A CURMUDGEON'S VIEW OF THE MULTI-GENERATIONAL TEACHING OF LEGAL WRITING

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This essay is an effort to open a discussion about some aspects of the academic legal writing world that have been increasingly troubling me for several years. In January 2020 Professor Sue Liemer of Elon University School of Law put together a diverse panel of legal writing professors for a session titled "The Multi-Generational Teaching of Legal Writing." The proposal called for participants "to keep an informal journal of experiences relevant to the discussion group's topic" to "serve as springboards for the participants' written presentation summaries."[1] The proposal noted that the "overall goal of the discussion group is to articulate and explore pedagogical issues that bubble beneath the surface as legal writing professors from four generations are now teaching at United States law schools."[2]

Of the nine professors on the panel, I was the one who had been teaching the longest. My legal writing teaching career began in 1980, with two years of adjunct teaching at Boston University. I went into full-time teaching in 1986 and have taught legal writing and directed the writing programs at the law schools at the University of Virginia, the University of Arkansas (Fayetteville), Temple University, and Duquesne. I was the founding President of the Association of Legal Writing Directors (ALWD), served on the boards of ALWD, the Legal Writing Institute (LWI), and Scribes; and served as chair and member of the ABA Communication Skills Committee (which has disappeared, but which used to address legal writing matters); and I've been a pre-publication reader for, or contributor to, all three editions of the ABA Legal Writing Sourcebook. I've written my share of legal writing scholarship and been approved for a good number of conference

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[1] Proposal on file with the author and this Journal.

[2] *Id.*

presentations over my career. Perhaps I am a curmudgeon,[3] but I am not alone. After the session, at other events during the AALS 2020 meeting, and since then many experienced writing professors told me that "someone had to say what you said," but there's an inherent reluctance among many colleagues in our field to publicly voice those same concerns.

As I kept my journal, I found myself focusing more on the generational differences among the teachers themselves than on the differences between teachers and students. I kept thinking about generational differences that I have seen manifesting in the scholarship, service, and self-image of the teachers in the field over the past three decades. Because I do not wish to point to any specific professors' scholarship or public statements on listservs, with one exception for an article written by a courageous young scholar, I am not supplying details that would identify individuals. But I'm afraid that my reticence is not going to be applied to the organizations in our field.

1. Historical Myopia

Within the national LRW community, it seems that junior faculty are blissfully unaware of what came before them, particularly as it concerns the decades of efforts to improve the status and salary of those teaching in the field, legal writing scholarship, and the long-term data gathering about the field. Instead of doing the type of basic research that we expect of our students, junior professors often ask naïve questions online,[4] or make fitful and incomplete efforts to reinvent the wheel without realizing how exactly the same things were approached and addressed in the past, often far more extensively. We seem to have lost continuity with, or even awareness of, the past; some writing professors write and post on listservs as if nothing important happened more than a few years earlier. For example, I've read several recent articles that simply failed to cite fundamental

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[3] An attendee of the AALS session kindly referred to me as "the conscience of legal writing," so perhaps I can say I'm a well-intentioned curmudgeon. On the other hand, for much I my career I have remembered the myth of Cassandra, to whom the Greek god Apollo gave the gift of accurate prophecy, but then after she spurned his advances added the curse that no one would believe the truth of her predictions.

[4] There have been two listservs for writing professors. DIRCON is run by ALWD, and LRWPROF-L was run by LWI. LRWPROF-L was replaced in 2020 by a web-based platform, LWIC.

articles on status and salary issues that are more than a decade old, which is frightening and depressing, particularly because the issues are exactly the same as they have been for far more years than these authors seem to think. Yes, I have written on those topics for more than three decades, as have many others before and after me, but I am not stating this because of anyone's failure to cite my own work. I have heard similar statements in conferences about efforts to address these matters by political action within the field, by well-meaning and angry teachers who simply are unaware of the massive past (and ongoing) efforts to address these issues—and who do not know what happened to those past efforts, why some were successful, and why others may have fallen short. This lack of historical awareness and in-depth understanding is troubling. A scholar needs to cite the fundamental and ground-breaking articles on a topic, even if written many years before; scholarship is based on citing the best and the most important sources, not merely the newest. Academic disciplines develop through accumulation, and mature scholarship demonstrates an understanding of this evolution by tracing ideas from their first to the most recent iteration. The harm of citing only the most recent works is compounded when those recent works themselves fail to refer to the earlier work on a topic. Social movements need to understand what happened to similar efforts in the past, or they are doomed to be co-opted or ignored. I am afraid that the lack of true depth and scope in article citations cannot simply be attributed solely to the work of student editors at law journals, or even peer editors who don't call for additional sources for an article; the mindset seems to be creeping into other areas of scholarship as well.

Some attendees in the audience for the AALS session suggested that new authors are focused on citing work by other new professors in an effort to bolster those persons' reputations. While citing new faculty members' work is laudable, that is no excuse for any of those authors to fail to cite the work of previous generations of scholars, and the argument is particularly flawed when addressing issues within the field that have been endemic for half a century. Any law professor working with a student on the law review, supervising a paper for a course, or assigning a memorandum or brief ought to never tell the student to limit research to recent cases and articles and to cite only to materials published within the past decade; we should require the same depth of attention to past scholarly thinking within our own scholarship.

Similarly, legal writing conferences frequently offer sessions on topics that have been done repeatedly in the past, and all too often the presenters have no idea that their presentation, chosen subject, or technique is not novel. Instead of coming up with a series of sessions

on basic concepts that are intentionally and transparently repeated for a new audience—prepared with a conscious understanding that the concepts and presentations have been offered before—we seem often to give new teachers thirty minutes to restate what experienced teachers learned a long time ago, and, worse, to present the concepts as ground-breaking and newly-discovered. It's as if no one ever bothered to look over past conference agendas, perhaps beyond the previous iteration of the conference, or to refer to existing scholarship on that topic. Conferences have often become unhelpful and uninteresting for experienced professors.

The field of legal writing has changed our "coin of the realm" from scholarship to fleeting conference presentations, and too often those presentations do not result in publication; presentations offered without the creation of a documentary record for the future doom us to repeat the past without significant progress. Listserv queries often ask about a presentation someone dimly remembers but cannot clearly recall. Our focus on conference presentations without follow-up scholarship fails to provide teachers in our field with the accumulated and painfully learned wisdom from the past, to allow us to build upon and acknowledge that past. I, and many other experienced writing professors often tried to write up our presentations even if only as short essays or columns for newsletters and less formal journals, such as The Second Draft and Perspectives.[5]

2. Institutional Forgetfulness

Regrettably, this absence of historical perspective and knowledge is too often true for the leadership of our national organizations. The leaders of ALWD, LWI, and the AALS Section on Legal Writing, Reasoning, and Research (LWRR) have repeatedly failed to preserve documentation of past efforts, projects, campaigns, data gathering, successes, and failures. The absence of that historical knowledge can lead to mistakes, "reinvention of the wheel," and flawed decisions based on partial knowledge. Those charged with making decisions during their term of office are not wholly at fault; on the contrary, the lion's share of responsibility for this is properly placed at the feet of their predecessors, who failed to ensure that organizational history was preserved and repeatedly passed on to new leaders. Institutional memory has become almost wholly short-term, perhaps because of the yearly change-over in many executive leadership positions, short terms for members of the boards of directors, and yearly changes in

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[5] THE SECOND DRAFT is an LWI publication. PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING is a Thomson-Reuters publication.

almost all members of committees. Non-profit and academic organizations often lack the continuity and historical awareness of their own history and the background and efforts of other similar organizations, but we too often find ourselves reinventing the wheel and not truly progressing. As George Santayana wrote: "Those who cannot remember the past are condemned to repeat it."[6]

Three examples of this apparent forgetfulness that come to mind are the ALWD/LWI job disclosure form, the presence of legal writing teachers offering support to candidates at the AALS Faculty Recruiting Conference, and consideration of the title of the ALWD Citation Guide. I have to acknowledge here that I was involved with the genesis of all of these projects, and maybe that's why I see something troubling that others may not.

The ALWD/LWI job disclosure form was adopted by both organizations in 1999. The form was intended to be used by schools seeking to hire legal writing professors via postings on the two listservs run by the organizations (which is the single best way to reach everyone except complete novices seeking to teach legal writing) and on the organizations' websites. Because of the historic low pay and second-class status given to writing professors at most law schools, limitations on the voting rights and job security of legal writing professors, and the ramifications of student:teacher ratios, the form required disclosure of these factors, all of which schools historically failed to provide in their vague job announcements. The other intended result of the forced disclosure was to push schools to address these issues as they compete for the best teachers, who would be aware of what other schools were offering at the same time. All of the disclosures called for by the form were also paralleled in the data gathered in the annual ALWD/LWI survey of legal writing programs and teachers, but that data was anonymized in the reporting of the survey results. The disclosure form provided new and experienced teachers with hard data on working conditions. This empowered writing teachers by making available the information needed to improve their professional standing at their current schools or encouraged them to apply for a better position elsewhere. It also enabled new teachers to bargain better when seeking to enter the field. Of course, law school administrators were often loath to disclose this data because it tended to level the playing field when competing for new talent and could help incumbent faculty argue for improved employment conditions.

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[6] GEORGE SANTAYANA, REASON IN COMMON SENSE 284 (1905).

But recently the LWI has relaxed the rigor of the form's use, permitting schools to opt out of the disclosure form completely for listserv postings, or to post jobs on the organization's website without using the form, referring to the form as "strongly recommended" and not required.[7] So, of course, many schools ignore the form and post ads without full disclosure of the employment conditions, which does no one any good other than the schools themselves. Frankly, this appears to be a capitulation to the demands of employers by an organization representing the interests of underpaid and overworked faculty.

Our other organizations also appear to have lost some awareness of their own history. For eleven years I attended the AALS Faculty Recruiting Conference (FRC) and hosted an informational session for the attendees who were there to interview for legal writing teaching positions. I did so because I was employed by a law school that always attended the FRC to interview candidates for graduate fellowships (those fellows taught legal writing at the school as part of their responsibilities). With the blessings and involvement of ALWD, LWI, and the AALS Section, I was able to have the AALS FRC personnel approve the informational session, and roughly a dozen experienced legal writing professors joined me every single year in answering questions from candidates and providing advice, along with supplying them with documents about the field, including articles and the latest ALWD/LWI Survey. The project ended because the AALS decided, without any questions to, or involvement of, the legal writing organizations or those of us who had been participating in the project, that they had better uses for the one-hour time slot they had given us. So, for about eight years there was no legal writing session at the FRC. Then, a couple of years ago, the AALS Section proposed to the also-new leadership in charge of the FRC that an information session for legal writing candidates would be helpful. It was a fine idea, but no one in the AALS Section leadership or at the AALS seemed to know that this had been a long-standing and successful project before. It was as if it had never happened.

For the many professors—leaders in our field—who participated in those past break-out sessions as mentors and guides for those seeking entry to our field, in an effort to help people improve their working conditions by seeking higher status and more secure jobs, it was as if none of their efforts meant anything in the long run, except to those job-seekers who attended the sessions. It was disheartening

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[7] *See* https://www.lwionline.org/resources/employment-listings.

to many of us to see the wheel being reinvented once more, by our own organizations failing to understand their own past.

Lastly, some readers may know that I was involved with the ALWD Guide to Legal Citation from its inception in the late 1990s. For the past several years I have served on the ALWD Guide Task Force, and recently I attended an ALWD Board meeting where the next edition was under discussion. I was astonished to hear that members of ALWD had proposed dropping the organization's name from the text, and that it had been considered by the Board as a possible change. The text has been a steady source of income for the organization, supporting projects and cash grants for the benefit of the organization's members. But more importantly, the proposal showed that some members of the Board—and the publisher's representatives—did not realize that the ALWD imprimatur and endorsement was one of the key marketing concepts underlying the legitimacy of the text since it began, and that the book itself was a critical piece of the organization's history and reputation within academic circles. It was as if the Modern Language Association decided to remove "MLA" from the title of its own citation guide.[8] Evidently, some ALWD members and even some members of the ALWD Board were unaware of the history of the Guide and saw it as something independent from the organization itself.

3. Scholarly and Pedagogical Kumbaya

Over the years I have discerned a growing and troubling mindset on the legal writing listservs. We have become ever more reluctant to disagree with each other about pedagogy and scholarship. We attack members of our own community for voicing unpopular opinions in print or in listserv postings, and seem to have developed a fear of the dialectic of discussion and an unwillingness to address ideas that are not "mainstream" or which are critical of our field. I am not talking about detours into politics and social policy, but perspectives on legal writing pedagogy and scholarship that self-immunize themselves from critiques and questioning. I do not know if this unwillingness to engage in discourse is grounded in a sense of collective victimization; a reflexive response to the criticism or a lack of understanding we all know is endemic among non-writing professors and deans (factors which have always been present in the law school environment); a sense of "academic correctness" leading us to "all get along"; or the socialization of the gender identified with most writing professors.

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[8] MODERN LANGUAGE ASSOCIATION, MLA HANDBOOK (2016).

For example, over the years there have been some listserv postings about pedagogical techniques with which I strongly disagree. One such technique is using "live grading" as a substitute for advance provision of detailed written critiques of a first-year student's document, followed by a conference to go over the student's reaction to my critique, discuss some revisions, and answer questions.[9] I can sit down with an upper-level law student and without advance preparation go over a one-page or even two-page job letter and resume quickly, but reviewing a 1200 or 2500 word draft of a first-year student's office memorandum requires reading over the whole document carefully and providing detailed and specific comments about large- and small-scale issues with organization, analysis, language, use of authority, and citation. I have never believed that's something done well "live" with the student coming into my office with a previously unseen complex document for me to read, although that would certainly involve less work for me. But several offers I made to do a conference presentation debate on the topic have gone unanswered.

A thoughtful forthcoming essay by a writing professor[10] that raised some of these points led to a highly critical listserv thread on LRWPROF-L that, ironically, probably proved by its very existence several of the points made by the author.[11] We all know that most people feel free to say things online that they would think twice about saying in person (or forgetting that the person being criticized is a member of the same online and academic community). I would not be surprised if I will be similarly treated after publication of this essay.

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[9] I do acknowledge that it can be helpful to read and critique a first-year student's revised memorandum during a 30-minute in-person or Zoom conference, but doing so is not a substitute for a more detailed, extensive, and nuanced critique that requires two or three times as much teacher time and is provided to the student before the conference as guidance for revision and further discussion.

[10] Kevin Bennardo, *Legal Writing's Harmful Psyche*, 105 MINN. L. REV. HEADNOTES 111 (2020).

[11] The LRWPROF-L archives are not publicly available. The author of this essay acknowledges that when the article was available on SSRN it prompted both positive and critical discussion but notes that those who have access to the archives would have to agree that the criticism was substantially more voluminous.

4. Over-Intellectualization and Academic Jargon

Younger faculty who are enamored of the pedagogical fads inherent in higher education frequently do not realize that the LRW world was far ahead of other law school faculty in developing what are now termed "formative assessment," "flipped classrooms" and "problem centered learning." Good writing programs and professors used those techniques for decades before the terms became fashionable. Younger faculty may believe the techniques are novel if they came to teaching legal writing from high-ranked law schools where the instruction was more lecture-oriented, far less intensive, and less focused on providing students with individual critiques and conferences. Furthermore, younger faculty members' efforts to explore those paths seems to focus on using limited class time for writing and collaborative work, when most experienced writers know writing is a solitary and lonely endeavor that benefits from the help of an experienced editor. I have seen over and over again that unguided and unstructured collaboration among total novices—which is what our first-year students are for that entire academic year—almost never leads to even half-way decent results. Instead, collaborative work reflects poorly- or partially-understood lessons, results skewed by the dominant personalities in a group, or an unwritten social compact to not deploy editorial violence upon another's work.

I don't think anyone who knows me would accuse me of being a technological Luddite. But I have been surprised to find that many junior writing faculty are enamored of the idea of online teaching. While I can understand how administrators, for financial reasons, might like the idea of online courses, they just don't understand the critical nature of face-to-face classroom instruction in a 1L writing course (furthermore, pursuit of online education devalues the importance of face-to-face classrooms for all courses). Before the COVID-19 pandemic, and after, I have been dismayed at the apparent buy-in of many writing professors who seem to equate the quality of in-person live teaching with online echoes of teaching. Of all courses within the law school, legal writing courses have, since their inception, been built upon the repeated use of individual assessment of student work product via critiques and conferences, and unlike any other first-year course, legal writing classes build a bond between students and teacher that is unparalleled. Putting aside all the hype about online instruction (and the financial benefits that probably underlie any commercial and academic interest in online education), most students and teachers know that the "live" social interaction of students and teachers, whether in a small classroom or a professor's office, is at the core of effective teaching and learning. Students'

discomfort and unhappiness with online instruction has been manifest since the universities closed as a result of the COVID-19 pandemic, yet some legal writing teachers still seem to believe that seeing screen images of students on a laptop is the equivalent of the live interaction our students—our fellow humans, who are social animals—need and crave.

Although some very experienced and senior legal writing faculty may not be interested in, or comfortable with, computerized tools for editing and instruction, younger faculty seem to trust the tools alone, believing that artificial intelligence and other software tools will result in better writing. I fear they do not realize that students who depend too much on those tools likely will not incorporate those lessons in their own work (i.e., turning over writing and editing to algorithms without much author's involvement beyond blindly accepting a change). The tools may make the job of the writing teacher easier, but the students who are encouraged to use the tools without critical assessment of the limitations of artificial intelligence may be leading to the legal writing equivalent of "putting lipstick on a pig."

I may be tilting at windmills with my next point about legal research. Senior faculty appreciate the value of teaching students how to use books to do legal research, while many junior faculty deprecate anything to do with books, in the belief that online research is all that has to be taught for students to become proficient at doing legal research. It is true that students are scared of, or totally unfamiliar with, doing anything that requires them to read a book. The absence of a print-based system of research results in students having far poorer global research abilities and weaker understanding of key materials, particularly when doing statutory research. Students are simply not as good at reading as students have been in the past; I often feel I could grade my students by watching them read over examples in class, seeing who reads the fastest and then realizing that most of them were also best at reading closely. But students are also more deficient in understanding the relationships among various legal research sources, primary versus secondary authority, and the hierarchy of caselaw authority within a state.

I also fear that younger faculty (and ambitious administrators) who want to add more document types, other lawyering skills, and other "soft" skills to 1L legal writing courses simply do not realize—or do not care—that adding such items to the legal writing course means less time and attention will be paid to striving for student-level mastery of fundamental document types and basic analytical legal writing, which in turn results in lesser command of the fundamentals by students. And experienced teachers know that our current students are all starting out weaker in reading, analysis, and writing than those

we have taught in the past. It also seems to me on my more cynical days that these "soft" and non-traditional additions may be favored by some writing professors because they lower the work load inherent in reviewing student writing and pushing them to strive for mastery of the fundamentals of predictive and persuasive writing in traditional legal writing contexts.

5. Unintended Consequences

The last point reminds me of the old saying, "Be careful what you wish for, lest it come true!"[12] I have spent much of my career fighting for improved status, salary, and working conditions of legal writing faculty. But what troubles me is that writing faculty who are new often seem to have a primary self-image that is not as a teacher of legal writing. As many attain job security and even tenure, which have only become possible for significant numbers of LRW faculty in the past 20 years, they become more like the "rest of the faculty" in many negative ways and respond to law school and personal incentives that lead them to cut back on the rigor of their teaching, becoming more focused on producing doctrinal scholarship (not LRW scholarship) and teaching doctrinal courses. While writing about legal writing may not have the same cachet and regard within the world of doctrinal professors as theoretical doctrinal scholarship written by "casebook professors," writing professors ought to write in the field in which they teach, just as a professor of contracts or torts ought to write in those areas, to inform the professors' own teaching. Although some of the blame for this avoidance of legal writing scholarship may well be the result of internal pressures within law school faculties, I cannot help but remark that, when this is coupled with teaching outside of the legal writing field, and eventual departure from the legal writing classroom, writing professors are fulfilling the long-voiced concerns of faculties about hiring writing professors on the tenure-track: that such hires are going to be an end-run around writing teaching and a back-door path to being a "regular professor." I have always hoped that writing professors wanted to enter the field because they are interested in teaching students how to think and write, not merely

[12] The source of this saying is lost in history. Repeated so many times in print, song, and film, the phrase has been attributed to diverse sources including Aesop's Fables, Goethe, and ancient China. *See, e.g.*, James Love, *"Be Careful What You Wish for." What Is the Origin of the Phrase?*, RANDOM BITS: NOTES ABOUT THINGS THAT DO AND DON'T MAKE SENSE (June 12, 2010, 3:05 pm), https://jamie.workingagenda.com/blog/2010/06/12/who-said-be-careful-what-you-wish-for.

because they want an appointment to teach legal writing as a steppingstone to becoming a doctrinal law professor.

6. The End

I have offered these thoughts in an effort to increase our self-awareness, to help us move forward (perhaps less fitfully than in the past), and to improve the quality of our discourse in print and online. Perhaps some of you will agree, and some will disagree. But that's fine. That's what professors are supposed to do.