] Id. at 87 (citing empirical studies in support of this proposition).
\[43\] Id. at 87.
\[44\] Id. at 101-106.
\[45\] Id. at 101-102.
\[46\] Id. at 102 (citing D.H. Shunk, Sequential Attributional Feedback and Children's Achievement Behaviors, 76 J. Educ. Psych. 1159 (1984)).
\[47\] Id. at 102.
sonal capabilities . . . only invites failures that will discredit the persuaders and further undermine the recipients beliefs in their capabilities."48

Bandura emphasizes that persuasion has its greatest benefit in strengthening efficacy beliefs that already exist, and that it is difficult to create self-efficacy beliefs using social persuasion alone, in the absence of any personal or observed experience. Thus, "[p]ersuasory efficacy attributions . . . have their greatest impact on people who [already] have some reason to believe that they can produce effects through their actions."49 Moreover, it is easier to convince talented people that they will fail than it is to convince less talented people that they will succeed.50

Feedback that focuses on the part of a task that has already been achieved raises self-efficacy while feedback that focuses primarily on what has not yet been achieved tends to decrease self-efficacy.51 Similarly, criticism that targets personal flaws in the individual lowers self-efficacy while criticism that focuses on needed changes in performance increases self-efficacy.52 Finally, the perceived credibility and expertise of a person providing feedback has a direct effect on how persuasive the feedback will be.53 "People are inclined to trust evaluations of their capabilities by those who are themselves skilled in the activity, have access to some objective predictors of performance capability, or possess a rich fund of knowledge gained from observing and comparing many different aspirants and their later accomplishments."54

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48 Id. at 101.
49 Id. at 101 (citing C.A. Chambliss and E.J. Murray, Efficacy Attribution, Locus of Control, and Weight Loss, 3 Cognitive Therapy & Research 349-54 (1979)).
50 Id. at 101. Bandura hypothesizes that people who are discouraged by initial negative feedback alone simply never test their actual ability, so they never get a chance to confirm that they in fact could have done the task but for the negative feedback. In contrast, people who are given unrealistic positive feedback can become quickly discouraged when their abilities do not allow their performance to match the expectations developed through excessively positive feedback.
51 Id. at 103 (citing F. Jourden, The Influence of Feedback Framing on the Self-Regulatory Mechanisms Governing Complex Decision Making, Ph.D. Diss., Stanford University (1991)).
52 Id. at 103.
53 Id. at 105.
54 Id.
4. Physical and Emotional Reactions: "[T]he fourth major way of altering efficacy beliefs is to enhance physical status, reduce stress levels and negative emotional proclivities, and correct misinterpretations of bodily states."55 In a nutshell, self-efficacy theorists explain that we attribute meaning to the physiological and psychological states we experience as we strive to achieve, and that meaning can either raise or lower our self-efficacy beliefs about our abilities to achieve our goals. The effect of somatic reactions is particularly strong where the goal is related to physical activities or health, including the ability to cope with stress.56 Moreover, "the less absorbed people are in activities and events around them, the more they focus attention on themselves and notice their aversive bodily states and reactions in taxing situations."57 People's interpretation of what their physical or emotional state means about their ability to perform is what dictates the raising or lowering of self-efficacy. Thus, if I believe that a sense that my heart is racing is a good thing -- perhaps indicating I'm excited about an upcoming success -- my self-efficacy about my ability to achieve a goal will increase if I experience that symptom. If, on the other hand, I interpret the same symptoms as a bad thing -- perhaps indicating I'm going to panic and fail -- my self-efficacy about my ability to successfully achieve the goal will decrease when my heart begins to race.58

Like physical experiences, emotional states also strongly affect self-efficacy beliefs. "[A] negative mood activates thoughts of past failings, whereas a positive mood activates thoughts of past accomplishments."59 When burdened with negative memories, our self-efficacy about any task is reduced. Conversely, when we feel good, we perceive our abilities to reach our goals to be greater.60

II. Self-efficacy theory and traditional legal pedagogy

Looking at the structure of a traditional law school through the eyes of a self-efficacy theorist, it is hard to imagine a more per-
fect laboratory for development of low self-efficacy beliefs in students about tasks most of them value highly (at least when they begin their studies), as well as low self-efficacy beliefs about students' abilities to avoid negative or painful events. It is completely predictable that depression and anxiety would pervade the law school classroom.

As an example, the following discussion explores what might happen to students' self-efficacy beliefs about their abilities to master the skill of learning to "think like a lawyer" as they move through the first year of law school. Most entering law students are highly invested in mastering legal reasoning – it is a skill they value in and of itself, and is a necessary stepping stone to even more highly valued goals such as ultimate career success. Their personal experience with analytic tasks in the past (in most cases) has been positive, most have excelled at what they perceive to be thinking tasks in other academic settings, and most have received considerable reinforcement from others for their reasoning skills. In fact, being a clear thinker is what got most of our students into law school in the first place. Thus, it is logical to assume that the majority of our students begin law school in with some significant confidence (i.e., with high self-efficacy) that they will master legal reasoning. Predictably, first year students often begin their studies enthusiastically, reading cases for many hours, taking copious notes, talking with their classmates about law, and seeking their professors out during and after class.

As the year progresses, however, something often changes. Astute observers, and anyone who has ever lived through the first year of law school, report that students begin to run out of steam. They participate less in class, avoid their peers who appear to be excelling, begin to experience stress symptoms, and often stop reading or briefing cases thoroughly. In self-efficacy terms, it is likely that their self-efficacy beliefs about their abilities to achieve academically have been reduced. Using our example of learning

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61 This same exercise could be done using any number of common first-year students' goals: achieving high grades, learning how to help someone with a legal problem, finding a satisfying job, learning about justice, etc. The goal of learning to think like a lawyer is used here by way of illustration only.

to "think like a lawyer," what could have caused that reduction in self-efficacy?

1. Personal Experience: Students begin to suspect fairly quickly that legal reasoning is not like anything else they've done before. The Socratic classroom is not like any other classroom they've been in. Case reading and briefing are not like any other homework assignments they've tackled in the past. Thus, any strong self-efficacy beliefs about their reasoning abilities that they brought with them to law school soon become irrelevant. They must begin to build new self-efficacy beliefs from scratch. When they are called on in class, however, many feel they fail to shine. Some experience strong, negative physiological reactions to speaking publicly under pressure in large classes, with large numbers of students sacrificing sleep, exercise, and leisure in an effort to manage the time demands of a difficult workload. Moreover, in most traditional law school classrooms, students receive little or no direct feedback, and grades almost always rest on one long final exam in each course. Thus, as students stumble through the first weeks of law school, the experiences of many are negative,
causing them to begin to suspect that they are not good at, and will never be good at, "thinking like a lawyer."69

2. Vicarious Experience: Even lacking personal success experiences, students might be able to acquire high self-efficacy by observing the success of others with whom they strongly identify.70 However, in any school (or writing program) that relies on a curved grading system, 90 percent of upperclass students will land below the top 10 percent of the class.71 Many upperclass students are extremely upset by their class rank and are often preoccupied with its impact on their job choices— to the detriment of their interest in class.72 Thus, it would be difficult for students to hold on to a belief that they will succeed in light of watching so many of their more experienced peers reel from perceived failure.73 Sadly, the students who have achieved academically are often the ones least likely to come in contact with first year students because they are preoccupied with journal and moot court responsibilities as a direct result of their success with grades. Moreover, many are often exhausted by the increased demands on their time and are not enthusiastic about what they have achieved. Thus, if entering students look for confident upperclass models who have demonstrated excellence in the ability to “think like a lawyer,” they’re hard-pressed to find them. Similarly, entering students looking for signs of success from their 1L peers are left with observing what

69 See Lundberg supra, n. 65 (comparing self-talk of experts and novices when reading cases, and finding that novices blamed themselves for their inability to read a difficult decision, whereas experts blamed the judges who wrote the decision).

70 As noted earlier, however, it is very difficult to raise a student's self-efficacy beliefs unless the student already has some reason to believe he or she will succeed. See text accompanying supra n. 49.

71 Supra n. 68; see also Krieger, supra n. 11, at 11 ("I recently asked our entire first year class how many wanted to be in the top 10% of the class. The affirmative response from 90% of the class indicates the potential problem: if this want is perceived as a need, most of the class must eventually see themselves as failures.") (emphasis in original).

72 See Taylor, supra n. 9; Glesner, supra n. 2.

73 Bandura, supra n. 21, at 87 ("observing others perceived to be similarly competent fail despite high effort lowers observers’ judgments of their own capabilities and undermines their effort") (citation omitted); Zimmerman, supra n. 11, at 974 n. 70 (citing Roger E. Schechter, Changing Law Schools to Make Less Nasty Lawyers, 10 Geo. J. Leg. Ethics 367, 390 (1996) (noting the author states that students who do not make top grades and win top honors are "publicly identified as . . . losers"); see also Krieger, supra n. 11, at 12 (urging law teachers to "pay special attention not to convey, expressly or tacitly, the message that only the 'top' students are valuable or employable. In most professional contexts, it is character, consistency, and competence that carry the day, but student behavior demonstrates that they believe otherwise.").
3. Social Feedback: The third means of developing self-efficacy is through direct feedback from the social environment, with the strongest input coming from individuals perceived to be in authority or holding special knowledge. Again, the very structure of law school inhibits the development of high self-efficacy in our students. Throughout most of the semester, concrete individual feedback is not to be found. Evaluation of academic performance is almost always restricted to a grade placed on one exam in each class per semester. Exams are frequently never given back, or never picked up, by students. Even when they are, written comments are rare. In class, the nature of the Socratic dialogue leaves students confused about when they are right and when they are wrong. Questions beget more questions, and traditional professors often leave students at the end of class with the infamous rhetorical question, “Well, that [classroom discussion] has given us more to think about, hasn’t it?” For students desperately seeking tangible feedback, the open-ended nature of classroom feedback assures low self-efficacy beliefs in relation to their ability to “think like lawyers” because they never get any reassurance that they are on the right track.

4. Physical and Emotional Reactions: The final means of developing self-efficacy, physical and emotional reactions to situations, is equally likely to develop low self-efficacy in our students about their abilities to be successful law students, and ultimately successful lawyers. When people are faced with extreme stress, the

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74 Zimmerman, supra n. 11, at 972 n. 62 (citing Alfie Kohn, No Contest: The Case Against Competition 196 (1992) (observing that students in a competitive environment “wish failure” upon student who responds)).

75 See Silver, supra n. 62.

76 Supra n. 68; see also Krieger, supra n. 11, at 982-85 (questioning the meaningfulness of feedback on traditional exams).

77 But see Paul T. Wangerin, Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education, 62 Tul. L. Rev. 1237, 1259 (1988) (asserting that at least some of this stress is the result of inappropriate thinking on students' part as they learn to move from “dualistic to multiplistic and relativistic thinking," and that the angst experienced in law school may be a necessary part of the educational task).
natural reaction is to run away or fight.\textsuperscript{78} This “fight or flight” response is often accompanied by sweaty palms, rapid heart rate, loss of analytical reasoning ability, nausea, and other physical reactions. These physical responses are often experienced by students called on in a large class, facing a three or four hour exam that will decide their academic fate, or looking in the eyes of a judge during their first oral argument experience.\textsuperscript{79} Unless students are expressly taught otherwise,\textsuperscript{80} most are likely to interpret these natural stress reactions as indicators of the likelihood that they will fail to develop the legal reasoning skills they seek. Of course, many of these physical responses interfere with performance in very concrete ways,\textsuperscript{81} thus further reducing students' efficacy beliefs by confirming their conviction that they will fail. Quite apart from these common stress reactions to immediate classroom experiences, the well-documented time demands of law school take a physical and emotional toll as well. Students frequently report loss of sleep, loss of appetite, reduction in exercise, and loss of contact with loved ones as natural consequences of the rigorous schedule of a traditional first-year curriculum.\textsuperscript{82}

Even a cursory examination of a typical first year experience, then, leads to the inference that the institutional environment reduces students' self-efficacy beliefs about their ability to think like lawyers -- a fundamental academic and professional task. As our students' efficacy beliefs about their abilities to develop critical law student skills diminish, what happens to their emotional states? Low self-efficacy about one's ability to reach a valued goal leads to sadness. Similarly, to the degree that students experience significant negative consequences as they struggle to develop this new skill (e.g., embarrassment in class, receipt of grades they perceive to be unacceptably low, loss of a balanced life due to the time demands of studying, rejection in the job market) that they feel ill

\textsuperscript{78} Archer & Peters, supra n. 12.
\textsuperscript{79} Id.; Carney, supra n. 1; Glesner, supra n. 1.
\textsuperscript{80} See generally Krieger, supra n. 11 (developing the thesis that students benefit from being taught expressly how to be "whole people" so they can be "whole lawyers.")
\textsuperscript{81} Archer & Peters, supra n. 12.
\textsuperscript{82} E.g., Krieger, supra n. 11, at 8-9.
equipped to avoid, they will also be anxious. It is no wonder law school has been called “the dark night of the soul.”

III. Self-efficacy theory and legal writing programs – making a difference

The question raised in the title to this paper is “Are We [legal writing professionals] Part of the Problem and Can We Be Part of the Solution?” The answer on the first count is "perhaps" and the answer on the second is a resounding "yes." To the extent that legal writing programs and classrooms persist in mirroring the aspects of traditional legal education that are at the heart of sabotaging student self-efficacy, we are indeed perpetuating the problem. To the extent that we have the freedom to choose, or have already chosen, to do things differently, we can be significant framers of a solution. To differing degrees, depending on our program design, we are already in the enviable position of being able to teach in small classrooms, have significant one-on-one student contact, work with Teaching Assistants, give multiple assignments, many with rewrites, and control the grading environment. No matter how small our budgets, no matter how constrained our ability to control our program designs, no matter how overwhelmed we are by our own workloads, self-efficacy theory provides us with a tool to create positive, and significant, change in our students' lives. Like all legal educators, we need to take ownership of our part in the problems of depression and anxiety in law school, but also pride in our potential ability to turn that problem around.

Looking at the four means for development of self-efficacy again, the possibilities for development of positive self-efficacy in our writing classrooms are endless. Positive self-efficacy about students' abilities to achieve meaningful goals, combined with our management of the environment to reduce unnecessary negative consequences for students, will directly reduce depression and anxiety in our students. The following discussion is by no means

83 Roach, supra n. 1 (quoting Jay Feinman & Marc Feldman, Pedagogy and Politics, 73 Geo. L.J. 875, 878 (1985)). Ms. Roach makes a strong case in her article for the fact that the emotional impact of law school goes beyond the negative ramifications of the psychological effects themselves, but rather directly affects academic progress.
84 See generally Ramsfield, supra n. 18.
85 Id.
an exhaustive or particularly detailed list of possibilities for the writing classroom. Rather, it is my hope that these suggestions will stimulate creative thought for each of us in the legal writing classroom about the many ways we can help our students identify appropriate educational goals, and about how we can increase their self-efficacy beliefs about their abilities to reach these goals.

For purposes of illustration, let’s examine how the thoughtful structuring of a first-year writing classroom could reduce unnecessary negative consequences for students and positively increase their self-efficacy beliefs about their ability to learn to "think like lawyers."\[86\]

1. **Personal Experience:** We can increase our students’ self-efficacy beliefs about their ability to be clear legal reasoners by drawing logical connections between their past intellectual successes and the present challenge of learning this new reasoning skill, thus taking advantage of high self-efficacy from the past to fuel the effort needed to learn this new skill. Even those students who are struggling the hardest have had some intellectual success in the past. To the degree that we can tap into that past success, we can increase the likelihood that the student will do whatever is necessary to succeed now.

In addition, we can structure exercises that are sufficiently challenging to build resilient self-efficacy beliefs, while being manageable enough to allow students to experience success. Self-efficacy theory teaches us that it is particularly important for beginners to experience success early on, reinforcing the notion that it makes sense to structure assignments so that students learn legal reasoning in increasingly difficult steps, building confidence with each success. As an example, a program that offers an opportunity for students to analyze a case in the first weeks of school, synthesize two or more related cases a week or so later, and then incorporate those cases in a short intra-office memo would be well on the way to building high self-efficacy about legal reasoning in its students.

\[86\] This same exercise can be done productively for any number of our own goals, or those of our students. For example, we can increase or decrease our students’ self-efficacy beliefs about their ability to be influential leaders in the legal community; their ability to write accurately; their ability to do reliable research; their ability to have happy families; their ability to be strong public speakers, and on and on.
Expressly teaching logic and incorporating logic exercises in the curriculum would be another way to ensure our students' successful mastery of legal reasoning. Where students lack any incoming skills they need to master our initial lessons, we should strive to warn them through pre-admission information about our expectations and we should work towards having remedial opportunities available if a particular student needs more attention to begin to succeed.

To be effective, of course, the program would have to set clear goals for each assignment, give students clear feedback about where they stand in relation to those criteria, and give students who miss the boat a chance to rewrite or otherwise redeem themselves. Experts in rhetoric theory emphasize that you can't separate thinking, speaking, and writing. Armed with that knowledge, we should give students as many opportunities as possible to think out loud and to write about what they are thinking. With each opportunity, we should strive to give express feedback, helping them know when they have succeeded and know what they need to do to succeed when they have failed.

87 Professor Craig Smith, Director of the Writing Program at Vanderbilt, gave an intriguing demonstration at the 2000 Legal Writing Institute Conference highlighting use of a computer-generated spreadsheet to help students working openly in a group learn to compare and contrast holdings of related cases.

88 I do not mean to imply that legal writing professionals should take hands-on responsibility for every struggling student. Rather, I mean that we can significantly contribute to the likelihood that all of our students will succeed if we consciously design programs that identify the incoming skills each will need, and have a referral service available that will help students catch up if they are behind. At UNC, we have had considerable success asking for volunteers to help others. Our academic support program rests on the principle that we all have strengths and we all have weaknesses, and that if we can share our gifts we will all benefit.

89 Judith W. Wegner, Professor and former Dean of the UNC School of Law, used an interesting technique to help first-year students in her small section seminar develop exam-writing skills. She gave students a practice exam and had each student continue to rewrite his or her exam until it was written at an "A" level. In that way, every student in her class experienced success in the exam writing process and learned first-hand that he or she had the capacity to write such an exam.

90 I was first introduced to this concept in 1991 at a workshop run at the University of North Carolina School of Law by Professor James Williams of the Department of English at the University of North Carolina. See generally Kellen McClendon, The Convergence of Thinking, Talking, and Writing: A Theory for Improving Writing, 38 Duq. L. Rev. 21 (2000) (exploring the interface between thinking, talking, and writing as a way to improve students' writing).
2. Vicarious Experience: First-year writing programs often isolate students from upperclass students who have succeeded in the past. That is a mistake. Rather, self-efficacy theory teaches us that we should take every opportunity to help students learn that others have succeeded before them. The more our students learn about the successes of other students, the more they will believe that they, too, will be successful. The more they believe that they will be successful, the more successful they will, in fact, be.

There are many ways to integrate the work of successful upperclass students in first-year writing programs. Upperclass students can work as Teaching Assistants and, in some programs, carry a great deal of the teaching load themselves. They can work as tutors, mentors, or advisors. On a less intensive level, we can hold panels of upperclass students who can address questions of beginning students on topics we identify as relevant to our class assignments (e.g., how do you maintain coherent research notes? what resources have you found helpful when analyzing a legal problem? How has work on a journal affected your second year studies?). Older students can be invited as guest speakers in class on topics they excelled in when they were first-year students. If you are hesitant to bring actual students into the classroom, you can still show many, many examples of outstanding student work. Perhaps even more effective is the use of less-than-stellar student work that has led to improvement and, ultimately, to excellence. The more we use examples of successful student work (especially showing progressions of work from a novice to an expert stage), the more fledgling students will come to believe that they, too, can make progress. By introducing current students to the value of perseverance, we encourage them to persevere themselves. Diversity is an important component of selecting models. Under self-efficacy theory, we know that we will develop self-efficacy by watching those with whom we closely identify succeed. Thus, we need to incorporate students with a wide range of interests and a variety of backgrounds as models.

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91 Ramsfield, supra n. 18, at 10, 15 (noting 56% of legal writing programs in 1994 used teaching assistants in some capacity).
92 Ramsfield, supra n. 18, at 14-15.
Use of modeling is not limited to upperclass students. Our students can learn a great deal from each other, and collaborative learning can be valuable tools for helping students gain useful feedback from their peers. Similarly, using overheads or computer editing techniques to move through an example of legal logic gives students a chance to compare their thinking to that of their peers. On a programming level, consider adopting an open honor code philosophy—where students are encouraged to share their thoughts and writing with each other and with experts. In general, the more we isolate students from one another, set students in competition against one another, and hold out only our best and brightest as examples, the greater the risk that our students will not develop the high self-efficacy they need to succeed.

3. Social Feedback: Students in law school are starved for feedback. In legal writing classes, we often have a rare opportunity to give them the feedback they need to develop self-confidence in their skills. Research on self-efficacy indicates that feedback has its greatest impact on self-efficacy when it comes from someone who is perceived to be an expert and is trusted and respected. Thus, our own behavior in the classroom and our positive, professional relationships with our students will dictate the effect that our feedback will have. It is equally important that our students know why we are qualified to teach them, so we should let them know our strengths and our weaknesses, and our teaching credentials. Similarly, our ability to develop a positive, supportive classroom environment will affect what they can learn from each other. It is only in an environment of trust and mutual respect that they will be able to use each other as models.

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93 See generally Zimmerman, supra n. 11. Interested readers would also enjoy Volume 15, No. 2 of The Second Draft (June 2001), containing a collection of short articles on the use of collaboration and cooperation in legal writing programs.

94 Supra n. 87. If you have a few students who are not "catching on" in group brainstorming exercises, self-efficacy principles would encourage us to do some additional, private exercises with that group so that they, too, experience incremental successes.

95 Ramsfield, supra n. 18, at 7 (noting that the 1994 survey of the Legal Writing Institute documented that students receive feedback at least three times a year in all legal writing programs, and at least four times a year in most).

96 Maddux, supra n. 16, at 11.

97 The importance of developing trust in a learning environment, especially a small group learning environment, cannot be overemphasized. I am indebted to Edward M. Neal, Director of Faculty Development at the University of North Carolina School at Chapel Hill Center for Teaching and Learning, for introducing me to this important concept.
The effect of feedback cuts both ways: feedback that is perceived as strongly negative and condemning can reduce self-efficacy just as certainly as valid positive feedback can increase self-efficacy. Additionally, negative feedback that the student cannot avoid (for example, feedback that appears erratic and unpredictable, personally abusive, or which the student cannot control by his or her own efforts) is devastating.

Legal writing teachers typically give written feedback on at least major assignments, and recent studies indicate that we often give feedback and a chance for rewrites on many other assignments as well. Feedback that is thoughtfully structured to the goal we have set will maximize the development of positive self-efficacy. For example, in our illustration, our goal is to develop high self-efficacy in our students about their ability to "think like lawyers." Our feedback, then, should be clearly directed to that goal, targeting analysis that is accurate and sophisticated, and raising questions about analysis that is flawed. Our focus should be on objective intellectual content, never straying to a personal attack on a student's innate reasoning abilities or self worth.

98 Anne Enquist, Critiquing Law Students' Writing: What the Students Say is Effective, 2 Leg. Writing 145, 166-68 (1996) (noting that students participating in her study were "unanimous in their remarks indicating that positive feedback is an essential part of their learning").
99 Ramsfield, supra n. 18, at 6-7.
100 See Enquist, supra n. 98, at 160-66 (documenting the effectiveness of "in-depth explanations" accompanying comments on student papers).
101 Bandura, supra n. 21, at 102 notes that social persuasion comes in many forms. Some are extremely subtle. As an example, when interacting with people we perceive to have limited abilities, we often "pull our punches," giving "dishonest comments" or otherwise communicating that we do not expect as much. In the legal writing context, we need to be sure that we maintain high standards for our students and communicate our faith that they are able to reach those standards. Where we have concerns about our students' abilities to reach the standards set, we can consider breaking the goal down to smaller, more manageable tasks and helping students identify what they need to do to master each incremental step.
The language we use when evaluating student work is important. Self-efficacy theorists emphasize that it is the students' perceptions about our feedback that matters, not what we think we are communicating. Thus, whatever grading system we adopt, we should be clear about levels of competency: what grade or other evaluative terms indicate that the student has met expectations, which ones indicate that the students have truly excelled, which ones indicate that the students have not yet caught on or demonstrated competence? Do the students understand your grading system the way you do? Do you believe the grading system you use is fair, reliable, and valid? Have you made rational choices between comparative grading (grading on a curve) and standard based grading (grading based on each person's performance in relation to a set performance standard)? Do you want your students to assess their performance in comparison to someone else or in comparison to an objective standard of excellence?

Finally, we can create a classroom environment that allows students to give each other honest and supportive feedback. Peer editing is an increasingly popular tool that not only saves the teacher time, but also allows students to receive feedback from each other. Peer editing, or in the case of our example, a related brainstorming exercise, also allows students an opportunity to compare their own performance to others -- an important step in the development of self-assessment tools critical to the development of high self-efficacy.

One of my favorite students who

102 Students, perhaps understandably, are enormously preoccupied with grades. To help combat the negative effects of traditional grading and to distinguish our writing course from doctrinal classes, at the UNC School of Law we have experimented successful with using a competence based grading system (i.e., evaluating student work in comparison to an objective standard rather than to each other) that adopts professional definitions of grades (e.g., an "A" memo is one that the senior partner could circulate to the firm or a client with no significant revisions, a "B" memo is one that the senior partner would find useful, but would need to revise before circulating, etc.). Students are given a copy of that grading rubric with their syllabus on the first day of class, and are told that it is our goal for every student to achieve as high a level of performance as possible on each assignment. Grades in our writing program are factored into students' overall class rank.

103 See generally Janet Mancini Billson, The College Classroom as a Small Group: Some Implications for Teaching and Learning, 14 Teaching Sociology 143 (1986) (applying principles of small group process to create an effective classroom environment).

104 See e.g. Ann Piccard, Using Peer Editing to Supplement Feedback, 15 Second Draft 14 (June 2001); Ruth Anne Robbins, Varying the Traditional Methods of Peer Editing, 15 Second Draft 15 (June 2001).

105 See supra n. 87 (discussing Craig Smith's group case analysis exercise); Susan C. Wawrose, Using Groups to 'Divide and Conquer,' 15 Second Draft 14 (June 2001).
graduated many years ago was working hard, but not meeting my expectations. She was disappointed in her grade, and I was too inexperienced to articulate clearly what she was doing wrong. Fortunately, I knew enough to ask a student who had earned a very high grade if I could use that student's paper as a teaching model. When the distressed student read the other student's work, she said in amazement, "I knew you wanted me to think hard. I didn't know you wanted me to think THIS hard."

4. Physical and Emotional Reactions: There is a halo effect to physiological and emotional responses that directly affects self-efficacy. When I am feeling good physically or emotionally, I am likely to believe I can master the task that I am facing at that time. When I am feeling bad, physically or emotionally, I am likely to attribute at least some of that bad feeling to my incompetence relating to the task at hand. Thus, our attention to details in and around the classroom and in our conference rooms can have a major impact on the self-efficacy our students develop. Temperature matters. Noise matters. Having adequate time matters. Reducing unnecessary anxiety matters. Privacy in conferences matters. Hunger matters. Rest matters. To the degree that we can control these things, we need to make sure our classes and conferences are held in locations with adequate space and light, where there is little noise interference, and that they are not scheduled when students are tired or hungry.

Similarly, if you are discussing confidential or private information, make sure you are in an environment that respects the student's confidence. Consider the healing effect of laughter. Consider our own state of mind when we enter the classroom – moods are contagious. Have you ever chosen to meet outside on a nice day? Have you taken the class for a walk or a "field trip" to a local

107 See Benjamin & Sales, supra n. 8, at 282 (noting that cumulative daily hassles create as much or more stress than major life events). Self-efficacy theory teaches us that students feel anxiety when they believe they cannot avoid a negative consequence. Consider what you can do to reduce negative experiences over which students have no control. As an example, we offer an oral argument support group for students with severe speech anxiety at the UNC School of Law, a group which experience has taught us includes approximately 5% of each entering class.
108 See Levy, supra n. 106 (emphasizing the importance of creating a positive mood in a classroom in order to motivate students to learn, and the contagious nature of moods).
courthouse? Develop a referral base of professionals in the community or in your school to whom you can refer students who appear despondent, depressed, or inordinately anxious. Acknowledge students' moods as well as their intellectual input.\textsuperscript{109} Both matter. Consider sharing your own feelings from time to time. How does it feel to be confused in your analysis? Do you enjoy legal analysis? Acknowledging that a student is angry or confused or sad about receiving a grade lower than he or she wants can go a long way towards releasing the student from the feeling, and freeing the student to try again.\textsuperscript{110} Our students need to associate the study of legal research, reasoning, and writing with positive feelings and personal pride in accomplishment. Returning to our example, such associations would increase their self-efficacy about their ability to "think like lawyers" and that, in turn, will increase the chance that it will happen.

V. Conclusion

While legal writing programs cannot be a panacea for all the ills of the legal educational world, we are uniquely positioned to make a significant difference that will stay with young lawyers throughout their careers. As one author has stated:

Although a sense of control, competence, or mastery does not ensure good psychological adjustment, good adjustment is difficult, if not impossible, without such beliefs. The most common complaints of emotional distress [anxiety and depression] are both characterized by the belief that the good things in life cannot be obtained and that the bad things in life cannot be avoided through one's own efforts. Sometimes perceptions of lack of control are the direct result of ineffective behavior, but such perceptions also can produce ineffective behavior, as well as inaction and inertia.\textsuperscript{111}

\textsuperscript{109} See id. (stating that people communicate on two levels -- the cognitive and the emotional, and that failure to attend to both leads to misunderstandings and reduction of communication).

\textsuperscript{110} Ruth Ann McKinney, Are We Hearing What They’re Saying? Active Listening Skills for Lawyers (unpublished manuscript presented at the Festival of Legal Learning, Chapel Hill, NC 1997) (copy on file with the author); see generally Carl Rogers, On Becoming a Person (Houghton Mifflin 1961).

\textsuperscript{111} Maddux, supra n. 16, at 37.
By thoughtfully integrating the teachings of self-efficacy theory into the structure of our writing programs and the realities of our writing classrooms, we can empower our students with the valid belief that they can develop the skills necessary to excel in the practice of law -- and then they will.
The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write

Kristen K. Robbins*

A recent survey indicates that what troubles federal judges most is not what lawyers say but what they fail to say when writing briefs.1 Although lawyers do a good job articulating legal issues and citing controlling, relevant legal authority, they are not doing enough with the law itself. Only fifty-six percent of the judges surveyed said that lawyers “always” or “usually” make their client’s best arguments. Fifty-eight percent of the judges rated the quality of the legal analysis as just “good,” as opposed to “excellent” or “very good.” The problem seems to be that briefs lack rigorous analysis, and the bulk of the work is left to busy judges. Many judges also indicated that lawyers often make redundant or weak arguments that detract from the good ones. What judges really want is shorter, harder hitting briefs.

I. INTRODUCTION

Lawyers are always admonishing lawyers to keep their audience in mind when they write: “[I]f you want to persuade judges and win legal arguments, you must understand what judges want and need, and adjust your presentation to satisfy them.”2 Although some judges have articulated what they do and do not find persua-

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1 Several research assistants and members of the Georgetown University family made this survey possible. I extend my heartfelt thanks to Erin Stockley, Michael Doherty, Carlos Gonzalez, Nicole Anzuoni, Lisa Sharlach, Joe Pettit, and Mike McGuire for helping me with this project.

sive, 3 “what judges want and need” remains to some extent a mystery. Knowing your audience and knowing how best to persuade it are two different things; one does not necessarily follow from the other. 4 Indeed, how audience concerns can and do affect writing is a complex and fascinating process. 5

Lawyers assume that judges can be researched and anticipated, and that a better understanding of a given judge will produce better results for their clients. A lawyer typically investigates a particular judge’s background and reads her opinions before crafting his arguments to that judge for the first time. Knowing that a judge has had experience with a particular area of the law and whether she has strong opinions on issues relating to the lawyer’s case is critical.

To write persuasively, however, a lawyer should know about more than just the judge’s educational background and knowledge of the subject matter. He needs to know the judge’s expectations with regard to the writing itself: What does she think is the goal of brief writing? What does she consider the most important characteristic of a well-written brief? What does she consider a well-reasoned argument? Does she expect to read well-reasoned arguments when she picks up a brief for the first time? Is she interested in reading all potential arguments or just the strongest ones? How much does she pay attention to grammar, punctuation, and spelling? What about citations? What about citations? In short, what is her overall attitude toward lawyers and the way they write?

3 See e.g. Joel F. Dubina, Effective Appellate Advocacy, 20 Litig. 3 (Winter 1994); Alex Kozinski, The Wrong Stuff, 1992 BYU L. Rev. 325.

4 The challenge that audience poses is confounded in the context of legal writing because lawyers write to please clients and supervising attorneys, as well as to persuade judges. “Writing a document for multiple audiences is difficult, particularly when each audience has a different background and reads it for a different purpose.” Debra R. Cohen, Competent Legal Writing — A Lawyer’s Professional Responsibility, 67 U. Cin. L. Rev. 491, 498 (1999) (footnote omitted).

5 “An essential part of the writing process is to determine the intended audience and then write for that audience. Although this is simple to state, it is hard to implement.” Cohen, supra n. 5, at 497 (footnote omitted). “The audience as it exists in the writers’ consciousness and as it shapes the text is a complex set of conventions, estimations, implied responses and attitudes.” Douglas B. Park, The Meanings of “Audience”, 44 College English 247, 313–314 (1982); see Lisa S. Ede, On Audience and Composition, 30 College Comp. & Commun. 291 (1979), in which Ede points out that “[c]onsider your audience” is “one of the most quoted and least understood of what might, for lack of a better term, be called composition commonplaces.”
In 1980, Fred Pfister and Joanne Petrick published a heuristic model for analyzing audience in written discourse. The model provides detailed questions for all kinds of writers to consider in anticipating their audience. The questions address four categories of information: 1) the nature of the audience itself, 2) the relationship between the audience and the subject matter of the writing, 3) the relationship between the audience and the writer, and 4) the best methods for persuading the audience. Lawyers generally have access to information regarding the first two categories, but


7 A Heuristic Model for Audience Analysis in Written Discourse

| The Environment of the Audience | What is his/her physical, social, and economic status? |
| Audience/Self | (age, environment, health, ethnic ties, class, income) |
| | What is his/her educational and cultural experience? |
| | Especially with certain patterns of written discourse? |
| | What are his/her ethical concerns and hierarchy of values? (home, family, job success, religion, money, car, social acceptance) |
| | What are his/her common myths and prejudices? |

| The Subject Interpreted by the Audience | How much does the reader know about what I want to say? |
| Audience/Subject | What is the opinion of the reader about my subject? |
| | How strong is that opinion? |
| | How willing is she to act on that opinion? |
| | Why does he/she react the way he/she does? |

| The Relationship of the Audience and the Writer | What is the reader's knowledge and attitude about me? |
| Audience/Writer | What are our shared experiences, attitudes, interests, values, myths, prejudices? |
| | What is my purpose(s)/aim(s) in addressing this audience? |
| | Is this an appropriate audience for this subject? |
| | What is the role I wish to assign to the audience? |
| | What role do I want to assume for the audience? |

| What are the best methods the writer can use to achieve cooperation/persuasion/identification with the audience? | What pattern/mode/development is appropriate? |
| Audience/Form | What tone? |
| | What diction, level of diction? |
| | What level of syntactic sophistication? |

Id. at 214.
this survey provides new and valuable information regarding the third and fourth categories: how judges feel about the way lawyers write and what they consider good legal writing. In short, it gives us a better idea of what judges “want and need.” By anticipating judicial audience in a broader sense, lawyers should achieve better writing and, in turn, better results.

II. SURVEY DESIGN

The survey consisted of twenty-nine questions, divided into four sections. The first section questioned judges about the goals of written advocacy and asked them how often the briefs they read meet those goals. The second section focused on the briefs themselves and asked judges to rate the quality of the writing in a variety of areas, including analysis, organization, tone, style, and mechanics. Sections III and IV invited written comments on the

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9 Although the assumption here that writing a better brief makes a difference in terms of ultimate outcome is quite common, it is subject to debate. The assumption is rooted in the notion that writers who are fully socialized into a particular discourse community will be more successful communicators. E.g. Joseph M. Williams, On the Maturing of Legal Writers: Two Models of Growth and Development, 1 Leg. Writing 1 (1991). Developing a better understanding of the judiciary’s expectations, therefore, hastens that socialization process.

Moreover, the adversarial system is based, in part, on the idea that judges should make decisions in response to the arguments presented by the advocates. As Justice Scalia has stated, “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); see U.S. v. Cherif, 943 F.2d 692, 699 (7th Cir. 1991) (holding certain arguments were waived because the appellant failed to present any argument in connection with the claimed errors). Therefore, a better-presented argument should yield better results.

Finally, the Rules of Professional Conduct mandate that advocates represent their clients with diligence and zeal. E.g. D.C. R. Prof. Conduct 1.3(a) (2001) (“A lawyer shall represent their clients with diligence and zeal.”); id. 1.3(b)(2) (2001) (“A lawyer shall not intentionally: Prejudice or damage a client during the course of the professional relationship.”); see Md. R. Prof. Conduct 1.3 (2001); Va. R. Prof. Conduct 1.3 (2000). This ethical responsibility seems to require that advocates write the best arguments they can and factor judicial expectations, when available, into their writing process.

10 A copy of the survey is attached as Appendix A.

11 Because my interest in legal writing has focused primarily on the construction of legal argument and the effective use of case law, I did not include a section in the survey that addresses statements of fact. Several judges pointed out this omission to me, and in
quality of advocates’ writing and how law school writing courses might assist in improving persuasive writing in practice.

III. THE RESULTS OF THE SURVEY

Although I suspected that judges would have strong opinions on this topic, the sheer number and intensity of their responses surprised me. Surveys were sent to all sitting federal judges on the supreme, circuit, and district court level (excluding senior and bankruptcy judges).¹² One Supreme Court justice, 68 (out of 163) circuit judges, and 286 (out of 601) district court judges responded to the survey.¹³ These 355 responses represent forty-six percent of all federal judges as of September 1999.¹⁴

¹² Confining the survey to the federal judiciary was necessary for logistical and financial reasons.

¹³ Responses designated as completed by judges’ clerks are not included in the reported results. It is possible that clerks completed surveys without my knowledge. It is also possible that judges completed surveys although their clerks are the primary brief readers and summarize them for the judge. I did not capture that information.

¹⁴ As the table below demonstrates, the survey results have a sampling error of ± three percent, at the ninety-five percent confidence level, given the similarity of the judges’ responses. See Priscilla Salant & Don A. Dillman, How to Conduct Your Own Survey 53–57 (John Wiley & Sons, Inc. 1994). In other words, ninety-five percent of the time, the true values should be within three percent of the stated results:

<table>
<thead>
<tr>
<th>Population Size</th>
<th>Sampling Error</th>
<th>±3%</th>
<th>±5%</th>
<th>±10%</th>
</tr>
</thead>
<tbody>
<tr>
<td>50/50 split</td>
<td>80/20 split</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50/50 split</td>
<td>254</td>
<td>185</td>
<td></td>
<td></td>
</tr>
<tr>
<td>80/20 split</td>
<td>358</td>
<td>85</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50/50 split</td>
<td>278</td>
<td>57</td>
<td></td>
<td></td>
</tr>
<tr>
<td>80/20 split</td>
<td>406</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Id. at 55.
The survey respondents represent the general population in terms of gender and age. Three hundred and ten (310) judges included their name in their response; 253 or eighty-two percent of these respondents were male, and 57 or eighteen percent of these respondents were female. This response rate reflects exactly the percentages of men and women in the federal judiciary. Three hundred and eight (308) of the respondents' ages were readily ascertainable. Of the 308, the vast majority — 248 or roughly eighty-one percent — is between the ages of 50 and 69. Again, as Figures 1 and 2 reflect, this is true in the general population.
Several judges declined to respond due to a stated policy not to answer surveys. One judge expressed his belief that his duty as a judge is to respond to cases and controversies and nothing else. Many judges also declined to answer because their busy schedules simply did not permit them to give a thoughtful and fair response. One — and only one — judge declined to answer on the ground that the survey was silly. In contrast, the number of responses suggests that many judges were quite interested in and excited by the subject of the survey. A few judges included articles that they liked or had authored on advocacy and writing. One judge graciously offered to visit my students and share his views on good legal writing. Finally, a few of the judges, some of whom did not

respond formally to the survey, submitted their thoughts or additional comments by letter.

Judges were asked to rate legal writing “as a whole,” which necessitated their generalizing about all briefs submitted to them. This proved to be a difficult task in some cases. Most judges, however, were willing to accept this inherent weakness in the process and supplemented their answers with written comments where they felt it necessary.

Four themes emerge from the judges’ responses to the survey: First and foremost, judges are critical of lawyers’ inability to use relevant, controlling authority to their advantage. The judges seem to think that lawyers can find the law, but they are not doing enough with it; the legal analysis in their briefs is mediocre. Second, judges value well organized, tightly constructed briefs second only to good legal analysis. For efficiency reasons, they seem to prefer traditional methods of organization, such as the use of a summary or roadmap of the arguments to follow and the placement of an advocate’s strongest arguments first. Third, “good writing” looks good. Judges value excellence in grammar, punctuation, and spelling as much as they do a fluid writing style and appropriate adversarial tone. Fourth and finally, judges use words like “concise” and “clear” to describe the best briefs. Of all the advice offered by judges to improve legal writing and the teaching of legal writing, the need to be concise and clear appeared most often.

A. Lawyers Need to Engage in More Sophisticated Legal Analysis

From the judges’ perspective, lawyers are achieving only half of the overall goals of persuasive writing. Judges were asked to rate the following goals of persuasive writing as essential, very important, somewhat important or not important:

- To identify the legal issue(s) for decision

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16 One circuit judge wrote,
The great difficulty in responding to your survey is that the variance in briefs’ quality is huge. Some so muddle the facts and law that teasing any sense out of them is a chore; others elegantly focus on the pertinent material in the law and in the record, so that little more than cogitation is needed from the judge. As a result my survey answers tend to be rather moderate, giving a sort of average answer that doesn’t actually apply to that many briefs.
• To inform the court about controlling legal authority
• To make the best arguments for the submitting party
• To refute the opponents' best arguments
• To provide policy reasons for deciding the issue in the submitting party's favor
• To change the law

Not surprisingly, eighty percent or more of the judges rated the first four goals as essential or very important. As Figure 3 illustrates, very few judges considered policy arguments and arguments to change the law as essential or very important.\textsuperscript{17}

\textsuperscript{17} Appellate and district court judges did not differ greatly with respect to the importance of these latter two goals. Only twenty-four percent of the appellate court judges and eighteen percent of the district court judges said that providing policy reasons is essential or very important; six percent of the appellate court judges compared with seven percent of district court judges said that aiming to change the law is essential or very important.
Should persuasive writing identify the legal issue(s) for decision?

Should persuasive writing inform the court about controlling legal authority?

Should persuasive writing make the best arguments for the submitting party?

Should persuasive writing refute the opponent's best arguments?

Should persuasive writing provide policy reasons for deciding the issue in the submitting party's favor?

Should persuasive writing aim to change the law?

**Figure #3**
Unfortunately, judges think lawyers meet only half of these goals with any assuring level of consistency. As Figure 4 illustrates, lawyers seem to have little problem identifying the legal issues and presenting the court with relevant, controlling authority. Eighty-six percent of the judges said that advocates “always” or “usually” identify the issues and seventy-nine percent said that advocates “always” or “usually” inform the court about controlling authority.

18 Judges were asked to indicate how often these goals are met: always, usually, sometimes, or never.

19 Similarly, seventy-two percent of the judges said that advocates “always” or “usually” cite sufficient authority in support of their arguments.

<table>
<thead>
<tr>
<th>Do advocates cite sufficient authority in support of their arguments?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Frequency</strong></td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td>Valid</td>
</tr>
<tr>
<td>Sometimes</td>
</tr>
<tr>
<td>Usually</td>
</tr>
<tr>
<td>Always</td>
</tr>
<tr>
<td>Total</td>
</tr>
<tr>
<td>Missing</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>
Apparently, though, lawyers are not doing enough with the law itself. Only fifty-six percent of the judges think lawyers “always” or “usually” make their clients’ best arguments.\textsuperscript{20} Perhaps worse, only thirty-one percent think lawyers “always” or “usually” refute their opponents’ best arguments.\textsuperscript{21} The image that comes to mind is that of the summer associate, who diligently researches a legal issue by submitting a notebook filled with copies of the pertinent cases. “So, what did you find?,” asks the assigning partner. “Oh, it’s all right here,” replies the associate. But the task too often falls to the senior attorney to figure out what the cases mean in the given context.

How would you rate the quality of the legal analysis in the briefs you receive?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td>Poor</td>
<td>4</td>
<td>1.1</td>
<td>1.1</td>
</tr>
<tr>
<td></td>
<td>Fair</td>
<td>64</td>
<td>18.0</td>
<td>18.3</td>
</tr>
<tr>
<td></td>
<td>Good</td>
<td>203</td>
<td>57.2</td>
<td>58.0</td>
</tr>
<tr>
<td></td>
<td>Very Good</td>
<td>76</td>
<td>21.4</td>
<td>21.7</td>
</tr>
<tr>
<td></td>
<td>Excellent</td>
<td>3</td>
<td>.8</td>
<td>.9</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>350</td>
<td>98.6</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Figure #7**

Judges, too, want to know what to make of the applicable law, and lawyers are missing a great opportunity to influence their thinking. Only twenty-three percent of the judges rated the quality of legal analysis in briefs as “excellent” or “very good.” As Figure 7

\textsuperscript{20} Similarly, only fifty-five percent of the judges indicated that advocates “always” or “usually” examine relevant legal issues in appropriate detail.

Do advocates examine the relevant legal issues in appropriate detail?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td>Sometimes</td>
<td>158</td>
<td>44.5</td>
<td>44.6</td>
</tr>
<tr>
<td></td>
<td>Usually</td>
<td>196</td>
<td>55.2</td>
<td>55.4</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>354</td>
<td>99.7</td>
<td>100.0</td>
</tr>
<tr>
<td>Missing</td>
<td></td>
<td>0</td>
<td>.3</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>355</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

**Figure #6**

\textsuperscript{21} As one judge indicated, an essential goal of persuasive writing is to “join the issue with the opponent’s position . . . [.] Too often I see two different lawsuits being argued.”
illustrates, most judges — fifty-eight percent — rated it as just "good." Although many judges indicated that the quality of legal analysis in briefs varies greatly, the lost opportunity to explain the import of the cited law comes through clearly in many of the judges' comments:

- Frequently analysis is superficial, relying on the case or cases that the writer subjectively thinks are helpful without sufficiently recognizing and rebutting contrary readings and without explaining how the law has developed.
- The bulk of briefs ... lack thoroughness regarding legal analysis.
- Counsel tends to state what they think is sufficient, but often will not adequately discuss the various implications of the issues.
- Too much of the brief is devoted to issues that are not in substantial dispute or there is too much emphasis on a point where the court is unlikely to base its decision.
- Counsel often waste words on trivial issues and neglect to focus more on the application of controlling case law to the particular facts of a case.
- Most of the briefs lack proper analysis of legal and factual issues. They ignore or gloss over obvious weaknesses in their argument and fail to address the compelling counterpoints of the other side.
- Advocates do not always apply relevant legal issues to the facts of the case at bar.
- Too often all lawyers do is cite cases. Rarely do they go a good job in analysis.
- We often get the feeling (law clerks and me) that the parties are satisfied simply to identify issues and leave the rigorous research and analysis to the court.

When lawyers do apply the controlling law to the facts, they are only moderately successful. Only nineteen percent of judges consider advocates' use of precedent in analogizing or distinguishing cases to be "excellent" or "very good"; no judges rated advocates' use of precedent as "excellent." As Figure 8 illustrates, fifty-four percent rated the use of precedent as "good," and twenty-five
percent rated it as just “fair.” One judge damned with faint praise the average lawyer’s ability to analyze precedent: “[T]he majority of advocates are able to analogize or distinguish on a somewhat superficial, though not necessarily inapplicable, level.” Another judge wrote, “The briefs are usually technically sufficient in the sense that they distinguish (or attempt to distinguish) factual differences (and sometime legal differences) between cases. They are often not good at grasping issue or thematic similarities and differences.”

How would you rate the quality of advocates’ use of existing precedent in analogizing favorable cases and distinguishing unfavorable cases?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poor</td>
<td>7</td>
<td>2.0</td>
<td>2.0</td>
<td>2.0</td>
</tr>
<tr>
<td>Fair</td>
<td>89</td>
<td>25.1</td>
<td>25.4</td>
<td>27.4</td>
</tr>
<tr>
<td>Good</td>
<td>189</td>
<td>53.2</td>
<td>53.8</td>
<td>81.2</td>
</tr>
<tr>
<td>Very Good</td>
<td>66</td>
<td>18.6</td>
<td>18.8</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>351</td>
<td>98.9</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
<td>0</td>
<td>1.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>355</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure #8

Fortunately, there is some good news with respect to lawyers’ current use of the law in persuasive writing. Judith Fischer reported in 1997 that “[m]isstatements of the law comprise a major category of attorney briefing errors.”22 Fischer cited several cases, state and federal, in which the attorneys’ failure to state the law accurately led to a variety of sanctions, including discipline by the appropriate bar, malpractice suits and judicial rebuke.23 The good news is that most federal judges think that lawyers are doing a decent job representing the law accurately. As Figure 9 illustrates, only three percent of the judges said that lawyers “always” or “usually” misrepresent the law they are citing in support of their arguments, and a mere 0.6% said that lawyers “usually” cite to “bad” law (i.e., reversed cases, repealed statutes, etc.)24 The over-

22 Judith D. Fischer, Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers’ Papers, 31 Suffolk U. L. Rev. 1, 5 (1997). Fischer cites federal and state cases in which courts have sanctioned lawyers for problems with poor organization and style, wordiness, poor grammar, spelling and typographical errors, punctuation errors, and citation errors. See id. at 20–30.

23 See id. at 5–19.

24 Judges were asked to indicate how often these mistakes occur: always, usually, sometimes, or never.
whelming majority of the judges indicated that lawyers only “sometimes” make these mistakes. The judges’ handwritten comments indicate that when lawyers do misstate the law, these misstatements take the form of citing cases for propositions they do not support.²⁵

Figure 9

<table>
<thead>
<tr>
<th>Percentage of Judges Who Feel Advocates Always, Usually, and Sometimes Misrepresent the Law or Cite to Bad Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1%</td>
</tr>
<tr>
<td>0%</td>
</tr>
<tr>
<td>0%</td>
</tr>
</tbody>
</table>

Do advocates cite to "bad" law (i.e. reversed cases, repealed statutes, etc.)?

Do advocates misrepresent the law they are citing in support of their arguments?

B. A Well-Organized Brief Is Second Only to Good Legal Analysis

Judges were asked to rank the following aspects of persuasive writing in order of their importance: legal analysis, organization, tone,²⁶ style,²⁷ mechanics,²⁸ and citation format. As one might ex-

²⁵ Sample comments include the following:
- They frequently overstate to aid a questionable argument.
- The mistake usually consists of citing a case for a proposition it does not support.
- Tendency to overstate relevance or stretch a holding beyond credibility.
- Represent cases stand for a legal principle when they do not.
- Claim case stands for more than it does (dicta).
- Advocates sometimes cite cases for erroneous propositions.
- Often, case holdings or testimony is taken out of context.
- Sometimes they overstate the support a case gives for their legal arguments.

²⁶ “Tone” refers to the advocates’ ability to strike the right balance between fairness and advocacy.
pect, Figure 10 reflects that the majority of judges consider legal analysis and organization — in that order — the two most important aspects of persuasive writing; citation format is considered the least important. Although it is difficult to separate written analysis from its organization, judges were more complimentary with respect to lawyers’ organizational skills. 29 Seventy-five percent of the judges rated the organization of briefs as “good” or “very good”; 30 no judges rated advocates’ organization as “excellent.” Similarly, ninety-six percent of the judges said that they have difficulty following advocates’ arguments only “sometimes.”

27 “Style” refers to the writing itself: Are paragraphs and sentences well constructed, do writers use strong topic sentences, do sentences and paragraphs flow together well, are words chosen carefully, etc.?

28 “Mechanics” refers to editorial concerns: Do advocates use proper punctuation, grammar and spelling, and are there many typographical errors?

29 Despite the cases cited by Fischer, supra n. 23, at 20–22, federal judges seem to think that lawyers, on the whole, do a pretty good job with respect to organizing their arguments.

30 Judges were asked to rate the quality of organization as excellent, very good, good, fair, or poor.

How would you rate the organization of the briefs (i.e. are arguments presented in a coherent, logical manner)?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td>Poor</td>
<td>.6</td>
<td>.6</td>
<td>.6</td>
</tr>
<tr>
<td></td>
<td>Fair</td>
<td>24.5</td>
<td>24.7</td>
<td>25.3</td>
</tr>
<tr>
<td></td>
<td>Good</td>
<td>56.1</td>
<td>56.5</td>
<td>81.8</td>
</tr>
<tr>
<td></td>
<td>Very Good</td>
<td>18.0</td>
<td>18.2</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>99.2</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
<td></td>
<td>.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure #11

31 Judges were asked to describe how often they had difficulty following advocates’ arguments as always, usually, sometimes, or never.

Do you have difficulty following advocates’ arguments?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td>Never</td>
<td>1.4</td>
<td>1.4</td>
<td>1.4</td>
</tr>
<tr>
<td></td>
<td>Sometimes</td>
<td>95.2</td>
<td>96.0</td>
<td>97.4</td>
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<tr>
<td></td>
<td>Usually</td>
<td>2.3</td>
<td>2.3</td>
<td>99.7</td>
</tr>
<tr>
<td></td>
<td>Always</td>
<td>.3</td>
<td>.3</td>
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</tr>
<tr>
<td>Total</td>
<td></td>
<td>99.2</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
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<td>.8</td>
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<tr>
<td>Total</td>
<td></td>
<td>100.0</td>
<td></td>
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</tbody>
</table>
When it comes to the organization of arguments, judges remain fairly traditional in terms of their expectations. Seventy-six percent of the judges said it is essential or very important to include an introductory paragraph that explicitly outlines the arguments to follow. Only twenty percent said it is somewhat important. Nearly the same number of judges — seventy-four percent — said it is essential or very important for advocates to put their strongest arguments first. Although confident legal writers

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**Figure #12**

Judges were asked to describe the importance of including an introductory paragraph or section that explicitly outlines the arguments to follow as essential, very important, somewhat important, or not important.

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
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<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid Not Important</td>
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<td>3.9</td>
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<tr>
<td>Somewhat Important</td>
<td>70</td>
<td>19.7</td>
<td>19.8</td>
<td>23.8</td>
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<tr>
<td>Very Important</td>
<td>185</td>
<td>52.1</td>
<td>52.4</td>
<td>76.2</td>
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<tr>
<td>Essential</td>
<td>84</td>
<td>23.7</td>
<td>23.8</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
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<td>Total</td>
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<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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**Figure #13**

Judges were asked to describe the importance of advocates putting their strongest arguments first as essential, very important, somewhat important, or not important.
might resist such formulaic convention, this audience seems to like and expect it. In response to the question of what advocates do best in legal writing, several judges indicated that the best briefs "[g]enerally begin with the most important issues," "emphasize the strongest arguments for their side," "[s]et forth early on their strongest arguments both legally and factually," "provid[e] the reader with a road map through the analysis, from strongest to weakest arguments," and "[m]ake an introduction that road maps the rest of the brief."

<table>
<thead>
<tr>
<th>Valid</th>
<th>Not Important</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid</th>
<th>Percent</th>
<th>Cumulative</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Important</td>
<td>22</td>
<td>6.2</td>
<td>6.2</td>
<td>6.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Somewhat Important</td>
<td>69</td>
<td>19.4</td>
<td>19.5</td>
<td>25.7</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>177</td>
<td>49.9</td>
<td>50.0</td>
<td>75.7</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Essential</td>
<td>86</td>
<td>24.2</td>
<td>24.3</td>
<td>100.0</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Total</td>
<td>355</td>
<td>100.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure #14


Many judges indicated that they have little time to wade through long, undifferentiated argument. See *infra* Part D. The judges' preference for straightforward organization makes sense given their desire to read as efficiently as possible.
C. *Judges Value Style, Tone, and Mechanics Equally*

Although the vast majority of judges agrees that analysis and organization are the most important aspects of persuasive writing, there is no clear third, fourth, and fifth place for tone, style, and mechanics. As Figure 15 illustrates, style is perhaps third, but only forty-seven percent of the judges ranked it third; twenty percent selected tone and twenty percent selected mechanics. The numbers for fourth place are very close: twenty-five percent chose style, thirty percent chose mechanics, and twenty-seven percent chose tone. As for fifth place, thirty-one percent chose mechanics and twenty-seven percent chose tone, but only six percent chose style. In other words, they all matter. Because different judges value these aspects of writing somewhat differently, the legal writer must take them all into account.
The survey indicates that judges think lawyers are performing only moderately well in these three areas: roughly fifty percent of the judges said that lawyers are doing a “good” job in each of these categories. However, as Figure 16 illustrates, a significant percentage — twenty-one percent, thirty-nine percent, and twenty-six percent — said that lawyers’ abilities range from poor to fair in mechanics, style, and tone, respectively. Only two percent rated mechanics as “excellent.” Twenty-six percent rated mechanics as “very good,” eleven percent rated style as “very good,” and sixteen percent rated tone as “very good.” Apparently, in addition to working better with the law, lawyers still need to brush up on — or develop — basic writing skills.

35 Judges were asked to rate the advocates’ performance as excellent, very good, good, fair, or poor.
36 For citations to opinions that discuss serious problems with grammar, spelling,
Regrettably, the survey did not elicit much data to explain specifically why advocates did not score better in these areas. However, as far as style is concerned, the judges’ opinions do not seem heavily influenced by lawyers’ use of arcane language. Ninety-seven percent of the judges said that lawyers “never” or “sometimes” use Latin phrases and/or legal jargon in a way that detracts from the writing’s persuasiveness.\textsuperscript{37} Either the Plain English movement is succeeding, in part, or more traditional legal writing does not trouble these judges. Second, with respect to “tone” or the lawyers’ ability to strike a balance between fairness and advocacy, the majority of judges does not seem to think that lawyers are behaving unprofessionally. Eighty-eight percent of the judges said that advocates “never” or “sometimes” characterize their opponents’ arguments unfairly,\textsuperscript{38} and ninety-eight percent typographical errors, and punctuation, see Fischer, supra n. 23, at 27–30.

\textsuperscript{37} Judges were asked to describe how often advocates use Latin phrases or legal jargon in a detrimental way as always, usually, sometimes, or never.

\textbf{Do advocates use Latin phrases and/or legal jargon in a way that detracts from the writing’s persuasiveness?}

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
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<td>Never</td>
<td>72</td>
<td>20.3</td>
<td>20.5</td>
<td>20.5</td>
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<tr>
<td>Sometimes</td>
<td>268</td>
<td>75.5</td>
<td>76.4</td>
<td>96.9</td>
</tr>
<tr>
<td>Usually</td>
<td>10</td>
<td>2.8</td>
<td>2.8</td>
<td>99.7</td>
</tr>
<tr>
<td>Always</td>
<td>1</td>
<td>.3</td>
<td>.3</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>351</td>
<td>98.9</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
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<td>1.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>355</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textbf{Figure #17}

\textsuperscript{38} Judges were asked to describe how often advocates unfairly characterize their opponents’ arguments to the court as always, usually, sometimes, or never.

\textbf{Do advocates unfairly characterize their opponent’s arguments to the court?}

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>3</td>
<td>.8</td>
<td>.9</td>
<td>.9</td>
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<tr>
<td>Sometimes</td>
<td>306</td>
<td>86.2</td>
<td>86.9</td>
<td>87.8</td>
</tr>
<tr>
<td>Usually</td>
<td>41</td>
<td>11.5</td>
<td>11.6</td>
<td>99.4</td>
</tr>
<tr>
<td>Always</td>
<td>2</td>
<td>.6</td>
<td>.6</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>352</td>
<td>99.2</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
<td>0</td>
<td>.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>355</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textbf{Figure #18}
said that advocates “never” or “sometimes” personally attack their opponents in an unprofessional manner.39

As legal writing professors have always suspected, judges base their opinions of a brief’s quality to some extent on its appearance. One judge stated:

Whether we mean to or not, we judges tend to become suspect of any argument advanced by an advocate who produced shoddy work. . . . I have little trust in an advocate who files a document that contains misspellings, poor grammar, or citation to “bad law.”

Another judge wrote, “The care with which an advocate proofreads a brief is usually indicative of the care with which he has made his argument.” It is no wonder, then, that these judges place as much significance on mechanics — grammar, punctuation, spelling — as they do on style and tone.

D. Judges Want Conciseness and Clarity in Legal Reasoning

The survey included four open-ended questions that asked judges what advocates do best and worst in persuasive writing, what additional comments they have with respect to the quality of advocates’ writing, and what law school writing courses should emphasize to improve persuasive writing in practice.40 Although the judges’ responses to each question vary widely, there is a

39 Judges were asked to describe how often advocates attack their opponents unprofessionally as always, usually, sometimes, or never.

Do advocates personally attack their opponents (parties or counsel) in an unprofessional manner?

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>36</td>
<td>10.1</td>
<td>10.2</td>
<td>10.2</td>
</tr>
<tr>
<td>Sometimes</td>
<td>311</td>
<td>87.6</td>
<td>88.1</td>
<td>98.3</td>
</tr>
<tr>
<td>Usually</td>
<td>6</td>
<td>1.7</td>
<td>1.7</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>353</td>
<td>99.4</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>Missing</td>
<td>0</td>
<td>.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>355</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

40 Judges interpreted Question 26, regarding what advocates do best in persuasive writing, differently. Some answered in terms of what the best briefs should do, while others answered in terms of what advocates generally do best. These multiple interpretations make it difficult to conclude what judges think with regard to the latter and intended interpretation.
strong, recurring, and unmistakable cry for conciseness and clarity.

Judges seem most interested in an advocate’s ability to be brief. From the judges’ perspective, conciseness is not aspirational, it is essential. Seventy-three of the 355 judges volunteered that the best briefs are concise; 70 said that the worst briefs fail to be concise; and 118 said that conciseness should be taught in law school writing courses.

When asked how important conciseness is to legal writing’s persuasiveness, ninety percent of the judges said that conciseness is “essential” or “very important.”41 However, none of the judges said that advocates are “always” concise, and only nineteen percent said that advocates are “usually” concise. In fact, seventy-five percent of the judges said that advocates are only “sometimes” concise.42

41 Judges were asked to rate the importance of conciseness in persuasive writing as essential, very important, somewhat important, or not important.

| How important is conciseness to the writing’s persuasiveness? |
|-----------------|-----------------|-----------------|-----------------|
|                  | Frequency | Percent | Valid | Cumulative |
|                  |           |         | Percent | Percent |
| Valid            |           |         |       |          |
| Not Important    | 2         | .3      | 6     | .6
| Somewhat Important | 33     | 4.3     | 9.3   | 9.5
| Very Important   | 216       | 28.3    | 61.0  | 70.5
| Essential        | 103       | 13.5    | 29.1  | 100.0 |
| Total            | 354       | 46.5    | 100.0 |
| Missing          | 0         | .1      |       |          |
| System           | 407       | 53.4    |       |          |
| Total            | 408       | 53.5    |       |          |
| Total            | 762       | 100.0   |       |          |

Figure #20

42 Judges were asked to describe how often advocates write concisely as always, usually, sometimes, or never.

| Do advocates write concisely? |
|-----------------|-----------------|-----------------|-----------------|
|                  | Frequency | Percent | Valid | Cumulative |
|                  |           |         | Percent | Percent |
|                  |           |         |       |          |
| Valid            |           |         |       |          |
| Never            | 22        | 2.9     | 6.2   | 6.2  |
| Sometimes        | 264       | 34.6    | 74.8  | 81.0 |
| Usually          | 67        | 8.8     | 19.0  | 100.0 |
| Total            | 353       | 46.3    | 100.0 |
| Missing          | 0         | .3      |       |          |
| System           | 407       | 53.4    |       |          |
| Total            | 409       | 53.7    |       |          |
| Total            | 762       | 100.0   |       |          |

Figure #21

Fischer cites several cases in which courts sanctioned or rebuked advocates for excessive
The frustration felt by judges is apparent in their handwritten comments. In response to Question 27, on what advocates do worst, some of the judges said:

- Ramble on.
- Their briefs are almost invariably too long and frequently repetitious.
- Write for the sake of writing. They do not edit and boil matters down to their essentials.
- Lengthy, rambling briefing in which it is difficult to discern the point.
- Too long, too repetitious and meandering.
- Making the briefs excessively long and incomprehensible.
- Verbosity and over citation.
- Often important and concise points are lost in a sea of irrelevant points.
- Length of virtually all briefs, excessive. Briefs far too long.
- Unfocused, imprecise and verbose writing.
- They write too much and dilute their arguments.
- Repeat arguments ad infinitum.
- Is verbosity a synonym for attorney?
- Write too much.
- Too lengthy and not really doing a good job of addressing the issues.
- Fail to write short, clear, “to the point” briefs.
- Unnecessary volume.
- In sum, the briefs — usually a misnomer — are too long and do not focus on the critical issues in the case.

The gravity of this problem from the judges’ perspective is even more apparent in their responses to Question 29, on what law schools can do to improve persuasive writing in practice. As these
comments illustrate, the time pressure felt by these judges greatly influences their recommendations:

- You need to stress the need to write clearly and concisely. We are *drowning* in 50 page briefs that are poorly written when the case should have been presented in a 20 page brief.

- A brief can be brief. Please tell your students that I have a lot to do and little time to do it. Write a brief that I can adopt as my opinion with a straight face and you will please me.

- How to say something concisely and once!

- Shorter, but harder hitting briefs.

- We read about 1000 pages a day and don’t have time for rambling briefs that are poorly organized.

- Brevity, brevity, brevity.

- Legal research and writing courses should continue to stress well-organized, clear and concise writing. Judges’ time is limited and cannot be wasted on bombast and personal attacks.

- Judges and their clerks have limited time and *hate* long briefs and rambling arguments.

- We don’t have time for unnecessary arguments.

- Remind the students that as they learned in English 101, clarity and brevity are virtues.

- It’s not “good” because it’s long, exhaustive and complex.

- Conciseness! Remember the burden of paperwork the courts face.

- Excessive length may hurt your case.

- Encourage brevity and precision.

- Students should be made to understand that, in today’s world of crowded dockets, a judge has only a limited amount of time to devote to each case and that the good advocate must be sure that none of that time is wasted. If briefs are too long, the judge’s attention will often stray and the good arguments will be lost in the sea of irrelevance.
As the judges' comments indicate, conciseness means presenting fewer arguments as well as writing shorter sentences.

Many judges also indicated that "clear" language contributes to good writing and should be taught in law schools. The judges did not mention "clarity" nearly as often as they mentioned "conciseness," but its recurrence in the judges' comments is noteworthy. For example, in response to Question 26, on what advocates do best, several judges said they "state clearly . . . what the case is about and why the court should affirm or reverse," "[m]ake things clear and interesting," "clearly and concisely identify and analyze the issues presented," and "state their positions clearly." Conversely, the worst briefs "read like a Joycean stream-of-consciousness and seem to have no theme or clear purpose," "are anything but" clear, "muddy up the water," "cloud the main issues with trivia," or contain "fuzzy, imprecise thinking and writing, leaving the reader to guess or assume as to the meaning."

"Clarity" is as elusive and opaque a concept as "audience." Of all the terms associated with good writing and the teaching of writing, it is perhaps the most difficult to define. What does it mean to write clearly? If something is clear, it is transparent, invisible. Surely, to write clearly does not mean to write something that cannot be seen. What, then, is it possible to see when the words themselves become see-through?

"Clarity" is often used to describe writing when the reader's — or the judge's — primary concern is with the text itself, in this case, the brief. The emphasis on the need for "clear" language may reflect the judges' implicit belief that language does not create

\[43\] Several judges said:

- Most brief writers tend toward redundancy and over argument. They also tend to raise more issues than are necessary to present the case.
- "[A]void the "everything but the kitchen sink" — in no particular order syndrome.
- Teach students not to throw in the kitchen sink. Shorter, sharper arguments are more likely to be winners.
- Avoid the shotgun approach to advocacy.

\[44\] In this regard, some judges advised:

- Keep the sentences short. Use action verbs.
- Shorter, more pithy sentences.
- Shorten the sentences.

\[45\] As indicated earlier, the briefs' lack of clarity does not appear due to a failure to use plain English. supra n. 38.
meaning; it is a transparent medium for meaning.\textsuperscript{46} In some sense, the content of the writing — the advocate’s arguments — is assumed to exist apart from the writing itself, and the advocate’s brief simply articulates those arguments. This traditional view of writing dominated writing pedagogy until the 1970s and 1980s, when the expressivists and cognitivists began to challenge and supplement this formalistic approach. At that time, the importance of the writing process emerged, including an interest in the way individual writers actually compose.\textsuperscript{47} Later, the context in which writing functions — the social construct — became important in thinking about ways to write and teach writing.\textsuperscript{48}

Although legal writing instruction has incorporated, in part, these newer writing pedagogies, a traditional approach to writing prevails both in the classroom and the courtroom. The survey responses that praise briefs for their “clarity” are perhaps good reminders of the judges’ educational background and perspective. Most, if not nearly all, federal judges were trained to write — both in undergraduate and law school — in the formalist tradition, well before the process and social constructionist approaches found their way into law school writing curricula in the late 1980s and early 1990s. As a result, judges predictably use words like “clear” to describe good writing. They sense that the advocate has a decent argument to make, but he has failed to express it well in writing. To the contrary, it may be that the advocate has not formed a well-reasoned argument, and the writing reflects that weakness.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{46} E.g. J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35, 49 (1994).
\item \textsuperscript{47} E.g. Peter Elbow, Writing without Teachers (Oxford U. Press 1973); Janet Emig, Writing as a Mode of Learning, 28 College Comp. & Commun. 122 (1977); Linda Flower, Writer-Based Prose: A Cognitive Basis for Problems in Writing, 41 College English 19 (1979); Linda Flower & John R. Hayes, The Cognition of Discovery: Defining a Rhetorical Problem, 31 College Comp. & Commun. 21 (1980).
\item \textsuperscript{48} E.g. Kenneth A. Bruffee, Thinking and Writing as Social Acts, in Thinking, Reasoning and Writing 213 (Elaine P. Maimon et al. eds., Longman Group 1989). For a more complete discussion of the evolution of writing pedagogy and its parallel in legal writing education, see Rideout & Ramsfield, supra n. 47, at 49–60.
\item \textsuperscript{49} The next logical question, of course, is how to produce “clearer” writing for the audience that demands it. That is, in part, the subject of my next article, in which I plan to develop the idea that “clarity” in writing really means reasoned thinking and better use of case law. “Unclear” writing is not simply a failure in translation from the mind to the written word, but the manifestation of unformed or weak argument. To improve the quality of legal analysis is to improve the clarity of the writing. Legal writing professors, in particular, need to find better ways to describe and teach persuasive argument. My next article
\end{itemize}
IV. CONCLUSION AND RECOMMENDATIONS

So, what do judges really think about the way lawyers write? On the whole, advocates are doing a “good” job but not much better than that. Advocates identify well the relevant, legal issues and cite the appropriate, controlling law, but they need to engage in hard-hitting, intelligent, and honest legal analysis. Citing the law is inadequate; advocates need to tell judges explicitly how the law supports their position, instead of hoping the judge will figure that out for them. Furthermore, when advocates analogize to or distinguish case law, they need to look beyond the facts, to the issues, themes and policies involved in those cases.

As the judges’ handwritten comments make clear, judges feel tremendous time pressure when called upon to read briefs. Perhaps as a result of this pressure, judges seem to prefer “tried and true” organizational forms, including summaries of or “roadmaps” to arguments and the selection of fewer, strong arguments arranged in their order of importance. In addition, good briefs still have to look good, and judges seem to value equally excellence in style, tone and mechanics. Although some lawyers still need to brush up on their basic writing skills, judges are more concerned about pithy legal analysis than good grammar. Judges don’t care much about citation format, but they will fault advocates for sloppy work.

The overwhelming message from judges is that they want briefs that are concise and clear. Again, because they are so busy, judges do not seem to have enough time or energy to figure out what an advocate is trying to say; he must argue “clearly.” Moreover, if an advocate takes ten pages to say what the judge perceives could have been argued in four, he runs the risk of annoying the judge or worse. Judges seem to want more legal analysis in less space. Although these demands seem to be inconsistent, they do not need to be. Judges do not necessarily want more, but better analysis.

will focus on the rhetorical underpinnings of legal argument with which students need to be explicitly acquainted and illustrate typical flaws in legal reasoning that students can easily identify and eradicate.
The Metaphysics of Courses in Legal Writing

Lynn N. Hughes

The significance of legal writing courses in law school – especially as exemplified in the plain language effort – depends on what legal education itself means. The first question is: What should law schools do? The second question is: How does legal writing fit that mission?

Law school would do well doing two things. Legal education should immerse the student in the cultural heritage of Anglo-American jurisprudence. This is the vocabulary of law – the labels and processes evolved over 400 years to resolve conflicts and to ensure expectancies.

Next, legal education should invigorate the students’ capacity for critical thinking – develop their rational faculty so that they may discern patterns, draw analogies – so they may have a sense of relevance.

Law schools have three types of courses: Principled, practical, and pretty. Principled courses are those dull basics like contracts and property; they are the large lumps of legal culture. Although they are far from elemental truth, they are the conceptual foundations – our frames of reference. These frames of reference may not be as tidy or progressive as some would have them, but they do have the virtue of experience. The percentage of course-work spent on the principled topics is declining.

Practical courses are those that familiarize the students with the mechanics of the legal enterprise, like legal bibliography and moot court. These courses have a modest but legitimate role in helping the students acclimate themselves to the tools and workshops of law. An excess of mock trial or law review, however, produces a shell of a lawyer – something between a mannequin and an android – technical skill without perspective or imagination.

Pretty courses are those that are derived from professorial niches or terminal socio-political trendiness. Here we have the growth industry of the “law &” courses. Look at your catalogues: Law and psychology, law and sexuality, law and music. Here too we have the free-floating ideological self-indulgences like critical
legal studies. Places where there are no data and no testable hypotheses – just felt visions.

To illustrate the problem of legal education take the example of a legitimate course like securities regulation. While we may need professorial experts in that particular specialty, we are looking at law school as education. If a student learned securities regulation, she might be able to say what the specific rule required at that moment. On the other hand, if she had mastered contracts, torts, and agency, she could teach herself securities law in an afternoon or two. Most important, she would have a sense of why it is the way it is and whither it might be tending. Teaching law through a course in sports law is like teaching physics through a class in T.V. repair.

Legal writing has an aspect of the practical. It has nuts and bolts, but those details are merely the fringe. The bulk of legal writing addresses – and addresses cogently – the second great purpose of law school: critical thinking. Teaching grammar is not teaching English. It is teaching logic. As the Rice physicist Pol Spanos says, “Words in a sentence are terms of an equation.”

Forms of argumentation and styles of persuasion can be taught as superficial tools. But mostly, to use an old-fashioned term, legal writing teachers give courses in rhetoric. Exposition – oral or written – can only be successful as the product of thinking. It is impossible to improve a student’s text without improving the thought expressed. As the student’s text improves, her jurisprudence improves.

Students arrive at law school with precious little experience of converting what they think into words on paper. Like most important or beautiful things, craftsmanship in exposition requires work. No one happens to play the violin. No one happens to write.

The trouble with legal writing is that it is too essential, too basic. On it, though, depends the usefulness of whatever it is that they may learn in seminars about Marxist perspectives on international trademark law or in contracts, if it is even offered anymore.

The substantive professors may say scholarship but they practice pedantry. Substance lies in molding – no, in freeing – the minds entrusted at great cost to law schools toward a constructive and productive rigor. Footnotes and quotations – those hallmarks of modern scholasticism – are neither analysis nor explication.
The substance of a course should be judged by — and only judged by — its effect on the mind. By this standard, legal writing classes are substantive.

Even a student who knows all the arcana of jurisprudence has her life as a lawyer truncated if she has not mastered what teachers of legal writing offer. Legal writing affords the student the ability to fuse culture and analysis in exposition. The facts of our heritage must be applied with the force of reason to old problems in new contexts — to old conflicts in new media.

The work you will have done in legal writing courses empowers the student to have a useful role in the economy, in our society, and in law. This role is more than the mindless replication of the forms of law — pleadings, depositions, courtesy copies. The common phrase "going through the motions" has an awful double resonance in law.

This role is a lawyer who creatively combines her foundation in the concepts and modes of law with her habits of keen analysis so that a condition is ameliorated, a problem solved, a bargain struck, a hope fulfilled. We teach the mechanics of language not so that the students will be proficient in the mechanics of language but so that they will live in the habit of paying attention to language — the only repository of meaning.

Thank you from their future clients.

Thank you from the future of the rule of law itself.

Thank you.

Lynn N. Hughes is a United States District Judge in Houston. He was educated by the University of Alabama, B.A., University of Texas, J.D., and University of Virginia, LL.M.

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Presentation of the Golden Pen Award

Jane Kent Gionfriddo

The Legal Writing Institute presents its second Golden Pen Award to Don LeDuc, Dean of the Thomas M. Cooley Law School. More than 15 years ago, Dean LeDuc placed his legal writing faculty on the tenure track. And in the years since, he has continued to publicly and forcefully advocate that legal writing be treated as an academic discipline like any other in law school. Dean LeDuc has done pioneering work to improve law school writing programs and the state of legal writing in the profession.

Let's be candid. As much as I would have it otherwise, I have not been accorded this high honor for the quality of my writing. Though I may yearn to be recognized for the clarity of my prose, I know, alas, that I do not measure up.

I acknowledge that this award recognizes my support of what the Legal Writing Institute holds dear – the plain English movement, the campaign for better writing within the legal profession, and, especially, the effort to achieve equal status for legal writing professors within law schools. This award comes my way because Thomas M. Cooley Law School represents what members of this organization wish were the norm in legal education – full recognition of the value of good legal writing and of the right to equal partnership on law-school faculties for those who teach it.

In 1982, I became Dean at Cooley. At the time, like most schools, we treated our one full-time clinician, without much thought, as unworthy of faculty status, and we operated our legal writing program through adjunct faculty. Yet, we were then, as we are now, a school whose mission was to prepare its graduates for practice.

It seemed to me that we could not fulfill that mission if we did not recognize the importance of legal writing and skills training. And it naturally followed that the only way to do that was to bring the clinician and the writing teachers into the full-time faculty.

We had some grant funds to support our clinic, which still specializes in the legal problems of the elderly, so the major cost was to upgrade the clinician's salary to that of our other faculty members. Because the clinic was started by a full-time faculty member and was already supported by the faculty, the conversion went relatively well. Today, we have five tenure-track faculty members whose primary assignment is in the Sixty-Plus Legal Clinic.
Creating a legal writing program and integrating the adjunct faculty into the full-time faculty did not go quite as smoothly. Again, our faculty was generally receptive to the idea, especially when one alternative posed was to have every professor teach research and writing. The harder sell was with our Board of Directors, which naturally was concerned about the cost; all of them had been taught by adjuncts, and, like all lawyers, they considered themselves to be good writers.

While I had some idea of what I wanted to accomplish, I really had no clue about how to structure a research-and-writing program. So I talked it over with our adjunct faculty and offered them the chance to join the full-time faculty. At the time, I thought that about three years would be all I could expect anyone to endure in this assignment, and I told them so. The idea, as I recall, was that after that time, if they so desired, they could move on to other assignments and be replaced in the writing program by newly hired faculty.

More than 15 years later, both these professors still teach research and writing as tenured professors. What they did for Cooley has repaid the initial investment over and over. Cooley now has eight full-time tenure-track professors whose primary assignment is research and writing.

Over the years, I have come to appreciate that the original idea was pretty good for teaching students about practicing law. More now even than then, I recognize that careful analysis and good writing are the lawyer's art. As the verbal skills of those leaving our colleges deteriorate, the need for solid programs in the law schools increases.

But I now realize that the best result of making our legal writing and clinical professors equal members of the faculty was that it's so good for our school and our faculty. These faculty members work as hard and as devotedly for our students' benefit as could be asked of any faculty member. They provide the sustained personal contact with our students that helps the students appreciate our desire for them to succeed as students and practitioners. They set a great example for all of our faculty, make all of us better at what we do, and keep our faculty on its toes. Thanks to them, no one sends a memo or writes a document without heeding what we hear from our legal-writing professors.
Our skills programs have helped put Cooley on the map to an extent we could never have hoped to achieve had we maintained a conventional approach. We now require six credit-hours of legal research and writing, and three credit-hours of clinical experience.

Cooley is not alone. A number of law schools have gone in the same direction with their clinicians or legal-writing professors or both. Some deans even admit to having started their careers in legal-writing programs. Yet at most schools, those who teach skills remain second or third-class citizens.

It seems odd that this should be so. The American Bar Association, through its accrediting process, has imposed only limited requirements on law schools for what should be included with the curriculum, but skills and legal writing have been identified as essential. Here are the relevant standards:

Standard 302(a): All students in a J.D. program shall receive: (1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession; and (2) substantial legal writing instruction, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.

Standard 302(b): A law school shall require all students in the J.D. degree program to receive instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.

Standard 302(c): A law school shall offer in its J.D. program: (1) adequate opportunities for instruction in professional skills; and (2) live-client or other real-life practice experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.
Standard 302(d): The educational program of a law school shall provide students with adequate opportunities for small group work through seminars, directed research, small classes, or collaborative work.

According to the ABA Standards, law schools must provide at least two rigorous writing experiences; they must instruct in legal analysis and reasoning, legal research, problem-solving and oral and written communication; they must teach some form of professional responsibility; and they must provide instruction in professional skills and offer live-client or other real-life practice experiences through clinics or externships.

As far as the ABA is concerned, schools can determine the content of the educational program in their individual discretion. They can chose to teach contract law or not, they can make study of the Constitution an elective, and they can decide that their students need not take evidence in order to graduate. They can be trusted to do the right thing in most aspects of the educational program, but they cannot be trusted to make sure their students learn how to practice law.

Oddly, although the skills and writing courses are so important that schools cannot be left to their own judgment about whether they should be offered or not, the ABA then endorses a scheme that relegates those who teach these courses to the second- and third-string among law faculty.

Standard 405(c), which requires tenure for full-time faculty, lets schools off the hook when it comes to clinicians by requiring only "a form of security of position reasonably similar to tenure." Standard 405(d) gives even less status to legal writing instructors than to clinicians, who at least get some form of job security: "A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom."

This inconsistency between the importance of legal writing as identified in the curricular standards and the importance of those who teach it as identified in the faculty standards is evidenced in another provision. Standard 404 allocates the major burden of a
law school's educational program to the full-time faculty, but does not mandate that the full-time faculty must teach the courses in the three areas identified in the Standards as most important — skills, research and writing, and professional responsibility. And, reminiscent of that infamous constitutional provision, those who are not on the tenure track are still counted as partial faculty for student-faculty ratio purposes through Interpretation 402-1: "Clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load: 0.7" (as compared to full-time faculty members).

The explanation for this anomaly is money and prestige. The ABA's accreditation process is controlled by full-time faculty and deans who tend to come from and return to full-time faculty positions. Tenured faculty positions are expensive. Despite identifying the teaching of skills and legal writing as essential to accreditation, those who control the accreditation process cannot impose upon themselves and others the mandate that schools treat these positions as financial priorities.

And including legal writing teachers within the ranks of the tenure-track faculty elevates them to parity with the established "other" faculty, whose devotion is largely to scholarship rather than to students, at least at many schools. I will admit that I'm offended by elitism, hypocrisy, and the academic caste-system mentality that I have come to recognize in the law schools during the 27 years that have passed since I became a law professor. I can understand the economic argument, even though I don't agree with it. But I cannot abide the attitude that those who actually prepare our graduates for practice and who hone the skills that will protect their future clients are somehow lesser beings, undeserving of the same stature as so-called "stand-up" faculty.

What I say is perhaps offensive to some and alarming to others, but it is nonetheless true. If the legal-education community wishes to respond to the criticisms of the bench and bar and to implement the recommendations of the ABA's MacCrate Committee about preparing graduates for practice and teaching skills and values, it should abandon its double standard toward legal writing and skills teachers and admit them to full partnership. I am convinced that if the law schools open their faculties to skills teachers, they will find, as Cooley has, that those who teach legal writing and practice skills are great partners in the educational enterprise.
I accept the honor you bestow upon me in its true spirit. I’m grateful that you have ignored my limitations as a writer. I’m proud to be a symbol and to receive this award on behalf of all the law schools, deans, professors, and legal writing teachers who have recognized the value of good writing and who are working so hard to secure its rightful place in the law school world.

Don LeDuc
Dean
Thomas M. Cooley Law School
On December 17, 1998, I sat in a mall café and revised an appellate brief. The brief had been a work in progress for almost three months. My team and I were laboring to convince the United States Court of Appeals for the Fourth Circuit that our client, an inmate who alleged that a prison warden had violated his First Amendment rights by opening and inspecting his outgoing mail, had stated a viable cause of action. My job was to answer the threshold question: Whether our client had standing to bring his claim despite failing to allege any actual harm caused by the prison’s inspection practice.

The warden argued that my client did not have standing because he neither claimed monetary damages nor sought injunctive relief (the prison had abandoned its practice of opening and inspecting all outgoing mail shortly before my client filed his case). My assignment for the brief was to persuade the Fourth Circuit that the warden was wrong. Throughout my drafting process, I argued that my client was not required to prove an actual injury to state a claim for nominal damages to vindicate his First Amendment rights. But my attention (and my argument) focused on my alternate argument, convincing the Fourth Circuit that my client suffered an actual injury for standing purposes because the prison’s practice had a “chilling effect” on my client’s free speech rights.


During the first two months, I turned in dozens of drafts, each time getting a fresh set of comments from my clinic supervisor. But on December 17th, I thought I was almost done. Indeed, the filing deadline was fast approaching. Maybe I needed to write more dynamic topic sentences and point headings, create smoother transitions, check verb tenses and word choice, but that was all.

You can imagine my dismay when I walked into my supervisor's office that morning and was hit with a barrage of questions. They were actually more like orders masked as questions, each one commanding an answer that required more than just turning over another draft: "Why don’t you need to begin with the definition of standing in the First Amendment context?" "This entire section that discusses the ‘chilling effect’ on free speech is not relevant, is it?" Frustrated, here was how I instinctively responded to his questions: "You should have told me this after my first draft three months ago," and "You told me I needed this ‘chilling effect’ section." My clinic supervisor sent me away to "turn over" another draft.

After I got past the initial shock, defensiveness, and exasperation from this meeting, and after staring blankly at a computer screen for two hours that afternoon, I threw my schoolbag in my car and went Christmas shopping. Try as I might, I could not stop thinking about my brief. I asked myself, "Why was I giving up on my opening argument?" As I walked from store to store, I bounced from idea to idea. Then, the ideas began to connect, and, within just a few minutes, I had developed a new angle, a new theory.

As I contemplated my original assignment, I realized that my client's strongest argument was that he was entitled to nominal damages to vindicate his free speech rights, regardless of whether he sought actual compensatory damages or injunctive relief. I finally saw that my supervisor’s comments made sense. My original argument did not work. The Fourth Circuit would likely reject my argument that the prison’s “open and inspect” policy had a “chilling effect” on my client’s free speech rights because the prison had already abandoned that policy. Therefore, I modified my “chilling effect” argument to support my new theme that my client had standing to sue for nominal damages because the prison had violated my client's free speech rights with its former policy. The “chilling effect,” demonstrated by my client's reluctance to express himself openly in his outgoing mail, was evidence of this prior violation and the prison’s abandonment of the policy could not erase
that harm, albeit nominal harm. While doing laps around the mall, I began to see my case differently.

So I walked to a café and redrafted my brief. I furiously scrawled notes in the margins and on the backs of pages, addressing many of my supervisor's concerns and most of my own. I wove the "chilling effect" case law together with my new theory that the prison could not simply erase damage that had already occurred by changing its policy. In short, I revised my brief: Deleting a section, adding paragraphs, cutting and pasting pieces of text. In the end, I could easily count the small number of sentences that remained undisturbed.

Writing this brief taught me that revising is writing and that writing is revising — the two processes cannot be separated. Because writing is a recursive process that calls upon the writer to "see" many things at once, revision must serve as more than the last stage on an assembly line where the writer corrects errors. Instead, revision, literally "re-vision," is best viewed as "re-seeing," a process by which the writer becomes his reader with new eyes in order to see in his text what the reader will see.

Recognizing that no single formula constitutes "expert revision," this Article demonstrates that most experienced writers engage in at least three different types of "re-seeing" activities when they revise: Resolving dissonance in their texts, reconceiving the

\[2\] Donald M. Murray, Internal Revision: A Process of Discovery, in Research on Composing: Points of Departure 85, 87 (C.R. Cooper & Lee Odell eds., Natl. Council of Teachers of English 1978). Murray argues that writing is rewriting. Id. He defines revision as "what the writer does after a draft is completed to understand and communicate what has begun to appear on the page." Id.

\[3\] Infra § III (emphasizing the dynamic role of revision in a recursive model of the writing process).

\[4\] Nancy Sommers, Revision Strategies of Student Writers and Experienced Adult Writers, 31 College Composition & Commun. 378, 382 (1980). In her case study of college freshmen in their first semester of composition, Sommers notes that inexperienced writers have a certain "blindness" when they write, which is "the inability to 'see' revision as a process; the inability to 're-view' their work again, as it were, with different eyes . . . ." Id.

\[5\] Id. at 385. Sommers explains that "at the heart of revision is the process by which writers recognize and resolve the dissonance they sense in their writing." Id. By seeing and resolving conflicts in their intention or execution, Sommers argues that experienced writers use the revision process to create and refine meaning. Id.
possibilities of their texts, and revisiting their original decisions. As composition theorists have noted, these revision activities often overlap with one another, and recur throughout the writing process.

This Article encourages the legal community to recognize what composition theorists have acknowledged for decades: New legal writers can write better right away by implementing the "re-seeing" revision habits of experienced writers into their writing processes. Section I explains that novice writers must abandon any allegiance to the traditional model of the writing process, the stage process model, because this linear theory does not adequately explain the complexities of the writing process. Instead, the recursive model more accurately describes the writing process because writers continually move back and forth among various writing activities such as prewriting, writing, and revising when they compose. Under this recursive model, revision serves as more than a final stage where the writer corrects errors. Revision in a recursive model of the writing process is a tool for discovery. The writer switches roles and becomes the reader to see his work from a different perspective, to re-see his text.

6 Carol Berkenkotter, Decisions and Revisions: The Planning Strategies of a Publishing Writer, 34 College Composition & Commun. 156, 162-163. In her study of composition theorist Donald M. Murray's revision habits, Berkenkotter explained that Murray often "collapsed planning and revising into an activity that is best described as reconceiving." Id. at 162. She defines "reconceiving" as scanning and rescanning "one's text from the perspective of an external reader and to continue re-drafting until all rhetorical, formal, and stylistic concerns have been resolved, or until the writer decides to let go of the text." Id.

7 Many writers' decisions relate to how they define their rhetorical problem. Linda Flower & John R. Hayes, The Cognition of Discovery: Defining a Rhetorical Problem, 31 College Composition & Commun. 21, 25 (1980) (explaining that a writer's rhetorical problem has external components such as the audience and assignment and writer-created goals such as how the writer wants to affect the reader, build meaning, and produce text). Similarly, many legal writers' original decisions relate to their original rhetorical decisions, such as their intended purpose, audience, scope, and stance. J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35, 75-76, 94 (1994). Professors Rideout and Ramsfield explain that legal writing calls upon writers to make various "rhetorical choices, choices that are best made when fully informed by the social contexts surrounding any act of writing and by the conventions and practices of legal discourse." Id. at 72. Because legal writers face many choices, they should begin each project by identifying their purpose, audience, scope, stance, and context. Id. at 94; see Jill J. Ramsfield, The Law as Architecture: Building Legal Documents 22-28 (West 2000) (analyzing how legal writers utilize the "rhetorical elements" of purpose, audience, scope, and stance).

8 Infra nn.16-18 (explaining recursive model of the writing process).
Section II highlights the results of my study, which compared the revision habits of first-year law students with those of experienced legal writers. My survey demonstrates that the experienced legal writers distinguish themselves from new legal writers in their ability to re-see their texts when they revise. The new legal writers who participated in my survey generally focused their revisions on micro-revisions, revisions aimed at correcting surface errors, such as spelling, grammar, and word choice. On the other hand, the experienced legal writers that I surveyed were dynamic revisers who attended to micro-revisions but who also addressed macro-revisions, revisions that affect how writers organize and present their ideas to their audiences.

Section III analyzes how new legal writers can learn to revise like experienced legal writers. Section III demonstrates that experienced legal writers revise by re-seeing their texts. Specifically, experts revise by resolving dissonance in their writing, by reconceiving the possibilities of their work, and by revisiting their original rhetorical decisions. Section III concludes that novice legal writers who incorporate these revision habits of expert legal writers into their own writing processes will become more effective legal writers.

I. THE TRADITIONAL STAGE PROCESS MODEL OF WRITING IS INACCURATE BECAUSE IT FAILS TO ACCOUNT FOR THE RECURSIVE NATURE OF WRITING.

A. The stage process model fails because writing is not an assembly line activity.

The traditional model of the writing process, the "stage process" model, suffers from its limited ability to describe how writers actually compose. This model suggests that writing is a linear process, separated into discrete stages that are performed at different times; each stage calls upon the writer to perform specific,

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compartmentalized tasks.\textsuperscript{10} According to this model, writing begins with prewriting where a writer plans her thesis, then she writes it, performs whatever rewriting or revising that is necessary, polishes it, and turns in the finished product.\textsuperscript{11} This description is convenient. It sounds easy, antiseptic even. Viewing the writing process in linear stages suggests that a writer composes on an assembly line: prewriting, writing, rewriting, revising, polishing, and then submitting the finished product.

In my case, if I had followed the stage model when I was redrafting my brief, then I would have been moving down the assembly line toward completion of my final product. I would have completed a number of “stages,” including prewriting (such as brainstorming, researching, and outlining), writing (well over a dozen excruciating drafts!), rewriting and revising (based upon my supervisor’s comments), and polishing my brief (or so I thought). On the morning of my crisis, I thought I was handing in my final draft. In fact, had I been following the linear stage model, I would have arrived at the end of the line, submitting a final product.

However, my writing process did not work like an assembly line. The linear stage model had broken down, and so had I. The evidence of my breakdown was that, after so many drafts, I found myself back at the computer to write another draft based upon my supervisor’s concerns. I had not been moving forward down the assembly line — I was moving backwards! For any new legal writer, myself included, this was the worst sort of punishment. I thought that no matter what I handed in to my supervisor, there would always be another round of corrections. I felt punished because I was not making progress and I did not understand why.

So how far back in the writing process did I go? On the day of my crisis, I wrote for hours. Did this mean I was still at the “rewriting” stage? But I was doing more than simply rewriting because I was developing new ideas and incorporating those ideas into my brief as I composed new text.\textsuperscript{12} I could have been all the

\textsuperscript{10} Flower & Hayes, \textit{supra} n. 9, at 366-367.

\textsuperscript{11} \textit{Id}.

\textsuperscript{12} In the stage process model, “rewriting” is the reworking of the written product that the writer created during the “writing” stage. \textit{Id} at 367. While effective revision habits necessarily must include a component of rewriting, “revision” is not synonymous with “rewriting.” Unlike revision, or “re-vision,” the term “rewriting” as it is used in the three-step
way back at the "prewriting" stage as I incorporated new research, replanned my organization, and explored a new theory of my case.

As you can see by my own diagnosis, I was going the wrong way down the assembly line. According to the linear stage process theory, I should have been moving forward. I should have been completing my final revisions, polishing the piece, and preparing the brief to be filed in court. Instead, I was moving backwards. My move backwards was also a cyclical one — not a linear one. I planned, wrote, and evaluated what I had written, which sparked me to plan and write more. In between, I revised, erased, and crossed out. Thus, I moved in an elliptical pattern: jumping backward and forward, forward and backward.

My example illustrates the limitations of the linear stage process theory. It may be a convenient model of how writers compose, but it is not an accurate one. The linear stage theory fails to account for any back and forth motion in the writing process. Although the stage model deserves praise for calling attention to previously ignored aspects of the writing process, such as prewriting, most researchers agree that this model fails to accurately reflect how writers actually write. Analyzing my appellate brief, I moved backwards in the writing process to rethink my original plan, rework my theory of the case, and reorganize my presentation of the case law.

By going back in the writing process, I rocketed myself forward to achieve my original purpose, which was to construct my client's best argument. I used most of the same cases and even cited the same legal propositions from each case. However, I re-

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13 See id. (noting that the acceptance of prewriting has called attention "to planning and discovery as legitimate parts of the writing process").

14 Id.; see Berkenkotter, supra n. 6, at 156-167 (describing her two-month study of the writing process of composition theorist Donald M. Murray). For example, Berkenkotter noted that Murray often collapsed his planning and revising activities into one activity, which she described as "reconceiving." Id. at 162-163. "To 'reconceive' is to scan and rescan one's text from the perspective of an external reader and to continue re-drafting until all rhetorical, formal, and stylistic concerns have been resolved, or until the writer decides to let go of the text." Id.
vised the framework of my brief, including my organization and, perhaps more importantly, my rhetorical stance.\footnote{For a discussion of the rhetorical problem see supra n. 7; see Wayne Booth, The Rhetorical Stance, 14 College Composition & Commun. 139, 141 (1963). According to Booth, the rhetorical stance consists of three elements: "the available arguments about the subject . . . the interests and peculiarities of the audience, and the voice, the implied character, of the speaker." Id. In my opening narrative, I shifted my rhetorical stance to focus the court on vindicating my client's rights and away from the fact that the prison had abandoned the policy that harmed my client.} Making those changes allowed me to write virtually uninhibited. Within a few minutes, I had moved forward and rewrote and revised a whole new section of text. The linear stage model cannot explain my writing process when I revised my appellate brief.

B. A recursive model accurately depicts the writing process because writers move back and forth among many writing activities when they compose.

The "back and forth" motion I have described shows that writing is a "recursive process."\footnote{Faigley & Witte, supra n. 9, at 400; Flower & Hayes, supra n. 9, at 367; Perl, supra n. 9, at 364; Sommers, supra n. 4, at 378; see Fran Lehr, Revision in the Writing Process <http://www.ed.gov/databases/ERIC_Digests/ed379664.html> ED379664 (accessed August 1, 2002).} A recursive model of the writing process suggests that writers constantly move back and forth to redo or repeat various composing activities as they progress toward project completion.\footnote{For a discussion of writing as a recursive process see supra n. 16.} The idea behind recursion is that when writers move back and forth in their text, they "tear down" much of what they have written, and then rebuild their text, making it even stronger. For this reason, Sondra Perl explains that the "recursive" model is "a forward-moving action that exists by virtue of a backward-moving action."\footnote{Perl, supra n. 9, at 364.}

Labeling writing as a recursive process, though, is still not enough to explain the complexities of composition. The legal writing community needs to answer the question of why legal writers "go back" to revisit what they have written and what they do with their texts when they go back. Stated simply, what recurs in legal writing? The recursive models of composition theorists Sondra
Perl, Linda Flower and John Hayes, and Nancy Sommers provide three possible answers for legal writing. These theorists describe, in different ways, how writers perform and then repeat the many activities that encompass writing, such as planning their thoughts, putting them into words, and then reviewing their work. Indeed, recursive theory explains why I revisited and changed my original organization to present a new explanation of my client's case after having developed the brief for over two months.

Sondra Perl, one of the first researchers to question what recurs in the writing process, suggests that each writer has a "felt sense" that guides her back and forth through the composing process. Perl asserts that a writer's felt sense occurs when she pauses and rereads her text, which sparks the writer to consider "non-verbalized perceptions that surround the words, or...what the words already present evoke in the reader." This "felt sense" reaction "encompasses everything you feel and know about a given subject at a given time." When writers pause, reread, or reflect on a topic, they call upon their felt sense to generate images, concepts, and words, and to discover new directions that warrant further exploration.

For Perl, "felt sense" sparks cyclical movement within the text, similar to the elliptical movement that I experienced in my own re-drafting experience. Writers move "from sense to words and from words to sense, from inner experience to outer judgment.

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19 Perl asserts that a writer's "felt sense," the writer's non-verbalized perception of the text, causes a writer to revisit what has already been written. Id. at 364-365. Flower and Hayes explain that writers move back in the process to pursue the specific goals they have set for their writing. Flower & Hayes, supra n. 9, at 366-367. Sommers argues that writers go back to resolve dissonance, that is, problems that they perceive in their texts. Sommers, supra n. 4, at 385.

20 Berkenkotter, supra n. 6, at 162-165.

21 Perl, supra n. 9, at 365.

22 Id.

23 Id. at 365 (quoting Eugene Gendlin, Focusing, 35, 165 (Everest House 1978)).

24 Id. at 365.
and from judgment back to experience.”

Perl contends that writers call up their felt sense and transform it into writing through a process of “retrospective restructuring.”

Perl explains this as the writer using “felt sense” to discover and then construct what she intends to say. The final part of the cycle, which Perl labels “projective restructuring,” focuses the writer’s attention on her audience, calling upon the writer to “craft what one intends to say so that it is intelligible to others.”

Projective restructuring is considered the “alternative mental posture” of retrospective restructuring as the writer temporarily becomes the reader and tries to anticipate the readers’ needs and expectations, filling in logical gaps, reorganizing the text, and making other “global” changes.

Despite some of the differences between the legal writing process and the composition process, the notion of “felt sense” can be instructive for legal writers. For example, in my brief writing project, terms-of-art reflecting First Amendment concepts such as “standing,” “actual injury,” and “nominal damages” represented dominant ideas and themes in my argument. As Perl explains, words and phrases often encompass “everything you feel and know about a given subject at a given time.”

Specific words and phrases, such as these terms of art, often prompt writers to reconcile what they have written with their original intentions, themes, and purposes for writing. In my case, my “felt sense” told me that I had to resolve why my client had “standing” to bring his First Amendment claim when he had no “actual damages” and did not seek an “injunction.” Thus, a legal writer’s “felt sense” might rep-

25 Id. at 369.

26 Id. at 367.

27 Id. at 368.

28 Id. at 369.

29 A few of the differences between the legal writing process and the composition process include the different forms, unwritten body of conventions and usage, emphasis on problem-solving, and reliance on technical terms-of-art, all of which are more prevalent in legal writing than in composition. Rideout & Ramsfield, supra n. 7, at 58; see Ramsfield, supra n. 7, at 16-20 (“A Word on the United States ‘Legal Discourse Community’”).

30 Perl, supra n. 9, at 365 (quoting Eugene Gendlin, Focusing, 35, 165 (Everest House 1978)).
resent how a writer reconciles her written product with her original purpose by comparing what she actually wrote with what she intended to write.

The "felt sense" behind specific words is not the only explanation for why writers revise their texts. Linda Flowers and John Hayes explain that writers go back to revise what they have written to accomplish their goals because composition is a goal-driven process in which writers pursue many different goals at once. 31 Their "cognitive process" theory of writing suggests that when writers move back in the process, they are pursuing specific goals by engaging in one of the three activities that comprise writing: planning, translating, and reviewing. 32 Flowers and Hayes explain that writers place their goals in a hierarchical structure composed of a thesis, or major goal, and many other smaller goals, all of which represent the logical reasoning or progression toward that major goal. Writers generate sentences, paragraphs, and sections of text by continually engaging in planning, translating, and reviewing. 33 These processes occur over and over, and not in any particular order, until the task is complete. 34

As with Perl's "felt sense," Flower and Hayes's cognitive process theory explains that writers go back to solve problems related to the goals they want to achieve with their texts. In legal writing, these goals may arise from the writer's original purpose, audience, scope, and stance. 35 As I think back to my redrafting experience, I believe that what sparked my planning session was my feeling that I had strayed from my original purpose. I realized that I needed to focus more on the harm to my client and that I needed to downplay the concept of a "chilling effect" on his free speech rights because the prison had subsequently abandoned the practice that infringed upon my client's rights. For me, this planning session led to new writing. I revised, which led to more planning, and

31 Flower & Hayes, supra n. 9, at 366-367.

32 Id. at 369.

33 Id. at 369, 372-374.

34 Id. at 375.

35 Rideout & Ramsfield, supra n. 7, at 75-76, 94.
writing, and so forth. By going back to revisit my goals and to focus on the original problem presented to me, I finished a project that had consumed me for so long within just a few hours.

A third answer to the question of why writers go back in their texts is that they see their texts differently from when they wrote them. Nancy Sommers explains that writers make backward jumps to “re-view” what they have written with “different eyes,” the eyes of a reader. Sommers defines “revision,” literally “revision,” as a “a sequence of changes in a composition — changes which are initiated by cues and occur continually throughout the writing of a work.” Sommers further explains that revising is “... part of the generative nature of the composition process ... not a stage, but a process that occurs throughout the writing of a work.” In short, a writer revises when, during the course of composing, something he has written prompts him to analyze or re-see his work from the reader’s perspective. Analyzing my experience, my re-vision was apparent. When I re-viewed my brief, I changed my focus to the harm done to my client, an argument that I believed had the best chance of winning in the Fourth Circuit.

II. THE REVISION HABITS OF FIRST-YEAR LEGAL WRITERS AND EXPERIENCED LEGAL WRITERS

If recursive theorists are correct about why writers revisit what they have written, then revising cannot simply be a stage during which the writer “corrects” errors. Yet, the traditional stage process theory has infected writers with exactly that concept. Despite the advances in research on the recursive aspects of the writing process, many students have been taught that being asked to revise a text is an indication that they did not “get it right” on the first draft. Nancy Sommers attributes this misconception to

36 Sommers, supra n. 4, at 382-384.

37 Id. at 380.


39 Lehr, supra n. 16, at first paragraph.
outdated writing textbooks and former teachers who have embedded this attitude in their students.\textsuperscript{40} Indeed, many inexperienced legal writers are stuck in the linear model’s assembly line mode. For new writers, revision consists of a set of rules that are strictly applied in machine-like fashion, as if revision works like a computer’s spell-checker: Replace passive voice with active voice, fix sentences that start with conjunctions, use a thesaurus to find the “right” word, and so on.\textsuperscript{41}

This assembly line view of revision as the final, “correcting” stage trivializes its importance and may cause inexperienced writers to equate revision with punishment. For inexperienced writers, the idea of revising conjures up memories of their youth when they learned to spell by writing all the words they got wrong on their spelling test twenty times over.\textsuperscript{42} This idea that revision is some sort of punishment for not getting it right the first time carries over into writers’ adult years. In fact, even as writers mature through their undergraduate careers and enter law school, many are unable to revise on their own and rarely move beyond treating revising as one last correcting stage, a “tidying-activity aimed at eliminating surface errors.”\textsuperscript{43} This phenomenon is well-documented by the results of my survey that compared the revision habits of first-year legal writers to those of experienced legal writers.

Just as most college students have not moved beyond eliminating surface errors when they revise,\textsuperscript{44} many first-year law students approach revision as the last stage on an assembly line dur-

\textsuperscript{40} Sommers, supra n. 4, at 383. Sommers suggests that many students “see their writing altogether passively through the eyes of former teachers or their surrogates, the textbooks, and are bound to the rules which they have been taught.” \textit{Id.}

\textsuperscript{41} \textit{Id.} Sommers notes that most students have been taught that they should revise until “they decide that they have not violated any of the rules for revising.” \textit{Id.}

\textsuperscript{42} A practice that I remember marked my elementary school years.

\textsuperscript{43} Faigley & Witte, supra n. 9, at 407.

\textsuperscript{44} \textit{Id.} at 400-414; see Sommers, supra n. 4, at 378-387. Sommers’ study involved twenty freshmen and twenty professional writers. \textit{Id.} at 380. Sommers concluded that the student writers understood the revision process as a rewording activity during which the selection and rejection of words determines success or failure. \textit{Id.} at 381.
ing which writers correct errors. This conclusion is evident from a survey that I administered to two groups of legal writers. The first group consisted of a section of first-year law students enrolled in legal research and writing. The second group was made up of experienced legal writers who taught at the law school as legal research and writing professors, law professors who supervise clinical programs, and graduate student clinic supervisors.

A. Methodology

The goal of my survey was to identify and compare the techniques new legal writers and experienced legal writers employ when they revise. I formulated five questions designed to learn how legal writers plan, write, and revise.\textsuperscript{45} I distributed my survey to a group of new legal writers, a class of more than one hundred first-year law students enrolled in their second semester of the Legal Research and Writing course taught at Georgetown University Law Center. I also distributed this survey to twenty experienced legal writers at the Law Center, all of whom wrote and supervised student writers as part of their teaching positions. As noted above, these experienced writers included legal research and writing professors, law professors who supervised the Law Center's many clinical programs, and graduate students who assisted in overseeing those clinical programs. The results of my survey are based upon my analysis of the eighty responses I received from the first-year law students and the fifteen responses I received from the experienced legal writers.

To perform a statistical analysis of the data I collected, I instructed respondents to circle responses from the answer choices I provided.\textsuperscript{46} I also elicited maximum participation in my survey by encouraging respondents to respond in any other manner they desired, such as describing their revision techniques in narrative form or by using a blank writing process profile diagram.\textsuperscript{47} Using the numerical data and the narrative responses I collected, I analyzed how new legal writers and experienced legal writers revise.

\begin{footnotes}
\footnote{45}This survey is reprinted in its entirety at \textit{infra} Appendix A.

\footnote{46}Appendix A.

\footnote{47}\textit{Id.}
\end{footnotes}
For example, the results I obtained from Question 5, which asked respondents what types of changes they make when they revise, allowed me to quantify and compare the revision habits of new legal writers and experienced legal writers.48

After I collected the completed surveys, I divided the eight revision techniques listed in Question 5 into two categories: "micro-revisions" and "macro-revisions." Drawing upon prior surveys performed by composition theorists, I defined a "micro-revision" as any revision that would correct a perceived surface error in the text without providing new information or changing the substantive meaning of the text.49 Conversely, I defined a "macro-revision" as any revision that would change the substantive meaning of the text, whether by adding new information or deleting existing content. My purpose for distinguishing between micro-revisions and macro-revisions was to determine whether novice and expert legal writers revised by correcting perceived errors or problems on a word-by-word level. I also sought to determine whether respondents also revised their writing on a global scale, including by revising how they approached their rhetorical problem50 or one of the rhetorical elements of their texts, such as its purpose, audience, scope, or stance.51

Using this breakdown of "micro-revisions" versus "macro-revisions," I defined three revision techniques from Question 5 as "micro-revisions":

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48 Appendix B, provides a statistical analysis of the student writers' and experienced writers' responses to Question 5.

49 Faigley and Witte utilized a similar format for their study of students' revision habits. They explained their methodology as follows:

Our taxonomy of revision changes is based on whether new information is brought to the text or whether old information is removed in such a way that it cannot be recovered through drawing inferences. We call changes that do not bring new information to a text or remove old information Surface Changes . . . Meaning Changes . . . involve the adding of new content or the deletion of existing content.

Faigley & Witte, supra n. 9, at 402 (emphasis in original).

50 For a discussion on rhetorical elements see supra n. 7.

51 Id.
(a) Changing content or structure of specific sentences

(d) Word choice or word order

(f) Spelling and grammar

In contrast, I analyzed the other five revision techniques listed in Question 5 as "macro-revisions":

(b) Large-scale organization (overall organization of piece, including section/paragraph order)

(c) Small-scale organization (rearranging organization of ideas within each paragraph)

(e) Changes designed to organize the material for your audience, such as headings, outlines, roadmaps, charts, etc.

(g) Topic sentences, conclusions, and transitions

(h) Audience-oriented changes such as clarity, style, tone, etc.

I compared how often novice and expert legal writers made micro-revisions versus macro-revisions and concluded that novice legal writers focused on making micro-revisions, while expert legal writers revised dynamically by making macro-revisions as well as micro-revisions.

B. Survey Results

The eighty law students who responded to my survey overwhelmingly focused their revising processes on micro-revisions. As Table 1 demonstrates, with regard to micro-revisions, eighty-eight percent of the students responded that they revised the content of individual sentences, eighty-three percent changed word choice or word order, and eighty-three percent changed spelling and grammar.\(^{52}\)

\(^{52}\) Appendix B.
In contrast, the same group of law students made very few “macro-revisions,” those that I defined as altering the substantive meaning of their texts. Only forty percent of the law students revised their large-scale organization, forty-six percent made audience-oriented changes related to their rhetoric (including their tone, perception of clarity, style, etc.), and thirty-one made audience-oriented organizational changes (such as providing topic headings, roadmaps, and outlines).\textsuperscript{53} Even when focusing their changes on specific sentences, only seventy-three percent of students revised topic sentences, conclusions, and transitions as compared to eighty-eight percent of the same group who revised sentence content, generally.\textsuperscript{54}

These results demonstrate that new legal writers “see” words and sentences when they write. However, new legal writers largely do not “see” that the form and shape of their writing is affected by how they view rhetorical goals such as their purpose, audience, scope, and stance.\textsuperscript{55} In sum, these numbers provide disturbing evidence that, even after having progressed through nearly twenty years of schooling, new legal writers are still wedded to correcting the individual words and sentences they write.\textsuperscript{56}

On the other hand, the experienced legal writers responded that they saw everything when they revised. The experts indicated that they made most or all of the changes asked about in the

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Sommers, supra n. 4, at 383-385. Sommers suggests that students have “strategies for handling words and phrases . . . What they lack, however, is a set of strategies to help them identify ‘something larger’ that they sense was wrong and work from there.” Id. at 383; for a discussion on the rhetorical elements see supra n. 7.

\textsuperscript{56} My survey is by no means anomalous. My results are consistent with other studies conducted of the revising habits of student writers. Nancy Sommers noted that students view revision as a "rewording activity" during which the selection and rejection of words takes on "symbolic importance." Sommers, supra n. 4, at 381. By focusing on rewording, Sommers explains, "students solve the immediate problem, but blind themselves to problems on a textual level; although they are using different words, they are sometimes merely restating the same idea with different words." Id. at 382; see Faigley & Witte, supra n. 9, at 402 (emphasis on original). These and other studies should serve as eye-opening evidence for new legal writers that they can achieve much more in their revision processes by learning to re-see their texts.
survey. Similar to the first-year writers, experienced writers are attentive to specific words, phrases, and sentences. Of the experienced writers, ninety-three percent made changes to specific sentences, ninety-three percent changed word choice or word order, and sixty-seven percent changed spelling and grammar.57

However, the most significant point of departure between expert and new legal writers is that experts see revision as an opportunity to address overall changes, to revisit their original rhetorical decisions, when they revise. More than seventy-three percent of experienced writers responded that they made changes in large-scale organization, sixty-seven percent made organizational changes designed to better present the material for their audience, and seventy-three percent indicated that they made rhetorical changes in anticipation of their audience.58 Furthermore, ninety-three percent of expert writers responded that they made changes in small-scale organization, as compared to the seventy-six percent of first-year writers who made small-scale organization changes.59

In sum, experienced writers differ from student writers because they see revision as a deep, dynamic process. An experienced writer sees revision as a “catch-all” activity and as an opportunity to re-see the purpose, form, and content of her writing as well as the likely reaction of her audience.

The raw numbers tell only part of the story. The students’ comments on the survey are additional evidence of the superficiality with which they view revision. Their comments demonstrate that new legal writers are assembly line revisers. They struggle over changes to specific words and sentences without regard to the overall purpose and meaning of their texts. For example, one student described his revision habits as “obsessive” and noted that “I struggle over every word.” Another student stated that “I revise sentence by sentence. I never get more than a few words out without changing them.”

By focusing so closely on writing the perfect word or sentence, new legal writers are often blind to the depth of ideas behind their

57 Appendix B.
58 Id.
59 Id.
texts. Nancy Sommers explains that college students place “symbolic importance” on each word and phrase because they believe that the “selection and rejection of words” will determine the success or failure of their projects. For first-year law students, the selection and rejection of words takes on even more importance because they have entered a new and unfamiliar legal “discourse community.” New legal writers have not yet mastered the legal discourse community’s conventions or its written and unwritten rules of discourse. Joseph Williams explains that

> 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 . . . we have to master new ways of thinking . . . We also have to find the voice of the community . . . And, of course, all of this is compounded by the anxiety, insecurity, strangeness, etc. that accompanies all ventures into new social space.

Having not yet become fully socialized into the legal discourse community, new legal writers retreat to what they know: Writing sentences and fixing spelling, grammar, and word choice.

Whether new legal writers perform only limited “micro-revisions” because they have not yet become “socialized” into the legal discourse community or because they associate success or failure with the selection and rejection of words, my survey plainly demonstrates that experienced writers revise dynamically and new legal writers do not. The new legal writers’ written feedback and the number and types of changes they make when revis-

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60 Sommers, supra n. 4, at 381.


62 Id.

63 Id. at 14.

64 Id. at 16; see Ramsfield, supra n. 7, at 16-20.

65 Sommers, supra n. 4, at 381.
ing prove that student revisers are stuck in the correcting mode of the linear stage process theory. Experts, on the other hand, participate in dynamic revision activities.

How, then, can new legal writers become dynamic revisers like their experienced counterparts? The easy answer is to say that new legal writers are not capable of dynamic revision, that the pool of "experienced" writers are experts who have risen to the highest ranks of the legal profession because of their ability to write. Furthermore, the easy answer would say that it is too hard to bridge this gap between novice and experienced legal writers for at least two reasons. First, it is not clear what even constitutes "expert revision" and most theorists agree that there is no "uniform pattern" of expert revision.\(^6^6\) Second, even if it is possible to discern patterns of expert revision, it is unclear whether new legal writers can be taught how to revise. Unlike teaching students how to compose, there are few ground rules in teaching them how to revise. In fact, even Flower and Hayes acknowledge the limitations of teaching revision by using traditional methods such as analyzing examples written by experts and then asking students to replicate those examples.\(^6^7\) Thus, perhaps the easy answer is not actually an answer — it merely denies that expert revision can be taught.

The better answer to the question of how to bridge the gap between expert and novice revisers must acknowledge that many new legal writers have been taught that revision means "correcting" words and sentences and following "rules" of grammar.\(^6^8\) New legal writers need to understand that while these micro-revisions are a necessary part of the process, revision should also focus on the overall substance of their texts; macro-revisions that affect the form, shape, and content of their text as a whole.

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\(^{6^6}\) *E.g.* Mimi Schwartz, *Revision Profiles: Patterns and Implications*, 45 College English 549 (1983) (suggesting at least nine different revision profiles that affect how different writers produce text, revise, and polish). *Id.* at 550.

\(^{6^7}\) John R. Hayes & Linda S. Flower, *Writing Research and the Writer*, 41 Am. Psychol. 1106, 1112 (1986) (noting that students often lack the ability to view global problems in their work).

\(^{6^8}\) Sommers, *supra* n. 4, at 383.
Thus, part of the “socialization” process must involve encouraging new legal writers to add another tool to their writing process — that is, learning to re-see their texts from a global perspective when they revise. Novice writers can become better revisers by focusing on the ideas and the goals that the words represent rather than just focusing on the words themselves. Section III explains how experienced legal writers revise by re-seeing and demonstrates that new legal writers can blossom into experienced writers by incorporating the re-seeing habits of experienced writers into their own writing processes.69

III. RE-SEEING THE REVISION PROCESS

Re-seeing legal writing requires a change in attitude and a change in perspective. To revise by re-seeing is to embrace the act of writing as a recursive process during which the writer forms and re-forms his ideas to achieve a goal, such as answering a research question, persuading a judge, or advising a client.70 By focusing on writers’ overall goals and the rhetorical decisions they make to achieve those goals, re-seeing de-emphasizes the symbolic importance of making changes word-by-word and of blindly following obscure grammar rules. Specifically, new legal writers and, indeed, their writing instructors, must realize that they cannot and should not expect to “see” everything on the first draft. If a writer is not expected to get everything right on the first pass, then revision ceases to be punishment. Far from punishment, new legal writers will begin to view revision as a pleasurable activity, as a second chance to explore their ideas and express them more clearly.71

69 Id. at 382; Perl, supra n. 9, at 364.

70 Ramsfield, supra n. 7, at 288 (listing some possible purposes for legal documents).

71 The Norton Guide to Writing printed this advice from Ann E. Berthoff in its chapter on drafting and revising: “You need to get some writing down on paper and to keep it there long enough so that you can give yourself the treat of rewriting. . . . How can you know what you think until you hear what you say? See what you’ve written?” Supra n. 1, at 88. In addition, as this excerpt demonstrates, this author does not mean to imply that all writing textbooks advocate the linear stage model, which equates the revision process with correction. Sommers, supra n. 4, at 383.
The pleasure of revision often arises when you refine what you intend to say and even discover that you have more to say, a new solution, a different path, a better presentation. During my re-drafting experience, I learned this lesson when I refocused my brief to emphasize the harm done to my client. I experienced the frustration of writing after struggling through dozens of drafts, and then I felt the joy of succeeding after I learned to re-see my text and progressed toward the end goal.

New legal writers do not have to struggle through dozens of drafts as I did with my brief, making changes, getting comments back, making more changes, and repeating the process over again. Instead, new legal writers can learn from my struggle. Every legal writer can revise better by learning to re-see. Specifically, new legal writers can incorporate three “re-seeing” revision habits of experienced legal writers into their writing processes:

1. Experienced writers revise by resolving dissonance in their texts;

2. Experienced writers reconceive the possibilities of their texts by using the revision process to explore new ideas and generate new writing in order to form meanings that make their texts work; and

3. Experienced writers are informed revisers because they revisit all the decisions they have made in constructing their texts; these decisions relate to the original problem, the plan for solving that problem, and other rhetorical decisions such as those affecting the purpose, audience, scope, and stance.

Composition theorists have long noted the importance of these re-seeing activities to the revision process in writing. However, these re-seeing techniques — resolving dissonance, reconceiving possibilities, and revisiting decisions — are more than abstract theories of composition. The results of my survey demonstrate that experienced legal writers have incorporated these dynamic re-seeing techniques into their revision habits and their writing processes. New legal writers, too, can become more efficient and effective revisers if they incorporate re-seeing into their writing processes.
A. Resolving Dissonance

Experienced legal writers have learned to resolve the dissonance in their work by embracing ambiguities, and even exploiting them to discover new solutions. Because there is no objective scale by which writers measure their ideas, composition theorists have noted that writers’ ideas are “always available for criticism and revision.” In the legal profession, this criticism will come from your audience. Law professors, partners, colleagues, clients, opposing counsel, and judges will pounce upon any inconsistencies, gaps, assumptions, or flaws in what you have written. Dissonance in legal writing can result from a number of sources, including disharmony between what the author wrote and what the author intended to write. Alternatively, the writer may have discovered a more effective interpretation or presentation of the material. My survey confirmed that experienced legal writers are conscious of resolving dissonance in their writing when they revise.

The experienced writers who responded to my survey were concerned with perceiving and resolving dissonance in their own work before exposing it to their audiences. These expert writers expressed the concept of finding harmony and eliminating dissonance in different ways. Experienced writers discussed “having coherence,” “developing a structure or progression of ideas,” “making an argument work,” or “telling a story.” For example, a law professor who supervises a clinic observed: “I work within a section once I’m confident on the structure and development (i.e., progres-


74 Sommers, supra n. 4, at 387. Sommers notes that experienced writers have learned to evaluate the “incongruities between intention and execution” and make the necessary revisions to resolve this dissonance. Id.

75 Ann E. Berthoff, Learning the Use of Chaos, in The Making of Meaning 68, 71 (Boynton/Cook 1981) (“Meanings change as we think about them; statements and events, significances and interpretations, can mean different things to different people at different times. Meanings are not prebaked or set for all time; they are created, found, formed, and reformed.” Id.).
sion) of the story I'm trying to tell.” Another clinic law professor concurred: “Tight editing will come when I am satisfied with the general structure and point I am making.” A legal research and writing professor stated, “I have developed a fairly strong sense of coherence in my writing — I know what sounds good and why.” These comments demonstrate that expert revisers anticipate and eliminate dissonance from their texts before turning to word-by-word revisions — they are primarily concerned with presenting a consistent, logical progression of ideas within a structure that makes sense to the reader.

Most new legal writers who participated in my survey, on the other hand, were not conscious of perceiving and resolving dissonance in their writing. A new legal writer's inability to resolve dissonance in his writing may be a symptom of being stuck in the stage process writing model, which treats revision as the last stage in which the writer corrects errors. For example, one law student remarked that her biggest weakness was that “I am not critical enough to recognize problems in my own work — I know something is wrong, but I can’t see how to improve it.” This student also described herself as “a perfectionist” who “stares at the computer screen for a long time to write each sentence.” Another first-year law student noted that “[I] tend to get stuck with what I first write and it’s hard to really change it.” This same writer found case analogy to be difficult because “after a while they [facts and cases] all just kind of get ‘messed up’ together.”

As their remarks demonstrate, inexperienced legal writers want to improve and strive for perfection, but they lack the tools to perceive and resolve dissonance in their writing. New legal writers get bogged down in making micro-revisions such as moving sentences around, finding a “better” word, or applying grammar rules. But they are often paralyzed to make substantive macro-revisions in their texts. Because student writers tend to focus their revisions on specific words and sentences and because they are looking for errors to correct, they do not see that a possible source of dissonance in their writing actually comes from the ideas they present and how they structure that presentation. New legal writers must re-see their texts to resolve dissonance in their writing. One way for writers to see and resolve the dissonance in their writing is for writers to better utilize their outline or other prewriting materials. Most students are taught to formulate an outline or use a chart or list of cases to organize their materials
before they begin to write. A new legal writer should not discard this outline when she sits down to write. Instead, she might write with her outline as her guide and then use that outline to test her execution, asking herself two questions: Did I write what I intended to write? Is there a better way to make my point? When new legal writers become trained to analyze their writing with the critical eyes and ears of their anticipated audience, they will begin to see the dissonance in their writing — such as logical gaps, erroneous assumptions, or ineffective organization — and they will learn to resolve dissonance when they revise.

B. Reconceiving the Possibilities of the Writer’s Text

If writers’ ideas are always open to criticism, then they are also open to invention. My survey demonstrates that experienced legal writers understand that the revision process frequently generates new ideas or better ways to present existing ideas because they revise with an eye toward organizing information for their readers. In addition, legal writing is so complex that no writer can be expected to “see” everything on the first draft. The concept of reconceiving captures the notion that the revision process often leads to discovery. Experienced writers have learned that the goal of writing is not to make the text conform to a pre-conceived meaning, but rather to engage the text to create meaning through revision. The revision process presents this opportunity for new legal writers to revisit and reconceive their topics, theses, theories, and meanings as they go along to shape an outcome or reach a goal.

Without being prompted by any particular question, the experienced legal writers who responded to my survey stressed the use of revision as a means of discovery. A law professor who supervises a clinic responded to Questions 1 and 2 by stating that “I rely heavily on outline development and then develop sub-themes

76 Diana R. Donahoe, Analyzing the Writer’s Analysis: Will It Be Clear to the Reader?, 72 N.Y. St. B. Assn. J. 46 (Mar./Apr. 2000) (offering tips for writers to review their documents from a reader’s perspective, such as by creating roadmaps and writer-based outlines before writing a first draft and then comparing those outlines to reader-based outlines created while revising); Sommers, supra n. 4, at 125; see Berthoff, supra n. 75, at 71.

77 Sommers, supra n. 4, at 385-386.

78 Id. at 386; see Berthoff, supra n. 75, at 71.
within the outline.” When this writer begins to write, he revises as he goes along “with much interaction with the outline.” He noted that this process allows him to refine the ideas he has and generate new ideas or themes as he writes. Similarly, a legal research and writing professor responded to Question 3 by noting that she does initial writing when she researches, then revises the text and determines what research remains to be done. Next, this writer prepares another draft when she uncovers additional materials. In her case, revision informs her research and vice versa.

My study shows that many new legal writers, stuck in the assembly line mode, do not take advantage of revision as a chance for discovery. This, too, may be a result of their focus on making micro-revisions, changing words and sentences. One student responded that he would revisit a sentence only if he is “having problems with a subsequent sentence that logically or syntactically invalidates the already-written sentence.” While this response is encouraging because it indicates that the student sees and attempts to resolve dissonance in his writing, it is discouraging that this student does not utilize revision as an opportunity for new discovery. This student is an assembly line writer. Once the text has progressed to the revising stage, it will be changed only if there is a defect, a sentence that is “invalidated” by a subsequent sentence. Assembly line revision equates revision with correction and leaves no hope for new discovery — no new themes, alternative theories, or solutions to a given problem.

One way for new legal writers to incorporate the opportunity for discovery into their revising activities is to use the prewriting technique of zero-drafting to explore new possibilities when they arise.\textsuperscript{79} Zero-drafting involves spending a short amount of time generating ideas on a particular subject in stream-of-consciousness mode, without trying to make the text perfect or even all that good.\textsuperscript{80} New legal writers can use zero-drafting to explore one issue, one section, or to write a rough draft. Zero-drafting can be


\textsuperscript{80} Elizabeth Fajans & Mary R. Falk, \textit{Scholarly Writing for Law Students} 48 (2d ed., West 2000).
done before writing, between drafts, or to explore a new possibility, if only briefly, while revising a draft.

Zero-drafting may be a great re-seeing technique for some new legal writers. First, as Philip C. Kissam observed, zero-drafting "helps both the writer and readers of these drafts to make new connections that will improve their thinking and writing about complex, difficult subjects."81 Thus, the exercise helps writers to identify key issues or obstacles and begin to think about how best to solve them. Second, zero-drafting provides a supportive environment for writers to explore new possibilities because it allows them to "discover what he or she has to say about a topic"82 without investing a lot of time or energy in the project.83 In sum, zero-drafting is one example of a technique that encourages writers to reconceive the possibilities of their texts and to explore difficult issues without expending precious time or energy.

C. Revisiting the Writers' Rhetorical Decisions

My study highlights a third re-seeing habit of experienced writers. Experienced revisers appear willing to revisit their original rhetorical decisions, paying special attention to their purpose, audience, scope, and stance.84 One experienced legal writer who responded to my survey prepares to write by formulating a substantive outline that integrates her thesis with research summaries and citations to authority. This writer starts with an idea of the "story I'm trying to tell" and then revises by paying close attention to the "structure, development, and progression" of that story. Similarly, the willingness of experienced writers to perform both micro-revisions and macro-revisions illustrates that experienced writers use all the "tools" at their disposal and adopt an "anything goes" approach to revising.85 One experienced writer

82 Huff, supra n. 79, at 806.
83 Id. at 803.
84 Rideout & Ramsfield, supra n. 7, at 76.
85 Appendix B.
remarked, "[R]evisions can go to any aspect of the work. If I can think of a better way to present something, I'll do it."

Table 1, which presents the responses to survey Question 5, demonstrates that experienced writers revisit all of their original rhetorical decisions when they revise. Table 1 also demonstrates that many new legal writers neglect to make macro-revisions. Perhaps the best illustration of this point is the extent to which experienced writers revise their large-scale organization, and, by contrast, the extent to which new legal writers do not.86 As Table 1 demonstrates, seventy-three percent of experienced respondents noted that they revise their large-scale organization whereas only forty percent of new legal writers revise their large-scale organization.87 Experienced writers understand that large-scale organization is like the frame of a house — it provides the form and structure of their argument.88 As Table 1 demonstrates, the experienced writers whom I surveyed overwhelmingly revisit their small-scale organization (ninety-three percent), which my survey defined as rearranging ideas within a paragraph.89 Experienced writers also indicated that they attended to how their reader would respond to their writing by revising headings, outlines, and roadmaps and by revising their clarity, style, and tone.90 Hence, because experienced writers take an "anything goes" approach to revision by revisiting all of their original rhetorical decisions, experienced writers are conscious writers. Experienced writers make informed decisions. They do not write blindly. Experienced writers also revisit their decisions and engage in dynamic revisions, which is further proof that experienced writers re-see when they revise.

In sharp contrast, my survey results demonstrate that most new legal writers do not revisit their original rhetorical decisions when they revise. Perhaps new legal writers do not revisit their

86 Id.

87 Id.

88 Ramsfield, supra n. 7, at 91-92.

89 Appendix B.

90 Id.
original decisions for the same reasons that they do not see and resolve dissonance in their writing or explore new possibilities when they revise. That is, new legal writers often see only words and sentences when they revise, and many new legal writers equate revision with correction. Even more disturbing, many new legal writers plan unconsciously or write blindly, with no plan at all.

Whatever the explanation, the students’ written responses to my survey demonstrate that they do not revisit their original rhetorical decisions when they revise. For example, recall the student who responded that “I tend to get stuck with what I first write and it’s hard to really change it.” This student might benefit from revisiting her original decisions regarding her purpose, audience, scope, and stance to determine if she accomplished her original goals. Similarly, recall the student who only revisits sentences when a subsequent sentence “invalidates the already-written sentence.” This student’s revision techniques leave no room for the possibility that he might have strayed from his original purpose or confused his anticipated audience.

The students’ responses to Question 5 — as compiled in Table 1 — confirm that new legal writers do not revisit many of their original rhetorical decisions when they revise. As noted earlier, only forty percent of the student writers revise their large-scale organization.91 Similarly, only thirty-one percent of surveyed students made changes to organize the material for their reader (such as headings, outlines, or roadmaps), and only forty-six of students read for clarity, style, tone, or other audience-oriented changes.92 Predictably, most students focus their revisions on changing specific sentences (eighty-eight percent), word choice (eighty-three percent), and spelling and grammar (eighty-three percent).93

These statistics demonstrate that new legal writers see only words and sentences when they revise. They do not see their texts as a product of their original purpose for writing, and they do not revise with their audience in mind. For these new legal writers,

91 Id.
92 Id.
93 Id.
macro-revisions, such as organizational changes or audience-oriented revisions, will only be affected incidentally by the specific changes they make to words and sentences. Their lack of attention to their original decisions, including their purpose, audience, scope, and stance, proves that new legal writers are largely unconscious writers.

Perhaps what is most disturbing about new legal writers’ lack of attention to organization or audience concerns when they revise is that many of these writers compose without ever formulating a plan. One student responded to Question 1 by noting that he organizes and prepares to write “in [his] head” or “by jotting down topic sentences.” This response illustrates that new legal writers often do not make informed decisions before they write and are not revisiting their decisions when they revise. A student who organizes in his head and jots down topic sentences should be encouraged to group those topic sentences into themes and to develop those themes into an overall organizational structure for composing a first draft. By making initial rhetorical decisions, the student will write with a plan, a plan that he can revisit when he revises.

IV. CONCLUSION

A recursive model of the writing process that incorporates re-seeing into the revision process sparks effective resolution of dissonance within a text, encourages exploration of new paths to success, and empowers writers to make informed decisions and to revisit those decisions. Reflecting on my own experience on the day when I revised my appellate brief in a mall café, I now understand that revision is not about the time or effort you expend or the number of drafts you submit. My own experience taught me that learning to revise by re-seeing is integral for any new legal writer who wants to become an expert legal writer.

Since conducting my survey as a third-year law student, I have graduated law school and now practice law as my profession. I write nearly every day, composing briefs, research memos, letters, discovery requests and responses, and law review articles.

94 Donahoe, supra n. 76, at 46-47 (encouraging legal writers to utilize roadmaps and outlines to structure issues and guide readers through their texts).
Although I consider myself an experienced legal writer, my writing is still exposed to criticism from supervising attorneys, opposing counsel, judges, and probably even you, the reader. That will never change for me or for any other legal writer. However, what has changed for me, and what has contributed significantly to my growth as a legal writer, is that I re-see my own writing when I revise. Revising by re-seeing has helped me become a more conscious, confident writer: I anticipate and resolve dissonance in my writing, I reconceive the possibilities of my writing, and I make rhetorical decisions before I begin to write and then revisit those decisions when I revise.

My goal for this paper has always been the same, albeit after re-seeing it more times than I care to admit. By sharing my experiences and the results of my survey, I hope that I can help new legal writers develop more dynamic revising habits. My research reveals three revision activities that new legal writers can learn from experienced legal writers and incorporate into their writing processes: resolving dissonance, reconceiving the possibilities, and revisiting rhetorical decisions.
APPENDIX A: Revision Survey

Instructions:

The following questions ask you to briefly describe different characteristics of your writing process. Please use whatever method is easiest for you: circle the appropriate choices, fill in the attached diagram, and/or use the space provided below. The term “revision,” as used in this survey, refers to any changes in the content or organization of a text, and includes both “rewriting” and “polishing.”

(1) How do you organize your materials and prepare to write?
   (a) Outline
   (b) Chart/list of sources
   (c) Formulate a thesis/theory
   (d) Other: Please explain.

(2) Once you begin to write, do you tend to write uninterruptedly, or do you revise as you write?
   (a) I write uninterruptedly.
   (b) I revise as I go along.
   (c) It depends on the project. (Please explain)

(3) If you don’t revise as you write, at what point in the writing process do you begin making changes to your text?
   (a) After I have formulated and written out my thesis and/or main ideas.
   (b) After I write a few pages or a full section.
   (c) Once I am sure of the overall conclusion or outcome.
   (d) After I have completed a full draft.
   (e) Other. Please explain.

(4) If you do revise as you write, do you tend to revise sentence by sentence, paragraph by paragraph, section by section, or do your revision habits vary? Please explain.

(5) Whenever you revise, what types of changes do you make? Feel free to circle any of the following types of changes or to add to this list in the space provided below:
   (a) Changing content or structure of specific sentences
(b) Large-scale organization (overall organization of piece, including section/paragraph order)
(c) Small-scale organization (rearranging organization of ideas within each paragraph)
(d) Word choice or word order
(e) Changes designed to organize the material for your audience, such as headings, outlines, roadmaps, charts, etc.
(f) Spelling and grammar
(g) Topic sentences, conclusions, and transitions
(h) Audience-oriented changes such as clarity, style, tone, etc.
(i) Other. Please explain.
WRITING PROCESS PERSONAL PROFILE

IDEA

| ------------------------------- |

DEADLINE

| ------------------------------- |

STRENGTHS   WEAKNESSES   "BREAKDOWN POINT"

|   -    -   -   -   |   -    -    -  |   -    -    -   |

(Circle the most difficult one)

PREWRITING
WRITING
REWRITING
REVISING
POLISHING
**APPENDIX B**

Percentages and Types of Revision Changes Made By Experienced Writers and Student Legal Writers
(Compiled from the Responses to Question 5 from Revision Study Reproduced as Appendix A)

<table>
<thead>
<tr>
<th>Types of Changes</th>
<th>Student Writers</th>
<th>Experienced Writers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Content/Structure of Specific Sentences</td>
<td>88% (70/80)</td>
<td>93% (14/15)</td>
</tr>
<tr>
<td>(b) Large-Scale Organization (overall organization, including order of sections and paragraphs)</td>
<td>40% (32/80)</td>
<td>73% (11/15)</td>
</tr>
<tr>
<td>(c) Small-Scale Organization (rearranging organization of ideas within each paragraph)</td>
<td>76% (61/80)</td>
<td>93% (14/15)</td>
</tr>
<tr>
<td>(d) Word Choice or Word Order</td>
<td>83% (66/80)</td>
<td>93% (14/15)</td>
</tr>
<tr>
<td>(e) Changes Designed to Organize the Material for Reader: headings, outlines, roadmaps, etc.</td>
<td>31% (25/80)</td>
<td>67% (10/15)</td>
</tr>
<tr>
<td>(f) Spelling and Grammar</td>
<td>83% (65/80)</td>
<td>67% (10/15)</td>
</tr>
<tr>
<td>(g) Topic Sentences, Conclusions, and Transitions</td>
<td>73% (58/80)</td>
<td>80% (12/15)</td>
</tr>
<tr>
<td>(h) Clarity, Style, Tone, and Other Audience-Oriented Changes</td>
<td>46% (37/80)</td>
<td>73% (11/15)</td>
</tr>
</tbody>
</table>
Providing Structure to Law Students — Introducing the Programmed Learning Sequence as an Instructional Tool

Robin A. Boyle*

Lynne Dolle**

INTRODUCTION

In the past few decades, legal academics have spawned writings about changing law school teaching methods from the traditional Socratic and case method to alternative approaches.¹ Some

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** Ed.D., St. John’s University School of Education and Human Services, 2000; M.S. in Special Education, College of New Rochelle, 1994; M.S. in Early Childhood Education, Bank State College, 1974; B.A., Hunter College, 1966. Dr. Dolle has been teaching and conducting workshops since 1981. Our study formed the basis of her dissertation submitted in partial fulfillment of the requirements for her degree as a Doctor of Education. Infra n. 5.

of these authors encourage law professors to be aware of individual differences among students. Yet there has been little empirical research conducted in law schools concerning the effectiveness of teaching students according to their individual learning styles.

"Learning styles" refers to the ways in which individuals “begin[] to concentrate on, process, [internalize,] and [remember] new and difficult [academic] information” or skills. The absence of learning-styles research in law schools spurred us to conduct an empirical study to determine whether the application of learning-styles theory actually improved student learning. As a legal writing professor and a doctoral student in education, we collaborated on an empirical study that assessed the learning-styles preferences of a first-year law student population and measured the effectiveness of a particular type of instructional tool – the Programmed Learning Sequence (PLS). The details and the results of that study are the subject of this Article.

Using an instrument known as the Productivity Environment Preference Survey (PEPS) to assess our law school population for the study, we found that our students showed a strong preference for “structure” and “tactual.” Thus, our law student population indicated on the PEPS that they strongly preferred structured and tactual materials.

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2 Boyle & Dunn, supra n. 1, at 217 n. 20 and accompanying text (citing J.P. Oglivy, The Use of Journals in Legal Education: A Tool for Reflection, 3 Clin. L. Rev. 55, 69, 71 (1996) (advocating that, because “students learn in different ways,” they should maintain a journal to “engage in and become more efficient at self-evaluation”)); Busharis & Rowe, supra n. 1, at 317 (“To reach all students, and to help students develop varied learning styles, law professors should expose students to a variety of learning environments, including writing, role-playing, and hands-on activities.”).

3 Interestingly, one researcher noted that empirical evidence exists suggesting that “none among the most . . . [traditional] law-teaching systems is uniquely effective.” Paul F. Teich, Research on American Law Teaching: Is There a Case against the Case System?, 36 J. Leg. Educ. 167, 167-68 (1986) (emphasis in original)


5 For a more technical discussion of the statistical analysis, see Lynne Dolle, Effects of Traditional Versus Programmed Learning Sequenced Instruction on the Achievement of First-Year Law School Students in a Legal Research and Writing Course ch. IV (unpublished Ed.D. dissertation, St. John’s Univ. 2000) (copy on file with St. John’s Univ. Lib.). Dolle’s dissertation won a distinction award from St. John’s University.

6 For a detailed discussion of the PEPS, consult infra Part II.A.

7 Infra app. A (Distributions of Opposite-Preferences, Non-Preferences, and Strong-Preferences for 21 Learning-Style Elements).
Researchers have defined “structure” as “the frequency with which concepts were repeated from one sentence to the next.” Researchers have found that all students “attained higher test scores in the structured settings. However, those who preferred structure scored significantly higher than those who did not prefer structure. . . .” Thus, all students can benefit from structured instructional materials, but those who need structure will significantly benefit from instructional materials that complement their learning styles.

Students who indicate that they are tactual learners on the PEPS “process new and difficult material best through hands-on experiences.” Researchers have found that low-achieving students are often tactual learners. When these students are provided with instructional strategies that address their needs, their achievement increases.

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8 Alice L. Listi, Effects of Programmed Learning Sequences Versus Traditional Instruction on the Social Studies Achievement and Attitudes Among Urban Third Graders 24 (unpublished Ed.D. dissertation, St. John’s Univ. 1998) (copy on file with St. John’s Univ. Lib.) (surveying research findings regarding the need for structure).

9 Id. at 25.

10 Id. at 27.

11 Id. at 25.

12 Id. at 24–26 (citing R. A. Napolitano, An Experimental Investigation of the Relationships Among Achievement, Attitude Scores, and Traditionally, Marginally, and Under-prepared College Students Enrolled in an Introductory Psychology Course When They Are Matched and Mismatched With Their Learning Style Preference for the Element of Structure (unpublished Ed.D. dissertation, St. John’s Univ. 1986) (copy on file with St. John’s Univ. Lib.). Napolitano stated, As was illustrated through both the achievement and attitudinal analyses, structure seems to be extremely important to some students. In all circumstances, highly preferred students performed better when they were matched, rather than when they were mismatched, with their structure preference. This finding did not hold true for low preferred subjects . . . despite their preference for low structure, students scored higher on achievement when taught in a highly structured setting.

Napolitano, supra, at 117.

13 Listi, supra n. 8, at 31.

14 Id. at 30 (reporting that the low achieving students are often kinesthetic learners too).

15 Id.
The PLS is a highly structured and tactual strategy for conveying information on any academic subject. It is designed to meet the needs of students who prefer structured and tactual teaching tools. Drs. Rita and Kenneth Dunn, who have researched and applied learning-styles strategies for more than thirty years, have used PLSs in many of their studies and have found them to be effective for students who indicate a strong preference for structured and tactual learning.\(^{16}\) The PLS is written in the form of a manual and focuses on discrete topics.

We selected the topic of legal research for our PLS manuals. PLS is an ideal instructional tool for teaching legal research because there are concrete terms (citation form, key number searches), concepts (defining an issue), and book resources (primary sources, secondary sources) that can be summarized and tested in bite-size pieces, one followed by another. Legal research can, to some extent, be self-taught,\(^{17}\) and the PLS provides for self-instruction and self-pacing.

Our empirical study contrasted how well law students learned legal research from traditional methods, such as classroom lecture with some visual aids, with how well they learned it with the PLS manuals.\(^{18}\) We found that students who used PLS manuals performed significantly better than those taught through traditional methods.\(^{19}\) These results have implications for teaching methods employed in all law schools.

\(^{16}\) Dunn & Dunn, supra n. 4, at 201–270 (providing detailed explanations and examples about how to design PLSs for students who prefer to learn in incremental steps and without supervision); Rita Dunn & Shirley Griggs, Practical Approaches to Using Learning Styles in Higher Education: The How-to Steps, in Practical Approaches to Using Learning Styles Application Higher Education 19, 26–29 (Rita Dunn & Shirley A. Griggs eds., Bergin & Garvey 2000) (describing the appropriate audience for a PLS, requisite components of a PLS, and studies that have found the PLS to be effective).


\(^{18}\) The sequencing of the traditional method and the PLS manual instruction is described infra Part II.C.

\(^{19}\) We measured student performance by a series of pretests and posttests, which are discussed infra Parts II.C and III, and in Appendix C. The statistical significance of this study is further explained infra Part III.
This Article is divided into four parts. Part I describes the burgeoning interest of law professors in teaching to a diverse student population with differing learning styles. Part II explains the design of our study. Part III sets forth the study's results. Finally, Part IV recommends the kind of course material that is suitable for a PLS— one that can be metered in small bits of concrete information, such as elements of a statute or cause of action. Professors should avoid constructing a PLS when delivering abstract concepts or when eliciting varied and multiple student responses to hypothetical questions.

PART I — LAW STUDENTS AND LEARNING STYLES

In any given student population, less than thirty percent of the adult population exposed to learning through lecture and discussion will absorb the material, and only ten to twenty percent of that material will be retained. Yet law school professors historically have relied upon students' ability to learn by listening, either by teaching with the Socratic method, by skillfully eliciting answers to poignantly phrased questions, or by straight lecturing. If large segments of the student population across the country fail to learn from auditory means, then this is also true for law students. It is no wonder that there is a growing interest among law professors to seek alternative classroom teaching tools.

20 Dunn & Dunn, supra n. 4, at 402 (describing the "perceptual strengths" of auditory, visual, tactual, and kinesthetic learners). The amount of retention depends upon how the original auditory reception is reinforced. If tactual learners take notes while learning the information, they will remember more of the material, id.; if visual learners go home and read the same material after they hear it in lecture, they will also retain more of the material. See generally id. at 407.


22 Boyle & Dunn, supra n. 1, at 213-219 (explaining the history of the traditional law school teaching methods, such as the case method and the Socratic method); Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 28 (1996) (concluding in his 1994-1995 academic-year survey of American Bar Association-accredited law schools that the Socratic method is used by "an overwhelming majority," which was ninety-seven percent of law professors who teach first-year students in his sample, and that the "lecture technique is most common in upper level courses, where ninety-four percent . . . of those responding stated that they use this method at least some of the time").

23 Boyle & Dunn, supra n. 1, at 219-223 (providing views of various professors about innovative approaches to law school teaching); Friedland, supra n. 22, at 32 (reporting findings that "[m]any of the respondents indicated a desire to do away with the 'Socratic non-
Because students have diverse strengths, law school teachers must teach in equally diverse ways. The American Bar Association recognizes the diversity of the law student population, observing that “[w]omen, like men, come to law school with a variety of skills, cultural and social backgrounds, interests, learning styles, and responsibilities.” The ABA encourages professors to use a “variety of methods” because “not all students learn best in the same manner.” A law teacher in the field of academic support aptly describes the dissonance between the use of lecture or Socratic method and students’ ability to learn the material: “Because traditional law school pedagogy is limited to only one learning style, it does not address the varied cognitive styles represented in each class. Students whose cognitive style does not comport with the Socratic method will have to learn legal reasoning on their own.”

24 ABA Comm. on Women in Educ., Elusive Equality: The Experiences of Women in Legal Education: Executive Summary and Recommendations 9 (ABA 1996). The ABA further recommended:

Individual teachers can experiment to determine what combination of methods works best to communicate effectively with all members of the class. For example, depending on the course and its size, effective techniques might include group projects or simulations, formal student presentations, small group discussions followed by reports on particular topics, reaction papers, journals, tours of legal institutions outside the law school, computer exercises for individual students or groups of students, and panels of experts.

Id. at 12.

25 Id.

Among those who advocate change in the law school classroom are proponents of recognizing individual differences.\textsuperscript{27} Drs. Rita

\textsuperscript{27} See e.g. Boyle & Dunn, supra n. 1, at 217 n. 20 (providing an overview of law professors' interest in individual learning); Friedland, supra n. 22, at 32 (explaining that his survey of teaching techniques used in law schools revealed "a willingness of professors to experiment and explore" in answer to questions regarding whether they use "new or different teaching techniques").

Some law teachers propose that there are different kinds of learners. See e.g. David W. Champagne, Improving Your Teaching: How Do Students Learn?, 83 L. Lib. J. 85, 89 (1991) (identifying eight categories of learners and providing advice for professors on how to plan and adapt their teaching styles to enhance the learning environment); Friedland, supra n. 22, at 4 (observing that "more and more educators are characterizing students as 'three-dimensional' learners who have disparate propensities for learning").

Some law teachers categorize personalities of students based upon "dimensions," according to Myers-Briggs Type Indicator theory. See e.g. Boyle & Dunn, supra n. 1, at 221–222 & n. 48 (explaining Myers-Briggs Type Indicator theory); Don Peters & Martha M. Peters, Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing, 35 N.Y.L. Sch. L. Rev. 169, 195–196 (1990) (encouraging the use of MBTI theory for legal interviewing skills in clinical settings); Vernellia R. Randall, The Myers-Briggs Type Indicator, First Year Law Students and Performance, 26 Cumb. L. Rev. 63, 102–103 (1995) (concluding that there is a correlation between personality types and law school performance and suggesting that law faculty know and teach about learning styles); contra M.H. Sam Jacobson, Using the Myers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype?, 33 Willamette L. Rev. 261, 269–304 (1997) (critiquing the MBTI theory); but cf. Dorothy Griggs et al., Accommodating Nursing Students' Diverse Learning Styles, 19 Nurse Educator 41, 43 (Nov. 1994) (critiquing theories, such as the Myers-Briggs Type Indicator, that focus on a few variables, because "[l]earning style is a multidimensional concept in which many variables impact on each other and produce highly unique patterns among individuals").

Despite the slight nuances in theory, there is a growing acceptance that students are not all the same. John Bishop, The Changing Educational Quality of the Workforce: Occupation-Specific Versus General Education and Training, 559 Annals Am. Acad. Pol. & Soc. Sci. 24, 36 (1998) ("Since individuals cannot achieve excellence without specialization, an education system that does not accommodate and indeed encourage specialization becomes a barrier to real excellence. People have diverse interests, diverse talents, and diverse learning styles. Employers are similarly diverse in the skills and talents they seek. A one-size-fits-all upper-secondary education is bound to fail the majority of students."); Mary Jo Eyster, Designing and Teaching the Large Externship Clinic, 5 Clin. L. Rev. 347, 368 n. 24 (1999) (indicating that "teaching methodologies must be varied in order to match the varieties in learning styles"); Alan M. Lerner, Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver, 32 Akron L. Rev. 107, 116 (1999) (stating that "we, as teachers, need to be conscious of offering not only a mode of learning that suits our styles (and thus the learning styles of some — but not all — of our students), but a variety of teaching/learning styles in order to be offering the same 'real' opportunity to learn to all of our students"); Lustbader, Construction Sites, supra n. 26, at 324 n. 17 (encouraging law teachers to "adapt their styles, methods, and program designs to accommodate the students' diverse patterns of thought").

Differences in a law school classroom experience have been detected along lines of race, gender, and sexual preference. See e.g. Janice L. Austin et al., Results from a Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School, 48 J. Leg. Educ. 157, 163–164 (1998) (concluding in a 1997 survey of 194 law schools that "classroom coverage of [Gay-Lesbian-Bisexual] issues may have improved, but many GLB students still have cause for concern. And the overall law school climate remains on the chilly side for many GLB students."); Lani Guinier, Michelle Fine & Jane Balin, Becoming Gentlemen: Women's Ex-
and Kenneth Dunn have developed an assessment tool, called the Productivity Environmental Preference Survey (PEPS),\(^\text{28}\) that reveals students’ learning preferences for twenty-one elements, known as the “Dunn and Dunn Learning-Style Model.” These twenty-one elements are divided among five categories: (1) environmental factors such as “sound, light, temperature, and furniture/seating designs”;\(^\text{29}\) (2) emotional factors such as “motivation, persistence, responsibility (conformity versus nonconformity), and need for either externally imposed structure or the opportunity to do things in their own way”;\(^\text{30}\) (3) sociological factors such as (a) “learning best alone, in a pair, in a small group, as part of a team, or with either an authoritative or a collegial adult”\(^\text{31}\) and (b) “wanting variety as opposed to patterns and routines”;\(^\text{32}\) (4) physiological factors such as “perceptual strengths, time-of-day energy levels, and need for intake and/or mobility while learning”;\(^\text{33}\) and (5) psychological factors such as (a) global versus analytic processing determined through correlations among sound, light, design, persistence, sociological preference and intake; (b) right/left brain hemisphericity; and (c) impulsive versus reflective.\(^\text{34}\)

28 The PEPS was developed by Rita Dunn, Kenneth Dunn, and Gary Price. If interested in obtaining the PEPS, contact: Price Systems, Inc., P.O. Box 1818, Lawrence, KS 66044-8818. The telephone number is 1-800-LSI-4441. Dr. Lynne Dolle and Professor Robin Boyle are willing to serve as a resource in assisting law professors in altering their teaching methods to reach the learning-style majorities of their classes.

29 Dunn & Dunn, supra n. 4, at 3, 5 (listing the various elements that affect learning).

30 Id.

31 Id.

32 Id.

33 Id.

34 Id. The multidimensional Dunn and Dunn Learning-Style Model is based on the following theoretical assumptions:

1. Learning style is a biological and developmental set of personality characteristics that makes identical instructional environments, methods, and resources effective for some learners and ineffective for others.

2. Most people have learning-style preferences, but individuals’ learning-style preferences differ significantly.
Our own studies indicate that there is validity to recognizing individual differences. The learning styles of incoming law students at St. John's University School of Law were assessed annually since 1996.\textsuperscript{35} In each of these academic years, our PEPS results show that law students were diverse in their learning styles.

Innovative educators are also incorporating self-instruction into their repertoire. Law school professors increasingly recognize the need to help students understand "their own learning processes."\textsuperscript{36} In turn, their students increasingly seek to gain an understanding of their individual learning processes through their metacognitive skills.\textsuperscript{37} Through self-instruction, students gradually

3. Individual instructional preferences exist and the impact of accommodating these preferences can be measured reliably.
4. The stronger the preference, the more important it is to provide compatible instructional strategies.
5. Accommodating individual learning-style preferences through complementary instructional and counseling interventions results in increased academic achievement and improved student attitudes toward learning.
6. Given responsive (matched learning-style) environments, resources and approaches, students attain statistically higher achievement and attitude test scores than students with dissonant (mismatched) treatments.
7. Most teachers can learn to use learning styles as a cornerstone of their instruction.
8. Most students can learn to capitalize on their learning-style strengths when concentrating on new or difficult academic material.
9. The less academically successful the individual, the more important it is to accommodate learning-style preferences.


\textsuperscript{36} Lustbader, \textit{From Dreams to Reality}, supra n. 26, at 852. Lustbader further stated, To facilitate students' awareness of how they learn, [academic support] teachers focus on the process of learning, provide examples of different ways students can master a specific skill, help students develop ways to evaluate their learning, and encourage students to modify their study techniques accordingly.

\textit{Id.} at 853.

\textsuperscript{37} See e.g. \textit{id.} at 852–53 & n. 44; Cathaleen A. Roach, \textit{A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy}, 36 Ariz. L. Rev. 667, 685 (1994) (encouraging law teachers to move law students into the direction of self-learning); Paul T. Wangerin, \textit{Learning Strategies for Law Students}, 52 Alb. L. Rev. 471,
become "active" rather than "passive learners" and by doing so, students can "manipulate and process information in [their] own way in order to fully understand it." Self-instruction has been a cornerstone of teaching legal research as evidenced by the frequency of do-it-on-your-own research exercises contained within legal textbooks. Self-instruction is also one of the many benefits of using the PLS instructional tool, as described further in Part II below.

Although there is a growing interest among law professors in recognizing both the diversity of our student population and the value of self-instruction, nonetheless there is a paucity of empirical research. One commentator noted, "Unfortunately, there is a distinct lack of empirical research that evaluates the effectiveness of the alternative group pedagogical methods used in legal education." Another explained the absence of studies by observing, "most legal educators have neither the time nor the inclination to engage in complex empirical research. . . ." Our study was empirical. It tested theory with practice. We hope that it inspires others to develop and evaluate alternative law teaching methods and materials.

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38 Lustbader, From Dreams to Reality, supra n. 26, at 852, 854–855; see Lerner, supra n. 27, at 116 ("Most students learn better when they are engaged in 'active learning.'").

39 Lustbader, From Dreams to Reality, supra n. 26, at 855.

40 Supra n. 17. Ruth Ann McKinney explains the value of self-instruction: Doing legal research is the kind of skill that you can learn best when you roll up your sleeves and try it. While it helps to read about it or hear experts talk about it, there's no substitute for trying it yourself. Most of us know through experience that "learning by doing" is the way to go when developing a skill. McKinney, supra n. 17, at 1.

41 James Eagar, Pedagogical Methods in Legal Education, 32 Gonz. L. Rev. 389, 414 (1996/97) (referring to the use of audio-visual aids and computers as supplements to the textbook and lecture/discussion model).

42 Paul T. Wangerin, Action Research in Legal Education, 33 Willamette L. Rev. 383, 385 (1997) (acknowledging merely a few studies by notable researchers). Wangerin went on to say, Furthermore, even if legal educators wished to gather evidence regarding the effectiveness of certain teaching techniques or educational programs, they would be dissuaded by the lack of a workable model for gathering such evidence. Standard statistical evidence is simply too difficult. Id. Our study, however, included "standard statistical evidence."
PART II — THE PLS STUDY CONDUCTED AT ST. JOHN'S UNIVERSITY SCHOOL OF LAW

The population for the study we conducted at St. John's University School of Law consisted of 113 first-year law students who were enrolled in Legal Research and Writing, a required course. The investigation was conducted in four legal writing sections; two professors each taught two sections. All students participated voluntarily.

A. Measuring Learning Styles

We used the PEPS to assess the learning-style preference of the students. The PEPS identifies how adults prefer to “function, learn, concentrate, and perform in their occupational or educational activities . . . .” PEPS concentrates on the five specific classifications explained in Part I above: environmental, emotional, sociological, physiological, and psychological. PEPS is administered in the form of 100 written questions that elicit answers relating to twenty-one discrete learning-style elements. These elements then translate into the five specific classifications. The PEPS has been used in research at more than 120 institutions of higher education and has evidenced predictive reliability and validity.

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43 Out of 113 students in the study, fifty-six were males and fifty-seven were females. At the conclusion of the study, there were 108 students; three males and two females left the course due to attrition. The average age among the full-time students in the entering class was twenty-three, with years ranging from twenty to forty-five. Twenty-six percent of the entering students were from African-American, Asian, Hispanic, or Native-American backgrounds.

44 All students participating in this study completed the prerequisite course, Legal Methods.

45 At the beginning of the fall semester, students were provided with a written description of the research project. Students were informed that all participation would be voluntary and that refusal to participate would not jeopardize their grades in the course.


47 Id.

48 The PEPS uses a five-point Likert Scale and can be completed in approximately twenty to thirty minutes. For those who cannot read or write, it can be administered on tape or orally.

49 See Research with the Dunn and Dunn Model (Ctr. for the Study of Learning & Teaching Styles, St. John’s Univ. Sch. of Educ. & Human Servs. 2001); www.learningstyles.net.
We administered the PEPS to our sample and obtained a survey of the learning-style preferences for the group as well as for each individual.52

B. Programmed Learning Sequences I and II

The PLS53 is designed to respond to selected learning styles. Researchers have found it to be an effective instructional tool.54

50 Lynn Curry, Integrating Concepts of Cognitive or Learning Style: A Review with Attention to Psychometric Standards 2, 23–24 (Ctr. for the Study of Learning and Teaching Styles, St. John’s Univ. 1987) (finding that the PEPS provided “good reliability evidence”); see generally Steve Baldridge, Creating Legally Valid School Administrator Evaluation Policy in Utah, 1998 BYU Educ. & L.J. 19, 25 (defining “reliability” as “when measurement can take place repeatedly resulting in the same outcome” (citation omitted)).

51 Curry, supra n. 50, at 23–24 (finding that the PEPS provided “good validity evidence”); Dunn & Dunn, supra n. 4, at 2 (noting that each of the major models of learning styles has specialized and “related” instruments for assessing an individual’s unique learning style). In 1991, researchers reported the reliability and validity of the PEPS in their study of nursing populations. Julie LaMotte et al., Reliability and Validity of the Productivity Environmental Preference Survey (PEPS), 16 Nurse Educator 30, 34 (July–Aug. 1991). Other studies have also found predictive validity of the PEPS. Rita Dunn et al., Effects of Matching and Mismatching Minority Developmental College Students’ Hemispheric Preferences on Mathematics Scores, 83 J. Educ. Res. 283, 285 (1990) (referring to various studies affirming the reliability of the PEPS); Rita Dunn, Joanne Ingham & Lawrence Deckinger, Effects of Matching and Mismatching Corporate Employees’ Perceptual Preferences and Instructional Strategies on Training Achievement and Attitudes, 11(3) J. Applied Bus. Research 30, 32 (Summer 1995) (pointing to studies that have established PEPS validity); Joanne M. Ingham, Matching Instruction with Employee Perceptual Preference Significantly Increases Training Effectiveness, 2(1) Hum. Resource Dev. Q. 53, 56 (Spring 1991) (indicating that “the PEPS has demonstrated predictive validity”); see generally Baldridge, supra n. 50, at 25 (defining “validity” as “the instrument’s ability to accurately assess those skills or behaviors for which it was constructed” (citation omitted)).

52 Infra app. A. Individual and group surveys were developed.

53 The PLSs used in this study were based upon the Dunn and Dunn Learning-Style Model alternative strategies.

54 Previous researchers report significant higher achievement-test scores on course content taught through the PLS learning-styles strategy as opposed to course content taught through traditional instruction. Dunn & Griggs, supra n. 16, at 28–29 (describing studies finding PLSs to be effective); Listi, supra n. 8, at 3, 54 (reporting on her study of the relative impact of PLS instruction to traditional teaching methods with third-grade students in a social studies lesson and finding that the PLS was effective as an instructional resource); Joyce A. Miller & Rose F. Lefkowitz, Incorporating Learning Styles into Curricula of Two Programs in a College of Health-Related Professions, in Practical Approaches to Using Learning Styles Application Higher Education 145, 147–151 (Rita Dunn & Shirley A. Griggs eds., Bergin & Garvey 2000) (describing the effectiveness of the PLSs developed for college students in health-related courses); Joyce A. Miller, Enhancement of Achievement and Attitudes Through Individualized Learning-Style Presentations of Two Allied Health Courses, 27 J. Allied Health 150, 154 (Fall 1998)(concluding in her investigation that the PLS she developed and used in college health classes proved to be “more efficacious [as an] instructional resource than the traditional method and was able to accommodate many
The PLS is ideally suited for students who prefer learning (a) with structure, (b) tactually, (c) in small steps with immediate reinforcement, (d) alone or with peers, (e) visually (by use of print, illustrations, tables, graphs), and (f) globally (with a story or case study introduction). It often is written in the form of a manual and focuses on discrete topics.

We wrote and presented to the sample population two manuals called Programmed Learning Sequence I and II (PLS I and II). Generally, PLS I focused on primary authority and PLS II focused on secondary authority. Specifically, PLS I focused on the federal court system, branches of our federal government, federal case reporters, federal case citations, New York state courts, New York reporter system, New York case citations, framing an issue from a fact pattern, and researching a New York statute. PLS II focused on case digests, key number system, case annotations in digests, pocket parts, publishers’ notes in case reporters (including headnotes), Index to Legal Periodicals, periodical citations, encyclopedias, American Law Reports, Restatements of the Law, and treatises.

The PLS must include defined objectives set forth in the introductory pages that follow the global introduction, user-friendly directions, and a vocabulary list. Students were introduced to our PLS through a global beginning – with a letter inviting them to do research in the law library. Objectives were provided in the introductory pages of our manuals. Vocabulary words were also provided in the introductory pages.

The PLS provides structure through a repetitive format of introducing new concepts in the form of individual frames and then

55 Dunn & Dunn, supra n. 4, at 201–270 (describing the ideal student for this instructional tool and how to construct a PLS). PLS is also suited for a student who prefers to learn auditorially if the material is presented on a tape cassette.

56 Each manual bore on its cover the title, Legal Research: A Method to Its Madness.

57 See infra Appendix B for an example. According to the Dunn and Dunn Learning-Style Model, broad introductions are helpful for global learners. Dunn & Dunn, supra n. 4, at 47–48 (explaining global versus analytic learners).

58 See infra Appendix B.

59 See infra Appendix B.
posing related questions. The correct answers, by which the students can check their own answers, are provided on the back of each frame. Structure is further emphasized by the educational objectives itemized on specific frames. Frames contain questions and answers directly related to the topic to help students retain the information.\footnote{For example, in our PLS I, Frame 5 reads as follows: Decisions from our courts can be found in what we call \textit{case reporters}. Some courts have their decisions printed in more than one reporter. In that case, one reporter is designated as the official reporter, which is published with authorization by the government. The other reporter(s) are referred to as unofficial and are published by private industry. Write one answer on each line below.\par 1) Court decisions can be found in \text{\underline{\underline{}}}.
\par 2) A distinction between official and unofficial reporters is that \text{\underline{\underline{}}}.
\par The back of Frame 5 read:}

\textbf{ANSWERS} \\
1) Court decisions can be found in \textit{case reporters}. \\
2) Official reporters are \textit{printed by an agent of the government} and unofficial reporters are \textit{printed by private industry}.

\footnote{The origin of the Sleeze Press fact pattern is unknown.}

\footnote{See \textit{infra} Appendix B for an example.}

\footnote{On file with the authors.}

In our PLS manuals, a singular concept was woven through the frames. In PLS I, the first frame opens with a global beginning, which enables students to consider history and to recognize how citizens from ancient times obeyed rules and regulations as decreed by kings. It further illustrates the contrast between the past and the present, specifically referring to the United States, where rules and regulations emanate from the law. This concept of American jurisprudence is woven throughout PLS I. In PLS II, the first frame begins with a humorous legal issue concerning a book publisher called Sleeze Press\footnote{The origin of the Sleeze Press fact pattern is unknown.}, which intends to publish fictionalized accounts of actual persons and events.\footnote{See \textit{infra} Appendix B for an example.} Throughout the manual, students are introduced to pertinent materials that will assist them in mastering this topic. Toward the end of the same manual, in Frame 24, students were asked to answer the issue posed regarding Sleeze Press.\footnote{On file with the authors.}

The PLS format is effective for "tactual learners" because these students prefer to work with their hands, and students using a PLS write their answers repeatedly. Tactual learners are engaged by manipulative hands-on games that serve as periodic review tests usually after seven or eight frames. These review tests
further reinforce the material and show the students how much they actually are remembering. Tactual manipulatives are effective for tactual learners who often cannot remember three-quarters of what they hear or read; they can, however, remember seventy-five of the material that is contained in an instructional hand game that they use.\(^{64}\)

Our PLS I and II contained three review tests per manual, each in the form of a tactual manipulative. Each review test followed approximately eight frames. One tactual review test was in the form of a puzzle; students were asked to reconstruct the puzzle pieces that substantively and physically fit together.\(^{65}\) A second tactual review test was in the form of a Poke-A-Hole, which consists of a card with a statement and three possible corresponding statements marked by holes at the bottom of each. The student was asked to poke a pen through the correct hole, which was verified with a star emblazoned around the hole with the best response on the back of the card.\(^{66}\) A third tactual review test was a matching column, in which students were asked to find the correct answer in one set of columns from the question posed in the opposite column.\(^{67}\)

For students who prefer to learn new material in incremental steps with periodic reinforcement, the PLS is an effective mode of instruction. Each frame provides a bite-size piece of new information. The questions and answers on each frame assist the students in learning each new concept. The tactual review tests reinforce all concepts.

For students who prefer to learn visually, the PLS provides not only the written word, but also includes diagrams, pictures, charts and/or graphs. Our PLS I and II provided visual depictions of the subject matter on every frame.\(^{68}\)

Additionally, the PLS is an effective mode of self-instruction. Its self-explanatory answers throughout the manual permit students to learn the academic material independently. The tactual tests and games contained within the manual also provide an-

\(^{64}\) Dunn & Griggs, supra n. 16, at 28.  
\(^{65}\) See infra Appendix B for an example.  
\(^{66}\) See infra Appendix B for an example.  
\(^{67}\) See infra Appendix B for an example.  
\(^{68}\) For example, PLS I in Frame 6 substantively covered the federal reporter system and visually depicted court houses with diagrams of corresponding case reporters. Maps of court systems were included on pertinent frames. See infra Appendix B for an example.
swers with which students can recognize their gradually increasing knowledge. The PLS is self-paced and is best used when students are permitted reasonable time intervals in which to proceed at their own speed. In our study, we allowed students approximately ninety minutes to complete one manual in class. Alternatively, the manuals can be completed at home or in the library.

The PLS can incorporate encouragement and humor, which some students prefer while learning challenging material. Our PLS I and II included periodic encouraging statements such as “[k]eep on focusing. It’s complicated, but you’ll get it!” The frames also contained humorous caricatures. While the study was in progress, we overheard students chuckling and enjoying themselves.

C. Measuring PLS's Effectiveness

To assess the effectiveness of the Programmed Learning Sequences (PLSs), two different groups were compared with two different subject areas.69 Half the students used PLS I while the other half used the traditional method to learn the same subject matter. The traditional method included lecture and the use of some visual aids, such as copies of legal print sources projected by an overhead onto a screen or photostatic copies distributed to each student. The subject matter for Week One of the study consisted of the topics contained in PLS I.70 During Week Two of the study, the students who used PLS I in Week One then used the traditional method, while the other students used PLS II. The subject matter for Week Two of the study consisted of the topics contained in PLS II. Thus, during the two weeks of the study, each student was presented with traditional methods consisting primarily of lectures and some visual aids, and with a PLS.

The sequence of our classroom teaching methods for the study is shown in the following chart:

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69 Statistically, there were two large groups. Practically speaking, however, each professor taught two groups, thus encompassing four groups. Each week of the two-week study was treated as a separate experiment.

70 Professor Elizabeth Cohen administered PLS I to one group of her students and taught by traditional methods (part lecture and part visual aids) to her second group. Professor Robin Boyle also administered PLS I to one group of her students and taught by traditional methods (part lecture and part visual aids) to the second group. This structure was repeated in Week Two. However, PLS II was given to the students who did not receive PLS I in Week One.
Figure 1. Random assignment of ordering within a two-week period

We used pretests and posttests to measure how well the students knew the material, before and after each lesson. Our study was performed during a two-week time span, each week focusing on different legal research topics. In Week One, all students in the study were administered the same pretest and posttest on the assigned subject matter for that week, and that process was repeated for Week Two.

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<table>
<thead>
<tr>
<th>CLASS</th>
<th>WEEK ONE</th>
<th>WEEK TWO</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLASS 1</td>
<td>Traditional ‘1’</td>
<td>PLS II</td>
</tr>
<tr>
<td>CLASS 2</td>
<td>PLS I</td>
<td>Traditional ‘2’</td>
</tr>
<tr>
<td>CLASS 3</td>
<td>Traditional ‘1’</td>
<td>PLS II</td>
</tr>
<tr>
<td>CLASS 4</td>
<td>PLS I</td>
<td>Traditional ‘2’</td>
</tr>
</tbody>
</table>

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71. The pretests and posttests contained fifteen to twenty multiple-choice questions. Scores were based on a scale of 100%. Only one answer was possible for each item. Each set of pretests and posttests was identical; however, the set for the week covering PLS I subject matter was different from the set covering PLS II subject matter. The items in the tests were similar to those used in the previous years’ course content and were chosen on the basis of their face validity. A jury of experts, consisting of learning-style researchers, examined the PLS manuals to assure that they met the requirements for proper methodology. Additionally, a jury of content experts, consisting of legal writing professors and law professors from other disciplines, examined the PLS manuals to assure comparability of both PLS manuals in terms of content quality and level of difficulty. Prior to each topic, a pretest was administered to determine comparability of the four Legal Research and Writing classes. Following each topic, a posttest was administered to assess student progress in legal research achievement.

72. Some of the questions and multiple choice answers posed on the pretests and posttests were:

In order for you to begin your legal research it is important for you to:

a) frame the legal issue in terms of the facts presented and topics of law;

b) use the identical strategy each time;

c) both (a) and (b).

Another multiple-choice question was:

Legal encyclopedias are generally:

a) listing of periodicals organized alphabetically by topic and by author;

b) written by legal research librarians;

c) resources that summarize the law on a wide variety of topics and are organized alphabetically by topic.
PART III — STUDY FINDINGS

The results of the pretests and posttests, as well as the PEPS, were examined by a team of statistics experts. The research question posed was whether the students had achieved higher scores on the posttests, in relation to their pretests, by using the PLS manuals than when taught the same course content through traditional instruction (lecture and some visual aids). The results of our study show that students learned statistically more material by using the PLS manuals than through traditional instruction.

The PLS was an effective instructional tool for a number of reasons. First, PEPS results indicated that our law student population strongly preferred structured and tactual materials, and the PLS has proven to be an effective instructional strategy for students who prefer to learn with structure and tactual tools. According to the PEPS results for our study population, fifty-four percent of the students indicated that they strongly preferred structure. This figure was significantly higher than the figure for all other twenty learning-styles elements. In addition, twenty-four percent of the students indicated that they strongly preferred tactual materials, which was the seventh highest preference revealed for the learning-style elements.

Second, the PLS is entirely student-controlled, whereas the traditional approach is instructor-controlled; thus, students may feel empowered using the PLS method. Students can pace themselves; those who process information more slowly are able to work at a relatively slower speed. Furthermore, when working with the tactual review tests, students can return to prior pages to reinforce earlier concepts.

It is difficult to ascertain the effectiveness of visuals in this study. Only 8% of this study population preferred visual materi-

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73 Data were analyzed using the t-test to determine whether there was a significant difference between the mean achievement scores of the classes being taught through traditional instruction and the mean achievement scores of the classes being taught through PLS instruction. The t-test ascertained whether the observed difference on the mean standardized gain scores from pretest to posttest was significantly larger than a difference that would be expected by chance.

74 Examination of the achievement data indicated significantly higher achievement for Week One (p<.001) and Week Two (p<.035) under PLS conditions than on course content taught through traditional instruction. See infra Appendix C for a complete table of study results.

75 Infra app. A.
als, indicating that the visual aids in either the PLS manuals or the lecture benefited a small segment of our population. Visuals were included in both the PLS as well as the traditional methods presentations. During their lectures for the traditional instruction, the professors used overhead projectors and distributed photostatic copies of legal print sources. These print sources contained written text. Thus, this study did not compare straight lecture to PLS instruction, but it did compare two teaching methods -- traditional versus programmed learning instruction.

PART IV — RECOMMENDATIONS

The success of the PLS as an instructional tool demonstrates that not all students learn best through lecture, nor by lecture with additional use of visual aids. The PLS is effective for students whose learning-style profiles indicate a preference for structure and tactile stimulation. Based upon the student populations that we have sampled, a substantial percentage of students strongly prefer to learn through these two learning style elements.

Law professors should not overlook the need to provide structure for our students. In our study conducted in academic year 1998-99, students strongly preferred structure more than any of other learning-style preferences. This finding does not appear to be an aberration. Professor Robin Boyle and Dr. Rita Dunn found similar results at the same law school in other years. In the academic year 2001-02, the PEPS revealed that 65.9% of our sampled first-year law students strongly preferred structure. In academic year 2000-01, the PEPS revealed that 65.85% of our sampled first-year law students strongly preferred structure. In academic year 1997-98, the PEPS revealed that 47.62% of our sampled first-year law students strongly preferred structure, which then was the second most strongly preferred element of the twenty-on elements. In academic year 1996-97, our PEPS revealed that 67.11% of our

76 Id.
77 Infra Part II.A & app. A (providing learning-style assessment results for first-year law student sample in 1998 and showing that fifty-four percent strongly preferred structure).
79 Id. at app. A tbl 2.
80 Boyle, supra n. 35, at 155, 160 tbl. 17.4 (providing learning-style assessment results for first-year law student sample in 1997 and showing that 47.62% strongly preferred structure, which was the second most popular element most strongly preferred).
sampled first-year law students strongly preferred structure, which was the element most strongly preferred that year. The second favorite was a preference for learning in the afternoon, with 56.58% preferring that time of day. Thus, in five successive years, each of our sampled law school populations strongly preferred structure.

Law school reform should include self-instruction. For example, those who teach legal research find that students need to engage in research exercises independently as an integral part of the learning process. The PLS manuals used for our study helped these students learn on their own without expert assistance. Many of the legal research and writing texts on the current market include research exercises for students to perform on their own in the library. We are not advocating that law teachers abandon the concept of classroom learning. Instead, self-instruction and learning-by-doing should be incorporated as part of a full educational experience.

A PLS is best suited for a legal subject area that can be organized into sequential detail. In designing a PLS, a law professor would be wise to use content that can be “learned in small, simple steps without the direct instruction of a presenter” and should provide objectives that each participant can master. Many legal courses, if examined carefully, can be taught piece-by-piece by identifying the “topic, concept, or skill” that students need to learn. For example, a PLS on intentional torts could define certain torts, such as false imprisonment, in individual frames, along with questions testing and reinforcing the students’ understanding. Elements of causes of action would be suitable for a PLS. Certain lessons in a statute-based course, such as Trusts and Estates, could also be the basis of a PLS with individual frames parsing information about key statutory sections. A civil procedure course could lend itself to a PLS if a professor were to isolate manageable

81 Boyle & Dunn, supra n. 1, at app. 2 (providing learning-style assessment results for first-year law student sample in academic year 1996-97 and showing that 67.11% strongly preferred structure, which was by far the most popular element).
82 Supra n. 17.
83 Rita Dunn & Kenneth Dunn, The Complete Guide to the Learning Styles Inservice System 120 (Allyn & Bacon 1999). This is a very useful book on how to construct a PLS and other learning styles materials.
84 Id.
85 Supra n. 17.
topics, such as the basis of long arm jurisdiction. For ease of first-week tension, a law professor teaching an advanced course with essential prerequisite material could develop a PLS for incoming students as a refresher.\textsuperscript{86} College level courses on legal topics, such as a Health Law class covering patients’ rights, would be appropriate.\textsuperscript{87} As a cautionary note, individual PLS frames and review frames with tactual exercises cannot be abstract — they must deliver to and request from the student concrete information.\textsuperscript{88} A PLS would be an inappropriate teaching tool if the professor’s goal would be to have students examine a multiple of writings and construct a variety of answers. A PLS would be equally inappropriate if the professor wanted to pose multiple hypothetical questions to her students and expected numerous responses.

Because a PLS is not effective for all students, professors should not construct an entire course solely based upon a single PLS. A PLS can be given to a class along with a variety of other teaching tools that appeal to different learning styles strengths.\textsuperscript{89} Furthermore, there will be voluminous information needed for inclusion in a PLS, thus an entire course would be unmanageable in a PLS. Discrete lesson plans would be preferable.

The student who would most likely benefit from using a PLS would be one who (1) enjoys working alone, or in pairs; (2) is persistent, meaning the student will work with it until completion;\textsuperscript{90} (3) enjoys “reading text supported by illustrations [and] tactuals . . . ”;\textsuperscript{91} (4) prefers structure; and (5) enjoys learning “in small steps

\textsuperscript{86} For example, legal writing professors could give a PLS to incoming students who need assistance with the basics of writing. Dr. Sue Ellen finds the PLS very helpful for incoming college students at Northeastern State University who need to catch up with her other students. Sue Ellen Read, Dir., Okla. Inst. of Learning Styles, Prof., N.E. St. Univ., Presentation, 24th Annual Learning Styles Leadership Certification Institute (New York, N.Y., July 25, 2001).

\textsuperscript{87} Dr. Rose Lefkowitz finds the PLS to be very effective for many of her college health law students in a Health Information Management Program. Interview with Rose Frances Lefkowitz, former Asst. Prof., Downstate Med. Ctr. (July 25, 2001).

\textsuperscript{88} In the Boyle & Dolle PLS, the most abstract concept involved explaining how to frame a legal issue from a sample fact pattern. Admittedly, a variety of statements could have been explored, but only one was given as an example with the caveat that students’ responses may vary.

\textsuperscript{89} These different teaching tools, such as the Contracts Activity Package and the Multisensory Resource Alternatives, are outlined in Dunn & Dunn, supra n. 83, at 85–119.

\textsuperscript{90} Id. at 121.

\textsuperscript{91} Id. Dunn & Dunn further suggest that the professor put the PLS on a tape recorder for the auditory learners. Such tapes would be beneficial for students who prefer to learn by “hearing the material read to them.” Id.
followed by periodic gamelike reinforcements."92 Because a PLS is self-paced, a student who likes to take time in doing a learning task can proceed independently.

A PLS can be given to students as either a take-home or in-classroom assignment. A professor is likely to feel superfluous as students progress through a PLS independently at their desks without need for lecture or guidance. But the work of the professor went into the preparation of the PLS, and, as students accomplish the PLS, the students are concentrating. The benefit to having students work with the PLS in the classroom, from start to finish, is that the professor knows that the students actually did the work and also the professor could immediately pretest and posttest her class to measure content absorption.

Because students are diverse, law teachers should alter and diversify their teaching methods and materials. We are not alone in this call. Law teachers across the country are encouraging law school faculty to employ a variety of teaching styles.93

92 Id. By placing a broad story in the first frame of the PLS and by including a humorous title, global students (as opposed to analytic students) find these touches appealing. Id.

93 E.g. Friedland, supra n. 22, at 13 (concluding that "[s]ince students have various learning styles predicated on differing cognitive structures and beliefs ... tailoring the delivery of legal education to how students learn best may improve the effectiveness of the pedagogy"); Paula Lustbader, Principle 7: Good Practice Respects Diverse Talents and Ways of Learning, 49 J. Leg. Educ. 448, 448 (1999) (encouraging educators to "respect all forms of diversity" including "diverse learning styles, forms of intelligence, previous experiences, level of preparation for learning, external environments, values, and goals"); Paula Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, 48 J. Leg. Educ. 401, 411 (1998) (encouraging teachers to use various techniques such as experiential, writing and collaborative exercises and to "integrate a full range of learning exercises into [their] teaching").
APPENDIX A

PRODUCTIVITY ENVIRONMENTAL PREFERENCE SURVEY: REPRESENTATIVE CLASS PROFILE OF ST. JOHN'S UNIVERSITY LAW STUDENTS - 1998

Distributions of Opposite-Preferences, Non-Preferences, and Strong-Preferences for 21 Learning-Style Elements*

<table>
<thead>
<tr>
<th>PEPS Element</th>
<th>% Opposite-Preferenced &lt;39</th>
<th>% Non-Preferenced 40-59</th>
<th>% Strong-Preferenced &gt;60</th>
<th>No. of Missing Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Noise</td>
<td>2</td>
<td>88</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Light</td>
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<td>48</td>
<td>23</td>
<td>2</td>
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<tr>
<td>Temperature</td>
<td>9</td>
<td>70</td>
<td>19</td>
<td>2</td>
</tr>
<tr>
<td>Design</td>
<td>24</td>
<td>55</td>
<td>19</td>
<td>2</td>
</tr>
<tr>
<td>Motivation</td>
<td>6</td>
<td>79</td>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>Persistence</td>
<td>5</td>
<td>84</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>Responsibility</td>
<td>19</td>
<td>64</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>Structure</td>
<td>2</td>
<td>44</td>
<td>54</td>
<td>2</td>
</tr>
<tr>
<td>Alone</td>
<td>25</td>
<td>57</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>Authority</td>
<td>6</td>
<td>64</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Varied</td>
<td>17</td>
<td>75</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Auditory</td>
<td>6</td>
<td>64</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Visual</td>
<td>9</td>
<td>80</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Tactual</td>
<td>9</td>
<td>66</td>
<td>24</td>
<td>2</td>
</tr>
</tbody>
</table>
The Productivity Environmental Preference Survey (PEPS) was used to collect data for this study. The data collected represents answers to 100 statements that elicit self-diagnostic responses. For instance, one statement reads, "I prefer working in bright light." The student would then choose one answer from the following choices: strongly disagree; disagree; uncertain; agree; or strongly agree. The data yield a computerized profile of each student's preferred learning style.

Strong Preferences are measured by high scores (see column above titled "% Strong-Preferred >60"). Some opposite Strong Preferences are measured by low scores (see column above titled "% Opposite-Preferred <39"). Reactions that are not strong on either end are tabulated for the middle of the continuum (see column above titled "% Nonpreferred 40-59").

---

* Percentages do not always add to 100 due to rounding.

<table>
<thead>
<tr>
<th>Kinesthetic</th>
<th>2</th>
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<td>54</td>
<td>2</td>
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<tr>
<td>Evening-Morning</td>
<td>40</td>
<td>53</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Late Morning</td>
<td>6</td>
<td>64</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Afternoon</td>
<td>17</td>
<td>75</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Mobility</td>
<td>4</td>
<td>57</td>
<td>37</td>
<td>2</td>
</tr>
</tbody>
</table>

---

94 Boyle & Dunn, supra n. 1, at app.1 (explaining the PEPS).
95 There are exceptions to this pattern. For instance, scores of evening/morning time preferences and intake do not fall into this pattern.
APPENDIX B

Sample Frames from PLS I Manual and PLS II Manual

OBJECTIVES

Being able to efficiently perform legal research is a necessary skill for lawyers, and this Programmed Learning Sequence (PLS) was carefully designed to help you obtain these skills. Soon you will be responsible for both researching and writing an office memorandum that informs a senior attorney about the law and how the law pertains to your particular client. Before you embark on the open memo research project, you need to learn the basics, which are provided in this PLS.

By the time you have completed this program, you should be able to:

1. identify and have a working knowledge of primary authority;

2. develop an understanding of the structure of our federal and state court system and become familiar with case reporters that contain decisions of those courts;

3. identify case reporters provided in legal citations;

---

4. formulate issues for conducting legal research posed in fact patterns; and

5. describe the essential components of annotated statutes.
HOW TO USE THIS PROGRAM

Each information card in this Programmed Learning Sequence is called a frame. You will find new information about legal research on each frame. Please go through this booklet carefully. You will be asked to read the statement or questions on each frame and write the answers to the question or questions at the bottom of the frame. Sometimes a frame is continued. You may check your answers on the back of the frame.
VOCABULARY

Here are some terms you will come across while doing legal research in the law library. You will want to look at them before you read on. By the time you have finished reading Legal Research: A Method to Its Madness, you will know every one of them and will be well prepared for the posttest.

"Primary authority" is the law. The legislature, judiciary and administrative agencies have law-making capacities; therefore, primary authority appears in sources that they produce. You may find primary authority in: legislation (called statutes), judicial case law (also called court decisions), and administrative regulations and decisions. The legislative bodies at the federal, state, and local levels also create constitutions, charters, and ordinances.

"Statute" is an enactment by a legislature and is considered a type of primary authority. Statutes and ordinances regulate a wide range of behavior by individuals, private entities, and the government.

"Judicial case law" or "court decisions" are pronouncements by courts as to their decisions regarding particular legal cases. They are considered a type of primary authority.
“Legal citation” is the abbreviation used in referring to a source where one could find in printed form, primary or secondary authority. The lawyers' handbook for finding proper legal citation is called *The Bluebook*.

“Case annotation” is a summary of a case.

“Fact pattern” or “statement of facts” explains what has brought your client to your law firm for his or her particular legal problem or endeavor.
Selected Frames from PLS I 97

Frame 1

PRIMARY AUTHORITY

Once upon a time, kings decreed the rules and regulations that citizens had to obey. However, in the United States, rules and regulations emanate from the law. Just how laws are made is the subject of this Programmed Learning Sequence (PLS).

American law emanates from three types of government bodies: the legislature, the judiciary, and administrative agencies. Each has law-making capacities and each produces what we call primary authority. The legislature issues statutes; the judi-

97 For a complete copy of PLS I and PLS II, contact Robin Boyle: boyler@stjohns.edu.
ciary issues case law, also called case decisions; and administrative agencies issue administrative regulations and decisions.

Write one answer on each line below.

1) Three types of government bodies that produce laws are ____________________________,
_________________________________ and
__________________________________.

2) Statutes emanate from the following governmental body:
__________________________________________

3) Case decisions emanate from the following governmental bodies:
__________________________________________
ANSWERS

1) Three types of government bodies that produce laws are: the legislature, judiciary, and administrative agencies.

2) Statutes emanate from the legislature.

3) Case decisions emanate from the judiciary (or courts) and administrative agencies.

You’re off to a good start!
The United States Courts of Appeals is divided into circuits throughout the country. New York sits in the Second Circuit, which is often abbreviated as 2d Cir.
Write one answer on each space below. Refer to the diagram.

1) St. John's University sits in the _________ Circuit for the United States Court of Appeals.

2) California is included in the _________ Circuit.

3) There are a total of ____ federal circuits.
ANSWERS

1) St. John's University sits in the Second Circuit for the United States Court of Appeals.

2) California is included in the Ninth Circuit.

3) There are a total of 13 federal circuits – 11 numbered circuits, the D.C. circuit, and the Federal circuit.

Keep focusing.
The case decisions of the United States Supreme Court appear in three published reporters:

- **United States Reports** (official reporter)
- **Supreme Court Reporter** (unofficial reporter)
- **Lawyer’s Edition** (unofficial reporter)

The case decisions of the United States Courts of Appeals are usually cited in one reporter: **Federal Reporter**.

The case decisions of the United States District Courts are usually cited in one reporter: **Federal Supplement**.
Draw a line to connect the **courts** on the left with the **appropriate reporter(s)** on the right. Check your answers on the back of this frame.

<table>
<thead>
<tr>
<th>COURTS</th>
<th>REPORTERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States Court of Appeals</td>
<td><em>Supreme Court Reporter</em></td>
</tr>
<tr>
<td>for the Second Circuit</td>
<td></td>
</tr>
<tr>
<td>United States District Court</td>
<td><em>Federal Supplement</em></td>
</tr>
<tr>
<td>for the Southern District of New York</td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td><em>Lawyer’s Edition</em></td>
</tr>
<tr>
<td><em>(2 unofficial reporters)</em></td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td><em>Federal Reporter</em></td>
</tr>
<tr>
<td><em>(official reporter)</em></td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td><em>United States Reporter</em></td>
</tr>
</tbody>
</table>
ANSWERS

NAMES OF THE COURTS ARE PLACED NEXT TO COURT REPORTERS

<table>
<thead>
<tr>
<th>Court</th>
<th>Reporter/Edition</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States Court of Appeals</td>
<td><em>Federal Reporter</em></td>
</tr>
<tr>
<td>for the Second Circuit</td>
<td></td>
</tr>
<tr>
<td>United States District Court</td>
<td><em>Federal Supplement</em></td>
</tr>
<tr>
<td>for the Southern District of New York</td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court (unofficial)</td>
<td><em>Supreme Court Reporter</em> and</td>
</tr>
<tr>
<td></td>
<td><em>Lawyer's Edition</em></td>
</tr>
<tr>
<td>United States Supreme Court (official)</td>
<td><em>United States Reports</em></td>
</tr>
</tbody>
</table>
CASE CITATIONS

One helpful hint for reading a proper legal citation is that the volume of the reporter usually precedes the reporter's name and the first page of the case follows the reporter name:

Let us decipher:

**Jones v. Hill, 385 U.S. 374 (1967).**

- **Jones v. Hill** is the case name.
- **385** means volume 385 of the particular reporter cited.
- **U.S.** means the *United States Reports* is the cited reporter.
- **374** means the case begins on that page.
- **1967** is the year the case was decided.
Now, you decipher the citation:


Circle the correct answers below.

**Doe v. Smith** means:  
(a) name of the case or  
(b) name of the lawyers who argued the appeal

271 means:  
(a) the first page of the case  
(b) the volume of the reporter

582 means:  
(a) the volume of the reporter  
(b) the first page of the case

1968 means:  
(a) year the case was first argued  
(b) year the case was decided
ANSWERS

Doe v. Smith means a) the name of the case.
271 means b) the volume of the reporter
582 means b) the first page of the case
1968 means b) the year the case was decided

Stretch in your seat if your feel like it!
Frame 18
MATCHING COLUMNS REVIEW

Let's stop here to review what you have learned so far. Fill in the letter for the correct response. Check your answers on the back of this frame. You may refer to the preceding frames to refresh your memory.

(a) The volume of a reporter usually _____ how they are organized.

(b) The first page of the case _____ court of appeals, appellate division, and supreme court.

(c) State reporter systems vary in terms of _____ four departments.

(d) The order of the New York State courts, beginning with the highest is _____ follows the reporter's name in a proper legal citation.

(e) The Appellate Division of the Supreme Court is divided into _____ the abbreviation for Miscellaneous Reports in the second series.
(f) The unofficial reporter for the New York cases is called ______ precedes the reporter's name in a legal citation

(g) Misc. 2d is ______ the New York Supplement

(h) A.D.2d is ______ the abbreviation for New York Reports, Second Series

(i) N.Y.2d is
ANSWERS

MATCHING COLUMNS REVIEW

(a) The volume of a reporter usually varies
(b) The first page of the case follows the reporter's name in a proper legal citation.
(c) State reporter systems vary in terms of how they are organized.
(d) The order of the New York State courts, beginning with the highest is: court of appeals, appellate division, and supreme court.
(e) The Appellate Division of the Supreme Court is divided into four departments.
(f) The unofficial reporter for the New York cases is called the New York Supplement
(g) Misc. 2d is the abbreviation for Miscellaneous Reports in the second series.
(h) A.D.2d is (h) the abbreviation for
Appellate Division Reports,
Second Series

(i) N.Y.2d is (i) the abbreviation for
New Reports, Second Series

Stand up and take a break. You deserve one.
Just don't distract someone else!
Frame 20

THE STATEMENT OF FACTS: SLEEZE PRESS CASE

FRAMING THE ISSUE

All legal research problems begin with a "Statement of Facts" that explains the factual circumstances that brought your client to your law firm for his or her particular legal problem or endeavor. Your client may ask (a) if he or she has a basis for a lawsuit, (b) how a particular corporate restructuring should occur, or (c) about any other conceivable legal issue under an unlimited number of factual circumstances. Sometimes you are given more facts than you need to answer a particular legal question and, therefore, you will need to (a) "frame the issues" to weed out the irrelevant facts and (b) focus better.

Write an answer on the line below.

A Statement of Facts explains ___________________________________
ANSWER

A Statement of Facts explains the factual circumstances that have occurred, which is the basis for why your hypothetical client needs legal assistance.

Clients may want to tell you much more than you really need to know!
THE USEFULNESS OF AN ANNOTATED STATUTE

§50

CIVIL RIGHTS

Art. 5

§50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

(L.1909. c. 14.)

Historical and Statutory Notes
Derivation. Section derived for
L. 1903 c. 132 §1.

Cross References
Cable television company, liability for invasion of privacy. see-Executive Law §8.30

Section 50 of the New York Civil Rights Law was copied from a publication produced by West Publishing Co. in McKinney's Session Laws of New York. McKinney's statutes are annotated, meaning that the publisher added material that can assist you in doing research.
As you see above, Cross References contained a suggestion to look under the Executive Law.

Write one answer in the space below.

Cross References generally provide

Refer to the sample above. The Cross References provided a reference to what kind of primary authority? ________
ANSWERS

Cross References generally provide added material that may assist you in doing your research.

Cross References provided a reference to a statute - the Executive Law § 830.

Stay focused. Continue to cross-reference.

You're almost there!
OBJECTIVES

Being able to efficiently perform legal research is a necessary skill for lawyers, and this Programmed Learning Sequence (PLS) was carefully designed to help you obtain these skills. Soon you will be responsible for both researching and writing an office memorandum that informs a senior attorney about the law and how the law pertains to your particular client. Before you embark on the open-memo research project, you need to learn the basics, which are provided in this PLS.

By the time you have completed this program, you should be able to:

1. use **finding tools** to locate case annotations on your topic;

2. understand **publishers' aids** when reading cases;

3. use the *Index to Legal Periodicals* to find useful articles on your topic;

4. interpret a **citation** to a legal periodical; and

5. have a working knowledge of a variety of **secondary sources**.

---

VOCABULARY

Here are some terms you will come across while doing legal research in the Law Library. You will want to examine them before you continue. By the time you have finished reading Legal Research: A Method to Its Madness, you will be aware of every one of them and be well prepared for the posttest.


"Finding tools" are resources that assist you in obtaining both primary and secondary authority. Finding tools consist of digests, Shepard’s Citations and primary and secondary authority. (Shepard’s Citations are not covered in this manual).

"Digests" are a finding tool. Digests provide information that will lead you to primary authority.

"Periodicals" are publications published by law students and other professional entities at regular intervals. [Note: “articles” are pieces written by legal scholars, lawyers and judges; “notes” and “comments” are pieces written by law students].
“Index to Legal Periodicals” provides a listing of periodicals organized alphabetically by topic and by author.

“Encyclopedias” are resources that summarize the law on a wide variety of topics and are organized alphabetically by topic. Encyclopedias are generally written by staff editors at the publishing company, rather than by well-known experts in the legal field.

“New York Jurisprudence” is an encyclopedia that covers the law in New York State. It is abbreviated as N.Y. Jur.

“American Jurisprudence” is an encyclopedia that covers state and federal law. It is abbreviated as Am. Jur.

“American Law Reports” reprints state and federal court decisions on particular topics that are published elsewhere, and it also provides articles. It is abbreviated as A.L.R.

“Restatements of the Law” are written on specific topics, such as torts, and are highly regarded because they seek to unify federal case law. They are written by scholars and serve as authoritative statements. Although not considered to be primary authority, Restatements are sometimes quoted in court decisions when courts describe the state of the law on a particular legal topic.
“Treatises” cover a single topic of the law with great detail of information. They are secondary authority because they are written about the law. Scholars write most treatises, although publishers’ staff write some.
FINDING TOOLS-DIGESTS

Sleeze Press, a book publisher, intends to take newsbreaking stories and, by slightly changing the names of the participants and additional surrounding circumstances, publish fictionalized accounts of actual persons and events. If you were asked to research whether Sleeze Press can be liable for invasion of privacy by the actual persons depicted in the book, one place to begin is with finding tools.

As you would no doubt guess, you will need assistance in locating pertinent materials in primary and secondary authorities for this topic. **Finding tools** are resources that will help you to do so. Finding tools consist of digests, *Shepard’s Citations*, and other primary and secondary authority. [Note: You will use legal digests for research purposes but you would never cite them as a source for formal writing].

Answer the following questions in the spaces provided below.

What is a finding tool?

_________________________________________________________________

_________________________________________________________________

What are two (2) examples of finding tools?

_________________________________________________________________

_________________________________________________________________

You would never cite _____________ as a source for formal writing.
ANSWERS

Finding tools are resources that lead you to primary and secondary authority.

Digests and Shepard's Citations are two (2) examples of finding tools.

You would never cite legal digests as a source for formal writing.

You're off to a good start!
Once you understand the specific topic to research - "use of name or picture" and its key number 8.5(6) - you would turn further into the digest to find references to useful cases on that topic.

Look on the next page for key number 8.5(6) on the narrow topic of "use of name or picture." What follows from that heading are case annotations with citations. As you have learned last week from studying annotated statutes, these case annotations will help you to understand what courts have decided in interpreting the right of privacy in New York State on the narrow topic of name, portrait or picture.

In looking at the first annotation under the heading "use of name or picture," you may have surmised that the case of Pirone v. MacMillan, Inc. held that the right of privacy in New York was limited to living persons only.
Key #8.5 (5)  

TORTS

For later cases see same Topic

N.Y. Sup. 1984. Conveying likeness of person, not graphically, but through sound, by means of limitation of distinctive voice, does not come within prohibition of civil rights statute prohibiting misappropriation of living person's name or likeness for commercial purposes. McKinney's Civil Rights Law §§ 50, 51.


Key # 8.5(6). — Use of name or picture.

C.A.2 (N.Y.) 1990. Right of privacy protection under New York Civil Rights law was clearly limited to living persons. N.Y.Civil Rights Law §§ 50, 51.

Write an answer in the space provided below.

In the case annotation above for *Onassis v. Christian Dior-New York, Inc.*, the court held that conveying likeness of a person through sound

________________________________________

________________________________________.
ANSWER

In the case annotation for Onassis v. Christian Dior-New York, the court held that conveying likeness of a person through sound is not encompassed by § 50 of the civil rights statute.

We all have a right to privacy.
Frame 8

CUMULATIVE SUPPLEMENTS

OTHERWISE KNOWN AS

POCKET PARTS

As a lawyer, you will want to know the most recent case or statute on your topic. Lawyers have been faced with dismissal from their jobs for failure to do this simple task of checking pocket parts.

Digests need to be updated periodically because new cases are reported daily. Rather than reprint hard volume texts over and over again, publishers produce soft covered "cumulative supplements," otherwise known as "pocket parts," which contain information leading to more recent primary authority. These supplements either stand alone on the library shelves next to their hard cover counterparts, or they are slipped into the hard cover book, earning the name "pocket parts."

Circle the correct answer below.

An often-repeated word of advice is: "Don't forget to check the pocket parts!"
Checking the pocket parts is so important because the pocket parts contain information leading to the _______________ authority.

<table>
<thead>
<tr>
<th>most recent</th>
<th>oldest</th>
<th>Latin version</th>
</tr>
</thead>
</table>
POCKET PARTS

ANSWER

Pocket parts contain the most recent authority.
MOVING FROM FINDING CASES IN THE DIGEST (FINDING TOOL) TO READING THE ACTUAL CASES FROM A CASE REPORTER

(PRIMARY AUTHORITY)

a situation that we should not encourage in matrimonial litigation . . . "

(Emphasis added)

Consequently, on this record the court would consider the plaintiff’s request for a $35,000 counsel fee through the trial of the action as being reasonable give the amounts at stake, the complexity of the issues presented, the standing of the respective counsel, and the husband’s failure to disclose his own arrangements.

[6] Nevertheless, it is unnecessary at this time to make an award which will carry though the trial of the action. Because further interim relief can be sought.

122 Misc.2d 603

Jacqueline Kennedy ONASSIS, Plaintiff,

v.

CHRISTIAN DIOR-NEW YORK, INC.,

Lansdowne Advertising, Inc.,

Richard Avedon, Barbara Reynolds and Ron Smith Celebrity Look-Alikes, Defendants.

Supreme Court, Special Term, New York County, Part I.

Jan. 11, 1984
Assume that you have successfully mastered the use of the digests and have located a case annotation in the digests to Onassis v. Christian Dior-New York, Inc. You learned last week not to rely upon what a publisher wrote about that case, so you would go to the library shelves and pull the case to read it in its case reporter.
Look at this case. Refer to this chart to help you decipher the information.

**CIRCLED NUMBERS:**

1. citation in the reporter in which this case appears
2. page from the reporter in which this case starts
3. citation in the parallel reporter
4. name of the case
5. court deciding the case

**Frame 10 cont'd**

Write one answer on each line below.

The **Onassis v. Christian Dior-New York, Inc.** case was copied from the ____________________ reporter.

The citation to the parallel reporter is ____________________.

The page from the reporter in which case starts is ________.

The court deciding the case is ____________________.
ANSWERS

The Onassis v. Christian Dior-New York, Inc. case was copied from the New York Supplement, Second Series.

The citation to the parallel reporter is 122 Misc.2d 603.

The page from the reporter in which the case starts is 254.

The court deciding the case is the Supreme Court, Special Term.

Stretch in your seat if you feel like it.
Thus far, you have learned how to find cases by using the digests, a finding tool.

Another way to find cases is by researching secondary authority. Secondary authority is legal material written about the law.

Circle the correct answer below.

Secondary authority generally provides:

the actual law

statutes

information leading to primary and other secondary authority
ANSWER

Secondary authority provides information leading to primary and other secondary authority.
SECONDARY AUTHORITY

One example of secondary authority is legal periodicals. Legal periodicals are regularly published law journals that contain:

- articles written by legal scholars, lawyers, and judges;
- student pieces which are called either:

  a “note” if it is written about a general legal topic; or
  a “case comment” if it is written about a single current case.

Place a star (*) next to the correct answers:

_____ Articles are written by legal scholars, lawyers, and judges.

_____ Pieces that law students write are called articles.

_____ A legal periodical is secondary authority.

_____ Pieces that law students write are sometimes called “notes.”
ANSWERS

* Articles are written by legal scholars, lawyers, and judges.

Pieces that law students write are called articles.

* A legal periodical is secondary authority.

* Pieces that law students write are sometimes called "notes."

There is much to absorb. You're almost there!
Frame 17

INDEX TO LEGAL PERIODICALS

Look at the sample below of an excerpt from the Index to Legal Periodicals.

______ Riga, Peter J.

The nature and obligation of law: the relationship of power and violence to law. 24 S. Tex. L.J. 149-69 '83.

______ Right to a Fair Trial

An amendment of the use of camera in state and federal courts. 18 Ga. L. Rev. 389-424. Wint. '84

Place a star (*) next to the correct answer below.

The Index to Legal Periodicals is organized by:

__ author of the article or student note/comment

__ topic

__ both author and topic
ANSWERS

The Index to Legal Periodicals is organized by:

___ author of the article or student note/comment

___ topic

___* both author and topic

Keep focusing.
Now that you have located how to find the listings of articles in the Index of Periodicals either by topic or author, take a look above at what an actual article would look like if you pulled it from the shelf and found it in a legal periodical.
Frame 19 cont'd

CIRCLED NUMBERS: REFER TO:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>name of periodical</td>
</tr>
<tr>
<td>2</td>
<td>volume of periodical</td>
</tr>
<tr>
<td>3</td>
<td>publication date</td>
</tr>
<tr>
<td>4</td>
<td>name of article</td>
</tr>
<tr>
<td>5</td>
<td>author's name</td>
</tr>
</tbody>
</table>

Write one answer on each line below. Refer to the actual article above.

The volume of the periodical is _____________.

The name of the periodical is _________________.

The first three words in the name of the article are _________________.

...
ANSWERS

The volume of the periodical is 48.

The name of the periodical is *Albany Law Review*.

The first three words in the name of the article are Right of Privacy.
Another useful authority is "American Jurisprudence, Second Edition." It is an encyclopedia that summarizes state and federal law. It is abbreviated as Am. Jur. 2d. Another encyclopedia that also summarizes state and federal law is the Corpus Juris Secundum.
Circle the correct answers.

Am. Jur. is considered to be

secondary authority primary authority

If you were researching a question concerning federal law you would use

ANSWERS

Am. Jur. is considered to be secondary authority because it summarizes state and federal law.

If researching federal law, you would use Am. Jur. because New York Jurisprudence summarizes state law.

Encyclopedias will be useful in your research.
Sample of Tactual Review Test: Puzzle

The three types of government bodies with lawmaking capacities are:
- the legislature,
- judiciary, and
- administrative agencies.

Case decisions emanate from the judiciary and administrative agencies.

The three tiers of the federal courts from the lowest to the highest are:
- United States District Court,
- United States Court of Appeals, United States Supreme Court.

Primary authority may be found in legislation, judicial case law, and administrative regulations and decisions.


The United States Courts of Appeals are divided into circuits throughout the country and is the intermediate level of federal courts.

The United States District Court may have more than one district per state and is the lowest level of federal courts.

Court decisions can be found in case reporters.
Sample of Tactual Review Test: Poke-A-Hole

### The United States District Court has at least

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### Court decisions can be found in

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Unofficial reporters are printed by

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The decisions for the United States Court of Appeals for the Second Circuit appear in the

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In a proper legal citation to a case decision, the first page of the case decision precedes the reporter’s name in a proper legal citation, follows the year in a proper legal citation, and follows the reporter’s name in a proper legal citation.

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New York Jurisprudence 2d is (an)

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APPENDIX C

STATISTICAL SIGNIFICANCE OF PRETEST AND POSTTEST RESULTS

Comparison of Mean Gain Scores
Results of the t Test for Equality of Under Each Condition Means:

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<tr>
<th></th>
<th>N</th>
<th>Mean Gain Score</th>
<th>Standard Deviation</th>
<th>t</th>
<th>df</th>
<th>Sig. (2-tailed)</th>
<th>Mean Difference</th>
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<tr>
<td>Traditional</td>
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<td>9.84</td>
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<td></td>
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<td>Week 1 Gain</td>
<td></td>
<td>-3.390</td>
<td>106</td>
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<td>-6.47</td>
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<tr>
<td>Second Week:</td>
<td></td>
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<td></td>
<td></td>
<td>Week 2 Gain</td>
<td></td>
<td>-2.13</td>
<td>106</td>
<td>.035</td>
<td>-4.94</td>
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A t test for equality of means was used for Week 1. Results yielded a significant t(106) = -3.39, p < .001, with the class achieving significantly better using the PLS. The Effect Size, d, was calculated by dividing the difference between the means by the standard deviation. The Effect Size, d, was .66, which indicated that the students achieved 66% of a standard deviation higher using the PLS than they did using traditional instruction.

A t test for equality of means was used for Week 2. Results yielded a significant t(106) = -2.13, p < .035, with the class achieving better using the PLS. The Effect Size, d, was calculated by dividing the difference between the means by the standard deviation. The Effect Size was .414, which indicated that the students achieved 41% of a standard deviation higher using the PLS than they did using traditional instruction.

In both weeks 1 and 2, there were significantly higher achievement-test scores on course content taught through the PLS learning-styles strategy than on course content using traditional instruction.
From Editor to Mentor: Considering the Effect of Your Commenting Style

Jessie C. Grearson*

Most legal writing teachers agree that commenting on students’ papers is one of the most important aspects of teaching writing. Teachers of legal writing also acknowledge that commenting on student papers is one of their most time-consuming activities. I would argue that reading and attempting to understand and respond to these written remarks also takes up a large amount of our students’ time and energy. Given the many hours that both readers and writers of such comments devote to the task, scrutiny about how effectively teachers and students may be spending that time, and to what end, seems in order.

As a writing advisor, a liaison between writing teachers and their students, I witness this exchange of information and energy and am in a unique position to see how much effort is expended in

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1 In a survey gathering information on effective commenting practices of experienced legal writing teachers, all the experts polled on the importance of commenting on student papers ranked the activity “at or near” the top of their list of most-important teaching activities. Anne Enquist, Critiquing and Evaluating Law Students’ Writing: Advice from Thirty-five Experts, 22 Seattle U. L. Rev. 1119, 1125 (1999).


3 For a more in-depth definition and a discussion of the role of the writing advisor at law schools, see Jessie Grearson and Anne Enquist’s study, A History of Writing Advisors at Law Schools: Looking at Our Past, Looking at Our Future, 5 Leg. Writing 55 (1999).
writing and reading these comments. I believe that we should approach commenting as environmentalists: with conservation of resources and energy in mind. We should tailor our written comments to give the amount of information that can be best absorbed by each student, allowing for the maximum insight. Too much, and our words overwhelm students or go unheeded, wasting everyone's precious time and energy. Too little, and students feel lost or unaided.

We should also consider how our own personalities and preferences as teachers may play an important, and perhaps an overlooked, role in the activity of commenting. Reflecting on our commenting styles and their potential effect on students can help us avoid provoking counterproductive reactions that waste students' and teachers' time and energy.

To our credit, legal writing professionals seem remarkably willing to engage in this self-scrutiny for the benefit of our students. From our consideration of Myers-Briggs personality tests to our interest in Anne Enquist's research on students' reactions to our written comments, we have begun to scrutinize our own efforts at written communication, rather than merely fine-tuning our ability to critique our students' communications.

4 For example, Christina L. Kunz presented "Using the Myers-Briggs Type Indicator to Accommodate Teaching Preferences and Learning Preferences," to the Legal Writing Institute in July 1990.


6 Despite the overall significance of teacher commentary's potential effect on students and their writing, it is interesting to note that the preponderance of articles on the subject was written in the 1980s, and that the most recent large-scale study of which I am aware was conducted by Robert J. Connors and Andrea A. Lunsford in 1988, and reported on in 1993. Robert J. Connors & Andrea A. Lunsford, Teachers' Rhetorical Comments on Student Papers, 44 College Composition & Commun. 200 (1993). It is more challenging to find recent research on the topic; perhaps this reflects not a lack of interest but of resources — how to fund and conduct a valid empirical study on something that has so many variables. I also note that this turn away from practice-oriented, classroom-based articles toward more theoretical ones occurred as the field of Composition Studies struggled to see itself as a scholarly discipline. For a discussion of how politics can affect a discourse community's preference for writing theories see Jessie Grearson, Teaching the Transitions, 4 Leg. Writing 57, 63 (1998), and Pat Belanoff, Book Review—Plethora of Practice: A Dollop of Theory, 62 College English 394, 401 (2000) (the author suggests that "too much of the [recent] theory in our field has not been tested or even linked to practice . . . . Our discipline could do with more than a dollop of such approaches, for our connection to our classroom is our strength and ultimately our rationale for being a discipline at all.").

In our legal writing community, it seems likely that future commenting research will focus
Our long-term purpose as educators is to teach students how to become competent writers and readers of their own work. This Article helps teachers address this goal by (1) reviewing generally accepted commenting goals, (2) considering the phenomenon of overcommenting\(^7\) and its link to underprioritizing, (3) highlighting the pros and cons of four common commenting styles used by legal writing teachers, and (4) discussing difficult commenting situations that may trigger unhelpful responses in commenters.

### I. COMMENTING GOALS

I begin this assessment of commenting effectiveness by articulating generally accepted goals of effective commenting.\(^8\) These goals are familiar to us, and yet they are remarkably easy to lose sight of, especially when we are struggling to critique a tall stack of papers in a short amount of time. I believe that it helps to return to them especially when we feel ourselves struggling to write helpful responses to students. Throughout this Article, I use these three goals to measure the effectiveness of our written communication.

1. **Providing feedback.** We want to let students know whether and how well they are meeting the goals we have set for them.

2. **Dramatizing the role of the reader.** We want to represent the reactions of the reader to let writers know whether they have attended to or ignored the targeted reader’s needs or interests.

3. **Creating motivation for change in future writing.** We want to encourage students to understand and accept the

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\(^7\) I define overcommenting as providing more comments than a student can possibly use; however, I am concerned with the activity’s negative effect on both student and teacher.

\(^8\) Although these general goals have their roots in several venerable composition articles, they are particularly well-expressed in one authored by Nancy Sommers. Nancy Sommers, *Responding to Student Writing*, 33 College Composition & Comm. 148 (1982).

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need to approach writing tasks differently in a new draft or a future paper.

I would argue that our ultimate goal as teachers, the goal that unifies these three goals, is to teach students to become their own best critics and editors — professional, flexible, adaptable writers. By providing written comments and questions to our students, we hope to encourage them to begin asking such questions themselves, to begin to anticipate the “needs and expectations”9 of future readers.

This last goal resonates with our conference theme10 of preparing students for life after the first year. As students move beyond their first year of law school (and beyond our individual classrooms), one of our common goals as legal writing professionals should be to foster in them this ability to critically review their own writing. Thus, we must always teach our students with an eye on their future, and with an understanding that they will soon encounter a new audience with new demands and preferences. Understanding how our comments may help (or inadvertently hinder11) that ability to adapt to future audiences is critical if we are to help our students become confident, competent professional writers.

II. THE LINK BETWEEN OVERCOMMENTING AND UNDERPRIORITIZING

Overcommenting12 is one of the tragedies of our profession because it represents so much well-intentioned but misdirected effort

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10 The Legal Writing Institute’s 2000 conference theme was “Moving On: Preparing Students for Life after the First Year.”

11 For example, unconsciously presenting personal writing preferences as “Universal Writing Truths” is inherently problematic for students sure to encounter other views when they leave our classrooms.

12 For an entertaining discussion of issues related to overcommenting (including the unfortunate fate of teachers who continue to believe that more is always better,) see Maxine Hairston’s On Not Being a Composition Slave, in Training the New Teacher of College Composition 117 (Charles W. Bridges ed., Natl. Council of Teachers of English 1986); see generally Terri LeClercq, The Premature Deaths of Writing Instructors, 3 Integrated Leg. Res. 4 (1991).
and because it frustrates students and teachers alike. Generally, overcommenting (writing more comments than a student can successfully absorb and implement) results in overwhelmed students and exhausted, irritated teachers.13

When asked why they overcomment, teachers typically articulate two reasons: they feel a sense of responsibility to convey a wealth of information to students, and they feel the need to justify their grades on students' work.14 Writing of his feeling of accountability to students, one teacher notes, "I feel it is my job to point out mistakes . . . and I am not sure what is enough to get the point across." Another writes, "I feel I owe it to my students to give them as much advice as I can." Describing how justifying grades influences her commenting, another notes: "If I don't comment on certain weaknesses and errors in the writing, the student will assume that the absence of comments means there are no problems in a particular section and be upset later — 'You didn't mark that!'"15

My observations as a writing advisor suggest that generally, overcommenters fare better in students' estimations than undercommenters, which may be partly why so many overcommenters exist.16 Students sense that such teachers want to help, and they appreciate this, though they may still be no less confused, lost, or blocked in their writing.

13 One often-cited study of seventh and eighth graders that considered, among other factors, the effect of brief versus extensive teacher remarks found little difference between them, although it noted that such longer comments "may be more meaningful when they have been preceded by instruction which is related to their content." George Hillocks, Jr., The Interaction of Instruction, Teacher Comment, and Revision in Teaching the Composing Process, 16 Research in the Teaching of English 261, 275 (1982).

14 The following directly quoted responses come from the adjunct faculty of The John Marshall Law School and the full-time faculty of Seattle University Law School.

15 Elaine Lees notes how difficult it is to resist writing a full critique of a paper and marking every error and lapse, connecting this tendency to a sense of security: "I . . . clung to the belief that it was somehow safer to do so, as my aunt believes it's safer to rinse the cups when they come from the dishwasher and iron every pair of Levi's she washed. A teacher marks things because they're THERE." Elaine O. Lees, Evaluating Student Writing, in The Writing Teacher's Sourcebook 263, 266 (Gary Tate & Edward P.J. Corbett eds., 2d ed., Oxford U. Press 1988).

16 I am currently conducting further research on the roots of overcommenting; early work suggests that perfectionists are often susceptible. One participant at the Seattle conference, Peter Cotorceanu of Washburn University School of Law, suggested that overcommenting can become a "co-dependent relationship" from which neither students nor teachers can easily extricate themselves.
I designed the following graphic to explore what I believe may be a third contributing factor: the link between underprioritizing and overcommenting. In other words, I predict that the more carefully we select our priorities and convey them to students (for each assignment and throughout the semester), the less likely we will be to fall into the trap of overcommenting. To balance the picture, I decided to explore two other negative extremes — undercommenting and overprioritizing — although I think these tend to happen much less frequently.

I charted overprioritizing and underprioritizing on a vertical axis, set against overcommenting and undercommenting on a horizontal axis. Striking the perfect balance in our comments would mean that we would provide just the right number to perfectly convey the ideal number of priorities or goals for a given assignment, leading to maximum insights for the students, and minimum wasted effort for us. Taking each quadrant at a time, we can examine how each works in light of the three commenting goals listed earlier (providing feedback, dramatizing the reader's role, and creating motivation for future change).

Balance between prioritizing and commenting provides insight and enables students to become independent, flexible writers by:
Providing feedback — give information to enhance student's sense of purpose and accomplishment

Dramatizing role of reader — encourage students to be responsible participants by being aware of and responding to reader's needs

Creating motivation for change — highlight doable tasks and focus students on concrete steps to achieve results.

Quadrant A: Underprioritize, Overcomment.

This type of commenter has not taken the necessary step of establishing clear priorities for the assignment before commenting, and ends up commenting profusely on many different aspects of a paper. Such a commenter may take a kind of “wait and see what develops as common class problems” approach or may simply comment on whatever catches the eye on a given paper. This commenter provides ample feedback, though it may seem inconsistent or scattered to the student. The teacher dramatizes a reader, but that reader is one who may surprise or even seem to ambush the student, one whom the student cannot successfully anticipate for the next paper, thus undercutting the motivation for future change. The result is likely to be a confused student and a tired teacher.

Quadrant B: Overprioritize, Overcomment.

The teacher who has set many priorities and who also provides many comments per paper presents slightly different problems for the student. Again, the teacher provides ample feedback, but the student is often overwhelmed at the amount that must be addressed by the next paper, and confused about the most important priorities for the next paper. A reader is dramatized, but that reader may seem to have impossibly high expectations, given that the teacher is using the vehicle of the paper as a forum in which to address all semester-long goals and in which to catch each individual error. The student in this scenario is likely to suffer from writer's block without a clear sense of where to begin. The teacher is likely to feel tired and frustrated.
Quadrant C: Overprioritize, Undercomment.

In this scenario, the teacher has, in fact, many priorities but has not thought to convey them beforehand to the student, or discovers them only after receiving responses to the assignment. This type of commenter may write a few zingers to let the students know how far off track or below expectations they are without detailing the path back, suggesting that the student "ought to know this by now." Students may feel condescended to because the teacher has not bothered to tell them important goals beforehand and does not bother to do so in writing on the paper. Students have been failed on three fronts: they lack feedback, they cannot picture the reader they must write to, and they are likely to feel apathetic about changing much for the next paper. The teacher in this scenario is likely to feel less tired than an overcommenter, though probably more vexed by the students' apparent unwillingness or inability to manage the work or to make improvements.

Quadrant D: Underprioritize, Undercomment.

A teacher who articulates and conveys few priorities and who also writes very few comments invariably invokes great hostility from students. Of course, this anger is justified because students have once again been failed on three fronts: they receive inadequate feedback, they have no identifiable audience for whom to write, and they have no incentive or direction for future change. The teacher in this scenario invariably feels perplexed by and alienated from the students.

Although we have been discussing the phenomenon of overcommenting for years, more work needs to be done in this area to understand why we still persist in what is often exhausting and unproductive behavior. Considering where we fall on the continuum of overcommenting and undercommenting and asking ourselves why and when we overcomment is a good place to begin and (especially for compulsive overcommenters) a good place to return to with each new commenting occasion.


A. Complications in Discussing Commenting Styles

Even as I invite teachers to think about their personal commenting styles, I feel obliged to offer several caveats that complicate this discussion. First, we must acknowledge that our comments and our particular styles of commenting cannot ever be entirely "personal" or "natural" because they do not occur in isolation. They are always already part of a larger institutional picture, where teachers are subject to a variety of stresses that may include but are never limited to grading curves, grade inflation, and student evaluations. In this sense, our comments on student papers are often highly artificial representations of us, or our ideas. They are more likely to represent who we are as instruments of a particular institution or profession as much as who we might be under more ideal circumstances.  

Meaningful discussion of commenting styles is also complicated by the reality that our comments are only one part of a larger teaching picture. We cannot separate this one form of communication from the classroom context in which it occurs or from the curricular goals our comments are meant to further. The manner in which students read a teacher's remarks hinges on how that teacher is perceived in a variety of other communications, including her in-class teaching, the way she creates and explains as-

17 For example, a teacher who thinks of herself as nurturing may be forced to come across as judgmental because she must ultimately grade a student's work, not just encourage it. Even a female instructor's reluctance to be seen as "nurturing" (and thus subject to less prestige and pay) may affect her on-paper persona. For an excellent discussion of the tension between the roles of coach and judge as well as other tensions inherent in commenting on student work, see Peter Elbow, Embracing Contraries in the Teaching Process, in The Writing Teacher's Sourcebook 224 (Gary Tate & Edward P.J. Corbett eds., 2d ed., Oxford U. Press 1988).

18 It is interesting to note that the experts in Enquist's study apparently agreed with this view that everything in a writing class connects, as they vigorously resisted ranking competing priorities such as class instruction, commenting, in-class teaching, etc. Enquist, supra n. 2, at 1126.
assignments, the way that she responds to questions in or after class, as well as the way she conducts personal conferences.

In fact, singling out our written comments for evaluation can be a potentially misleading endeavor. In their article, Commenting: The State of the Art, C.H. Knoblauch and Lil Brannon remind us that it is dangerous to "expect too much from isolated marginal remarks on essays and to reflect too little on the larger conversation between teacher and student to which they only contribute." As the authors point out, even remarks such as the common "is this the best word here?" and "can't you be more specific?" bear vastly different connotations depending on a teacher's overall communication with a class.

And finally, if we argue that our personal styles of commenting affect how students read our comments, we must also acknowledge that students' own personalities and individual histories as writers, as people, will affect their reading of our comments too. Not only do many new law students lack practice in writing, but most lack experience reading and applying teachers' commentary. Few have received the kind of in-depth critiques that are common in first-year legal writing classes. Many students are also likely to be caught off guard by the grade attached to such comments, especially when they have been accustomed to thinking of themselves as strong writers in previous educational settings.

Given all these complications, is there a reason to even bother trying to describe different commenting styles and discuss their effectiveness? I think so. First, I believe that simply naming these complications helps us better appreciate the sheer complexity and difficulty of the commenting act, which in turn encourages us to leave time for it, to understand why it is so difficult, to be more deliberate in our efforts and so more helpful to our students. Mapping the complicated terrain on which we work helps us see how

19 Knoblauch & Brannon, supra n. 10, at 286.
20 Id. at 287.
21 Id.
22 For a thoughtful consideration of how teachers' previous remarks may affect — often in negative ways — students' writing and color their reactions to teacher response, see Cleo Martin, Responding to Student Writing, in Ways of Knowing: Research and Practice in the Teaching of Writing 111, 115 (James Davis & James Marshall eds., Iowa Council of Teachers of English 1988).
these various constraints may force us into commenting patterns that we may sometimes wish to resist.

Additionally, despite all the ways in which academia may pressure us into roles or types, it seems that, for better and sometimes for worse, our own particular personalities are indeed often vividly apparent in the act of commenting on student papers. It is this sense of the highly personal, the essence of the individual writer embodied in written comments (whether scolding or cheering from the margins), that makes them such potentially powerful tools. Most writers can recall at least one comment some long-ago teacher made on their writing, and most teachers of writing have heard stories about the profound effects of some remark a teacher made on a paper, words that lingered long after the subject of the paper or course had been forgotten. We need to consider the effect of our comments because they can have such an enduring impact on the students who read them.

B. The Four Styles

Below, I have attempted to distill four types or styles of commenting that legal writing teachers frequently use.\(^{23}\) The first two are typically found in the margins of students' papers, and the latter two typically at the end of their papers. My goal is to characterize each style and then to consider potential risks associated with each style. Many teachers suggest that they employ different styles with different students, or at different times in the semester, though they typically report a tendency toward one style or another. I recognize that each style has its helpful aspects as well as potential hazards, disadvantages that may be exacerbated by the difficult commenting situations that teachers invariably face, such as tight paper turnaround deadlines, students who seem to

\(^{23}\) These categories, and the observations about them, come from ten years of observing a variety of teachers in a variety of legal writing courses commenting on countless student papers. I am aware of little material available that directly relates to commenting styles, although one teacher has divided the activity of commenting into seven modes: correcting, emoting, describing, suggesting, questioning, reminding, and assigning. Lees, supra n. 16, at 263. Peter Elbow and Pat Belanoff have also created a variety of useful activities that commenters can use in different situations that include not responding, descriptive responding, analytic responding, and reader-based responding. See Peter Elbow & Pat Belanoff, Sharing and Responding (Random House 1989).
be ignoring previous suggestions, or some less capable students.  
My goal throughout this article is to encourage commenters to think about tendencies associated with each style in order to maximize the benefits of each and minimize the potential damaging effects of each.

1. The Editor

The style of editor is quite common among legal writing professors, perhaps because so many were editors — frequently of legal journals or in the offices or law firms where they previously worked. The editor tends to read methodically, line by line, usually commenting in words or short phrases. Editors tend to be rule-based, very systematic and comprehensive, and they typically use matter-of-fact or slightly neutral tones when telling the writer what to do. They come across as "straight-shooters" and do not create a false or hierarchical relationship with the student — the comments they put on the paper are there to instruct and teach the student about rules of writing, not to enact the role of the senior partner. They may use symbols (such as "wc" for "word choice" or "f. comp." for faulty comparison) or codes that match prescriptive sections in writing handbooks. They are likely to write fewer positive comments, perhaps because they do not see praise as a primary function of the editing role. Overall, editors bring a high level of competence to their remarks, and they offer students valuable insights into the challenging standards expected of professional writers.

Under less than ideal circumstances, however, the editor may come across to the student as the God of grammar and punctuation (or as one student put it, a "grammar geek"), overly concerned with a paper's surface features. The editor may seem to focus more attention on the paper's individual parts than on its big picture and may offer multiple comments on a variety of subjects can disorient the writer about priorities for revision. Also, the editor may risk sending conflicted messages if he has mechanically corrected a paragraph whose relevance he also questions.

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24 These difficult commenting situations will be addressed later, but are raised here to help the reader picture the kinds of less than ideal commenting circumstances that we so often labor under.
A problem that the editor can create for the student is that the student may become a typist, mechanically entering the corrections of another writer who has already mastered these conventions, rather than thinking them through herself. If a paper has too many symbols or encoded messages (e.g., "see B7 in writer's reference" or just "B7!" and "C2!") the student may become frustrated shuttling back and forth between sources and feel inclined to give up. The student may also feel that she lacks guidance about the top priorities for a rewrite or the following paper. Finally, the lack of positive response can discourage the student, especially in the face of much work to be done. As a result, the student may feel disengaged from the paper, as though it is no longer hers, making it much less likely that she will find it a fruitful site for further learning.

A solution that helps the editor to address these problems is limiting comments to one part of the paper, and inviting the student to apply similar editing strategies to another, to be later reviewed in conference. As a result, the student can focus on understanding the error and thinking through solutions in the context of her own writing. Editors can also limit their remarks to a finite set of writing issues per paper, and can provide examples of those mistakes so that the student can begin to see and correct patterns of error in the writing.

In this scenario, a student who might have been overwhelmed by receiving thirty seemingly unrelated remarks will be more enlightened and less daunted to receive ten examples of three writing issues to be addressed in the next draft. As one teacher wrote: "I know I am an editor—so I try to give detailed end comments to compensate." This teacher puts a detailed prioritizing end comment first, and asks the student to read that comprehensive comment before reviewing the rest of the paper that has been "taken apart" in the margins.

2. The Margin Conversationalist

The margin conversationalist is another popular commenting style. Margin conversationalists tend to be slightly less comprehensive than editors. Their comments come across as chatty, spontaneous, energetic, inquisitive, and conversational in tone, and they tend to be based on reactions as a reader and posed as ques-
tions. Generally, the margin conversationalist offers reactions to larger chunks of the paper (to paragraphs instead of words or sentences) and also tends to comment in sentences, phrases, or questions. Their comments tend to record their thoughts and feelings as they read the paper, and typically include a sprinkling of both positive and negative remarks. As one teacher put it, the margin conversationalist regards the margins of the paper as a "chance to really 'talk' to students" about their writing. Because their style is that of "talking on paper," this type of commenter can help draw on the oral proficiencies of students, which is especially important to many who are excellent talkers but less experienced writers. Overall, margin conversationalists offer valuable insights about the effect of the writing on a real reader, as well as concrete evidence of the reader's reactions that can vividly convey information about the effectiveness of certain choices the writer has made. Such valuable information can provide incentive for revision.

Under less ideal circumstances, the somewhat spontaneous approach of the margin conversationalist may come across as random and without an agenda, partly because such commenters may pursue tangential points at some length, or even cross out a comment with a "never mind" attached to it. Because they do pursue a variety of points at a variety of lengths, such commenters may run the risk of miscommunicating priorities to students who logically assume, in the absence of any other cues, that the amount of time spent on a point is proportionate to its importance to the teacher. These commenters tend to run the highest risk of being dismissed as idiosyncratic by students, partly because they are more guided by their reactions as a reader and less rule-based.

If a teacher is commenting partly in a territorial way (to show he has read that page) or as a way of verbal nodding (to show that he is listening to the point under discussion), he may also mislead the student about future need for revisions. Unless notified about the intention (or lack of intention) of such remarks, students may read such comments as cues for rewriting, simply because they are used to seeing written remarks on their papers as more prescrip-

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25 Peter Elbow might describe this way of commenting as offering a "movie of your mind." Peter Elbow, Writing without Teachers 85 (Oxford U. Press 1977). With this technique, the teacher may seem to be adopting an egalitarian approach — providing one reader's descriptive reaction — rather than performing a more evaluative, prescriptive role.
tive of a writer’s future tasks than descriptive of a reader’s process.

Because the energy and spontaneous nature of the margin conversationalist’s remarks tends to infuse them with a more personal tone, the possibility of a student misreading that tone is increased. At times, such commenters can come across as opinionated or on the attack, thus provoking an emotional rather than a rational reaction from the student.

A problem that the margin conversationalist can create for the student is that she may be distracted from the paper’s real problems, focusing on what was actually a minor, tangential point. A student may waste time on personal reactions such as “the teacher doesn’t like me” or “the teacher hated this paper,” instead of addressing the paper’s actual problems. The student may also be confused about priorities for the next paper.

Strategies that often work well for margin conversationalists include (1) reading students’ work once through without a pen in order to get a clearer sense of what writing issues the student faces, and (2) determining priorities before writing comments, perhaps by handing out a form before each assignment to notify writers what the focus tasks will be, and then sticking to those tasks for that assignment. One teacher who found herself writing remarks that felt unfocused says she “tries to stop and articulate for myself — and then the student — what the gist of all this is.” Another says she reads through a copy of the student’s paper, “free-writing” her comments there before putting a second draft on the one she hands back to the student.

Margin conversationalists can address issues of tone in their comments by handing out a previously commented on paper and helping students become versed in the style and the intended tone of such remarks. Comments that the margin conversationalist may see as evidence of her engagement with a writer’s ideas can come across to students as much more negative than intended; modeling the tone of written remarks in class and providing a running commentary on them can help prevent future misreadings. Teachers who favor this style may also wish to make sure that the tone of their comments has been correctly interpreted by sounding out students’ reactions to them in conferences.

Although questions may be an excellent pedagogical tool, margin conversationalists may wish to consider, and perhaps even
limit, their use, as the tone of questions can come across as more hostile than quizzical. Are the questions used rhetorical? Genuine? Cross-examining? How can students tell the difference? One teacher suggested that he wrote his comments in the form of questions because he felt it sounded "less opinionated," less likely to suggest there was "one right answer." But in the hands of attorneys, the useful tool of questioning can take on a different tone and a darker side. A battery of questions ("What do you mean by this? Are you sure? Where? When? Why?") can make students feel as though they are being grilled, which can make them defensive and less open to learning. At such times, the margin conversation-alist may seem more like a cross-examiner. A summarizing end comment that sets priorities for students and that helps them see how such questions are tied to an overarching concern or issue in the paper can help here as well.

3. The End Commenter

The end commenter tends to focus on global goals in a paper and strives to emphasize the big picture and the reader's reaction to the paper as a whole. Of all the commenting styles, this one tends to be the most future-oriented, most aware that the paper is one brief stopping place in a procession of writing occasions during which skills will be acquired and sharpened. The end commenter typically talks to the writer about the writing, using the paper as a particular example of a writing principle in action. She tends to write longer comments at the end of the paper in complete paragraphs of prose. The end commenter typically offers a list of priorities for the paper and sets out concrete steps the student can take to achieve them; she offers students valuable information regarding a paper's overall strengths and weaknesses as well as important insights into its large-scale structure. First-year students benefit from such information on their organization, and they appreciate the time such teachers spend writing to them about their work. The end commenter realizes that the final comment is a great opportunity to communicate with — even to persuade — students of future work to be done as well as strengths to be replicated.26

26 Indeed, Anne Enquist's current research suggests that students read end comments
Under less than ideal circumstances, however, the end commenter may find herself mechanically writing an end comment out of a sense of duty, and grasping for something to say. She may include positive comments out of this same feeling of obligation, falling into the formula of "good job but . . ." or "I know you worked hard, but . . ." that may come across as insincere to the student, reminiscent of the "Dear John" letter ("you're a real nice guy, but I'm still gonna dump you").

Unfortunately, long end comments, especially those that lack clear priorities or a strong sense of purpose and conviction, run the risk of losing students' attention. Students often miss the point of such epistles, especially if they must infer that point from a page or dense paragraph of prose. Students' ability to infer meaning from such end comments is further complicated by their inevitable focus on any discrepancy between the "nice" paragraph and the grade they received on the paper. Such discrepancies make them cynical, suspicious, and ultimately less likely to credit the gist of a positive response or to consider replicating what was praised in the future.

Strategies that may be used to address these potential pitfalls include organizing a long end comment into a number of specific points by using point headings, numbers, or bullets, and by including references to margin comments that illustrate the particular point under discussion. Such points could mirror a list of expectations that the teacher has distributed in advance. It is critical to remember that poor writers are often also poor readers, so the message must be as clear as possible to reach such students.27

Even for more capable writers and readers, it is important to recall that each remark represents additional work to be done, time spent struggling at the brink of chaos. Thus, comments need to be as engaging and enticing as possible. When a commenter shows a genuine level of engagement with some part of the work, the student is more likely to be engaged too, and more able to tackle the work of addressing (or salvaging) the paper. As writers,

over and over again for purposes of instruction and inspiration, typically returning to the end comments three to four times and sometimes even seven to eight times. Ongoing research, data on file with Anne Enquist.

we know how much more inclined we are to linger over a paragraph that has been praised, at least in part, than one that has been, as students put it, "slammed." And yet, students must return to reread and linger over their writing if they are to engage in the hard work of revision.

Breaking up the "Dear John" letter format by beginning with a topic sentence of praise that leads into work still needing to be done can address the students' tendency to skip over the "generic" nice paragraph. Sincerity — truly finding something in the work to admire — is still the best way to address the cynical student's assumption that a remark has been made merely to cushion the blow of a C. Specific references to a student's progress, for example, provide such encouragement. Calling the student's attention to a better attempt at a topic sentence, for instance, while pointing out a weaker example at another point in the same paper is instructive.

Vague compliments (a generic, floating "good" in the margin with no reference, for example) are almost as bad as no compliments at all. It is imperative that students receive positive comments that really mean something—not just empty praise, but also something concrete, something they can take pride in having done and interest in doing again on the next paper.

4. The Professional Mentor

The professional mentor is another typical commenting style, again because so many legal writing teachers were practitioners who have played this role before coming to their classrooms. The mentor focuses on introducing students to legal conventions by emphasizing the reader's reactions (particularly the legal reader's reactions) and by professional role-playing. Typical comments might begin with phrases such as, "A judge would . . . your boss would" or "as your senior partner, I felt . . . ." The mentor is likely to engage students by relating war stories and horror stories from their professional pasts, and often phrases comments in the form of terse questions, as a boss reviewing a brief might do.

The mentor's remarks often reflect a hierarchical relationship with students. As one self-identified mentor said, "I do tend to run my class like a small law firm." The mentor offers important information about the student's "real-world" audience, as well as the
possible reactions and opinions of those who populate it. Such glimpses are often intensely interesting to students looking ahead to their own professional futures.

Under pressure, however, the mentor’s comments may reflect the discrepancy between what she has been trained to do in the profession (pounce on an opponent’s weakness) and what students often need her to do in her comments (build up a weak student’s strengths). Such a commenter may also feel pressured to represent all real-world readers, and may feel irritated or alarmed by students’ poor performance in light of looming professional expectations.

As one teacher noted, “I feel such a sense of urgency about how soon they will be criticized by judges, bosses, and clients and I would rather have them resent me than be embarrassed later.” As a result, the comments of a mentor may inadvertently sound alarmed, overemphasize the expert/novice divide, or seem to represent the royal “we” of a profession unwilling to accept a given student into its ranks. Finally, given the intensity of their on-paper interactions and their sense of responsibility to the profession, such commenters may almost become parental, and over-identify with students’ choices, failures, and successes. “I tend to feel bad when a student does poorly—and see it as my failure as a teacher.”

In its extreme form, this approach can be daunting to students. Students may feel overwhelmed at the disparity between where they are and where they will need to be as professional legal writers. They may feel inadequate (“I am not worthy to be part of this scholarly community”), which can lead to writer’s block. Also, an intense “mentoring” experience may inadvertently decrease a student’s sense of independence and adaptability by encouraging the student to be overly reliant on one person’s perceptions and advice, and overly trained to that reader’s particular preferences.

The mentor may want to experiment with using peer responses to offset this potential weakness. Hearing the reactions of more than one reader can help the writer keep the mentor’s advice in perspective, and can also serve to reinforce that advice in useful ways. The mentor may also want to invite student dialogue on her comments. Inviting students to comment on written comments can provide valuable insights into what they learned and what they misunderstood, and it can provide much to talk about in some-
times quiet or one-sided conferences. Although all types of commenters would benefit from such insights, the mentor (because of potentially more hierarchical overtones in his relationship with students) may be least likely to hear students volunteer such information unless explicitly encouraging students to offer it.

The mentor also must recall that students need to be able to make their own choices, just as experienced writers do. As Elaine Maimon reminds us, seasoned writers “frequently ask colleagues and editors to comment on the work-in-progress, but they also know how to reject advice as well as how to accept it. Experienced writers know that no matter how much help they seek, they alone are responsible for final decisions about their own work.”

Even while we keep our students’ professional futures in mind, it helps to recall where first-year students are on the educational continuum, how much time they do still have to learn, and how, astonishingly quickly, they are able to absorb information in light of all the information we are throwing at them. It is important for the mentor to remember that students are adults who are balancing competing priorities, that they are responsible for their own choices, and that ultimately they must learn the material themselves.

Summary of Commenting Styles & Characteristics

<table>
<thead>
<tr>
<th>Editor/Corrector...</th>
<th>Margin Conversationalist</th>
<th>End Commenter...</th>
<th>Professional mentor...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grammar and punctuation</td>
<td>Cross examiner</td>
<td>Dear John</td>
<td>Parent</td>
</tr>
<tr>
<td>systematic and comprehensive</td>
<td>a little less comprehensive-than editor</td>
<td>focuses on global goals based on particular moments in paper</td>
<td>focuses on introducing students to legal conventions</td>
</tr>
<tr>
<td>matter of fact, neutral tone</td>
<td>energetic, inquisitive, conversational tone</td>
<td>emphasizes the big picture and reader's reaction to whole paper</td>
<td>emphasizes reader's reactions by professional role-playing (<em>A judge would...your boss would</em>)</td>
</tr>
<tr>
<td>tell oriented, reads and responds line by line</td>
<td>ask oriented, offers reader's reaction to larger chunks of paper (paragraphs)</td>
<td>comments in sentences, questions</td>
<td></td>
</tr>
<tr>
<td>comments in words or short phrases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>come across as focused on surface features of grammar and punctuation</td>
<td>seem to focus more on individual parts than big picture</td>
<td>lacks guidance about top priorities</td>
<td></td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
<td>seem critical of person instead of paper</td>
<td>profile comments into categories (e.g., group 30 comments into 3 categories)</td>
<td></td>
</tr>
<tr>
<td>ask oriented, offers reader's reaction to larger chunks of paper (paragraphs) comments in sentences, questions</td>
<td></td>
<td>only edit part of paper and require student to do part</td>
<td></td>
</tr>
<tr>
<td>come across as opinionated or on the attack; may go off on a tangent</td>
<td>may miss priorities for next paper</td>
<td>read paper without a pen</td>
<td>feel irritated by students' poor performance</td>
</tr>
<tr>
<td>seem to focus more on individual parts than big picture</td>
<td>may be distracted from real problem (&quot;teacher doesn't like me&quot;)</td>
<td>may focus on discrepancy between &quot;nice&quot; paragraph and grade</td>
<td>overemphasize the expert/novice divide</td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
<td>may not get the gist — &quot;What am I supposed to do?&quot;</td>
<td></td>
<td>over identify with students' choices/failures/successes</td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
<td>may make the most of discrepancy between &quot;nice&quot; paragraph and grade</td>
<td></td>
<td></td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
<td></td>
<td>may decrease student's sense of independence and adaptability</td>
<td></td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
<td></td>
<td>may make students feel inadequate</td>
<td></td>
</tr>
<tr>
<td>energetic, inquisitive, conversational tone</td>
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</tbody>
</table>

IV. DIFFICULT COMMENTING SITUATIONS THAT CAN TRIGGER UNHELPFUL RESPONSES

While preparing this Article, I invited a variety of legal writing teachers to comment on what the top stresses on their commenting might be. Teachers reported with remarkable consistency on three stresses that triggered their less strategic commenting: (1) the exhaustion arising from reading too many papers in too short a time frame, (2) irritation with students who ignored their specific remarks made either in class or in previous comments, and (3) the difficulty of communicating with the struggling writer (also referred to as "the C student").

The first problem—too many papers and too little time to grade them—is most often institutional in nature, and I won’t address it here beyond hoping that to the extent possible we pace ourselves and avoid commenting on too many papers at once. More in keeping with the scope of this paper are the other two stresses that commenters experienced working with students who ignored
their advice or whose writing reflected great difficulty with the assignment. Though I list them as separate points, I would argue that the student who appears to be ignoring advice is in fact another version of the inexperienced writer struggling to cope with the demands of the assignment.

As someone who has written her own share of indignant “see my comments on last draft!,” I certainly sympathize with teachers who feel their written or in-class comments have been ignored. But I have also wondered why students who are so focused on class rankings, so grade driven, so conscious that their writing class was the only place where they had some control over their grades would deliberately scuttle their own chances for improvement. I have become convinced that the problem is rarely that of insolence or laziness on the part of the student, and conversations with many student writers bear out this impression.

I have sat with students who couldn’t even begin to read, much less comprehend, comments attached to the lowest grade they had ever received in their lives, and with others who seemed genuinely incapable of absorbing the meaning of such comments despite multiple readings evidenced by scribbled notations and highlighter in the margins. I have translated comments for students who were attempting to prioritize the work before them. As one student facing a heavily commented-on paper joked, “I know my paper’s bleeding out, but I don’t know where to press!”

Over time I have come to believe that it is the students’ inexperience with writing in general and with revising in particular that hampers their ability to read and usefully apply the information the teacher has provided.29 A common trait of unsophisticated writers, Knoblauch and Brannon point out, is that they “ordinarily limit their revising to changes that minimally affect the plan and order of ideas with which they began, readily making only those adjustments that place the least pressure on them to reconceive or significantly extend the writing they have already done.”30 As the

29 For a deeper understanding of why students cannot simply march through the stages of the writing process from generating to drafting to revising, see James A. Reither, Writing and Knowing: Toward Redefining the Writing Process, in The Writing Teacher's Sourcebook 141 (Gary Tate & Edward P.J. Corbett eds., 2d ed., Oxford U. Press 1988) (citing Patricia Bizzell’s idea that students’ inability to revise has a large “social component,” and arises from their lack of familiarity with academic conventions and expectations).
30 Knoblauch & Brannon, supra n. 10, at 289.
authors note, "this resistance seems more complicated than laziness," and is, indeed, "natural, rising out of the anxiety that even experienced writers feel at having to reduce an achieved coherence, however inadequate, to the chaos of fragments and underdeveloped insights from which they started."^{31}

While experienced writers have the confidence built from previous success and practice rewriting, "no such comforting pattern of successes exists to steady the resolve of the apprentice."^{32} As writers ourselves, we can alert our students to the heavy work of revising and, perhaps even more important, we can empathize with them when they are in the throes of its deep miseries. We can talk honestly with them about how we have coped with similar frustrations and lived to see future drafts.^{33}

One teacher explicitly linked the frustrations of working with the C student to the irritations of ignored suggestions:

> The papers of the students who ignore class expectations are harder to read and require more interpretation. It is difficult to comment on numerous levels when the basic expectations are not met. Yet I often find in tutorials that the paper is not as bad as I perceived it to be. Students given an opportunity to explain their arguments demonstrate a greater understanding than the writing would suggest.

I was struck by this teacher's willingness to make room for a genuine conversation about the writing that has occurred. By doing so, the teacher has created an opportunity for the writer to understand the power of her written words and to realize her communicative shortcomings by discussing the gap between intention and realization. Similarly, other teachers who ask students to respond in writing to their comments invite meaningful dialogues that can provide company for students who are engaging in the lonely, anxious work of revision. Such conversations can allow students to move away from defensiveness toward a greater under-

^{31} Id.
^{32} Id.
^{33} It is interesting to note the highly charged language writers use to describe their difficulties rewriting. As a writing advisor, I frequently hear students describe their efforts at revising using words such as chaotic, stressful, lonely, and anxious.
standing as they gain experience and eventual success in writing and revising.

V. FINAL COMMENT

If, as I suggested earlier, the underlying purpose of commenting is to teach students how to become capable writers and thoughtful readers of their own work, then teachers of writing must consider and reconsider how their written remarks can best encourage students along this path. Repeated cycles of writing, response and rewriting can help students, as Knoblauch and Brannon suggest, gradually “internalize” the “Questioning Reader” in order to learn how to anticipate the needs and expectations of future readers.34 Such Questioning Readers may also fill another important role, that of providing the writer with companionship during the often difficult and lonely work of writing. As Elaine Maimon reminds us,

Experienced writers can tolerate the solitude of the silent library because they have learned not to be alone there. Writers hear the voices of colleagues asking questions about the formulation of ideas, reminding them about absent readers, pointing to potential dissonances. Inexperienced writers hear voices, too, but these . . . are often mocking and disdainful: “You can’t write,” they chide. Or they ask the student’s preoccupying question: “Do you belong here?” When the writers hear the voices of colleagues, they can talk back to them on paper, and that dialogue can drown out the voices of self-doubt and discouragement.35

Internalizing an unhelpful Questioning Reader, one whose voice seems to mock or to nag at a student’s confidence, could substantially increase the hurdles of self-doubt and discouragement so many first-year law students feel. In contrast, internalizing a helpful Questioning Reader, whose collegial voice provides company and encouragement for future writing, could help smooth the difficult road ahead of most writers. It is important to remember that our students do hear our voices in the comments we write and that

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34 Knoblauch & Brannon, supra n. 10, at 285.
35 Maimon, supra n. 29, at 89.
our words are likely to linger long after students have left our classes. It is important to remember the power we wield as commenters, and that we can afford to use that power gently.
APPENDIX

Suggestions for making comments an effective and integrated part of the class environment:

**Identify and share your priorities in advance.**

Writers should not feel ambushed by your written comments. Hand out a list of priorities for each writing assignment. Highlight priorities in class and in your meetings with students, and follow up on these top concerns in your comments.

**Prepare writers to read your comments.**

Be aware of your own commenting style and your reasons for it. Give students a copy of a draft with your comments on it, and model how to read your comments in terms of their content and tone as well as how to respond to them in future assignments. Be sure to explain any symbols that you use, and consider limiting them so that writers need not spend excessive time decoding.

**Select writing issues to comment on.**

Follow a hierarchy of concerns when commenting, especially for writers in earlier stages of drafting. Focus first on content and development of ideas, then organization, then on more surface-level concerns. Consider only correcting errors that are frequent enough to form patterns or that interfere with the reader's understanding. Let students know when you are using this "triage" approach; specify what level of response you are offering on a particular draft and why.

**Use comments to reinforce points made in previous meetings.**

Effective comments draw on and extend ideas from previous conversations you have had with the student. Envision comments
as part of an ongoing dialogue between teacher and student. Students thrive on a sense of continuity and accomplishment. Ask students to submit previous drafts with new drafts, and refer, when relevant, to your remarks on previous drafts.

**Use end comments as a way to prioritize tasks for writers.**

Use end comments to add coherence to your margin comments so they don't appear to be random criticisms but part of a greater whole effort on your part. Use end comments to define and prioritize tasks for next draft. Use bullets or numbers within end comments to organize and prioritize your suggestions.

**Make your comments as specific as possible.**

Offer text-specific, anchored comments instead of "rubber stamping" a paper with generic comments that could be used on any paper at any time.

**Write comments that can be easily read.**

Students who struggle with writing often struggle with reading as well. In order for them to digest your comments (and so to improve their writing) they must read those comments carefully, probably more than once. Attempt to make each comment as accessible and as palatable as possible. Remember that each comment typically represents more work to be done. Consider using headings, numbers, and typed comments because, as we tell students, neatness counts. Use neutral tones that focus on the writing— not the writer.

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36 For compelling evidence of how much students value the unifying end comment, see Enquist, *supra* n. 6, at 188.

37 This phrase comes from Nancy Sommers, urging teachers to be specific in their comments and critiquing those generic remarks that could be stamped anywhere on a student's paper. Sommers, *supra* n. 9, at 152.

38 Butler, *supra* n. 28, at 273.
Write comments that include genuine appreciation for the work that the writer has accomplished.

Do not underestimate the power of genuine praise. Also, do not assume that the student "blew off" an assignment, unless the student confesses having done so. Make certain that each set of comments includes some positive points.\(^\text{39}\)

\(^{39}\) If there is nothing positive to comment on, consider inviting the writer to discuss the paper in conference to determine where he or she went wrong.
How Law Students Absorb Information: Determining Modality in Learning Style

M.H. Sam Jacobson*

While all law students may be equal, not all law students are the same. Each student takes a different path to mastering the law and legal analysis, but along the way, some students get lost. Let me illustrate more specifically with an example from my law school experience. Every morning, 220 duly-intimidated first-year students took their seats in a course taught by one of the co-authors of a major treatise on the subject, scared to death that they might be called on that day for a little tête-à-tête with the master. While everyone suffered through their day in the hot-seat at some point during the semester, only one person consistently met the master’s match. Two hundred and nineteen students sat in awe of this student, who could answer any question, no matter how difficult, and wind his way through any hypothetical, no matter how convoluted, to the obvious delight of the professor. When grades came out at the beginning of the next semester, everyone expected this student to have the highest grade in the class. Instead, the student nearly failed. What happened?

Somewhere along the way, this student got lost. In one form or another, Legal Research & Writing professors see this phenomenon every year as students try to learn the law and legal analysis. One student may feel comfortable with individual cases, but not understand their significance in a larger picture. Another student may be frustrated because the more that he reads, the foggier everything gets. Another student may feel lost when she is not the one engaged in conversation with the professor during class.

With assignments beginning as early as orientation, LRW professors usually are the first to recognize the lost ones, whether it

* Instructor, Willamette University College of Law. B.S., University of Oregon; J.D., University of Iowa College of Law. Special thanks to the many students who have allowed me to see and experience learning through their eyes; to my research assistants extraordinaire, Keliang Zhu and David Schultz; and to the helpful comments of Kate O’Neill and Anne Enquist.
be from the errors made in assignments or from the glazed and anxious look of a student with whom they are conferring. While LRW professors may find it relatively easy to recognize the lost ones, LRW professors might not always find it so easy to determine how to get the lost ones back on track. Knowing more about a student’s learning style might be helpful. However, learning styles are determined by many things, some of which may not be very susceptible to change, some of which may not be readily assessable, and some of which may not be particularly relevant to the problems the student may be having in learning law and legal analysis.

1 While no single definition of “learning style” exists, learning styles generally are those cognitive, affective, and psychological behaviors that indicate how learners interact with and respond to the learning environment, and how learners perceive, process, store, and recall what they are attempting to learn. See J.W. Keefe, Student Learning Styles: Diagnosing and Prescribing Programs 4 (Natl. Assn. of Secondary Sch. Principals 1979); Wayne B. James & William E. Blank, Review and Critique of Available Learning-Style Instructors for Adults, in Applying Cognitive Learning Theory to Adult Learning 47, 47-48 (Daniele D. Flannery ed., Jossey-Bass 1993).

2 Occasionally a professor might have a student whose learning difficulties are so significant that even the most masterful use of learning style information cannot help. However, even when I have been unable to help a student succeed academically in law school, the student has been grateful for all of the insights into learning that he or she has gained in the process.

3 The learning styles of our students are determined by intelligence, personality, habitual styles of processing information social milieu, and environmental preferences. For a more complete discussion of each of these influences on learning style, see M.H. Sam Jacobson, A Primer on Learning Styles: Reaching Every Student, 25 Seattle U. L. Rev. 139 (2001).

4 Intelligence and personality are the least susceptible to change. H.J. Eysenck, Knowing Your Own I.Q. 17-19 (Bell Publg. 1962) (discussing the permanency of I.Q.); Carl G. Jung, Psychological Types 559, 331-332 (Princeton Univ. Press 1971) (originally published in 1923) (personality attitudes of introversion and extraversion and personality functions of perceiving and judging are biologically determined).

5 Psychological assessments exist for all of the categories that influence learning style. See supra n. 3. However, these assessments usually must be administered by a licensed professional. For example, the order form for Consulting Psychologists Press, publisher of a number of psychological tests, requires documentation of degrees and training before it will process an order. Consulting Psychols. Press, Tools for Developing Individuals & Transforming Organizations, Qualifications <http://www.mbti.com/qual/index.asp> (accessed July 29, 2001). This policy is consistent with the standards for test user qualifications adopted by the American Psychological Association. See Am. Psychol. Assn., Report of the Task Force on Test User Qualifications (2000) (approved by the APA Council of Representatives). Therefore, the conditions that psychologists evaluate are not readily assessable by most law professors.

6 For example, the Myers-Briggs Type Indicator, which assesses personality, has limited value for determining learning styles in law school. M.H. Sam Jacobson, Using the Myers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype?, 33 Willamette L.
Despite these limitations, the most significant aspect of learning style\textsuperscript{7} may be the one where LRW professors can be the most effective in helping students: how students absorb information. Before students can process information, they must absorb it.\textsuperscript{8} If students are adequately absorbing information, the informational input is sufficient to support further cognitive processing. Conversely, when the informational input is inadequate, the output necessarily will be inadequate as well, because the "database" from which the output is derived is incomplete. Consequently, if students are not fully absorbing critical information, their product, the output, will be fatally flawed, regardless of their brilliance in processing the information, and regardless of their sophistication in mastering other aspects of learning style.\textsuperscript{9}

To illustrate, in working on a memorandum assignment, a student might organize the information from the cases he or she has read by developing a chart of key information from relevant authorities. Then, the student might use that information to develop an analytical framework from information synthesized from the chart and to develop logical arguments that, in reasoning by analogy, compare the facts of the problem with facts from the cases. However, if the law taken from the chart is incorrect, the analytical framework will also be incorrect, and if the factual information in the chart is incorrect, the arguments derived from that information also will be incorrect, notwithstanding the most impeccable logic.

In law school, professors primarily rely on text to communicate information. Students absorb this information primarily through reading. However, many law students do not do well at absorbing information primarily in this way,\textsuperscript{10} and that number is


\textsuperscript{8} Absorbing information and processing information are distinct cognitive steps: one must first obtain (absorb) information before one can do something with it (process it). Similar to baking a cake, the baker must put all of the ingredients into the bowl before he or she can mix them together.

\textsuperscript{9} To return to the analogy in footnote 9, if a cake ingredient is missing from the bowl, then no matter how well the baker mixes the rest of the ingredients, he or she will never have a very good cake. This Article addresses how to improve getting all of the ingredients in the bowl.

\textsuperscript{10} Of the fifty-two Willamette law students from 1995-2001 who took a remedial summer Legal Research & Writing class after not passing the class during their first year of law
increasing. Unless these students modify their studying regime to absorb information more effectively, these students may do poorly in law school. In Part I, this Article describes the different modes, or modalities, for absorbing information. This information might be useful to LRW professors for two reasons: (1) professors can adjust their course materials or class time to accommodate a more diverse range of learning modalities; and (2) professors can use this information when counseling students outside of class. In Part II, this Article offers a simple tool that professors can use to help students discover their preferred modes for absorbing information. If students can learn how they learn best, they can develop more efficient and effective study habits, and these better habits will improve their success in law school.

I. MODES FOR ABSORBING INFORMATION

We absorb information through our senses: sight, hearing, touch, taste, and smell. Of those senses significant to law school, sight allows us to absorb information verbally — i.e., through reading — or visually — i.e., through pictures, designs, etc. Hearing at school, thirty-nine were visual learners, three were oral learners, five were oral/visual learners, and only five were verbal learners.

When I first started teaching in 1989, few students were visual learners, perhaps ten percent. Now, approximately thirty percent of my students are visual learners. An increasingly visual culture was also recognized by Diane Kirrane in Visual Learning, 46 Training & Dev 58 (Sept. 1992).

For example, only two of thirteen first-year students on academic probation at the end of fall semester 2000 preferred to absorb information verbally. See Richard Riding & David Mathias, Cognitive Styles and Preferred Learning Mode, Reading Attainment and Cognitive Ability in 11-Year-Old Children, 11 Educ. Psychol. 383 (1991) (verbal learners and visual learners will have difficulty learning when teaching materials and methods do not match their cognitive style).


Taste and smell generally would not be significant modes of absorbing information in law school, although offensive smells, e.g., the musty or moldy smells from old books, may adversely affect the ability to absorb information.
allows us to absorb information by listening to oneself speak (orally) or by hearing others speak (aurally). Touch allows us to absorb information tactically or kinesthetically. Early discussions of the modes for absorbing information primarily concerned auditory, visual, and kinesthetic modalities. This schema is deficient, however, because it does not distinguish between listening and talking for the auditory modality, reading and pictures for the visual modality, and doing and moving for the kinesthetic modality. These additional refinements are significant: some learners do not learn well by listening to others, but do learn well by talking out their ideas. Some learners do not learn well from reading alone, but do learn well with pictures or graphic representations of the material. Some readers learn well by moving or having a tactile component to their learning, but all learners learn well by doing, a characteristic traditionally denominated as kinesthetic, since doing is an integral part of a complete learning cycle. Therefore, our schema will include verbal, visual, aural, oral, tactile, and kinesthetic modalities where kinesthetic means moving, but not the broader concept of doing.

While students use all of these modes for absorbing information, some modalities are stronger than others so that students learn better when they absorb information in a particular way. For ease of discussion, I will refer to learners by their predominate

15 E.g. Walter B. Barbe & Raymond H. Swassing, Teaching through Modality Strengths: Concepts and Practices 18–28 (Zaner-Bloser 1979) (tracing instruction based on these modalities from the ancient Greeks and Romans to modern day).

16 While reading and pictures both involve use of the eyes, they use different parts of the brain. Susumu Kobayashi, Theoretical Issues Concerning Superiority of Pictures over Words and Sentences in Memory, 63 Perceptual & Motor Skills 783 (1986), discusses four recent theories concerning why pictures might be superior to words in memory. In fact, pictures may be superior to words for long-term memory in all learners. See Arthur R. Jensen, Individual Differences in Visual and Auditory Memory, 62 J. Educ. Psychol. 123 (1971) (visual memory was better than auditory memory for long-term recall); Roger N. Shepard, Recognition Memory for Words, Sentences, and Pictures, 6 J. Verbal Learning & Verbal Behavior 156 (1967) (humans can retain only about fifty “bits” of written information but much more than that in pictures).

17 See e.g. Rita Dunn & Kenneth Dunn, Teaching Students through Their Individual Learning Styles: A Practical Approach 317 (Prentice-Hall 1978) (noting that kinesthetic learners learn by participating in “real life” activities).

18 A complete learning cycle includes having a new experience, reflecting from the experiencing, concluding from the experience, and doing something with the experience, such as planning the next steps or applying it to solve a problem. Peter Honey & Alan Mumford, The Manual of Learning Styles 4 (Dr. Peter Honey 1992); David A. Kolb, Experiential Learning: Experience as the Source of Learning and Development 42 (Prentice-Hall 1984). For additional discussion, see Jacobson, supra n. 6, at 304–312.
mode of absorbing information, although I do not mean that the learners learn exclusively through their predominant mode. A verbal learner is one who best absorbs information through written text, either reading or writing. A visual learner is one who best absorbs information through pictures, diagrams, and other models of information rather than through written text. An oral learner is one who best absorbs information by talking out ideas. An aural learner is one who best absorbs information by listening, e.g., by using tapes or lectures. A tactile learner needs to be able to touch and manipulate. A kinesthetic learner needs to be able to move around or to see movement, e.g., of the instructor in the classroom.

In law school, we do not teach to all of these modalities. Information is primarily conveyed through written materials. While most students in law school are good verbal learners, many are not. Because of law school's heavy reliance on written materials, students who learn more effectively by absorbing information through modes other than verbally through reading may have difficulty. In fact, Vernellia Randall, Director of the Academic Excellence Program at the University of Dayton School of Law, believes that reading ability is the key predictor of law school success.19

After verbal learning, the most common mode for absorbing information is visual. A significant number of law students are visual learners and that number appears to be increasing,20 perhaps because of the early use of computers or because of early instruction designed to appeal to different intelligences.21 In addition, students with learning disabilities that affect reading, like dyslexia, use other modes of absorbing information, including the visual mode, to compensate for problems in absorbing information verbally.22 Without visual tools, these students may not be able to

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19 E-mail from Vernellia Randall to <asp-l@chicagokent.kentlaw.edu>, Reading Comprehension Test (July 19, 1997) (copy on file with Author).
20 Supra, n. 11.
21 Many elementary and secondary schools have incorporated Howard Gardner's multiple intelligences into their classrooms. A sample of publications discussing the use of multiple intelligences in the classroom is available in the ERIC records, ERIC Clearinghouse on Reading, English, and Communication, Digests and Bibliographies <http://www.indiana.edu/~eric_rec/seo/bibs/multiple.html> (accessed July 6, 2000) (listing forty-five citations from the ERIC Database and 5 other resources).
22 See Wilma H. Miller, Complete Reading Disabilities Handbook: Ready to-Use Techniques for Teaching Reading Disabled Students ch. 6 (Ctr. for Applied Research in Educ. 1993) (providing numerous visual techniques to help students who have a reading disability).
master the volume and complexity of material in law school. Significantly, but perhaps not surprisingly, visual learners may be disproportionately represented in the bottom of the class.\textsuperscript{23} While classroom lectures and discussion may aid aural and oral learners, no integral aspect of legal education aids the visual learner.

Visual learners may need additional help to master law studies since the transition from the visual mode of absorbing information to the logical output required by legal analysis is the most difficult and the least intuitive for the visual learner, especially when the visual mode is the least likely to be reinforced in law school. Visual learners tend to be right brain, or holistic, thinkers, rather than left brain, or logical, thinkers.\textsuperscript{24} This means that they absorb information in its entirety rather than in parts. Visual learners have a mental picture, or photograph, of the information that they absorb. Visual learners might mentally scroll down to page five, paragraph three of the text to recall what was written. When visual learners prepare an outline, they do not remember the information in the outline because of doing the outline, but because they can mentally see what they wrote. Visual learners remember an idea, not because of the idea itself, but by where it appears on a page. They also remember what a professor said because of the professor's movements or use of visual aids, including writing on the board.

While the visual mode of absorbing information may be good for memorizing, it is not useful for analytical learning. The information is absorbed verbatim, effective for description but not for legal analysis. The information absorbed is not synthesized with other ideas, a skill needed to establish an analytical framework; it is not prioritized, a skill needed to eliminate the irrelevant; and it does not establish the connections between ideas, a skill needed to understand and critically evaluate the reasoning and logical support for the ideas.

Following verbal learners and visual learners, the next most common learner is one whose strong mode of absorbing informa-

\textsuperscript{23} Supra n. 10. Many students in the special summer class are also at the bottom of the class. For the past five years, I have met with each of my students who is on academic probation after fall semester of the first year. None preferred to absorb information verbally.

\textsuperscript{24} Kolb, supra n. 18, at 46–50. For additional discussion of right brain-left brain functions, see Jacobson, supra n. 3, at 23–28.
tion is oral. Students who come from an environment with an oral tradition are often oral learners. Students who are oral learners need to talk out their ideas. They are the students who frequently contribute to class discussion as their way of processing information or developing ideas. They are the students who may receive a D on their appellate brief but win the oral competition. For oral learners to thrive, they need to have opportunities to talk.

Following verbal, visual, and oral learners, the next most common learners are those whose strong mode of absorbing information is aural. Aural learners learn well from listening to lectures, class discussions, study group discussions, the professor, tutors, teaching assistants, or tapes.

Finally, the least common learners in law school are those whose strong modes of absorbing information are tactile or kinesthetic. Tactile learners learn better if they can touch and feel what they are to absorb, whether it is a handout, book, or computer keyboard or mouse. Kinesthetic learners learn better if they can move around when they study, e.g., moving to music, standing, pacing, or typing.

II. DETERMINING PREFERRED MODALITY

The preferred learning mode of many students may not be readily apparent to professors, or even known by the student. Most students have done well in the verbal mode and have not yet been


26 For example, in one study, African-American children significantly improved their verbal learning under high-movement verve (HMV) conditions. A. Wade Boykin & Brenda A. Allen, *Rhythmic-Movement Facilitation of Learning in Working-Class Afro-American Children*, 149 J. Genetic Psychol. 335, 344–345 (1987) (confirming the results of several previous studies noted).
sufficiently challenged by the workload\textsuperscript{27} or the higher level of learning of analysis\textsuperscript{28} to know that the verbal mode of absorbing information is not efficient for them. However, the academic challenges of law school may challenge students' perceptions of how well they can learn verbally. While a number of evaluations exist for determining preferred modes of absorbing information,\textsuperscript{29} the following Learning Mode Assessment,\textsuperscript{30} a simple checklist and series of true-false questions, may suffice for most students to offer them some insight into how they might better absorb information.\textsuperscript{31}

\textsuperscript{27}One study performed at Washington State University indicated that few undergraduate students studied more than ten hours per week. Ernst Stromsdorfer, Presentation, \textit{Computer-Based Instruction for Improved Learning and Teaching Productivity} (Fund for the Improvement of Post-Secondary Educ. Project Directors' Mtg., U.S. Dept. of Educ., Oct. 28, 1995) (based on a self-reporting survey of over 10,000 students). In law school, that may be the number of hours per day. If students carry a load of fifteen hours and study three hours per class, that totals sixty hours per week, excluding any special projects or assignments. LSAC, \textit{A Practical Guide for Law School Academic Assistance Programs} 52-53 (LSAC 2000).


\textsuperscript{29}E.g. Walter & Swassing, supra n. 15 (Swassing-Barbe Modality Index; instrument tests recall within three modalities); Albert A. Canfield, \textit{Canfield Learning Styles Inventory (LSI)} (Humanics Media 1988) (one of the four areas assessed by this instrument is one's preferred learning mode: listening, reading, iconic experience, direct experience); J.T. Dailey, \textit{The Dailey Vocational Test: Spatial Visualization Test} (Houghton Mifflin 1965); Rita Dunn, Kenneth Dunn & Gary E. Price, \textit{Productivity Environmental Preference Survey} (Reston 1988) (PEPS; one of the five categories of this instrument tests for four modalities: auditory, visual, tactile, and kinesthetic); James W. Keefe et al., \textit{Learning Style Profile} (Natl. Assn. of Secondary Sch. Principals 1989) (portion of instrument tests for three modalities: kinesthetic, visual/spatial, and auditory/verbal); Walter B. Barbe & Michael N. Milone, Jr., \textit{Modality}, 89 Instructor 44 (1980) (Barbe-Milone Modality Checklist) (the ten items in this instrument test three modalities); app. B (simple instrument differentiates learners who absorb information visually/spacially, verbally, aurally or orally, Detlev Leutner & Jan L. Plass, \textit{Measuring Learning Styles with Questionnaires versus Direct Observation of Preferential Choice Behavior in Authentic Learning Situations: The Visualizer/Verbalizer Behavior Observations Scale (VV-BOS)}, 14 Computers in Human Behavior 543 (1998) (tests student preferences for visual or verbal learning material).

\textsuperscript{30}Readers have my permission to use the copyrighted Learning Mode Assessment for classroom or educational purposes so long as (1) copies are made and the Assessment is used at no cost to the student, and (2) I am identified as the author and copyright holder. For any other use, please contact me to obtain permission.

\textsuperscript{31}Unlike the evaluations in supra note 29, the Learning Mode Assessment has not
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

☐ lectures ☐ reading
☐ reading ☐ discussion
☐ discussion ☐ lecture
☐ writing ☐ discussion
☐ pictures ☐ words
☐ color ☐ print (B & W)
☐ charts ☐ written narrative
☐ audiotapes ☐ reading
☐ talking ☐ listening
☐ videotape ☐ audiotape

Indicate if the following are true or false when you recall information:

T F I remember the idea.
T F I remember where the idea appears on the page or in my notes.
T F I remember the illustration, diagram or chart that the information was in.
T F I remember what someone said about the idea.
T F I remember what I read.
T F I remember what I wrote about the information.
T F I remember the story from which the idea arose.
T F I remember talking about the idea.

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This assessment helps identify those students who prefer to learn verbally (reading), orally (discussion as participant), aurally (lecture, discussion as listener, audiotapes), or visually (videos, overheads, colors). A preference for writing usually reflects a verbal mode of absorbing information, but it might also reflect a visual, tactile, or kinesthetic mode, depending on the other answers to the assessment.

When to use the evaluation. The Learning Mode Assessment is an effective tool when used to counsel students experiencing difficulty in mastering law and legal analysis. It might be helpful if a student expresses any difficulty in reading, if a student has trouble retaining what he or she has read, if a student has trouble organizing material or developing an analytical framework,32 or if a

been evaluated to determine its scientific reliability. However, in the ten years that I have been using it in counseling students, students who completed the assessment found it helpful and insightful, and no student disagreed with its result. In the one instance in which I felt that a student would benefit from a more sophisticated psychological profile, the results of the modality portion of that profile were consistent with the results of the Learning Mode Assessment.

32 Difficulty in organizing or developing an analytical framework can have many causes, only one of which concerns the mode of absorbing information. For example, it could
student expresses any of the characteristics of a learning modality other than reading. The latter might be in response to a professor's general questions to a student about how the student approached doing an assignment or what the student's study habits are.

In addition, the Learning Mode Assessment is most effective when used to counsel students individually. It is less effective when done as a blanket assessment of all students for two reasons. First, when the evaluation is given to an entire class, the majority of whom are verbal learners, the students whose strengths lie in other modalities may feel marginalized, i.e., isolated from their peers, and less confident about their ability to perform in law school. This phenomenon may not occur when the evaluation is given to a self-selected group of students, e.g., those who attend a volunteer session to learn about learning styles. In that circumstance, fewer of those attending may be strong verbal learners because those learners may not perceive themselves as having difficulty in learning.

Second, unless a student has a clear modality preference, the Learning Mode Assessment requires interpretation that may be difficult to convey in a large group. When evaluations reflect preferences for more than one modality or when answers conflict, the professor needs to be able to ask additional questions \(^{33}\) to clarify the evaluation and to understand the learning dynamics that are occurring.

*How to interpret the evaluation.* The illustrations that follow reflect different patterns within this assessment, beginning with the simplest patterns (where the learner has a very strong modal preference) and ending with the more complex patterns (where the learner’s modal preferences are mixed).

**Verbal mode.** Someone with a strong verbal mode of absorbing information would check, or answer as true, the following highlighted information:

---

\(^{33}\) The types of questions that a professor might ask are described in the examples that follow.
## LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

- lectures
- 
- reading
- 
- discussion
- 
- writing
- 
- pictures
- 
- color
- 
- charts
- 
- audiotapes
- 
- talking
- 
- videotape

Indicate if the following are true or false when you recall information:

<table>
<thead>
<tr>
<th>T/F</th>
<th>I remember the idea.</th>
</tr>
</thead>
<tbody>
<tr>
<td>T/F</td>
<td>I remember where the idea appears on the page or in my notes.</td>
</tr>
<tr>
<td>T/F</td>
<td>I remember the illustration, diagram or chart that the information was in.</td>
</tr>
<tr>
<td>T/F</td>
<td>I remember what someone said about the idea.</td>
</tr>
<tr>
<td>T/F</td>
<td>I remember what I wrote about the idea.</td>
</tr>
<tr>
<td>T/F</td>
<td>I remember talking about the idea.</td>
</tr>
</tbody>
</table>

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The strong verbal learner would prefer words over other modes of absorbing information. Someone who is a strong verbal learner may prefer reading but not writing; however, writing may also indicate a preference for a verbal mode of absorbing information.

**Visual mode.** Someone with a strong visual mode of absorbing information would check, or indicate as true, the following highlighted information:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

<table>
<thead>
<tr>
<th>Lectures</th>
<th>Reading</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discussion</td>
<td>Lecture</td>
</tr>
<tr>
<td>Writing</td>
<td>Discussion</td>
</tr>
<tr>
<td>Pictures</td>
<td>Words</td>
</tr>
<tr>
<td>Color</td>
<td>Print (B &amp; W)</td>
</tr>
<tr>
<td>Charts</td>
<td>Written narrative</td>
</tr>
<tr>
<td>Audiotapes</td>
<td>Listening</td>
</tr>
<tr>
<td>Talking</td>
<td>Videotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

<table>
<thead>
<tr>
<th>T</th>
<th>F</th>
</tr>
</thead>
<tbody>
<tr>
<td>I remember the idea.</td>
<td>I remember where the idea appears on the page or in my notes.</td>
</tr>
<tr>
<td>I remember the illustration, diagram or chart that the information was in.</td>
<td>I remember what someone said about the idea.</td>
</tr>
<tr>
<td>I remember what I read.</td>
<td>I remember what I wrote about the information.</td>
</tr>
<tr>
<td>I remember the story from which the idea arose.</td>
<td>I remember talking about the idea.</td>
</tr>
</tbody>
</table>

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A strong visual learner rarely prefers reading in any of the paired choices. Instead, visual learners prefer pictures, diagrams, charts, and color.

Pictures, diagrams, charts, and other graphical representations help the visual learner to see the relationship between ideas. Other graphic representations might include time lines, tabulations, continua, Venn diagrams, dyads, flow charts, matrices, or other illustrations. In addition, computer software is available to help visually organize material, including presentation software included with word processing packages. Software designed specifically for educators and visual learners includes Inspiration, available from Inspiration Software, Inc., Portland, Oregon.

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software allows the user to create a visual organizer, e.g., concept map, web, or diagram, and then convert it to a traditional outline format. I have also used the program in reverse: inputted a traditional outline and converted it to a visual format. To see the relationship between ideas on a smaller scale, visual learners might use a visual organizer like the T-chart.  

Color helps the visual learner to extract ideas coded by color. Using color codes for lists or outlines can help the visual learner to categorize or prioritize. Using color codes for book briefing or for analysis of documents can help the visual learner to identify parts of the case brief or document.

While all learners may enjoy these visual cues, only a visual learner would remember an idea by “seeing” where the information appears on a page or by “seeing” a visual representation of the information. A visual learner mentally scrolls through pages of script to retrieve desired information. Since the script, or verbal material, is inputted literally, this manner of storing information is inefficient, particularly when the output goal is analysis and not memorization. For visual learners, inputting a visual representation allows them to “see” the relationship between ideas necessary for legal analysis.

A visual learner might also check a preference for lectures, not for the oral (or aural) content, but because the learner remembers the ideas from visual cues based on what the professor or others in

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35 T-charts are a note-taking technique that derive their name from drawing a big T on a piece of paper. The use of T-charts is illustrated in M.H. Sam Jacobson, Providing Academic Support without An Academic Support Program, 3 J. Leg. Writing 246–249 (1997).


37 Visuals help all students retain information, not just those who are visual learners. Studies on memory indicate that learners remember pictures better than words or sentences. See e.g., Susumi Kobayashi, Theoretical Issues Concerning Superiority of Pictures over Words and Sentences in Memory, 63 Perceptual & Motor Skills 783 (1986) (reviewing the results of studies and the four main theories for explaining this phenomenon).

38 Supra n. 28.

39 Patton, supra n. 7, at 2–3. Studies cited in this article indicate that poor learners are poor organizers. Id. at 2 n. 9 (citing Thomas J. Shuell, The Effect of Instructions to Organize for Good and Poor Learners, 7 Intelligence 271, 272–278 (1983)). When students were helped to develop organizational skills appropriate to their learning style, the difference in performance between good and poor learners was approximately cut in half. Id. at 3 n. 14 (citing Shuell, supra, at 282).
the classroom were doing at the time the idea was discussed. Finally, the visual learner might also remember the story about the idea. Some visual learners convert verbal material into a play or television program that they replay later when they want to recall the information. The characters help to understand ideas, the plot helps to establish the relationship between ideas, and the affectations of the characters help to prioritize information.

**Oral mode.** Someone with a strong oral mode of absorbing information might check or indicate as true the following highlighted information:

<table>
<thead>
<tr>
<th>LEARNING MODE ASSESSMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>For each of the following pairs, check your preferred choice for how you learn best:</td>
</tr>
<tr>
<td>☐ lectures</td>
</tr>
<tr>
<td>☐ reading</td>
</tr>
<tr>
<td>☐ discussion</td>
</tr>
<tr>
<td>☐ writing</td>
</tr>
<tr>
<td>☐ pictures</td>
</tr>
<tr>
<td>☐ color</td>
</tr>
<tr>
<td>☐ charts</td>
</tr>
<tr>
<td>☐ audiotapes</td>
</tr>
<tr>
<td>☐ talking</td>
</tr>
<tr>
<td>☐ videotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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A strong oral learner will prefer learning situations in which the learner can talk out ideas. While discussion involves both listening and talking, an oral learner will prefer talking over listening and may not select other situations, like audiotapes, that would appeal to the aural learner. In addition, the oral learner may remember the idea by talking to himself or herself, including reading aloud, or creating a story about the idea.
**Aural mode.** Someone with a strong aural mode of absorbing information would check or indicate as true the following highlighted information:

<table>
<thead>
<tr>
<th>LEARNING MODE ASSESSMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>For each of the following pairs, check your preferred choice for how you learn best:</td>
</tr>
<tr>
<td>□ lectures                   □ reading</td>
</tr>
<tr>
<td>□ reading                    □ discussion</td>
</tr>
<tr>
<td>□ discussion                 □ lecture</td>
</tr>
<tr>
<td>□ writing                    □ discussion</td>
</tr>
<tr>
<td>□ pictures                   □ words</td>
</tr>
<tr>
<td>□ color                      □ print (B &amp; W)</td>
</tr>
<tr>
<td>□ charts                     □ written narrative</td>
</tr>
<tr>
<td>□ audiotapes                 □ reading</td>
</tr>
<tr>
<td>□ talking                    □ listening</td>
</tr>
<tr>
<td>□ videotape                  □ audiotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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A strong aural learner will prefer learning situations in which the learner can listen to ideas. This learner likes to listen to lectures, discussion, audiotapes, and videotapes. The aural learner also may remember the idea because he or she heard it as part of a story or a conversation.

When students complete the Learning Mode Assessment, the results may not indicate as strong of a preference for one mode of absorbing information as the previous examples. Good learners often use and are strong in more than one mode of absorbing information. However, the responses might also reflect a pattern in the modes of absorbing information that could be problematic for effective law studies.
Patterns when modality preferences are mixed. While all learners have a preference for one modality, most learners use more than one modality when they learn.40 One pattern that could be problematic for law studies is an assessment in which the learner never selects a verbal mode of absorbing information. For example:

<table>
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<td>- pictures</td>
</tr>
<tr>
<td>- writing</td>
</tr>
<tr>
<td>- color</td>
</tr>
<tr>
<td>- charts</td>
</tr>
<tr>
<td>- audiotapes</td>
</tr>
<tr>
<td>- talking</td>
</tr>
<tr>
<td>- videotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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The assessment indicates that the student’s least preferred mode of absorbing information is verbal. While the student indicated that she preferred written narrative over charts, she also indicated that she remembered information from charts but not from the written text. When I asked the student about this, she explained that sometimes the written narrative was helpful to understand the chart, but that once she understood the chart, she remembered the ideas because of the chart, not because of the written narrative. We then discussed how she might study to take advantage of her preferences for visual, oral, and aural modes for absorbing information, so that she could compensate for the weaker verbal mode of absorbing information.

40 Barbe & Swassing, supra n. 15, at 6–7.
In another example, the following student indicated preferences for oral and visual modalities:

<table>
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<th>LEARNING MODE ASSESSMENT</th>
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<tbody>
<tr>
<td>For each of the following pairs, check your preferred choice for how you learn best:</td>
</tr>
<tr>
<td>☐ lectures ☐ reading</td>
</tr>
<tr>
<td>☐ reading ☐ discussion</td>
</tr>
<tr>
<td>☐ discussion ☐ lecture</td>
</tr>
<tr>
<td>☐ lecture ☐ discussion</td>
</tr>
<tr>
<td>☐ writing ☐ words</td>
</tr>
<tr>
<td>☐ pictures ☐ print (B &amp; W)</td>
</tr>
<tr>
<td>☐ color ☐ written narrative</td>
</tr>
<tr>
<td>☐ charts ☐ reading</td>
</tr>
<tr>
<td>☐ audiotapes ☐ listening</td>
</tr>
<tr>
<td>☐ written narrative ☐ audiotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

T  F I remember the idea.
T  F I remember where the idea appears on the page or in my notes.
T  F I remember what someone said about the idea.
T  F I remember what I wrote about the information.
T  F I remember the story from which the idea arose.
T  F I remember talking about the idea.

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This assessment also indicates a weak preference for verbal learning, even though two of the answers suggested a preference for the verbal mode for absorbing information. The student selected black and white print over color because he is color-blind, and he selected reading over audiotapes because his aural mode for absorbing information is imperfect. He indicated that he learns best aurally when he also has something or someone to view; therefore, audiotapes were not a good choice for him. We discussed how to use visual and oral tools to complement reading and lectures.

In the following example, the student was very passive in his learning:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

- Lecture
- Reading
- Discussion
- Writing
- Pictures
- Color
- Charts
- Audio tapes
- Talking
- Videotape

- Reading
- Lecture
- Discussion
- Words
- Print (B & W)
- Written narrative
- Reading
- Listening
- Audiotape

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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These answers to the true/false questions reflect a strong visual learner who does not learn well from the aural or oral modes of absorbing information. However, the true/false responses conflict with the paired choices. When I questioned the student about the apparent inconsistencies, the student indicated that he generally preferred listening in law school because he was not understanding the material and this allowed him to observe what others were learning from the material. He was dyslexic and very visual as compensation for his difficulty in reading. His answers to the paired choices were a reflection of his passive approach to studying, so we discussed how to become more engaged and active in what he was learning, using his preferred modes of absorbing information.

In the following example, the student’s least preferred mode of absorbing information was aural:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

<table>
<thead>
<tr>
<th></th>
<th>lectures</th>
<th>reading</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>discussion</td>
<td>lecture</td>
</tr>
<tr>
<td></td>
<td>writing</td>
<td>discussion</td>
</tr>
<tr>
<td></td>
<td>pictures</td>
<td>words</td>
</tr>
<tr>
<td></td>
<td>color</td>
<td>print (B &amp; W)</td>
</tr>
<tr>
<td></td>
<td>charts</td>
<td>written narrative</td>
</tr>
<tr>
<td></td>
<td>audiotapes</td>
<td>reading</td>
</tr>
<tr>
<td></td>
<td>talking</td>
<td>listening</td>
</tr>
<tr>
<td></td>
<td>videotape</td>
<td>audiotape</td>
</tr>
</tbody>
</table>

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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In this example, the student was a slow reader, but preferred reading because he was hard of hearing and, therefore, had difficulty with lectures, audiotapes, and listening. He also had a strong oral preference but primarily for the opportunity to ask questions about what he did not understand from the reading and not as a way of talking through his ideas. We discussed how to use visual tools to complement reading and lectures. We also discussed how to develop additional opportunities to ask questions by participating in study groups and meeting with professors during office hours.

In the following example, the student preferred the visual and aural modes of absorbing information and did not prefer the verbal or aural modes:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

- lectures  
- reading  
- discussion  
- writing  
- pictures  
- color  
- charts  
- audiotapes  
- talking  
- video tape

- reading  
- discussion  
- lecture  
- discussion  
- words  
- print (B & W)  
- written narrative  
- reading  
- listening  
- audiotape

Indicate if the following are true or false when you recall information:

- True  False
  - I remember the idea.
  - I remember where the idea appears on the page or in my notes.
  - I remember the illustration, diagram or chart that the information was in.
  - I remember what someone said about the idea.
  - I remember what I read.
  - I remember what I wrote about the information.
  - I remember the story from which the idea arose.
  - I remember talking about the idea.

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This student’s least preferred modes of absorbing information, verbal and aural, are the two modes by which most of law is taught. This student was a good student, but she was well aware of her limitations in reading. Consequently, she organized her materials visually, and she frequently sought out faculty and peers with whom she could discuss her ideas.

In this example, the student preferred to absorb information orally and had significant difficulty absorbing information visually:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

- lectures
- reading
- discussion
- writing
- pictures
- color
- charts
- audiotapes
- talking
- videotape
- reading
- discussion
- lecture
- discussion
- words
- print (B & W)
- written narrative
- reading
- listening
- audiotape

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
- T F I remember where the idea appears on the page or in my notes.
- T F I remember the illustration, diagram or chart that the information was in.
- T F I remember what someone said about the idea.
- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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This student relied on her oral, aural, and verbal modes of absorbing information to compensate for a weakness in absorbing information visually. The inability to absorb information visually was quite pronounced, even reflected in routine observations about objects in my office, and may reflect a learning disability.

In a final example, this student did not prefer to absorb information orally, but the remainder of her answers were more inconsistent than any I had seen before:
LEARNING MODE ASSESSMENT

For each of the following pairs, check your preferred choice for how you learn best:

- lectures
- reading
- discussion
- writing
- pictures
- color
- charts
- audiotapes
- talking
- videotape
- discussion
- discussion
- words
- print (B & W)
- written narrative
- reading
- listening
- audiotape

Indicate if the following are true or false when you recall information:

- T F I remember the idea.
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- T F I remember what I read.
- T F I remember what I wrote about the information.
- T F I remember the story from which the idea arose.
- T F I remember talking about the idea.

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To illustrate the inconsistencies, the student indicated that she preferred lectures (listening) over reading, but that she preferred reading over audiotapes (also listening). She indicated that she remembered where the idea appeared on a page and ideas from stories, but she did not check any other choices of a visual learner other than that she preferred charts over written narrative. Even though she preferred charts over written narrative, she indicated that she did not remember the charts that the information was in. In addition, she selected listening, lectures, and audiotapes, but answered that she did not remember ideas because of what someone said.

When I asked her about these somewhat inconsistent answers, she explained that she thought she was just lazy, that she preferred lectures and charts where someone else has done the work, listening because it did not require much effort, and writing because she was good at it. The latter self-assessment was of particular interest because the student had failed Legal Research and Writing. In fact, her technical writing skills were quite good, but her analytical skills were quite deficient because she was absorb-
ing information in ways that were useful only for memorization, not for analysis. She needed to be more engaged in the material and to develop her own analytical schemas to improve, a problem in processing information rather than absorbing information.

III. CONCLUSION

With the results of the Learning Mode Assessment, students can develop more effective study rituals and can assume control over how they master the study of law. When students understand how they best absorb information and apply that understanding to reform their study habits, their ability to master law will improve, sometimes dramatically. For example, in the summer LRW course, I often have students writing A papers, when previously they had failed. In another example, one student ended her first year with a 1.8 GPA, which put her on academic probation. After determining that she was strongly visual in her preferred mode of absorbing information, she integrated several visual techniques into her study routine, including organizing her thoughts with elaborate color drawings. The next semester her grades increased a full grade point, 2.8, even though she was taking the more difficult bar courses required of students on academic probation.

In addition to improving study rituals, knowing the most effective way to absorb information empowers the student. At the end of the first year of law school, one student, who was a visual learner, told me that she had met with her Contracts professor to discuss a question she had about the material. When the professor began to answer her question, she interrupted him and told him that she could understand his explanation better if he could draw her a picture, rather than just talk to her. The professor drew a simple diagram illustrating his point, which she thought made the point quite clear. She was struck by how easily she understood the professor’s point once she could “see” it and by how good it made her feel, knowing that she had some control over how she learned. If our students can learn how they learn best, they can develop

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41 Supra, n. 28.
42 For discussions on processing information, see generally Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313 (1995); Jacobson, supra, n. 2; Wangerin, supra, n. 13.
more efficient and effective study habits, and these better habits will improve their success in law school. Students who know how they prefer to absorb information can become masters, or at least co-masters, of their law student universe.
Improving Legal Writing Courses: Perspectives From the Bar and Bench*

Susan McClellan**
Constance Krontz

In my twelve years on the bench, I have seen much written work by lawyers that is quite appalling.

— Hon. Harry T. Edwards

Legal writing teachers constantly fine-tune legal writing courses to better prepare students to enter legal practice. That practice, however, is rapidly changing and evolving. Although we, as teachers, may think we understand the changes in legal practice, the judges and attorneys who supervise the work of new members of the bar can help us evaluate the strengths and weaknesses of both our graduates' skills and our programs.

The literature reveals few surveys that address specific aspects of materials taught in basic legal writing courses, and fewer still that tap the expertise of these judges and attorneys. Most surveys and critiques of legal education, from the MacCrate Report in 1992 to the present date, address broader educational con-

* The Authors presented this material at The Legal Writing Institute's Summer Conference in July 2000. They conducted the survey between January and May 2000.

** The Authors teach legal writing at Seattle University School of Law. Susan McClellan, who is in her twelfth year of teaching, clerked for Justice Robert F. Utter at the Washington Supreme Court and spent several years in private practice with Karr Tuttle Campbell. Constance Krontz, who is in her tenth year of teaching, clerked for Justice Barbara Durham at the Washington Supreme Court and spent several years handling criminal appeals for the former Washington Appellate Defenders Association. The Authors would like to thank Aprille Walker for her assistance in researching this Article.


3 ABA Sec. Leg. Educ. & Admis. to the B., Legal Education and Professional Devel-
cerns. One survey, however, conducted by the University of Montana Law School in 1994, specifically addressed judges’ preferences in briefs. Although the survey provided useful suggestions for

opment — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (ABA 1992) [hereinafter MacCrate Report]. In its Statement of Fundamental Lawyering Skills and Professional Values, the MacCrate Report addressed concerns about communication generally, not separating writing skills from skills in oral argument. The Task Force Recommendations, however, specifically addressed writing: “In view of the widely held perception that new lawyers today are deficient in writing skills, further concerted effort should be made in law schools and in programs of transition education after law school to teach writing at a better level than is now generally done.” MacCrate Report, supra, at 332.

4 E.g. Edwards, supra n. 3. Judge Edwards’s comments focus on the gap between the teaching and practice of law. He criticizes most heavily the preference for teaching and writing about theory detached from doctrinal realities, the lack of attention paid to legal pedagogy, and lack of training for ethical practice. To support his argument that law schools have strayed too far from “their principal mission of professional education and training,” Edwards surveyed his own previous law clerks, asking them to reflect on the connection between their own education and practice. Id. at 41-42. The thirty clerks graduated from ten different prestigious law schools. The commentary and the clerks’ reflections call for a number of changes in legal education, including a few that relate specifically to legal writing. Edwards noted, as a “serious concern,” the lack of good training in legal writing. He added that clerks faulted their legal writing programs, with good cause, because law school exams and seminar papers do not provide sufficient training for practicing lawyers. Id. at 63.

Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing, i.e., things that serve to facilitate communications between lawyers and clients, lawyers and opposing counsel, and lawyers and governmental decisionmakers or policymakers.

The more serious problem in legal writing, however, is what I would call a lack of depth and precision in legal analysis. For example, too many lawyers demonstrate a lack of familiarity with or understanding of controlling or analogous precedent. Too many advocates are unable to focus an argument, so as to highlight and concentrate on the principal issue(s); and too many attorneys fail to assess how an action in a particular case may affect future cases or future developments in the law. These failings, I think, are attributable in no small measure to failings in “doctrinal education.”

Id. at 64-65; see Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. Leg. Educ. 469 (1993) (discussing two surveys, sent to law firm partners and to junior practitioners in the Chicago area, designed to assess the MacCrate Report skills, some skills from a survey completed in the 1970s, and the “dirty’ skills of obtaining and preserving clients”). Garth and Martin’s respondents ranked written and oral communication skills atop the hierarchy of “extremely important skills” needed by new practitioners, id. at 474, but the surveys did not ask them to address discrete skills in the area of writing and oral argument.

5 Sharon K. Snyder, Judges Know a Good Brief When They See One, 20 Mont. Law. 11 (June 1995). To complete the survey, judges answered thirty questions about “what does, and does not, persuade them in legal writing,” Id. The survey appears to have focused on briefing in the practice of law generally, not on the specific skills of first-year associates or
briefing, it did not evaluate law school graduates' performance in their first year of practice or judicial clerking. To improve the skills of recent graduates, academics and judges have called for increased collaboration among legal educators, the bench, and the bar.6

To further this collaboration and to gain insights from the bench and bar, we sent a survey to judges and practicing attorneys who supervise the work of first-year associates or judicial law clerks.7 We selected attorneys from a variety of practices in Washington State, including offices of public defenders and state prosecutors, the Attorney General's office, and private firms of various sizes.8 Although all the practices are Washington based, many of them hire attorneys from law schools across the country, and several firms have offices in other states. We sought information about the performance of all first-year clerks and associates, without reference to where they obtained their law degrees. Knowledge of the bench and bar's perception of the oral and written performance of recent law school graduates generally can inform all legal writing programs. Such knowledge can help legal writing professors determine whether the skills we are targeting are those the students will need when they begin clerking or practicing law.

We presented the results of the survey at The Legal Writing Institute's Summer Conference in July 2000.9 As part of the program, a panel consisting of a judge and two attorneys commented on specific points raised by the survey. The panel members were

judicial law clerks. The one-page article summarizing the results emphasizes organization, logical analysis, effective use of both supporting and adverse authority, proper English grammar and punctuation, and accurate citation.


7 The Authors would like to thank all the judges and attorneys who spent the time and effort to respond to the survey. The responses reflected considerable thought and a desire to contribute to our mission.

8 For obvious reasons, we did not include solo practitioners. We selected attorneys and judges who regularly supervise the work of new clerks and associates.

9 The Authors presented this material in concert with Molly Lien's presentation titled "Training Tortoises to Trot."
Judge J. Dean Morgan\textsuperscript{10} of the Washington State Court of Appeals, Division Two; William Bailey,\textsuperscript{11} a partner with Mills Meyers Swartling, a medium-sized Washington firm; and Elaine Winters,\textsuperscript{12} a supervising attorney with the Washington Appellate Project.\textsuperscript{13}

This Article describes the survey, summarizes the results, and offers some suggestions for rethinking areas of emphasis in legal writing programs. The discussion includes some of the panelists' comments as well as those made by the survey's respondents. In addition, Judge Morgan's Top Ten List for Legal Writers appears in the appendix.\textsuperscript{14} The entire survey, with tabulated results, is on file with the Authors.

\section*{I. THE SURVEY}

The survey includes three basic sections: a chart-form checklist for evaluating performance on specific skills; questions seeking comments about areas in which new associates and judicial law clerks seem best prepared and areas legal writing programs should stress more heavily; and questions relating to the responding attorney's or judge's practice. In designing questions for each section, we tried to balance the goal of obtaining as much information as possible with the need to keep the survey short enough to ensure responses from busy judges and practitioners.\textsuperscript{15}

\begin{flushleft}
\textsuperscript{10} Judge Morgan formerly served as a partner in a major Seattle law firm, as a public defender, as a superior court judge, and as the Former Chief Presiding Judge statewide for the Court of Appeals. He has also taught extensively at two law schools and at both the Washington State and National Judicial Colleges.

\textsuperscript{11} Mr. Bailey previously served as a partner at Lane Powell Spears Lubersky LLP, one of the largest Seattle law firms, and as a Deputy Prosecuting Attorney. He has been named the American Board of Trial Advocates' Washington State Trial Lawyer for 2000. He is also a fellow in the American College of Trial Lawyers.

\textsuperscript{12} Ms. Winters served as a public defender in Seattle for more than twenty years, working as both a trial attorney and an appellate advocate. In her current position, she supervises attorneys representing indigent clients in the Washington Court of Appeals and Supreme Court.

\textsuperscript{13} John D. Lien, who is a partner in the Chicago office of Foley & Lardner, a large firm with nearly 1,000 attorneys and sixteen offices nationwide, also served on the panel, but his remarks were directed to points made in Molly Lien's presentation. \textit{Supra} n. 9.

\textsuperscript{14} Judge Morgan prepared his \textit{Top Ten List for Legal Writers} as part of his presentation for the panel's review of the survey.

\textsuperscript{15} The Authors would like to thank the following members of the Seattle University
The checklist in section one asks the respondent to rate performance on specific skills divided into six parts:

- Legal Research
- Presenting Legal Analysis in Briefs and Office Memos
- Writing
- Mechanics
- Manner of Working
- Oral Communication Skills

Each part lists four to eight specific skills that generally receive some emphasis in legal writing courses.

The questions in section two are open ended. The intent was to allow each respondent to express personal observations about strengths and deficiencies in new associates’ or judicial law clerks’ performance in legal research and writing. The questions also seek recommendations about skills legal writing programs should stress more heavily. The respondents’ observations and recommendations could and did exceed the scope of questions asked in section one, and they added depth to an otherwise impersonal checklist.

The questions in section three, which relate to the nature of the respondent’s practice, seek information about the size of the firm, the percentage of time new associates and clerks spend writing different types of documents, the length of internal (objective) office memoranda produced, and the manner of reviewing work. This information provides insight into the way associates spend their time in practice and raises questions about the types or length of writing assignments that might be most appropriate for law students, especially first-year law students. Additionally, we would like to thank Lori Lamb for her assistance in formatting and distributing the survey and in tabulating the initial results.

Judicial clerks’ activities are generally far more limited than those of new attorneys in practice. This question, therefore, focused on associates in practice.

For example, if most firms expect new attorneys to write only three-to-five-page objective office memoranda, writing programs might consider restricting most assignments to that length. Similarly, if firms dispense with objective memoranda altogether, writing programs might revise the relative emphasis given to objective office memoranda and per-
tions in section three relate to the respondent’s length of time in practice and the nature of training in legal writing received in law school.

II. THE SURVEY RESULTS

Overall, the results seem to support the focus of modern legal writing programs, but they also indicate areas for additional emphasis. As expected, the respondents generally gave higher marks for the rudimentary skills that are easier to teach, such as stating the legal rule clearly, than for the more difficult skills, such as using persuasive techniques effectively or writing concisely. The lower marks for the difficult skills do not necessarily indicate monumental deficiencies. As one of the respondents explained, “My rationale for marking ‘fair’ rather than ‘good’ is generally to highlight areas where improvement is desirable. It is not my intent to indicate that overall work product is not good.” Improvement is always desirable, but the number of fair and poor ratings for certain skills deserves discussion.

A. SECTION ONE, PART ONE: LEGAL RESEARCH

As the chart below demonstrates, respondents favorably rated new associates’ and clerks’ knowledge of how to use print and computerized sources to research legal issues.

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18 Legal writing programs usually teach students to frame, research, and analyze an issue; to present that analysis in an effective manner in a conventional format, usually in an internal office memorandum, a persuasive memorandum or brief, or an oral argument to a court; and to use proper tone, grammar, and citation forms in each document. See generally e.g. Laurel Currie Oates, Anne Enquist & Kelly Kunsch, The Legal Writing Handbook: Analysis, Research, and Writing (2d ed., Aspen L. & Bus. 1998); Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, Writing & Analysis in the Law (4th ed., Found. Press 1999). Although texts often spend some time discussing opinion letters, negotiations, and client counseling, they emphasize briefs and memos, correct and effective writing, and oral argument.

19 The instructions for completing the chart read as follows: “Please rate the ability, generally, of first-year associates or judicial law clerks to perform the following skills (Excellent = E, Good = G, Fair = F, Poor = P, No Basis to Assess = N).”
PART ONE: LEGAL RESEARCH

1. **Understand which sources to use to begin researching an issue?**

2. **Understand how to use print sources to research legal issues?**

3. **Understand when to use print sources to research legal issues?**

4. **Understand how to use computerized sources**

5. **Understand when to use computerized sources**

6. **Understand how to use the Internet to find factual**

7. **Research efficiently, in a cost-effective manner?**

<table>
<thead>
<tr>
<th></th>
<th>E</th>
<th>G</th>
<th>F</th>
<th>P</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4</td>
<td>19</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>22</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>3</td>
<td>16</td>
<td>10</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>12</td>
<td>15</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>2</td>
<td>17</td>
<td>10</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>6</td>
<td>5</td>
<td>5</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>11</td>
<td>11</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

Twenty-seven respondents (ninety percent)\(^{20}\) gave “good” or “excellent” ratings to knowledge of how to use computerized sources, while only three (ten percent) gave “fair” ratings.\(^{21}\) In fact, the excellence rating for this skill (forty percent) is higher than for any other skill in the survey.

The ratings drop markedly, however, for understanding *when* to use computerized sources and for researching efficiently. While the number of “good” ratings remains about the same for the “when” question, the ratings for “excellent” and “fair” essentially reversed: two (seven percent) excellent, seventeen (fifty-seven percent) good, and ten (thirty-three percent) fair.\(^{22}\) The results for researching efficiently are even lower; the “good” ratings drop to thirty-eight percent and three respondents rated performance as poor.

The results for “researching efficiently” are not surprising, considering the difficulty in both teaching and learning that skill. It necessarily includes the concepts in questions three and five, understanding when to use print and computerized sources. As one respondent noted, “[S]ome are less adept in using print resources — though sometimes one simply has to do it the old fash-

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\(^{20}\) The number of respondents for each skill question varies; not all respondents rated performance on each skill, and some checked the “No Basis to Assess” column.

\(^{21}\) Percentages have been rounded. This Article does not purport to convey a full statistical analysis. Our intent is to provide a general view from practitioners.

\(^{22}\) One respondent marked no basis to assess.
Panelist Winters suggested that, regardless of the medium used, new attorneys could streamline their research by learning to use secondary sources more efficiently. Nonetheless, respondents' comments indicate that new associates and clerks have good research skills, especially for state law issues and for substantive areas in which they have taken classes.

**B. SECTION ONE: PART TWO, PRESENTING LEGAL ANALYSIS IN BRIEFS AND MEMOS**

Overall, the scores are lower for presenting the analysis than for researching.

<table>
<thead>
<tr>
<th>PART TWO: PRESENTING LEGAL ANALYSIS IN BRIEFS AND MEMOS</th>
<th>E</th>
<th>G</th>
<th>F</th>
<th>P</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Organize content in a manner that meets conventions and readers' expectations?</td>
<td>16</td>
<td></td>
<td>13</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(PLUS 1-G/F)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Structure analysis around legal principles and use authorities to illustrate how the principles have been applied in similar cases (rather than focusing on a case and stating the point later)?</td>
<td>17</td>
<td></td>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(PLUS 1-F/P)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. State the applicable rules clearly and concisely?</td>
<td>3</td>
<td>17</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(PLUS 1-F/P)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Develop strong arguments by comparing the reasoning and facts from analogous cases to facts from the attorney's case?</td>
<td>1</td>
<td>13</td>
<td>14</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5. Present the arguments based on mandatory authority before those based on lesser authority?</td>
<td>2</td>
<td>18</td>
<td>8</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6. Make the entire argument or discussion section read smoothly?</td>
<td>11</td>
<td></td>
<td>14</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(PLUS 1-G/F)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. In briefs, use persuasive techniques, including acknowledging, but minimizing, the opponent's best facts, cases, or arguments?</td>
<td>4</td>
<td>18</td>
<td>5</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>8. Present thorough, yet succinct, analysis?</td>
<td>8</td>
<td></td>
<td>18</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(PLUS 1-G/F)</td>
<td></td>
<td>(PLUS 1-F/P)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As might be expected, the ratings are higher for the writing skills that are easier to teach (numbers 1, 2, 3, and 5) than for the more complicated or global skills (4, 6, 7, and 8).

Although all of the ratings indicate that improvement is needed, the last three show that writing programs need to emphasize making an argument section read smoothly; using persuasive techniques to address the opponent’s strongest points; and presenting thorough, yet succinct, analysis. None of the respondents rated performance on any of those three skills as excellent, while several rated performance as poor.

Skill number seven, using persuasive techniques to address the opponent’s best points, received the lowest rating of any skill in the survey. No respondents rated skill performance as excellent, while only fourteen percent gave good ratings; fifty-nine percent, fair; and seventeen percent, poor. Comments in section two of the survey underscore the ratings and stress the need to confront adverse authority: “[Legal writing teachers] should stress [the] need to maintain credibility with decision-makers, and to clarify that [the] advocate’s role does not include overlooking contrary facts/authority.” Panelist Judge Morgan highlighted the need to deal with the weak points:

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23 Judges regularly praise succinct writing. E.g. Brent T. Adams, Writing for Lawyers, 2 Nev. Law. 21 (Feb. 1994) (district judge; “Rule 2: Make it short. Senior United States District Judge James M. Burns often remarks that nothing is persuasive after five pages.”); Christine M. Durham, Writing a Winning Appellate Brief, 10 Utah B.J. 34 (Oct. 1997) (“Never forget that appellate judges regularly face mountains of briefs — they want to learn what they need to know quickly and efficiently.”); Charles Wood, How to Write Appealing Briefs, 25 Mont. Law. 29 (Oct. 1999) (quoting Montana Supreme Court Justice William Leapheart’s advice: “First I look to see how long a brief is. A brief should be punchy and get to the point.”). Retired Judge Alba L. Whiteside has stressed the need to be brief but to present thorough analysis. Alba A. Whiteside, Ohio Appellate Practice: How to Write the Appellate Brief — Helpful Hints and Suggestions Oh. App. Prac. T. 5.28 (West 2001) (“Effective writing is hard work and requires that you devote the necessary time and effort to create a brief, simple, clear, thorough, complete, and effective appellate brief.”). Briefs should be thorough, but most judges do not want to see the academic treatment required for law review articles. David R. Fine, What It Takes to Write a Great Brief, 20 Pa. Law. 30, 31 (June 1998). Judge Ruggero Aldisert estimates that he has read about 12,600 briefs, or some 630,000 pages— about 400,000 of which were unnecessary. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 194 (rev. 1st ed., NITA 1996). Judge Aldisert quotes and discusses comments about brevity and coherence made by chief justices of state supreme courts. Id. at 191-196.

24 Three respondents indicated no basis to assess.
To a limited extent, the court is interested in your strong points. To a greater extent, the court is interested in your weak points — in other words, in exploring the bad things that may happen if it embraces your position. What any judge really wants to know is this: If I jump over the cliff in the direction you are urging, how far will I fall?  

To be persuasive, an attorney should strongly make her own point in such a manner that it discredits her opponent's point: "Briefs should be written from the offensive standpoint rather than from the defensive standpoint." Judge Morgan emphasized the need to "play your own game first." He advised attorneys to "[d]escribe your theory in complete and cohesive form; then rebut your opponent's theory."  

Three other respondents stressed the need for persuasive, effective advocacy that does not misrepresent authorities. Judge Morgan concurred: "Don't overstate your facts or your authorities."

Similar comments highlight the need to focus on skill number 8: presenting thorough, yet succinct, analysis. One comment relating to question 8 indicates that analysis might be thorough, but not succinct. Another states that we need to stress "the need to write actively and avoid redundancy. Few courts have time to read law review articles in the guise of briefs." On the brighter side, one respondent noted some improvement in this area:

I have noticed a great improvement over the last ten years in law clerks' abilities to write clearly and concisely. Since I am a great believer in The Elements of Style (Strunk &

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Do make sure your narrative contains not only the good but at least some of the bad and the ugly. "While it's obviously important to be a good advocate and emphasize your strong points, it's silly to ignore conspicuous holes in your case," says Judge John P. Doyle, now a judge of the unified Los Angeles Superior Court . . . "If you address any difficulties with your case candidly, the judge thinks, 'How refreshing that counsel has chosen to talk about them a little bit.' Not mentioning them, on the other hand, is sometimes like trying to ignore the elephant in the room."

Dustman, supra, at 100.

White) and The Elements of Legal Style (Bryan Garner), I think every lawyer should own a copy of each – from the first day of law school and forevermore.

Other comments stress the need to teach not only concise writing but also the “ability to develop concise legal arguments” – with power and style. “Brevity is an art form.”

All three panelists also emphasized the need to teach students to write concisely. Ms. Winters said, “Thank you, thank you, thank you for teaching them plain English,” but teach them to write as succinctly as possible. Attorneys in her firm are paid on a per case basis, so they must figure out the main points as soon as they can and focus on stating them succinctly in briefs. Judge Morgan stressed the goal: to communicate clearly and quickly. To accomplish the goal, he added, attorneys should strip away excess verbiage and use short words, short sentences, and short paragraphs.

Concise writing goes hand in glove with skill number 6: making the entire argument or discussion section read smoothly. Most responses were in the “good” to “fair” range, with a few “poor” ratings. The comments focus on problems with organizing and supporting arguments. Some problems arise from failing to think before writing; in addition, several respondents indicated that new associates tend to have trouble applying the law to the facts of their cases. One respondent noted that new associates were very good at finding and stating the law, but need to work on using “topic sentences that develop the point and distinguishing between mandatory and persuasive authority. [They] need to take on a project as if it is [their] own – not just an academic exercise – and make arguments/conclusions accordingly.” Revising for flow and coherency has both analytical and writing components. The writing portion is addressed more thoroughly in the next section.

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27 Judges regularly plead for readable briefs: “I only read a brief once; I don’t have time to reread it — so you’d better hope that I understood it that one time through.” Wood, supra n. 25, at 29 (quoting Montana Supreme Court Justice William Leapheart).
C. SECTION ONE, PART THREE: WRITING

Even if new clerks’ and associates’ analysis proceeds fairly well, the responses show that the manner of presenting that analysis still needs more improvement.

PART THREE: Writing

1. START A PARAGRAPH WITH A PRINCIPLE-BASED TOPIC SENTENCE AND DEVELOP THAT POINT IN THE SENTENCES THAT FOLLOW? (SAMPLE A IS PRINCIPLE-BASED; SAMPLE B IS NOT.)

SAMPLE A:
Courts have readily found that flight coupled with violence or physical resistance constitutes obstruction. E.g., State v. Little, 116 Wn.2d 488,

SAMPLE B:
In State v. Little, 116 Wn.2d 488, 492, 806 P.2d 749 (1991), police officers investigating a group of juveniles believed to be involved in a criminal trespass identified themselves and yelled for Little to stop as Little ran off.

2. USE APPROPRIATE TRANSITIONS BETWEEN SENTENCES AND PARAGRAPHS?

3. STATE POINTS CLEARLY, ACCURATELY, AND IN PLAIN ENGLISH?

4. WRITE IN A FLUID, CONCISE, READABLE STYLE?

For each skill, except skill number 2, approximately half of the ratings are in the “fair” range or below.

One respondent suggests the problem is simply a lack of experience with writing:

In our type of firm (large corporate), the new associates tend to have excellent legal analytical skills. The writing shortfalls, generally, involve how to structure paragraphs and larger pieces of prose. It’s not a “legal” writing failure, nor is it an intellectual failure – most of them are smarter than I am – instead, they just haven’t had enough exposure in their careers to writing, period. The associates
with business experience, after college, in areas where they needed to write, are generally better prepared.

Panelist Bailey voiced a similar concern: Many attorneys have not read enough good writing. He suggested that they read The New York Times, Gunther's biography of Learned Hand, and Judge Posner's opinions.

While the lack of experience with writing is a problem, perhaps the lack of experience with rewriting or redrafting is an even greater problem. Every respondent stated that attorneys in the firm, agency, or court write multiple drafts. The words of one respondent should be chiseled in the portals of every legal writing department across the country: “As the founding partner of my law firm often remarked, 'There's no such thing as great writing. There's only great re-writing.'” Judge Morgan's directive is equally memorable: “Write, re-write, and re-write some more.”

Great rewriting can lead to clear, direct, coherent, concise writing; many respondents suggested stressing those skills more heavily. Coherency is key. “Above all, make sense,” Judge Morgan advises. He suggests asking whether your barber or grocery clerk would understand why you are right; “if not, go back and start again!” In writing or re-writing, as Judge Morgan noted, “[e]ach paragraph should have a topic sentence that proceeds linearly from the last to the next.” We all think we do stress clear, direct, coherent, concise writing, but those skills are harder to teach than the mechanics, which fared better in the ratings.

D. SECTION ONE, PART FOUR: MECHANICS

Although some respondents noted continuing problems with mechanics of grammar, punctuation, citation, and court rules, the overall ratings were fairly good.


29 Judges regularly stress rewriting and editing: “Be candid with the court. Don't file a brief, whether prepared personally or otherwise, without having edited it yourself at least three and preferably four or five times.” Aldisert, supra n. 25, at 264 (quoting Frank X. Gordon, Former Chief Justice of the Arizona Supreme Court).

30 See Snyder, supra n. 7 (discussing Montana judges' preferences for organization using strong topic sentences and short paragraphs).
### PART FOUR: MECHANICS

<table>
<thead>
<tr>
<th></th>
<th>E</th>
<th>G</th>
<th>F</th>
<th>P</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>USE PROPER GRAMMAR AND PUNCTUATION?</td>
<td>5</td>
<td>18 (PLUS 1-G/F)</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>CITE CHECK AUTHORITIES?</td>
<td>6</td>
<td>20</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Conform to court rules?</td>
<td>5</td>
<td>16</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>USE PROPER CITATION FORM?</td>
<td>7</td>
<td>17</td>
<td>4</td>
<td>2</td>
</tr>
</tbody>
</table>

Some of the scores, however, are low, and some respondents lamented the continuing need to re-teach skills that should have been learned in elementary or secondary school. Moreover, the higher ratings in this area might also reflect the preliminary selection process some firms use. At least one firm sends all applicants' writing samples and cover letters to a grammarian; if she does not find them acceptable, the applications never reach the hiring committee.\(^{31}\) Similarly, another hiring coordinator, who has excellent skills in writing and grammar, stated that the hiring committee never sees applications when the cover letter contains grammatical errors. These considerations emphasize the need to continue systematic efforts to improve students' basic skills in grammar and punctuation.\(^{32}\)

### E. SECTION ONE, PART FIVE: MANNER OF WORKING

New associates and clerks received better scores for working well with little supervision than they did for completing work products efficiently or for submitting work products that require little reworking by supervisors.

\(^{31}\) The information is from a phone conversation with the hiring coordinator, who is not an attorney, for one Seattle/Portland-based firm. We assured all survey participants that all information would be discussed anonymously.

\(^{32}\) See Snyder, supra n. 7 (noting that "54 percent of Montana judges responded that proper English grammar and punctuation are important in legal writing because poor grammar and punctuation detract from the attorney's legal analysis").
Skills 1 and 3 necessarily require excellence in all the other skills rated in the survey. The lower scores are hardly surprising, but they should stimulate thought for developing systematic methods of teaching efficiency.

F. SECTION ONE, PART SIX: ORAL COMMUNICATION SKILLS

The ratings for oral communication skills are generally higher than those for writing skills, but a number of respondents had no basis to assess those skills. Some of those respondents were judges; judicial clerks write internal memoranda and draft opinions, but they do not present oral arguments.33

Only question 3, returning smoothly to an argument after answering a question, received somewhat low marks. That rating is not surprising considering the difficulty of both responding to judges’ questions and teaching students to respond to them.

33 Other respondents apparently supervised written work but not the oral arguments of new associates.
G. SECTION TWO: RESPONDENTS' GENERAL COMMENTS AND SUGGESTIONS

Section two contained only two questions. The first asked the respondents to comment on research and writing areas in which the new associates or law clerks seem best prepared. The second asked for the converse: areas, either those addressed in section one or other areas, that legal writing programs should stress more heavily. A number of the respondents’ comments have already been incorporated into the appropriate areas of the Section One discussion above. A few other comments, however, are worth noting, as are some of the respondents’ comments about legal writing programs in their own law schools.

Comments indicate that new associates and clerks seem best prepared to conduct research, particularly on-line research; draft objective memos and single-issue briefs; and “make straightforward comparisons with case law and distinguish their own facts when necessary.”

Suggestions for improvement seem to focus on three areas: organizing arguments, writing concisely, and writing persuasively. The latter two combine well in the words of one respondent: the ability “to concisely make an argument with power and style.”

Several respondents stated that the legal writing programs in their own schools could have been improved by focusing more on memoranda or briefs supporting motions, particularly summary judgment motions, and by requiring more writing. Some of that writing could take the form of other common drafting documents, such as complaints and answers. One person suggested assigning multiple writing projects and providing more feedback.

Some comments reflect practice issues that normally do not receive formal instruction. For example, one respondent suggested teaching students to juggle multiple projects at the same time. Another suggested teaching ways to help clients do things, within the limits of the law, rather than tell clients why they cannot do things. The same respondent suggested hiring legal writing teachers who have spent a number of years in private practice.

Some comments suggest that writing programs either be longer or offer additional legal writing classes. Several respondents lauded their schools’ programs for having small classes with intensive, hands-on instruction and realistic projects. Other
strengths identified in programs included good research training, good workshops and exercises for grammar and punctuation, good emphasis on Plain English and editing, and good instruction for the structure of objective memoranda and briefs. The best feature of any legal writing program may well be, in the words of one respondent, “the opportunity to make my first 100 mistakes before clients were paying for my time.”

H. SECTION THREE: THE RESPONDENTS’ PRACTICES

This section of the survey was designed primarily to determine the percentage of time new associates spend writing different types of documents, the length of office memoranda new associates are asked to write, and the amount and type of review new associates’ work receives.

We knew that judicial clerks spend a good portion of their time writing bench memos and drafting opinions, but we wondered whether there is any correlation between the size of firm or agency and the type of documents most frequently produced. We divided the firms and agencies into three size categories: small (six to twenty); medium (twenty-one to sixty); and large (more than sixty).³⁴ Although the type of document varies according to the type of practice, the results show quite a range.

³⁴ This survey was not sent to firms employing fewer than six attorneys because they would not hire new associates frequently enough to warrant completing the survey.
### FIVE SMALL FIRMS (6-20 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>90  80  20-30  10  5</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td></td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>10  20  10</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td></td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>*40  55</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td></td>
</tr>
<tr>
<td>* Usually turned into brief or demand letter. ** Other 20% argument and correspondence.</td>
<td></td>
</tr>
</tbody>
</table>

### FOUR MEDIUM FIRMS (20-60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
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</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>#30  30  20-25  10</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>#small  10-15</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>#30  25  30</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>25  30  20</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>25  15  10  50</td>
</tr>
<tr>
<td>Opinions</td>
<td>25  0-5</td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>25  10</td>
</tr>
<tr>
<td>Policies</td>
<td>0-5</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td></td>
</tr>
<tr>
<td>* letters to clients</td>
<td>*small</td>
</tr>
</tbody>
</table>

# some overlap
SIX LARGE FIRMS (MORE THAN 60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>#15 40 25 20</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>10</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>10 25 15 20</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>40 25 10 10</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>*50 50 20 20</td>
</tr>
<tr>
<td>Opinions</td>
<td></td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>5 20 25</td>
</tr>
<tr>
<td>Other (Describe) * includes e-mail</td>
<td>**10</td>
</tr>
<tr>
<td>** client letters</td>
<td></td>
</tr>
</tbody>
</table>

# This varies widely depending upon the practice area in which the associate works. In my particular practice area, which is a mix of business advice and litigation, it breaks down along these lines.

### Litigation associates spend most of their time working on research and preparation of legal memoranda, motion preparation and response, and document discovery. Business associates research business and commercial issues and draft commercial and corporate documents.

FOUR COURTS

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prehearings/Bench Memos</td>
<td>70</td>
</tr>
<tr>
<td>Draft Opinions</td>
<td>30 #100 100 **100</td>
</tr>
</tbody>
</table>

* True only for commissioners’ law clerks.

** Commissioners’ law clerks write draft rulings rather than draft opinions.

# Includes research and writing.

FIVE SMALL AGENCIES (6-20 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>5 20 #5 20</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>10</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>5 20 15</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>1 5 30 20</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>1 75 50 30</td>
</tr>
<tr>
<td>Opinions</td>
<td></td>
</tr>
<tr>
<td>Policies</td>
<td>5</td>
</tr>
<tr>
<td>Other (Describe) * Correspondence to public</td>
<td>*10</td>
</tr>
<tr>
<td>** Client correspondence</td>
<td></td>
</tr>
</tbody>
</table>

# Percentages include research time.

### Percentages are time spent writing; we also have oral arguments and telephone calls with clients.
### TWO MEDIUM AGENCIES (20-60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>20 2</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>10 15</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>10 5</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>2</td>
</tr>
<tr>
<td>Opinions</td>
<td>&gt;1</td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>&gt;5</td>
</tr>
<tr>
<td>Policies</td>
<td>&gt;1</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>*</td>
</tr>
<tr>
<td>* Most time is spent doing oral arguments</td>
<td></td>
</tr>
<tr>
<td>** Jury Instructions</td>
<td>**1</td>
</tr>
</tbody>
</table>

### FIVE LARGE AGENCIES (MORE THAN 60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>20 30 10 8 70</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>2</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>3</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>30 2</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>50 70 85</td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>20</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>* 70</td>
</tr>
<tr>
<td>* Internal office memoranda intended to analyze and resolve a discrete legal issue for a client. The memos are not necessarily “objective” as stated above.</td>
<td>**20</td>
</tr>
<tr>
<td>** Oral argument</td>
<td></td>
</tr>
<tr>
<td>Trials</td>
<td>10</td>
</tr>
</tbody>
</table>

We anticipated that new associates in small firms would produce fewer objective office memos than those in large firms. That assumption proved to be only partially correct. Although three of the five small firms surveyed indicated that new associates spend no time on objective memos, the other two indicated that they spend forty to fifty-five percent of their time on them. The four medium firms indicated percentages from ten to fifty, while the six large firms listed zero to fifty.\(^{35}\)

The agencies also suggest quite a range for the percentage of time spent producing objective memos. The five small agencies

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\(^{35}\) One respondent provided the following comment instead of percentage ratings: “Litigation associates spend most of their time working on research and preparation of legal memoranda, motion preparation and response, and document discovery. Business associates research business and commercial issues and draft commercial and corporate documents.”
reported percentages from zero to seventy-five; the two medium agencies, zero to two; and the five large agencies, zero\textsuperscript{36} to eighty-five, with three of the large agencies reporting seventy or higher.

The length of memos requested varies greatly depending on the task, but most firms and agencies indicated that the average length is five single-spaced pages. Several estimated the length as five to ten single-spaced pages, which is similar to the lengths given for bench memos in courts.

Surprisingly, in a number of firms and agencies, the percentage of time new associates spend writing briefs is lower than the time spent writing internal office memos, but that statement does not hold true across the board.\textsuperscript{37} Three of the four small firms reported percentage of time spent briefing as five to twenty to thirty, but the remaining two firms reported eighty and ninety.\textsuperscript{38} Medium firms reported ten to thirty percent, while large firms reported fifteen\textsuperscript{39} to forty. Four of the five small agencies listed percentages as five to twenty, but the fifth listed seventy-five (including oral arguments and calls to clients).\textsuperscript{40} The medium agencies listed two to twenty percent, while four of the five large agencies listed eight to thirty, and the fifth listed seventy.

Firms and agencies generally listed ranges for time spent writing court documents, such as pleadings, as ten to thirty percent and discovery documents about the same. Some firms and agencies, however, reported that associates spend no time creating these documents.

The judges’ and law firms’ approaches to reviewing the written work of new judicial clerks and associates vary greatly. Even within a firm, attorneys have differing attitudes: “Our firm has varying opinions on how to improve a new associate’s skills. Some [have a] ‘sink or swim’ attitude, others provide one-on-one help

\textsuperscript{36} This respondent added the following note: “Internal office memoranda intended to analyze and resolve a discrete legal issue for a client. The memos are not necessarily ‘objective’ as stated above.”

\textsuperscript{37} The agencies surveyed included offices of state prosecutors, public defenders, and attorney general divisions of other state agencies. At least one firm and one agency do only appellate work.

\textsuperscript{38} The latter firm does only appellate work.

\textsuperscript{39} The respondent noted, “This varies widely depending upon the practice area in which the associate works.”

\textsuperscript{40} This agency does only appellate work.
when asked, others seek out new associates and offer assistance." Nine of the respondents indicated that the individual attorney produces the work product independently, with one noting that an appellate brief is peer reviewed. Six respondents stated that the firm or agency uses some form of peer review. Fifteen respondents indicated that a senior attorney or judge regularly edits a new associate's work, but five others stated that the practice varies or that help is given only when requested.

Some firms have organized professional development programs. Most of the large firms and some smaller firms and agencies provide group seminars and encourage new associates to attend CLE's about legal writing. Some firms assign a mentor to each new attorney, and some combine several techniques. The bottom line seems to be that new attorneys cannot count on receiving on-going, systematic training or assistance with legal writing in some practices.

III. SUGGESTIONS FOR RETHINKING AREAS OF EMPHASIS IN LEGAL WRITING PROGRAMS

This survey provides some important foundation data for evaluating whether current legal writing programs are meeting the needs of today's courts, public agencies, and law firms. The data provide information about how well first-year clerks and associates perform certain skills and about the types of documents that are most prevalent in firms and agencies of different sizes. Both types of information can help writing professionals refine their programs.

Legal writing programs, the survey indicates, have had some success in teaching the basic concepts of research, writing, and oral argument, but innovative methods of teaching certain skills could benefit graduates. Although new associates seem to understand how to research legal issues, particularly how to research on-line, they need more training in researching efficiently. That skill involves judgment and a more thorough picture of both research skills and a given area of law. In addition, training should emphasize how to organize a coherent legal argument that moves smoothly, persuasively, and concisely from one point to the next.
To improve writing skills, programs need to provide a number of writing assignments, not just one or two.\textsuperscript{41} To be consistent with most objective memoranda produced in practice, most writing assignments for office memos should be limited to five single-spaced or ten double-spaced pages. Those memos should remain an important part of legal writing programs, given the percentage of time many new associates spend writing them in a number of firms and agencies.\textsuperscript{42}

In Seattle University’s program, we are addressing some of these concerns by trying a revised curriculum for our first-year course, which is the portion of our required writing program in which we teach objective writing. Instead of requiring four memos that are 10-15 double-spaced pages, we will be assigning about ten projects,\textsuperscript{43} most of which are considerably shorter than the assignments in previous years. We hope that the shorter assignments will serve three pedagogical goals: 1) provide students with more frequent writing experiences; 2) allow us to focus more on developing clear, coherent, succinct writing; and 3) more closely reflect the length of memos associates currently produce in practice.

Although objective memos are important,\textsuperscript{44} persuasive writing should receive additional emphasis. That emphasis should contain

\textsuperscript{41} Laurel Currie Oates, I Know That I Taught Them How to Do That, 7 Leg. Writing 1, 7-8 (2001) (citing studies of “transfer,” the problem of teaching students to use a known structure to solve a similar problem). “[I]n teaching our students how to organize a discussion section that involves the analysis of elements, we should provide multiple examples.” Id. (citation omitted). Director Oates suggests that multiple memo problems in different areas of law would be desirable, but in the interests of limited time, several sample memos provided in the assigned reading and during class will help. Id. at 8; see id. at 12-14.

\textsuperscript{42} This survey addresses only practice-oriented concerns. Similarly, this Article discusses only reasonable inferences from the respondents’ ratings or comments. For a discussion of other pedagogical reasons that support continued emphasis on objective memoranda, see Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 Leg. Writing 1, 20-22 (2000).

\textsuperscript{43} Legal Writing Professors at Seattle University have discretion in determining the exact number of assignments.

\textsuperscript{44} In her keynote address to the AALS conference in 1999, former Attorney General Janet Reno praised the legal preparation of young attorneys in the Justice Department, but noted areas for improvement:

First of all, you haven’t taught them how to write yet, and I don’t mean writing a legal brief, I mean writing a memo that will prepare a client to make a decision, or one that will explain a legal position. One of the things I treasure and sometimes save in a drawer as an example is a beautifully written memo-
three components. First, students must realize that good advocacy requires addressing, not avoiding, the opponent's strongest points. Addressing those points does not mean repeating the opponent's arguments, but rather using persuasive techniques to minimize their importance. Second, students must understand the audience and realize that good briefs are not law review articles. Students must concisely and persuasively apply the law to the facts of the case, not give the entire history of the point of law. Audience is important in the final point as well; students should receive training in writing motion briefs as well as appellate briefs. The concerns of appellate and trial court judges are not synonymous.45

To the extent possible, legal writing programs should teach students to draft other types of legal documents as well as briefs and office memoranda. Although the initial legal writing course might be over-taxed to include additional documents, advanced legal writing courses, drafting labs, or skill components in doctrinal courses could provide this training.

For all types of writing, legal writing teachers must stress rewriting, editing, and proofreading. Before the editing and proofreading begin, the argument or analysis must be coherent and easy to read. Once the writing is clear, graduates must eliminate surface errors in resumes, cover letters, and writing samples if they hope to pass the first hiring hurdle in some firms, by obtaining the grammarian's approval. Once hired, a new associate must carefully edit work if he or she hopes to avoid having a supervisor "edit what the new associate believes to be the 'final draft.'" It is often difficult to explain to students that grammar and punctuation really matter. The comments from responses to this survey might help make the point.

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45 Students must understand that trial judges focus on applying the law to the facts of the case, so arguments based on the underlying facts and on the burden of proof are key. While facts are still critical at the appellate level, appellate courts focus primarily on trial court error; in reviewing that error, questions relating to the preservation of error, the standard of review, and harmless error are key. E.g. Oates et al., supra n. 20, at 260. In close cases, the appellate courts also focus on the burden of proof.
Finally, legal writing teachers must develop some methods for teaching students to research and write briefs and memos efficiently. Respondents consistently gave new associates and judicial clerks lower marks for researching efficiently and for producing a work product that requires little reworking by the supervising attorney. We have made progress, but significant challenges remain, especially in teaching efficiency.
I offer ten suggestions for legal writing. Each is a generalization that will help many, but not all, situations.

1. **Short words, short sentences, short paragraphs.**
The goal is to communicate clearly and quickly. A writer is more likely to achieve that goal if he or she uses common words, simple sentences, and a separate paragraph for each idea.

2. **Strip away excess verbiage.**
Communication requires clarity. To achieve clarity, one must expose the essence of the case. To expose the essence of the case, one must strip away the superfluous.

3. **Play your own game first.**
Describe your theory in complete and cohesive form; then rebut your opponent's theory. If you rebut your opponent's theory in the midst of discussing your own, you risk obscuring your own.

4. **Recognize and deal with your weak points.**
To a limited extent, the court is interested in your strong points. To a greater extent, the court is interested in your weak points — in other words, in exploring the bad things that may happen if it embraces your position. What any judge really wants to know is this: If I jump over the cliff in the direction you are urging, how far will I fall?

Distinguish volunteering your weak points from the need to deal with them. Although it may not be necessary to volunteer weak points that your opponent is not putting in issue, it is crucial to discuss those that your opponent is putting in issue.

5. **Don't overstate your facts or your authorities.**
If you don't follow this tip, your credibility will suffer—in this case, and perhaps in future cases also.
6. Write, re-write, and re-write some more.
As someone once said, there’s no such thing as great writing; there’s only great re-writing.

7. Write a roadmap.
A “roadmap” is a statement of each proposition essential to your analysis, in linear order. If you can’t write a roadmap, think about settling.

8. Each paragraph should have a topic sentence that proceeds linearly from the last to the next.
If you have written a roadmap, this step will not be hard; if you haven’t, this step may be impossible. To do this is to avoid redundancy.

9. Follow the usual rules of good writing.
Examples include but are not limited to:
   a. Active over passive
   b. Singular over plural
   c. Present tense over other tenses
   d. Parallel subjects within the same paragraph
   e. One meaning per pronoun within the same paragraph
   f. Transition words to relate ideas (e.g., accordingly, hence, thus, therefore, consequently, additionally, alternatively, finally, lastly)
   g. Subject and verb as close together as possible

10. Above all, make sense.
Would your barber or grocery clerk understand why you are right? If not, go back and start again.