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TOWARD A WRITING-CENTERED LEGAL EDUCATION

*Adam Lamparello**

INTRODUCTION

The future of legal education—and experiential learning—should be grounded in a curriculum that requires students to take writing courses throughout law school. Additionally, the curriculum should be one that collapses the distinction between doctrinal, legal writing, and clinical faculty, as well as merges analytical, practical, and clinical instruction into a real world curriculum.

The justification for a writing-intensive program of legal education is driven by the reality that persuasive writing ability is among the most important skills a lawyer must possess and a skill that many lawyers and judges claim graduates lack.¹ Part of the problem is that law schools dedicate fewer than six credits to required legal writing courses and treat legal writing faculty as if they were second-class citizens.² That should stop now. In making legal education more writing-centered, law schools can help struggling students to become competent writers, cultivate an educational environment in which good writers can become great writers, and bridge the divide between legal education and law practice.³

I. THE JUSTIFICATION: LEGAL WRITING IS THE FOUNDATION OF LAW PRACTICE AND SHOULD BE THE CORNERSTONE OF LEGAL EDUCATION

Law students must learn to write effectively if they are to succeed in law practice. A recent survey by LexisNexis that included three hundred hiring

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1. See Andrew Perlman, *The Most Important Knowledge and Skills for Recent Law Grads*, INST. ON L. PRAC. TECH. & INNOVATION (Apr. 8, 2014, 4:39 PM), <http://lawpracticetechnology.blogs.law.suffolk.edu/2014/04/08/the-most-important-knowledge-and-skills-for-recent-law-grads/> [<http://perma.cc/8ADN-BFRA>].

2. See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY vi (2014), <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf> [hereinafter LEGAL WRITING SURVEY] (noting that, in 2014, the average number of required legal writing credits rose from 5.65 to 5.71) [<http://perma.cc/73K5-SJIT>].

3. See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (proposing that the big problem for many people is that law school and the practice of law are so different).

partners and law faculty revealed that forty-one percent of attorneys and fifty-one percent of law faculty believe that writing is among the most important skills needed to successfully practice law.⁴ Unfortunately, most attorneys (and judges) criticize graduates' writing skills.⁵ The skills considered most lacking among graduates "consisted of writing and drafting documents, briefs and pleadings, and skills beyond basic legal research."⁶ Thus, for law schools to be *truly* experiential, they cannot merely increase the number of clinical offerings or externship opportunities. They must devote more credits and resources to a comprehensive, real world legal writing program.

II. THE COMMITMENT TO A WRITING-CENTERED CURRICULUM IS ESSENTIAL TO DEVELOPING COMPETENT GRADUATES

No graduate can be truly practice-ready, whatever that means, but graduates should acquire a minimum level of skill to ensure that they can represent clients competently. A writing-centered curriculum—complete with a fully staffed writing center and a required legal writing course in every semester of law school—is necessary to remedy the problems many graduates face when they enter the legal profession. The criticism of recent graduates should come as no surprise. Most legal writing programs devote fewer than six credits to *required* legal writing courses, which can be completed in two or three semesters.⁷ As Bryan Garner states, "the biggest failure at most law schools is the dearth of seriously good skills courses, especially training in legal writing."⁸ The solution, as Garner explains, is to require more legal writing courses, particularly in the upper-level curriculum:

[T]he second and third years of law school ought to include much more research, writing and editing, with three to six short papers required in each course Each paper should be subjected to rigorous editing, then rewritten and resubmitted. . . . Short of such reform, the future for new law school graduates looks dismal.⁹

In sum, "[I]aw schools should get their priorities straight and better meet the needs of their students' future employers."¹⁰

4. See BARBRI, STATE OF THE LEGAL FIELD SURVEY 5 (2015), http://www.thebarbri.com/files/white-papers/220173_bar_research-summary_1502_v09.pdf [<http://perma.cc/4ZLB-B9CJ>].

5. See Sharon D. Nelson & John W. Simek, *Why Can't Law Graduates Write?*, LAW PRAC., Nov.–Dec. 2012, 22, 22 (when asked to identify the most glaring weakness in young lawyers, judges and senior attorneys argue that "[t]hey can't write").

6. See LEXISNEXIS, HIRING PARTNERS REVEAL NEW ATTORNEY READINESS FOR REAL WORLD PRACTICE 3 (2015), http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf [<http://perma.cc/RER3-SDQG>].

7. See LEGAL WRITING SURVEY, *supra* note 2, at vi.

8. Bryan Garner, *Three Years in Law School, Better Spent*, N.Y. TIMES (July 25, 2011, 11:48 AM), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better> [<http://perma.cc/4XNN-XCH6>].

9. *Id.*

10. *Id.*

The lack of intensive legal writing programs at law schools has three lasting implications for graduates. First, students are not afforded the time or opportunity to develop basic writing skills.¹¹ Second, students do not understand the role and purpose that litigation and transactional documents play in the litigation process because writing assignments are not sequenced to mirror the order in which they are drafted in law practice.¹² For example, students do not draft a motion to dismiss after drafting a complaint or draft interrogatories after drafting an answer. Third, students are not required to draft many of the documents they will encounter in practice. For example, some students may never have heard of a motion to compel or a motion for injunctive relief until a partner assigns it to them at their first job. As a result, law students graduate without the skills necessary to practice law competently—regardless of how many clinics or externships they completed—and law firms are forced to incur substantial costs training new associates.

A. Skill Deficiency: Insufficient Time and Commitment to Developing Basic Writing (Not Legal Writing) and Rewriting Skills

Students must acquire basic writing techniques and learn how to become good writers before they can be competent legal writers.¹³ This includes instruction in, among other things, grammar, style, sentence structure, organization, flow, and clarity.¹⁴ Particularly for students with poor writing skills, two or three semesters of legal writing courses—worth, on average, fewer than six credits—will not address these deficiencies. Schools that devote fewer than six credits to legal writing will not have the time or resources to develop core writing skills.

In addition, students will not learn the art of rewriting, which is a neglected and often overlooked skill. Too many students collapse the writing, rewriting, and revision phases, believe that their first draft is their *last* draft and think that rewriting and revision simply means performing a spelling and grammar check on their computer. In addition, many students collapse the writing, rewriting, and revision phases into a single draft that lacks organization and structure. Given these facts, it should come as no surprise that graduates are not prepared to practice law. As stated above, law school should focus on designing a broader curriculum that integrates thinking, writing, and doing across and throughout the curriculum. The deficiencies in graduates' writing skills are impossible to ignore and are traceable to lack of sequencing, context, and comprehensiveness.

11. See Adam Lamparello & Charles E. MacLean, *Beyond the Rules: Creating Great Writers—Not Just Legal Writers*, 39 CAN. L. LIBR. REV. 23, 23 (2014).

12. See, e.g., ADAM LAMPARELLO & MEGAN E. BOYD, SHOW, DON'T TELL: LEGAL WRITING FOR THE REAL WORLD (LexisNexis ed., 2014) (using a fictitious case, the authors assume the role of attorneys for the opposing parties and proceed to "litigate" the case from the complaint to appellate brief).

13. See Lamparello & MacLean, *supra* note 11, at 23.

14. See, e.g., MURRAY SPERBER, JOHN WILLIAM POPE CTR. FOR HIGHER EDUC. POL'Y, WE MUST OVERHAUL COLLEGE WRITING (2011), <http://www.popecenter.org/commentaries/article.html?id=2539> [<http://perma.cc/DA8V-JYY7>].

B. Legal Writing Education Does Not Mirror Law Practice

Legal writing education lacks a focus on the manner and context in which law is practiced. Specifically, legal writing assignments are not sequenced to mirror the litigation and transactional process and fail to provide students with the context within which litigation and transactional documents are drafted. As such, students graduate without understanding the role that each document plays in the dispute resolution process and the writing techniques that apply with particular force to each document.

1. Lack of Sequencing: No Understanding of the Role Litigation and Transactional Documents Play in the Dispute Resolution Process

Most graduates do not understand how disputes are resolved in the real world and do not understand the role and purpose that litigation and transactional documents play in the judicial process. In fact, in a majority of law schools, the most common writing assignments are a predictive memorandum, client letter, and appellate brief, although pretrial and trial briefs are becoming more common.¹⁵ As revealed in a LexisNexis survey, students are not gaining a practical understanding of the litigation and transactional process:

*Attorneys particularly noted that new attorneys' lack of understanding of how a litigation or transactional matter actually happens in real life requires them to review this foundational knowledge to increase associates' immediate value. These skills allow new attorneys to immediately address real-world client matters and to more quickly bridge the gap between legal concepts and doctrines and practical application. In short, they would enter the practice of law armed with the skills they need to be of immediate value to their employers and to their clients.*¹⁶

Furthermore, even if students did draft most of the documents they were likely to encounter in actual practice, a curriculum that devotes fewer than six credits to legal writing would not give students sufficient time in which to develop and refine their skills.

Importantly, there is one approach that could remedy this problem, particularly if the number of required writing credits remained unchanged. For example, at Indiana Tech Law School, in addition to a six-semester, thirteen-credit writing program, students are required in the first three semesters of law school to draft the most common litigation documents, as they would in practice. Specifically, in their first semester, students receive a multi-issue fact pattern containing issues from all first-year courses and proceed through each stage of the litigation process, beginning with the initial client interview, up to and including an appellate brief. In addition, legal writing and doctrinal professors from all first-year courses collaborate to ensure that each drafting assignment involves a legal issue that is simultaneously being taught in a doctrinal course. This requires students to

15. See LEGAL WRITING SURVEY, *supra* note 2, at 13.

16. See LEXISNEXIS, *supra* note 6, at 1 (emphasis added).

apply the legal concepts they learn in class, and it enables the faculty to assess assignments for writing proficiency *and* substantive legal knowledge. The table below summarizes sequencing during the first three semesters, which is designed to ensure that assignments are not duplicative, and that students are not overburdened.

Assignment Sequencing in the First Year

| Course | Assignment and Due Date |
|--|---|
| Criminal Law | Client Meeting (Sept. 8) |
| Contracts | Retention Agreement (Sept. 17) |
| Legal Research | Research Offer and Acceptance and/or Personal Jurisdiction (Sept. 24) |
| Experiential Legal Writing/ Lawyering Skills/Legal Research and Writing | Predictive Memorandum (Experiential Legal Writing) (Oct. 8) |
| Civil Procedure | Complaint (Nov. 10) |
| Experiential Legal Writing II/ Lawyering Skills II/Legal Research and Writing II | Motion to Dismiss (Feb. 8) |
| Property | Answer (Feb. 26) |
| Torts | Discovery (interrogatories and document requests) (Mar. 11) |
| Foundations of Legal Analysis II (or other academic support course) | Motion to Compel Discovery (Mar. 30) |
| Experiential Legal Writing II/ Lawyering Skills/Legal Research and Writing | Motion for Summary Judgment (Apr. 22) |

In Experiential Legal Writing III, which occurs in the fall semester of the third year, students draft an appellate brief in response to a fictional decision by a district court judge on the motion for summary judgment.

The above model, or whatever variation a law school or legal writing program adopts, would give students a contextual and practical understanding of how law is practiced.

2. Lack of Context: Failure to Understand How Predictive and Persuasive Writing Techniques Apply to Different Documents and Factual Contexts

Legal writing courses should emphasize that predictive and persuasive writing techniques apply differently depending on the documents being drafted and the legal and factual context in which a case is being litigated.

a. Legal Context

As stated above, most students draft a predictive memorandum and appellate brief in their required legal writing courses. Most students do not, however, get the opportunity to draft a complaint, answer, motion to dismiss, motion for summary judgment, motion in limine, and trial brief. Put simply, they do not have the opportunity to draft documents they will encounter in practice, learn the legal context within which various real world documents are drafted, or understand the purpose that each document plays in the litigation or transactional process.

The problem with this approach is that students do not understand how to apply predictive and persuasive writing techniques based on the specific document being drafted. For example, in a complaint, factual allegations should be stated concisely to survive a motion to dismiss and, if accepted as true, support a finding of liability. By contrast, in a motion to dismiss, the statement of facts should be a compelling and detailed narrative that shows a court why it should rule in a party's favor. As a final example, in a summary judgment brief, a party's statement of facts should only be comprised of undisputed material facts. Not knowing these differences, and the writing techniques that apply with particular force in each context, leaves students without the tools to be effective persuasive writers.

Moreover, the model proposed above would allow students to continuously refine and improve their legal research, persuasive writing, and analytical skills, all of which are vital to competency as an attorney. In the LexisNexis Survey, responding attorneys stated:

Drafting pleadings and motions and advanced legal research skills were both highly important skills upon hiring and often lacking. It is also important for new attorneys to be competent drafters of trial level briefs, discovery documents, and deposition questions or summaries; familiarity with e-discovery and conference briefs is also important.¹⁷

Furthermore, even if students did draft these documents in law school, they are not given sufficient time to receive individualized feedback, reflect on their performance, and rewrite based on this feedback. As a result, many students spend the last two or three semesters of law school without refining their writing skills and enter practice without the writing skills necessary to succeed.

17. *See id.* at 4.

b. Factual Context

Even if students did draft some or all of the above documents in law school, they are not given sufficient opportunity to draft such documents in factual contexts that implicate a variety of legal issues. For example, in upper-level writing courses, students should be given hypothetical or actual fact patterns that require them to research issues in different jurisdictions and draft documents involving those issues. This would force law students to do precisely what lawyers do: research an area of the law with which they are unfamiliar and draft a document applying the law to a new (and likely incomplete) set of facts. Professor Kirsten Holmquist explains the benefits of a context-based legal writing curriculum:

Our pedagogy and curriculum—an over-reliance on neatly edited cases to the exclusion of working with messy, human facts, in ways that real lawyers might—obscures the inter-dependence of knowing and doing that is at the heart of thinking like a lawyer. It obscures the context and content that lawyers work within while, together with their clients, solving problems. Students’ lack of applied learning opportunities may deny them the ability to write a fantastic brief.¹⁸

Most importantly, it would teach students how to be problem-solvers and self-sufficient learners, which is particularly valuable in an era where law firms no longer train young lawyers and clients increasingly refuse to pay for hours that new associates bill.

CONCLUSION

The future of legal education should bridge the divide between learning and practicing the law. This requires three things. First, tuition should bear some reasonable relationship to graduates’ employment outcomes. Perhaps Harvard is justified in charging \$50,000 in tuition, but a fourth-tier law school is not. Second, no school should resist infusing more practical skills training into the curriculum. This does not mean that law schools should focus on adding clinics and externships to the curriculum. The focus should be on developing critical thinkers and persuasive writers that can solve real world legal problems. Third, law schools should be transparent about their students’ employment prospects and actively assist students with job placement during *and* after graduation. To be blunt, the days when students graduate with a six-figure, non-dischargeable debt, cannot find a job, and lack the skills necessary to practice law at a minimally competent level, should soon be over.

18. Kirsten Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 357 (2012).