

WHAT IS LEGAL WRITING? THE TALE OF A DISCIPLINE

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*Discipline: A branch of knowledge, typically one studied in higher education.*¹

As with many stories, the story of legal writing does not have a clear beginning or end, nor does its character manifest itself in a single, clear dramatis personae. The story of legal writing can trace its beginnings to the earliest civilizations that used writing as a form of communication. Ancient Egyptians engaged in written legal transactions as early as the 6th Century B.C.² A constitution written over two centuries ago forms the basis of our system of laws. Court decisions written hundreds of years ago form the basis for our common law system and are still used as tools to educate law students on legal doctrine. Legal writing has been a core component of law school curricula for several decades,³ but the character of legal writing as a discipline is relatively new.⁴

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¹ Oxford Living Dictionary, *Discipline*, <https://en.oxforddictionaries.com/definition/discipline> (last visited Jan. 16, 2018).

² Encyclopedia Britannica, *Egyptian Law*, <https://www.britannica.com/topic/Egyptian-law> (last visited Nov. 9, 2017).

³ There's some indication that legal writing instruction was taking place as early as the 1930s. See, e.g., Harry Kalven Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107 (1948). The 1994-95 LWI Survey showed that all law schools had at least a single semester of legal writing in their curricula, and most had a full year. See Jill J. Ramsfield, *Legal Writing in the 21st Century: A Sharper Image*, 2 LEG. WRITING 1, 4 (1996).

⁴ While some of the earliest scholarship on teaching legal writing dates back to 1921, the 1960s saw a move toward scholarship that was more than a description of how schools teach legal writing. See James R. Elkins, *Teaching Lawyers to Write: A Chronological Bibliography*, 22 LEG. STUD. FORUM 778 (1998).

The discipline of legal writing is unique in that it encompasses both the teaching of legal writing and the scholarship of legal writing. The focus of the discipline has shifted and morphed over the course of the last 30 years. The early scholarship on legal writing focused heavily on a single facet of legal writing's character—the teaching of legal writing. Descriptions of legal writing programs, suggestions for more effective instruction, and critical evaluation of how legal writing was and should be taught dominated our field.⁵ These early works were essential to opening a discourse about legal writing. In the discipline's early stages, the discussion of legal writing did not move far from pedagogy.

As with any character, the discipline grew and took on new features. As a reflection of the changes taking place in the discipline, scholarship on legal writing developed and the discipline began to find a new voice.⁶ While the discussion continued to include the teaching of legal writing, scholars began pulling from other disciplines; infusing theories and practices from English composition, literature, and education to create a discourse and a unique pedagogy focused specifically on legal writing.⁷ As we developed our voice, by inviting other ideas and scholarship into the conversation, the discipline created new “rooms” to discuss specific concepts related to legal writing.⁸ This growth helped to bring recognition to legal writing as a discipline. At this point in its development, the character of legal writing became multi-dimensional.

As the character of the discipline grew and matured, this segued into the professionalization of the field. When law schools first began teaching legal writing, the focus of many law schools was to provide legal writing instruction for the lowest cost possible.⁹ As a result, many of those teaching legal writing were not necessarily invested in legal writing as a profession or a discipline. There was little or no job security. There was no form of advancement available for legal writing faculty. The discipline rose to address these concerns. In its next phase of development, scholars and practitioners of the discipline examined the impact of job security and

⁵ Linda L. Berger, Linda H. Edwards, & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship*, 16 LEG. WRITING 521, 525-26 (2002).

⁶ *Id.* at 526-27.

⁷ *See id.* at 527.

⁸ *Id.* at 530-31.

⁹ *See, e.g.*, Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program--The Wisconsin Experience*, 11 J. LEG. EDUC. 387 (1959).

professional support on legal writing teaching.¹⁰ Professionals dedicated to the development of the legal writing discipline began to find permanent homes on law school faculties. Law schools began to see the value of legal writing faculty who dedicated their efforts to and studied legal writing. This professional permanence was essential to the continued development of the discipline and to the next arc in its story. The early voices and rooms dedicated to specific aspects of the discipline matured from germination to sprouting and production. Scholars of the discipline expanded from dissecting the practice of teaching legal writing and began to focus on law as rhetoric.¹¹ Progressively, the teaching of legal argument had led to curiosity about rhetorical devices and narrative techniques.¹² The importance of plain or accessible language became a key component of effective communication.¹³ The intersection of legal writing and storytelling emerged as an important area of the scholarly discourse.¹⁴ The discipline's character developed and created new and emerging sub-characters within the story. The discipline continues to stem new and varied sub-characters and sub-plots within the story of legal writing. It includes areas such as understanding visual rhetoric as a part of writing,¹⁵ examining contracts and other documents from a

¹⁰ See, e.g., Marjorie Dick Rombauer, *Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem*, 44 ALB. L. REV. 392 (1980); Willard H. Pedrick, N. William Hines & William A. Reppy, Jr., *Should Permanent Faculty Teach Legal Writing? A Debate*, 32 J. LEGAL EDUC. 141 (1983); Gerald Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 NOVA L.J. 867 (1986).

¹¹ See Berger et al., *supra* note 5, at 553; Berger *infra* note 21.

¹² See J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEG. WRITING 53 (2008).

¹³ See Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1 (1992).

¹⁴ See J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247 (2015).

¹⁵ See Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEG. WRITING 57 (2015); Michael D. Murray, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 LEG. WRITING 186 (2016).

narrative perspective,¹⁶ applying cognitive science¹⁷ and neuroscience¹⁸ to explain what happens when readers interpret legal writing, understanding how bias impacts writing,¹⁹ and appreciating how rhetorical devices in writing impact the reader's understanding of concepts and, ultimately, the law.²⁰

The discipline of legal writing is now more than simply a subject taught in law school. Legal writing, while still closely tied to pedagogy, now invites greater discussion about the impact of legal writing beyond the walls of the legal writing classroom. It is a way of thinking about how legal writing impacts society, policy, and community. These discussions challenge and stimulate our intellectual curiosity and enhance the teaching of legal writing.

When the inaugural editor of this Journal posed the question, "What is legal writing?" thirty years ago, the answer was both the same and different as the answer is today. Legal Writing is a profession. And, while legal writing is still the specialized way in which we communicate the law to society, legal writing is also a unique and thriving scholarly discipline. And as a discipline, it requires applying thought to resolve and shape ideas and policy when other logical forms of reasoning such as mathematics or the scientific method do not apply.²¹ The discipline's story now looks to the future—to its next arc, new plots, and new characters.

¹⁶ See Susan Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016).

¹⁷ See Lucy A. Jewel, *Old School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEG. COMM. & RHETORIC 39 (2016).

¹⁸ See Lucy A. Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663 (2017).

¹⁹ See Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747 (2017); Brad Desnoyer & Anne Alexander, *Race, Rhetoric, and Judicial Opinions: Missouri as a Case Study*, 76 MD. L. REV. 696 (2017).

²⁰ See Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007); Carrie Sperling & Kimberly Holst, *Do Muddy Waters Shift Burdens*, 76 MD. L. REV. 629 (2017).

²¹ Linda L. Berger, *Studying and Teaching "Law as Rhetoric": Between Reason and Power*, 16 LEG. WRITING 3 (2010) (citation omitted).