

Are We There Yet?

Aligning the Expectations and Realities of Gaining Competency in Legal Writing

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ABSTRACT

Each year, it seems that more law professors express their concerns that increasing numbers of students are coming to law school underprepared for the task. Moreover, professors often express specific concerns about their students' writing abilities. While there may be some truth to these assertions, it is also true that legal educators need to take a closer look at law school curriculums and teaching methods to make sure that students are afforded the best opportunities to succeed. Indeed, the challenges of modern legal education may reflect not only the shortcomings of today's students, but also the need for law schools to reconsider their curricular goals and approaches to teaching. Legal skills, such as legal writing, have long maintained a subordinate position in the curriculums of many law schools. While their importance has received increased recognition as of late, many law schools continue to dedicate insufficient time and resources to their teaching. Indeed, most law schools only require students to take two semesters of formal instruction in practical legal writing during their first year and require students to take no additional legal writing courses in their second or third years. Consistent with this curricular approach, many law professors seem to expect students to gain significant competency in legal writing before they begin their second year of law school and to be able to proceed from that point with less guidance.

This article urges legal educators to consider what law schools are asking their first-year law students to learn in just two semesters of practical legal writing in comparison to what law students can realistically achieve. Currently, it seems that a disconnect exists between what legal writing faculty are able to teach students in their first year and what professors teaching students in later years expect these students to know. A review of select, first-year students' final writing assignments provides some perspective on

what students are learning in their first-year legal writing courses. It is the author's hope that this article will paint a more accurate picture of what professors can reasonably expect from students in their second and third years. Ultimately, this article asks legal educators to recognize the hard work and achievements of law students, while acknowledging all that legal writing entails and all that students still need to be taught after their first year.

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INTRODUCTION

Most legal writing professors share the experience of having law school faculty colleagues, who do not teach legal writing¹ to students in their first year, express concerns about the level of writing proficiency of the upper-level students whom they teach. While many of these professors' remarks address their students' struggles

to produce meaningful scholarly papers, others' remarks concern their students' inability to communicate effectively their analysis of legal problems for hypothetical, and sometimes even real, clients.² Yet, those professors who teach legal writing to first-year students know the broad scope of skills and topics covered in first-year legal writing courses and how hard most students work to gain competency in legal analysis and writing before they leave their legal writing classrooms.³ Legal writing professors know that nearly all of their students show amazing growth over the course of the school year and that by the end of the spring semester, many students submit legal writing papers that are impressive overall, or at least in many respects. But, these professors also know that at the end of the first year, many law students still struggle with legal writing and that all law students still have much more to learn.

Most, if not all, professors of legal writing would agree that more than two semesters of practical legal writing courses are needed to prepare law students adequately for the work they will do in legal practice.⁴ The transition to legal writing is not easy for the majority

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1. Unless otherwise indicated, in this article, the term "legal writing" refers to practical legal writing, or the types of writing that lawyers regularly do in practice when representing clients.

2. See Sarah O. Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301, 302 (2007) ("Even when LRW faculty members believe they have produced within each student the best writer that student can be in his nascent legal career, upper-level faculty, including clinicians, lament the research and writing skills of the students that enter their courses.").

3. See Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223 (2010) (comparing the expectations of beginning legal writers to their experiences during the first weeks of law school); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK L. REV. 245 (1996) (discussing the scope of coverage of first-year legal writing courses and the hurdles that students face when they begin to engage in practical legal writing).

4. See Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 73-4 (2004) (noting that difficulties with legal writing stem, at least in part, from a lack of opportunity for students to apply the skills they learned in their first-year legal writing courses after that year and advocating for a program that includes required

of new law students. Even if students have been successful with writing in other contexts, most new legal writers find that they face a steep learning curve when they begin their legal writing coursework. To most entering law students, practical legal writing is a new and different form of writing that requires a shift in thinking from more familiar written products and processes, and a learned appreciation for what is considered to be effective writing in a legal context. Indeed, what qualified as effective writing in undergraduate school may not qualify as such in law school. In undergraduate school, for example, many professors reward students for restating learned information, and verbosity is often encouraged as students work to add more content to meet required page limits.⁵ By contrast, in legal writing, clarity and conciseness are of the utmost importance.⁶ Effective legal writing is to be thorough, but nonetheless efficient, and the writer is often called upon to synthesize and repackage information so that it is easier for the reader to understand. This type of writing is often more purposeful and reader-focused than the writing that students did before law school.⁷

writing components in all upper-level doctrinal courses); Carol McCrehan Parker, *Writing Throughout the Curriculum, Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 563 (1997) (“Neither a single ‘rigorous writing experience’ nor a first-year legal writing class is sufficient to provide basic competence in written communication.”); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 75–76 (1994) (advocating for programs that afford students an opportunity to further develop their legal writing during their second and third years of law school).

5. See Felsenburg & Graham, *supra* note 3, at 266–67 (noting how law students past writing successes may have resulted from their demonstrating a mastery of a subject matter and reciting that mastery, “often accompanied by editorial comments and opinions as permitted or required by the professor.”); Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation By Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83, 88 (2011) (noting that college students are often asked “to read and discuss the content of the subject area, to memorize the content of the subject area for examinations, or to write research papers identifying and commenting on the trends and themes of the subject area.”) (citing KENNEY F. HEGLAND, INTRODUCTION TO THE STUDY AND PRACTICE OF LAW IN A NUTSHELL 1–2 (5th ed. 2008) (exploring students’ undergraduate studying habits that are not effective in law school)).

6. Mark L. Osbeck, *What is “Good Legal Writing” and Why Does it Matter?*, 4 DREXEL L. REV. 417, 427 (2012) (describing clarity, conciseness, and engagement of the reader as the fundamental qualities of good legal writing); Felsenburg & Graham, *supra* note 3, at 257 (“The central task of the legal writer is to produce a document . . . that effectively communicates a correct, clear, concise answer to the legal problem.”).

7. See Felsenburg & Graham, *supra* note 3, at 268 (“Knowledge-driven approach to writing, which likely produced ‘A’ papers in college is ‘woefully inadequate for the goal-oriented writing of lawyers and judges.”) (quoting Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 467, 511 (1997)); see *id.* at 273 (describing the shift from “knowledge telling” to “knowledge transforming” required for legal writing) (citing Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 639 (2006) (noting that students need to come to see their writing as “knowledge transforming,” and to “begin to see themselves as legal authors who contribute to the ongoing development of the law.”)).

It follows that the quality of legal writing is judged not only by whether it is mechanically well-written, but also by its content and usefulness to the reader.⁸ Thus, to be effective as a legal writer, a law student must not only possess a solid technical writing ability, but also develop an understanding of the law and a familiarity with legal practice.⁹ Students, therefore, must gain a real appreciation for the new legal audience for which they are writing and consider how this audience makes professional decisions. In order to write successfully for this new reader, law students need to gain an understanding of legal methods, including concepts such as jurisdiction, court hierarchy, and *stare decisis*. Indeed, good legal writing is often the result of the successful execution of a number of important legal skills—such as sound legal analysis, thorough legal research and factual investigation, advocacy, and problem solving.¹⁰ To be effective advocates, students will also need to learn how to make not only superficial writing choices, but also strategic, professional decisions about how best to present their analysis in order to serve their specific writing purpose.¹¹

In order to be more effective teachers, legal writing professors have raised their awareness of all that is required for effective legal writing and all that law students must learn to become competent in this skill. Therefore, legal writing professors understand that effective legal writing is not a skill that is easily acquired and that no law student can truly master legal writing in their first year.¹² Law school professors who do not teach legal writing to entering law students may not fully appreciate what legal writing requires,

8. One legal writing scholar has aptly described successful legal writing as writing that helps its readers to “make the decisions they need to make in the course of their professional duties.” Osbeck, *supra* note 6, at 422.

9. *Id.* at 423–24 (explaining that a document that is technically well-written is not good legal writing if it is not useful to the reader).

10. Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Law School Curriculum*, 65 MERCER L. REV. 467, 476 (2014). In a 1992 Report, commonly called the MacCrate Report, the American Bar Association identified written and oral “communication” and many skills important to legal writing, as essential lawyering skills, including “problem solving,” “legal analysis and reasoning,” and “legal research.” SECTION ON LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

11. Keene, *supra* note 10, at 476 (concluding that good legal writing requires not only knowledge of law and familiarity with legal practice, but also sound professional judgment).

12. See Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build A Solid Foundation by Shifting their Focus from Product to Process*, 24 REGENT U. L. REV. 83, 90, 92 (2011) (discussing that legal writing, like law, cannot be mastered); Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Mastery in Written Legal Analysis and Advocacy*, 108 NW. U. L. REV. 80 (2013) (describing a three-year legal writing mastery program for the law school curriculum).

and may significantly underestimate what students must learn to be successful. These professors may assume that students who do not excel early on as legal writers, are simply poor writers generally.¹³ This lack of understanding can lead legal educators to expect, wrongly, that most law students should be able to acquire a high level of proficiency in legal writing with just a few legal writing experiences in a relatively short period of time.¹⁴ Even more, wrong assumptions about the time needed to gain competency in legal writing are reflected in current American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools (ABA Standards), and the curriculums of many law schools that devote insufficient time and resources to its teaching.

Given the current demands of the legal market, it would seem worthwhile for legal educators to take a closer look at what law students can realistically accomplish in two semesters of legal writing and adjust their law school curriculums accordingly in order to better prepare new law graduates for the legal writing that they will do when they begin to practice. While opinions vary widely as to what level of proficiency in legal writing is sufficient for new law school graduates, it seems beyond dispute that law students have nothing to lose and everything to gain from increasing their competence.¹⁵ This article will focus less, however, on defining appropriate goals for legal educators with respect to legal writing, but rather, will address the question—how much can legal educators realistically expect law students to accomplish in one year of legal writing?¹⁶

13. Rideout & Ramsfield, *supra* note 4, at 40–41 (“Legal educators . . . often see legal writing as quite simple if one knows how to write . . . Without further investigation, these educators may have pegged legal writing courses as remedial, either explicitly or implicitly. In any case, these experts are often frustrated and mystified by the apparent inability of law students to write. The easiest method is to blame lower academic institutions for failing in one of their purposes—to teach writing.”).

14. See Rideout & Ramsfield, *supra* note 4, at 40–46 (discussing traditional views of legal writing teaching and pointing out how misconceptions about legal writing teaching can lead to poor curricular choices).

15. See Neil Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STAN L. & POL’Y REV. 425 (2013) (discussing the expectations of the legal bar of new law graduates).

16. This article focuses on one year of legal writing courses as most accredited law schools offer two semesters of legal writing in their students’ first year, and do not require students to engage in advanced legal writing courses. See ALWD/LWI, REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), available at <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf> (Question 12, p. 7) [hereinafter ALWD SURVEY]. The ALWD Survey provides that almost all legal writing programs required courses in both the first semester (98%) and second semester (99%) of the first year of law school. *Id.* Significantly fewer schools, 47 of 178 responders (26%), indicated that they had required a legal writing course in the fall semester of the second year of law school, and considerably less indicated requiring legal writing courses in subsequent semesters. *Id.* at vi, 12.

The author will explore this question by reviewing appellate briefs written by law students across a law school class at the end of their first year for a uniform, legal writing assignment. In order to get a better sense of what legal educators can best hope students to accomplish, the appellate briefs selected to be reviewed were identified by legal writing professors as the best in the class. Part I of this article will discuss what many legal educators expect law students to know after one year of legal writing instruction. Part II of this article will discuss the methods used by the author to assess the level of proficiency in legal writing that legal educators can reasonably expect of law students after they complete two semesters of legal writing coursework. This part will also acknowledge the scope and limitations of this study. Part III will provide some context for the appellate briefs reviewed for this assessment. This includes describing the law school course for which students wrote their appellate briefs and the specific legal writing assignment. Part IV will discuss in detail what the students included in this study were able to accomplish in two semesters of legal writing. Part V will consider what remained after the first year for students to learn. Ultimately, this article will consider whether legal educators have realistic expectations of what law students can learn in only one year of legal writing coursework. As many law schools do not require students to take practical legal writing courses after their first year, this discussion further considers whether this limited exposure to formal legal writing training is sufficient to prepare law students for the kinds of legal writing that they will encounter when they begin to practice law.

I. EXPECTATIONS OF LAW STUDENTS' LEGAL WRITING AFTER
THE FIRST YEAR OF LAW SCHOOL

A. *Expectations Reflected in ABA Standards*

In setting the standards for legal education, the American Bar Association has sent a conflicting message about the study of legal writing. In 2014, the Standards Review Committee made significant changes to the American Bar Association Standards and Rules of Procedure for Approval of Law Schools.¹⁷ Significantly, Standard 302 introduced specific "Learning Outcomes" that accredited

17. See generally *Section on Legal Education & Admissions to the Bar Standards & Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N (2014–15) [hereinafter ABA STANDARDS 2014–15].

law schools are now required to establish.¹⁸ According to these new standards, “at a minimum,” learning outcomes are to include “competency” in four areas, including “[l]egal analysis and reasoning, legal research, problem solving, and written and oral communication in a legal context.”¹⁹ Current ABA Standards therefore acknowledge the need for students to gain “competency” in legal writing while in law school,²⁰ and also explicitly require law schools to provide opportunities in their curriculums for students to engage in “faculty-supervised” “writing experience[s]” both in, and after, their first year.²¹ The current ABA Standards, however, do not explain what level of proficiency is required for “competency.” Moreover, the ABA Standards make no specific reference to practical legal writing, and refrain from specifying that a particular type of writing needs to be taught.

The requirement that law students have one writing experience in their first year and one writing experience after their first year is not new, though the prior version of the ABA Standards described them as “rigorous writing experiences” “in a legal context.”²² The ambiguity of both the prior and current versions of this provision greatly limits their effectiveness as tools for those advocating for more required practical legal writing courses in the law school curriculum.²³ Indeed, most law schools have interpreted this provision

18. *Id.* at 15 (Standard 302).

19. *Id.* Chapter 3 explains that law schools are to “establish learning outcomes that shall, at a minimum, include competency” in: knowledge and understanding of substantive procedural law, legal analysis and reasoning, legal research, problem solving, and written and oral communication in a legal context, exercise of proper professional and ethical responsibilities to clients and the legal system, and other professional skills needed for competent and ethical participation as a member of the legal profession. *Id.* The prior version of Chapter 3 did not reference specific learning outcomes, but did provide that each law student was to receive substantial instruction in a list of areas, including “legal analysis and reasoning, legal research, problem solving, and oral communication.” *Section on Legal Education & Admissions to the Bar Standards & Rules of Procedure for Approval of Law Schools*, AM. BAR ASS’N 21 (2013–14) (Standard 302) [hereinafter ABA STANDARDS 2013–14] (the Curriculum is now addressed in Standard 303).

20. Prior ABA reports on legal education have acknowledged the importance of legal writing. MACCRATE REPORT, *supra* note 10. The MacCrate Report identified ten essential lawyering skills, including “legal analysis and reasoning” and “communication (oral and written).” *Id.*

21. ABA STANDARDS 2014–15, *supra* note 17, at 16 (Standard 303(a)(2)). Standard 303(a)(2) provides that law schools are to have a curriculum that requires students to “satisfactorily complete . . . one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised.” *Id.*

22. ABA STANDARDS 2013–14, *supra* note 19, at 21 (Standard 302(a)(3)).

23. See Kenneth D. Chestnek, *MacCrate (In)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 COLO. L. REV. 115, 122–26 (2007) (suggesting that the 2001 amendment to America Bar Association Standard 302 adding an upper-level rigorous writing requirement, was intended to encourage additional practical legal writing instruction). While this Standard has been amended since 2001, the intent of the standard

broadly, only requiring students to take practical legal writing courses in their first year of law school, and permitting, or requiring, students to satisfy the later writing requirement with scholarly writing.²⁴ Moreover, regardless of the drafters' intent in requiring two significant legal writing experiences in law school, this requirement reinforces existing expectations among many legal educators that competence in practical legal writing can be achieved with little formal legal writing training.²⁵

has not been clarified to indicate that a specific type of writing is required. Indeed, Interpretation 303-2 to current ABA Standard 303 focuses on the intensity of the writing experience rather than the type of writing and now provides that "factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student's written products, and the number of drafts that a student must produce for any writing experience." ABA STANDARDS 2014-15, *supra* note 17, at 17 (Interpretation to Standard 303-2).

24. See Chestnek, *supra* note 23, at 116 (concluding that the 2001 amendment to the ABA Standards, which added an additional "rigorous writing" requirement, "had little or no effect on how law schools educate law students in practice skills" and "constituted a missed opportunity"). In the most recent ALWD Survey, out of the 178 schools that replied, 164 indicated that students at their law school were required to satisfy an upper-level writing requirement for graduation. Of that 164, however, seventy-one schools indicated that scholarly writing was required, and 92 schools indicated that scholarly writing was not required but could count toward the requirement. By contrast, only thirteen schools reported that advanced practical legal writing was required, and sixty-nine schools reported that it was not required but could count toward the requirement. ALWD SURVEY, *supra* note 16, at 25.

25. The author recognizes that while the ABA Standards require that students satisfy only two "writing experience[s]" they also now require that students "satisfactorily complete" "one or more experiential course(s)." ABA STANDARDS 2014-15, *supra* note 17, at 16 (Standard 303(a)(3)). In addition, law schools are now required to provide substantial opportunities to students for "law clinics or field placements(s)." *Id.* While not all of these experiential opportunities can provide formal writing instruction, some may provide additional legal writing opportunities. See Schrup, *supra* note 2, at n.3 (citing Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 663 (1993) (arguing that live-client law clinics can provide richer learning opportunities for students than those offered in simulated courses) and Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 33-38 (discussing how clinical teaching can promote advanced writing skills)). Yet the argument can be made that advanced writing in legal clinics is not a good substitute for advanced legal writing courses. See Schrup, *supra* note 2 ("[W]hile both clinicians and LRW faculty members devote substantial time to teaching, clinicians teach a wider variety of skills and substantive law, while LRW faculty members provide more in-depth coverage of the nuances of writing, research, and legal analysis. To the extent that a clinician even touches upon writing during the clinic's classroom component, that instruction necessarily must be limited in order to accommodate other topics that arise in the clinical setting . . ."); Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 285 (2010) (noting that while "[c]linicians spend many hours every week triaging student writing and coaching their students to produce practice-worthy documents, . . . advanced legal writing is not routinely addressed in clinic seminars and there is no clear methodology for teaching advanced legal writing through clinical supervision.").

B. *Expectations Reflected in Teaching Methods*

As discussed above, ABA Standards concerning the study of legal writing only require that students have two faculty-supervised writing experiences in law school, and do not specify the type of legal writing to be taught. Regardless, most law schools require their students to take two semesters of practical legal writing in the first year of law school. Many law schools, however, do not require students to take practical legal writing after their first year.²⁶ The expectations of law faculty often mimic this curriculum, as students are expected to make significant strides in their first-year legal writing courses. Many law professors expect students to be prepared as they enter their second year, to engage in increasingly complex legal analysis and writing, in a variety of forms, without the need for significant formal instruction and with decreased faculty supervision.²⁷ Yet the expectations of legal writing professors, who provide formal legal writing training to law students in their first year, are relatively humble.

Legal writing professors tend to expect that students will leave the first year with *some* knowledge of how to analyze the legal problems that they will be assigned and draft the basic documents that they will be expected to produce, when they first enter the practice of law. Most legal writing professors would describe their first-year required, legal writing courses as introductory in nature. The term “legal writing” often encompasses a wide scope of writing in law practice. One year only affords enough time for students to be introduced to the basic genres of legal writing, analyze a handful of legal problems, and produce a few types of documents. At most law schools, the fall semester required legal writing course focuses on predictive legal writing, while the spring semester focuses on persuasive legal writing. While the range of documents that students write can vary from one law school to another, most first-year legal

26. ALWD SURVEY, *supra* note 16.

27. See Schrup, *supra* note 2, at 317 (noting that law school clinicians use teaching methodologies that are “client-centered,” “experiential, reflective and non-interventionist,” and thus less directive than legal writing teaching methods); Kowalski, *supra* note 25, at 290 (observing that clinical scholarship seems to presume “that all of the fundamentals are covered during the first year and should not have to be addressed again with upper-division students.”); Jessica Wherry Clark & Kristen E. Murray, *The Theoretical and Practical Underpinnings of Teaching Scholarly Legal Writing*, 1 TEX. A&M L. REV. 523, 524 (2014) (describing the process of engaging in scholarly writing for law students as akin to being “thrown into the deep end,” and noting the “lack of structured feedback and guidance” in this “often-isolating experience”).

writing courses are consistent in requiring that, at a minimum, students learn to write office memoranda and litigation briefs.²⁸

It follows that students can only meet the expectation that they have some knowledge of how to analyze a legal problem and to draft the necessary documents, if they are able to transfer what they learn in their first-year legal writing courses to new legal problems and new forms of legal writing that they later encounter. As such, many legal writing professors place significant emphasis on helping students develop a general approach for engaging in legal analysis and a broad understanding of what makes a legal document effective.²⁹ Moreover, most legal writing professors define their teaching goals not in terms of the types of practice documents that their students will be able to write, but rather by their students' abilities to engage in a learned process as they work to produce practice documents that meet the needs of their intended readers and the expectations of the legal community. As legal writing courses afford only enough time for students to analyze a few legal problems and draft a few practice documents, it makes sense that legal writing professors maintain a focus on teaching students how to engage in necessary analytical and writing processes.³⁰

While focusing on the analytical and writing processes, legal writing professors work to teach students to prepare legal practice documents that align with legal practitioners' and judges' ideas of what is effective legal writing.³¹ Yet, legal writing is, in many ways, more of an art than a science. The expectations of legal practitioners and judges are not firmly established, and accordingly the standards of legal writing professors are not perfectly aligned.

28. See ALWD SURVEY, *supra* note 16, at 13 (showing that the most popular legal writing assignments in the first year are office memoranda (assigned by 174 of 176 responders or 99%) and appellate briefs (assigned by 125 of 176 responders or 76%)).

29. See Schrup, *supra* note 2, at 317 (characterizing legal writing teaching as placing emphasis on "writing to an institutionalized legal audience, applying set writing processes, and operating within an established discourse community.").

30. See Rideout & Ramsfield, *supra* note 4, at 50–51 (discussing the "process' perspective on writing, in which the focus shifts from the text itself to the processes by means of which the writer produces the text"); *id.* at 51–61 (discussing the process perspective and noting its growing popularity as a method of legal writing teaching, and discussing the socialization process that is a necessary corollary to teaching legal writing to legal novices).

31. See Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 GONZ. L. REV. 427, 430 (2005) ("Legal writing classes do not teach students to write to a general audience; they teach students to write to an audience of law practitioners."); Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1 (2009) (surveying judges and practitioners in order to compare the demands of legal writing curricula to real world expectations).

Nonetheless, some consensus has been reached regarding what legal writing professors deem to be effective legal writing, and what “elements” are fundamental to an effective legal document.

One of the best evaluations of legal writing standards comes from a 1994 study by the Law School Admission Council (LSAC), in which researchers attempted to define legal writing by analyzing professor comments on objective legal memoranda prepared by first-semester law students.³² While that study involved predictive writing, the elements identified as important to the professors’ assessments of good writing in that study seem relevant in many respects to other forms of legal writing. Researchers found some disagreement among professors’ assessments of the overall quality of the memoranda studied. Notwithstanding, researchers were able to identify individual elements of legal writing that were most significant to the law professors’ determinations of the quality of the memoranda, and ultimately grouped these individual elements into categories.³³

Researchers found that professors’ assessments were determined primarily by the quality of the legal discussion; less attention was placed on other parts of the memoranda, such as the Question Presented and Brief Answer, Statement of Facts, and Conclusion sections.³⁴ It was determined that the application of law to facts, organization, flow, and clarity had the greatest impact on the professors’ assessments of the overall quality of the memoranda.³⁵ The most important category of elements addressed various aspects of the writer’s analysis and reasoning that researchers labeled as “Discussion,” including the writer’s application of law to facts, use of key facts, and inclusion of support for statements, as well as the completeness of the writer’s explanation and the effectiveness of the writer’s analogy and comparison of facts.³⁶ The second most important category addressed various aspects that researchers labeled as “Writing,” including clarity, organization, introduction and

32. Hunter M. Breland & Frederick M. Hart, *Defining Legal Writing: An Empirical Analysis of the Legal Memorandum*, in LSAC RESEARCH REPORT SERIES (1996) [hereinafter LSAC STUDY]. For this study, researchers examined 237 legal memoranda prepared by first-semester law students at twelve different law schools. Researchers developed taxonomy of the elements of a legal memorandum from oral and written professor comments to the memoranda.

33. *Id.* at 24–34.

34. *Id.* at 32.

35. *Id.* at 30, 41.

36. *Id.* at 32.

thesis statements, and flow.³⁷ Less weight was given to writing mechanics and other aspects of writing style.³⁸

The expectations of legal writing professors are reflected in their teaching goals and the manner in which they teach. Consistent with the above study, legal writing professors continue to focus on specific elements of legal writing as they provide guidance and feedback to students. In particular, legal writing professors spend significant time teaching students how to organize their legal writing and perfect their legal analysis. Legal writing professors also work with first-year law students to meet the broader goal of producing useful legal documents that meet the needs and expectations of their legal audience and satisfy the purpose for which they are written.

II. METHODS USED TO EVALUATE STUDENT LEGAL WRITING

The goal of this project was to analyze well-executed legal writing documents submitted by law students at the end of their first year in order to get a better understanding of what legal educators can reasonably expect students to learn in their first-year legal writing courses. The appellate briefs reviewed for this article were prepared by first-year law students at the author's institution—the University of Maryland Carey School of Law—for their final legal writing assignment. Students submitted these appellate briefs at the end of their second-semester, required legal writing class. While the first-semester required legal writing class focused on predictive legal writing, the second semester class—Written and Oral Advocacy (Advocacy)—focused on persuasive legal writing. “Best” briefs were solicited for review, as the goal of this project was not so much to determine the range of performance that could be expected, but rather to establish an upper-threshold of what legal educators can reasonably expect of students' legal writing after two semesters of legal writing.

Professors of the Advocacy courses are primarily adjunct faculty, who are also current, or former, legal practitioners or judges. Each Advocacy class usually has about twelve students and there are typically about twenty sections. The content of this course is designed to be fairly uniform, and all classes use the same textbook, cover the same topics, and work on the same legal writing assignments.

37. *Id.*

38. *Id.* “Mechanics” included citations, editing and proofreading, grammar and usage, punctuation, and spelling. *Id.* The aspects of style that were given less weight included word choice, precision, tone and attitude, paraphrasing and use of quotations. *Id.*

The program is coordinated by the author, a legal writing professor and program director, who is a full-time faculty member. The author plans the course syllabus, chooses and prepares the legal writing assignments, and provides teaching materials to the adjunct faculty, including detailed guidance for legal writing assignments.

At the end of the second semester, the author asked Advocacy professors to identify and submit the best briefs that they received from their students. Professors identified a total of fourteen appellate briefs as the best in their classes. In soliciting best briefs from a variety of professors, the author hoped to get an idea of what students can be expected to learn regardless of the professor's specific teaching style or methods and a more collective representation of what are thought to be exceptional briefs. The fact that Advocacy professors are primarily adjunct faculty, most of whom are also practicing attorneys or judges, suggests that these attorneys' evaluations might align with those of legal professionals in practice.

The author acknowledges that this study has some obvious limitations. As the appellate briefs considered here were selected by individual professors, and necessarily the selection was somewhat subjective, it is impossible to know if the briefs considered were truly representative of the best work in the class. In addition, not every professor chose to submit a brief, so the briefs collected are not from all Advocacy classes. The author also recognizes that the briefs examined here may not be perfect representations of the work of first-year students. The abilities and performances of law students will vary by law school, and even by law school class. Since this study only includes appellate briefs written by Maryland students, it is not necessarily representative of the work of other law students at other law schools. Furthermore, as the study only covers one law school class, and one legal writing assignment, it is not possible to determine what the students in this study accomplished compared with other Maryland students in other graduating classes, or whether the legal writing assignment used had any impact on the students' performances.

Even with these limitations, however, this study should still have some relevance for legal educators at other law schools. While examples were drawn from Maryland, this law school is not an outlier with respect to its student body.³⁹ Furthermore, the fundamental

39. University of Maryland Carey School of Law is in the top-tier of law schools and currently ranked as No. 46 in the *U.S. News and World Reports Best Graduate Schools, Law School Ranking*. *U.S. News and World Reports* reported that Maryland law had 643 students in 2013. See *Education, Best Law Schools*, U.S. NEWS & WORLD REPORTS, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools>

coverage, teaching methods, and types of legal writing assignments used at Maryland are fairly consistent with those at many law schools.⁴⁰ Indeed, the writing assignments used at Maryland, including the one used for this study, are often modified versions of writing assignments used at other law schools.⁴¹ Moreover, the goal of this study goes beyond defining successful legal writing for first-year law students. In providing a snapshot of law student achievement in legal writing, this study ultimately serves its intended purpose if it furthers the dialogue about legal writing study in the law school curriculum.

The author determined that the appellate briefs selected for this study should be evaluated both to confirm their overall good quality and to identify various qualities of these briefs for the purpose of comparison. Therefore, the appellate briefs were examined holistically for their individual and relative effectiveness, and also reviewed with specific criteria in mind. After consulting the LSAC study, as well as various legal writing texts and scholarly articles, it was determined that further review of each brief should focus on: (1) the brief's organizational structure; (2) the quality of legal analysis; (3) the clarity, conciseness, and flow, of the writing (both substantive and more superficial); (4) the persuasiveness of the arguments; and (5) the persuasiveness (and other relevant qualities) of the statement of facts and other non-argument sections.⁴² The identified criteria are discussed more fully below.

With respect to organization, the primary focus was on the writer's use of headings, roadmaps, and strong topic sentences, as well as the internal structure of the text in the argument section of the briefs. In assessing the quality of legal analysis, particular attention was given to the writer's synthesis of information, and effective use of case law, including the making of clear connections (including analogies and distinctions) between prior case law and

/law-rankings/page+2 (last visited Feb. 15, 2015).

40. See ALWD SURVEY, *supra* note 16, at iv, v, 7–18.

41. The writing assignments used in Maryland's Advocacy course, including the writing assignment that was the subject of the present study, are often adapted from hypothetical legal problems developed at other law schools and shared in a collective "brief bank." Maryland professors also contribute legal problems to this bank and those assignment are sometimes used by professors at other law schools.

42. LSAC STUDY, *supra* note 32; Osbeck, *supra* note 6; MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (2010); MICHAEL D. MURRAY & CHRISTY H. DESANTIS, ADVERSARIAL LEGAL WRITING AND ORAL ARGUMENT (2006); ANTONIN SCALIA & BRYAN A. GARBER, MAKING YOUR CASE—THE ART OF PERSUADING JUDGES (2008); LOUIS J. SIRICO & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION (2001).

the writer's client's case. While evaluations of the briefs' organization and the quality of legal analysis addressed the clarity and conciseness of the writing to some extent, these qualities were also considered independently.

Clarity and conciseness were judged from the perspective of the intended reader, or legal audience. In assessing clarity, the primary focus was whether the writer had formulated a clear message—clearly stating the relevant points that needed to be established for the argument to be successful, and whether the reader could comprehend the writer's message. For this category, stylistic and grammar issues were also considered, including whether the writer used plain English, simple words, simple sentence and paragraph structures, and proper grammar and punctuation. In assessing conciseness, one consideration was whether the writing was efficient—being as succinct as possible without omitting useful information. Another factor was whether the writing included unnecessary parts, words, or sentences. In evaluating the flow of the writing, the reader's reaction to the writer's style was considered. Attention was also given to the various writing techniques employed by the writer, including variation in sentence structure, as well as the effectiveness of the tone and the authenticity of the writing style.

With respect to the persuasiveness of the argument, the reader's reaction was again considered, but this time the focus was on the reader's reaction to the argument itself. One specific concern was whether the legal rules and concepts were framed in a persuasive manner in the argument. Another consideration was whether counter-arguments were addressed and negative authority was distinguished, and if so, the manner in which this was done. Attention was also given to whether the writer told a compelling story and connected with the reader on a more personal or emotional level.

In evaluating parts of the brief other than the argument, the primary focus was on the reader's overall impression of the appellate brief, including whether the brief seemed professional and the writer seemed credible. For many parts of the brief, the main question was whether or not the required information was provided and whether the intended purpose was served. For the statement of facts, the main concern was whether the writer told a persuasive version of events without inappropriately characterizing the facts. Other parts, such as the statement of issues and summary of the argument, were evaluated not only for the usefulness of their content, but also their persuasive quality.

Through a review using the above criteria, the author sought to establish that there was some consensus among professors as to the overall quality of the briefs and the various elements that made them effective.⁴³

III. CONTEXTUAL INFORMATION FOR THE LEGAL WRITING REVIEWED

Like most law schools, Maryland's first-year students are required to take two semesters of legal writing courses.⁴⁴ The first-semester course focuses on predictive legal writing and, while this course is not taught uniformly, most legal writing assignments involve the preparation of all or part of an office memorandum. In contrast to the second semester, and different than many schools, the fall semester legal writing course at Maryland is taught by full-time law school professors, who are primarily casebook and clinical faculty, and in conjunction with a casebook course, such as Criminal Law, Torts, Contracts, or Civil Procedure, taught by the same professor.⁴⁵ The spring semester Advocacy course focuses on persuasive legal writing, and students are required to prepare both a trial motion memorandum and an appellate brief. As indicated above, the Advocacy course is taught primarily by adjunct faculty in a stand-alone course.

In addition to moving from objective to persuasive writing, students should also experience a shift in difficulty in legal writing assignments over the course of the school year as each new assignment is designed to be incrementally more difficult than the one before it. Students generally begin the year writing a short office memorandum or discussion section of an office memorandum on a

43. The author reviewed the briefs, first making a holistic assessment and then a more-focused assessment. Two Maryland law graduates, who were then third-year students, conducted research and helped to establish the criteria for evaluating the briefs. The appellate briefs were evaluated first by the two student reviewers. The student reviewers independently evaluated each brief, judging it both holistically and with respect to the established criteria. After independent review, these reviewers then met to discuss their individual assessments. While they found some disagreement, they also concluded that their initial evaluations were consistent in many respects. They ultimately wrote a combined report summarizing their general findings and also discussing their assessment of each brief in good detail, considering the above stated criteria. After the author completed her assessment, she consulted the report prepared by the student reviewers and compared her findings and assessment. While there were some disagreements between the author's evaluation and the students', the most significant strengths and weaknesses of each brief were consistently identified. Through this process the author was able, to some extent, to test the review process.

44. ALWD SURVEY, *supra* note 16, at vi, 7 ("Almost all writing programs include required courses in both the first (98% of responders) and second (99% of responders) semesters of the first year of law school.")

45. *Id.* at v, 5.

single, discrete legal issue. The law is usually relatively straight forward and students work with little legal authority. By the end of the year, students write a full appellate brief on two distinct legal issues, complying with many of the requirements of actual court procedural rules. The law for persuasive writing assignments is more complex, often involving constitutional issues, and federal statutes and case law. In addition, students work with significantly more legal authority. Students are also assigned to represent opposing parties, but expected to know the arguments for both sides.

The students' work is also expected to become increasingly more independent over the course of the year. Nonetheless, throughout the year, students are given significant support and often work collaboratively in their legal writing classes. Students often discuss their organization and legal analysis for their assignments in class with both their professor and peers. While more guidance is provided on early assignments, even for later assignments in the second semester, it is not unusual for professors to work with students to establish a sound organizational structure for their appellate briefs and identify viable arguments, as well as potential counter-arguments. In addition to receiving guidance in class, students also have the opportunity throughout the year to work one-on-one with their professor and student teaching assistants. The professor and teaching assistants provide written and oral feedback to students on their document drafts throughout the fall semester and on their motion memorandum drafts in the second semester. Professors often provide feedback on common "errors" in class, and the professors and teaching assistants usually meet with students individually during the semester for at least one planned writing conference, and encourage students to schedule additional conferences, as they deem necessary.

In Advocacy, the appellate brief assignment involves the same legal problem as the motion memorandum assignment, though students are required to "switch sides" and represent the opposite party. Nonetheless, the feedback on the motion memorandum is relevant to the appellate brief. It is not expected that students will receive significant, individualized feedback on their appellate brief drafts, and students often only turn in their final drafts of their appellate briefs, not the preliminary drafts, to their professors.

One way that Maryland varies from many other law schools is in its approach to teaching research.⁴⁶ Research is taught independently of legal writing in an accelerated course in the first half

46. *Id.* at 11.

of the second semester. It follows that in both semesters, students engage primarily in closed–research legal writing assignments, for which much or all of the legal authority they are to use for a given assignment is provided to them. For the final appellate brief assignment, students are provided with sufficient authority to complete their assignment successfully, but are often given the option of doing additional research if they choose.

The final appellate briefs reviewed by the author addressed a legal problem involving an arrest of a hypothetical client, John Smith, in the doorway of his home. An anonymous tip to local police accusing Smith of selling illegal drugs prompted the arrest. The parties' arguments addressed whether police violated Smith's constitutional rights when they reached across the threshold of his home to arrest him. Prior to his arrest, the police had not obtained a warrant. In addition, the briefs addressed an alternative argument that focused on whether the police had probable cause to arrest Mr. Smith. For the legal writing assignment, students were provided with a number of documents including a case record that included court documents, relevant legal authority, and court procedural rules.

IV. WHAT LAW STUDENTS WERE ABLE TO LEARN IN TWO SEMESTERS OF LEGAL WRITING

While the author attempted to establish specific criteria for assessing the student briefs, the evaluation of the students' legal writing inevitably remained subjective to some extent. That said, the author's assessment was in accord with the initial assessments of the professors who selected the briefs, to the extent that the author agreed that every best brief submitted for review was overall an effective document. Of course, each brief had its strengths and weaknesses, and no one appellate brief was most effective in every respect. A common strength of all of the best briefs was their organization and clarity, as well as their persuasiveness. All briefs clearly explained the more general rules that governed the issues, and structured their arguments around the relevant law. One area in which appellate briefs varied considerably was with respect to the writers' explanations of more specific aspects of the relevant rules of law, including the writers' use of prior cases in their arguments. Some students included more information in their case descriptions and others provided less, yet both approaches seemed effective in many circumstances. The effectiveness of the arguments seemed to depend less on this factor, however, and more on how

well writers synthesized information and explained the connections, and differences, between the prior cases and their client's case.

Below are some specific examples from the Argument and Statement of Fact sections of the students' final appellate briefs. To make these arguments easier to follow, all examples are from appellate briefs written on behalf of the defendant, Mr. John Smith. For comparison, examples from other less effective briefs have also been included.

A. *Clear, Concise Summaries of the Arguments*

Most of the appellate briefs contained summaries of the arguments that were concise and laid out the legal positions of the parties fairly clearly. Writing a summary can be challenging for students as they need to be able to boil their argument down to a few key legal points and facts that they present clearly and efficiently. Even more, students need to figure out the best way to present these arguments so that they are persuasive to the reader. Some of the summaries, like the example below, seemed to focus primarily on stating the relevant legal rules, but also addressed the key facts of Mr. Smith's case:

Example 1: Police violated John Smith's Fourth Amendment rights by crossing the threshold of his private home without a warrant during the course of his arrest. Smith's arrest was not made lawful when he opened the door of his home to police because he retained an expectation of privacy and did not acquiesce to the authority of officers Absent exigent circumstances or consent, the threshold of one's home cannot be crossed without a warrant. [Cite]⁴⁷ Although what a person knowingly exposes to the public is not a subject of Fourth Amendment protection, [Cite] an individual's right to privacy is not completely relinquished when one opens the door after being summoned by a police officer's knock. [Cite] This privacy right may be lost, however, if an individual submits to police authority. [Cite]

Other summaries, like the example below, incorporated more case facts, but provided less information about the law:

47. For brevity, most citations have been omitted from the examples.

Example 2: The District Court did not err in granting defendant John Smith's motion to suppress the evidence because Fourth Amendment violations occurred. Police violated the Fourth Amendment when they crossed the threshold into John Smith's home in order to arrest him, when the police did not have a warrant. There is a firm line at the entrance to the home which cannot reasonably be crossed without a warrant. [Cite]

B. *Synthesized Information*

The best briefs benefitted from useful topic sentences and rule statements that summarized the relevant law. The following examples come from a part of the argument where students discussed prior cases involving doorway arrests, including cases where the defendant came to the door in response to a police officer's knock. The factual similarities and differences among these cases were not obvious at first. Students, therefore, had the task of identifying commonalities and distinctions among the prior cases. Some students did an excellent job cobbling together a rule statement from the existing cases and then explicitly stating it:

Example 3: Circuit courts have diverged in deciding the outcome of circumstances where a suspect is not already present in the doorway when police arrive. The Fourth Circuit follows the approach that an expectation of privacy is not forfeited when one exposes oneself to public view after police summon the individual by command or through a knock at the door. [Then, citing and describing *United States v. McCraw*, 920 F.2d 224 (4th Cir. 1990)].

Most of the students included synthesized rule statements in their appellate briefs, though some were more useful than others. Occasionally, a student did a good job describing the holding and facts of a case, but the argument was less effective because the student did not place a synthesized rule statement before the discussion. For example, instead of providing a synthesized statement of the relevant law, one student provided only the following much less useful sentence before launching into a discussion of the case: "Support for the *Payton* [*v. New York*, 445 U.S. 573 (1980)] [the seminal doorway arrest case] decision is found in *McCraw*."

C. *Useful Case Descriptions*

For one part of the argument, the relevant authority included prior cases with facts that were often similar to Mr. Smith's case facts. So that they could later analogize or distinguish these cases from their client's case, it was important that students clearly describe the facts of the prior cases. For example, students needed to distinguish between cases where courts found that arrests in the doorway of one's home were constitutional compared to those where arrests were deemed to be unconstitutional. The surrounding facts, including how the defendant came to arrive at the door, impacted the outcome of these cases. In the example below, the writer makes clear under what circumstances police have been found not to violate a defendant's privacy (when the defendant opens the door and consents) and when they have (when the defendant opens the door but does not clearly consent):

Example 4: The police do not violate an individual's Fourth Amendment rights when that individual answers a knock on the door and explicitly consents to a search. [Cite] (discussing that after Defendant relinquished his right of privacy and was arrested with probable cause by the police officer, Defendant gave explicit written and verbal consent to the police officers allowing a search). However an individual does not surrender his expectation of privacy nor consent to arrest by solely opening the door to his home. [Cite to *McCraw*] (holding that Defendant did not relinquish his expectation of privacy in his hotel room when he opened the door slightly to determine the identity of the police knocking on the door).

Another student also discussed the court's holding in *McCraw*, but did so less effectively because he did not include a contrasting case or point out distinguishing facts. In the example below, the writer chose to ignore the factual differences between the facts in *McCraw* and those in Mr. Smith's case (for example, that the defendant opened the door only slightly in *McCraw* compared with Mr. Smith fully opening the door in the present case), though these factual differences would likely be noted by a court:

Example 5: In *McCraw*, one of the defendants opened the door to his hotel in response to a police knock. The Court held that "a person does not surrender his expectation of privacy nor consent to the officer's entry by so doing, and that his arrest . . . is contrary to the [F]ourth [A]mendment." [Cite]

D. Clear Comparisons and Distinctions of Prior Cases

In arguing that Mr. Smith's arrest in the doorway of his home was unconstitutional, students had to discuss conflicting rules set forth in competing authority. The United States Supreme Court's decision in *Payton v. New York*, 445 U.S. 573 (1980) established the doorway of the home as a line that police cannot cross to affect a routine warrantless arrest. In an earlier case, *United States v. Santana*, 427 U.S. 38 (1976), the Court had allowed police to cross the threshold and enter a home to affect an arrest where a suspect was standing in the doorway when police arrived holding what appeared to be contraband and retreated into the home when she encountered the police. As such, that case involved not only the viability of an arrest in the doorway, but also the police's right to enter the home when exigent circumstances existed. Many students did an excellent job discussing these two cases and showing the similarity and distinctions between those cases and their client's case facts.

Example 6: Unlike, Mr. Smith who merely stood inside his doorway while he responded to a knock, the suspect in *Santana* had voluntarily positioned herself in plain view of a busy Philadelphia street and "was exposed to the public view, speech, hearing and touch as if she had been standing completely outside her house." [Cite] [In *Santana*,] [t]he suspect attempted to thwart an arrest begun in public by retreating into her home and, by virtue of this "hot pursuit," police were not required to obtain a warrant before entering the suspect's home [Cite] Other [C]ircuits have distinguished the application of *Payton* from *Santana* and its progeny by focusing on whether the actions of the suspect reveal any disregard for his privacy expectation.

One student took a somewhat different approach, but likewise effectively compared and distinguished the facts of the prior cases:

Example 7: *Santana* only justifies a warrantless entry into the home because of exigent circumstances—the "hot pursuit" of a suspect. [Cite] In *Santana*, the defendant fled from a public place into her home after the police identified themselves and sought to place her under arrest. [Cite] (holding that the facts of the case were distinguishable from *Santana* on the grounds that the defendant opened the door in response to a knock). In

this case Mr. Smith did not flee from the police and the government has conceded that the police entry in this case was not justified by exigent circumstances.

Another student did a fairly good job distinguishing the facts of *Santana* and made the same general argument as the students above. This later argument was arguably less effective, however, because the student failed to connect the distinguishing facts of *Santana* to the Court's holding in that case. Moreover, while the writer included in his discussion of *Santana* that the case involved exigent circumstances, he did not state explicitly that there were no exigent circumstances in Mr. Smith's case. While the lack of exigent circumstances was implied and could be understood from the context, an explicit statement would make the argument more effective:

Example 8: Santana was standing in her doorway conducting illegal business activities when the police arrived on the scene. When the police moved to arrest her she retreated into her home and the police were forced, due to exigent circumstances, to follow in hot pursuit. Mr. Smith was not standing in the doorway when the police arrived. The arrest took place in the doorway only after Mr. Smith came to the doorway in response to a police knock. [Cite] But for the police knocking on his door, Mr. Smith would not have been in his doorway, and while he was in his doorway Mr. Smith made it clear via verbal communication with the police that he did not consent to their presence without a warrant.

E. Effective Use of Relevant Language in Opinions

As indicated above, students were provided with sufficient legal authority to complete the legal writing assignment. Some students found some excellent language in the cases provided that they used to enhance their arguments. Where students found helpful case language, this tended to add a bit of "punch" to their arguments and add to the overall persuasiveness of their arguments. In their arguments, students were expected to address the fact that, in Mr. Smith's case, the police's intrusion into the home was minimal. The following examples compare two students' use of helpful case language. In the first example, the writer used the case language at the end of the relevant part of the argument to drive the point home:

Example 9: The unlawful conduct by police in the aforementioned cases and the conduct by [] [p]olice officers in the present case are one and the same . . . Although only Detective Smalls' arms and hands crossed Smith's threshold, for Fourth Amendment purposes, a breach no matter how small, is a breach. [Cite] (“[I]ntrusion into the home without a warrant by even a fraction of an inch is too much.”).

Some students did not use this language in their briefs. As the police intrusion into the defendant's home in the present case was minimal, however, the above language seemed very appropriate to quote. Yet, as the next example shows, even where other students used this same language, the placement of the quote affected its impact. One student used this quote at the beginning of the argument in a more general discussion that did not address the specific facts of Mr. Smith's case. The language as placed seemed helpful to the analysis, but its use was less dynamic:

Example 10: The Court has in *Payton* and other cases concluded that this privacy protection casts a bright line over the doorway of one's home, which, absent a warrant, consent or exigent circumstances, police shall not breach. [Cite] (prohibiting a warrantless police invasion of a home “by even a fraction of an inch”).

F. Persuasive Presentation of Facts

Persuasive authority on doorway arrests provides that a defendant, who is told by police that they are at the door to arrest him and then opens his door, has acquiesced to his arrest. Thus, in arguing that Mr. Smith relinquished his privacy when he opened his door to a police knock, effective advocates for Mr. Smith sought to suggest that the case evidence did not establish that Mr. Smith knew that police were at his door when he responded to their knock. Moreover, because the courts draw a bright line of privacy at the threshold of the home, effective advocates emphasized that Mr. Smith was standing in his home throughout his arrest.

In the following example, the writer did a good job of generally stating the relevant facts and being explicit that Mr. Smith remained in the doorway during his arrest. This writer also included the “bad fact” that, according to police testimony, Mr. Smith peered out the window prior to opening the door, but presented the officer's testimony on this point in a manner that questions its validity (e.g.

someone who looked like Mr. Smith peered out the window). However, the writer says nothing about the source of this statement (e.g. “according to the police”) and thus appears not to contest the basic facts of what occurred (e.g. someone who looked like the defendant peered out the window):

Example 11: A little while later, at about 6:20 p.m., the officers went to Mr. Smith’s house unannounced, and without a warrant. [Cite] Mr. Smith’s car was parked in the driveway, and no one was outside. [Cite] All the curtains were drawn, and the door was shut. [Cite] The officers knocked on his door without identifying themselves and someone who looked like Mr. Smith peered out of the window. [Cite] . . . After a few seconds a man matching Mr. Smith’s description opened the front door while remaining in the doorway. [Cite]

In the example below, the writer also does a good job of presenting the facts in a manner favorable to Mr. Smith. However, this writer chose to omit the “bad fact” that Mr. Smith is purported to have looked out the window before he opened the door. While a strategic choice, a court may not appreciate what it may interpret to be the writer’s lack of candor:

Example 12: On the evening of November 16 [], two members of the Police Department, including Detective Mark Smalls, arrived at the home of Appellee John Smith. [Cite] The yard was empty, the door was shut, and windows were closed and covered by curtains. [Cite] Mr. Smith answered an unannounced knock at his door to find the two police officers. [Cite] Upon recognizing the officers, and while standing inside the doorway of his home, Mr. Smith requested that unless they had [a] warrant, he would like for the officers to leave his property . . .

Mr. Smith remained in the threshold of his home during this exchange [with police]. [Cite] [Detective] Smalls then reached his hands and arms across the threshold of Mr. Smith’s home to grab him[,] spin him around, and push him against the door-jamb before handcuffing him; this all occurred while Mr. Smith remained inside his house. [Cite]

The above examples demonstrate that the authors of the best appellate briefs were able to develop some level of proficiency in legal writing by the end of their first year. These students were able to draft appellate briefs that were considered to be effective when

evaluated holistically, and also exemplify, to varying degrees, the identified qualities of a good brief.⁴⁸

V. WHAT LAW STUDENTS STILL NEED TO BE TAUGHT AFTER TWO SEMESTERS OF LEGAL WRITING

The above review paints a fairly optimistic picture of what law students can learn in their first-year legal writing courses. Those students whose appellate briefs were identified as among the best in the class, were able to produce legal writing that was judged to be effective overall and to possess many of the elements associated with effective legal writing. These briefs demonstrate the students' good grasp of the applicable law, and familiarity with the processes of legal decision-making and the conventions of legal practice. Moreover, the work of these students reflects an effective thinking process for analyzing a legal problem. The examples show that the students who authored these briefs made a number of thoughtful decisions in the course of their writing, for which they clearly considered their legal audience and writing purpose.

The above study suggests that it is realistic for legal educators to expect that law students will finish their first year with some knowledge of how to analyze the legal problems that they will be assigned to evaluate and draft the basic documents that they will be expected to produce, when they first enter the practice of law. It seems less clear, however, whether it is reasonable to expect that students who successfully complete their first-year legal writing courses will be able to engage successfully in increasingly complex legal analysis and writing, in a variety of forms, without the need for significant writing guidance and instruction. While the achievements of these students should be celebrated, the effective legal writing in the reviewed student briefs must be viewed in the proper context. The overall high quality of work presented should not be interpreted as an indication that these students have mastered legal writing or are even competent in this skill after taking their first-year legal writing courses.

48. In preparing this article, the author also reviewed briefs from other students that were not identified as best briefs, including some briefs that received average or low grades. Even among these briefs, the author found that most of the students' briefs were well organized, though these briefs were generally less clear and less concise, and many were not particularly persuasive. Like the writers of the best briefs, these writers attempted to synthesize information and make connections between their case and prior cases. Though many of the writers of the other briefs did this less effectively, most were able to produce, among other things, persuasive statements of facts, some synthesized rule statements, and some made comparisons and distinctions between the present case and prior cases.

In evaluating the work of first-year students, it is important to understand what their accomplishments in legal writing do and do not represent. To this end, it is important to consider the professional context in which effective legal writing is done. As discussed more fully above, effective legal writing requires more than just strong technical writing ability. To be successful in this task, writers must be able to analyze legal problems and to communicate their analysis in a manner that will help them achieve a particular goal. As legal novices, new law students begin to engage in legal writing with little context and knowledge from which to work. Students are asked to write a document that meets the needs of a legal audience and serves a specified purpose, while they are just developing an understanding of the roles of legal professionals and the methods by which legal decisions are made. For many professors of legal writing, it can feel as if they are “trying to teach the wrong people the wrong material at the wrong time.”⁴⁹ It follows that legal writing professors must provide significant guidance and feedback to students, especially early on. With their professors’ help, legal novices become not only better communicators, but also better legal thinkers.⁵⁰

To help facilitate the learning of the students, who are gaining knowledge about law and legal practice while writing in this context, it is important for legal writing professors to carefully plan and execute their students’ writing assignments.⁵¹ This is true even at the end of the first year. For example, for the appellate brief assignment, the legal issues were considered carefully to ensure that the selected issues were appropriately difficult for new legal writers. Discrete legal issues were selected in order to contain the scope of the problem. More important, throughout the process of writing their appellate briefs, students had the benefit of receiving

49. Ian Gallacher, *Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 168 (2006) (describing the process of teaching legal research to students who have not yet mastered the first-year curriculum as somewhat comparable to “trying to teach the wrong people the wrong material at the wrong time.”) (quoting Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 LAW LIBR. J. 431, 441 (1989)); see Felsenburg & Graham, *supra* note 3, at 257 (noting that new law students often lack “any context in which to place the fundamental legal skills” they are being taught).

50. See Rideout & Ramsfield, *supra* note 4, at 45–46 (“[W]riting is an integral part of thinking and cognitive development.”) (citing Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122 (1977) (discussing how writing helps writers develop their thoughts)).

51. See Venter, *supra* note 7, at 626–28 (2006) (explaining that teachers of legal writing need to be explicit as they teach students analytical skills in order to better help students become experts in analysis).

extensive guidance and feedback. The relevant issues were identified for the students, significant authority was provided, and students collaborated to determine the best arguments and organizational structure. Under these circumstances, students had only a limited opportunity to make their own decisions as to how best to frame and support their arguments, and to develop their own writing voice.⁵² Thus, even the students' final appellate briefs do not fully represent the level of difficulty of work that students will do when they enter practice, or mimic the circumstances under which students will be writing.

Moreover, the fact that students have been able to produce effective legal briefs in their first-year courses, does not necessarily mean that they will be equally successful in doing similar work for another course. While many law professors expect students to be able to engage more independently in new practical legal writing tasks after their first year, it may be difficult for many students to recognize the connections between the work that they did in their first-year legal writing courses and what they are later called upon to do. To be successful in addressing new legal problems and preparing different types of legal documents, students will need to be able to apply their previously acquired knowledge. Once a new legal writer grasps an understanding of legal writing in one context, they still have to transfer this knowledge to other contexts. While often assumed otherwise, such a transition is not always easy for students.⁵³ Contrary to what many legal educators expect, even

52. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1098 (1986) ("Although many in the legal profession see legal writing courses as remedial, teachers of advanced writers generally concur that first-year law students possess 'flat competence,' which is the ability to produce, for the most part, a document not marred by mistakes of spelling or grammar. Nonetheless, their writing lacks an authentic voice . . .") (quoting Maxine Hairston, *Working with Advanced Writers*, 35 C. COMPOSITION AND COMM. 196, 198 (1984)); Terrell Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 892 (2002) ("The greatest opportunity law offers 'is not that one can learn to manipulate forms, but that one can acquire a voice of one's own, as a lawyer and as a mind; not a bureaucratic voice, but a real voice.") (quoting JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 25–26 (1999)).

53. See Laurel Currie Oates, *I Know That I Taught Them to Do That*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 1, 236 (2001) (noting the concern expressed by teachers "that students are not able to recognize that information acquired in one class is also applicable in another class."); Schrup, *supra* note 2, at 303 (arguing that differences in teaching methods and the failure to collaborate "can ultimately hinder [students'] seamless learning from the first-year program into advanced, clinic-based writing."); Kowalski, *supra* note 25, at 285, 288–295 (discussing the "transfer of learning" phenomenon where the mind fails to recognize "applications for previous learning in new situations due to the change in context.").

when students successfully complete a task, they often have difficulty accessing their knowledge when they change contexts.⁵⁴

Legal writing professors see examples of this every year when students move from their first semester legal writing course to their second. Some students have difficulty understanding which skills developed in their first-semester course focused on predictive legal writing, are relevant to their second semester course focused on persuasive legal writing. To help students make this transition, legal writing professors often engage students in a discussion of which skills are needed for both tasks, such as good organization, synthesized discussions of the relevant legal rules and cases, and useful case descriptions that are appropriately detailed. Moreover, some professors introduce persuasive legal writing problems to students using a familiar process that the students employed in their predictive writing—evaluating the strengths and weaknesses of each sides' potential arguments.

Sometimes transfer issues can be even more acute. Many students have difficulty as they attempt to organize arguments that apply different legal standards or types of legal tests, such as the weighing of factors as opposed to the satisfaction of elements. Even such a subtle shift from one structure of legal analysis to another, can challenge the novice legal writer. It follows that transitions to other types of legal writing, like scholarly writing, will necessarily be met with some challenges as the connections between these very different writing assignments are much more tenuous.⁵⁵ While some skills are important to both practical and scholarly legal writing, such as writing clearly and concisely, it is also true that the audience and purpose of scholarly writing differs significantly from that of practical legal writing, and the legal writer must often make substantially different analytical and writing choices.

Professors are often dismayed when students are unable to apply what they have already learned to new situations. Such difficulty

54. See Kowalski, *supra* note 25, at 289 (noting that “[n]ot only do students often overlook applications for knowledge obtained in previous situations, they also sometimes appear to regress when asked to change contexts.”) (citing Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 1, 6 (noting that regression may occur when students are introduced to new experiences) and Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DET. MERCY L. REV. 207, 236 (2009) (describing student writing regression during transition periods)).

55. See Murray, *supra* note 27, at n.115 (explaining that students need to be made aware that a transition to scholarly writing is not as easy as other legal writing transitions, and pointing out the uniqueness of the need for the writer to find and develop a thesis).

in transferring knowledge, however, is part of the learning process.⁵⁶ For novices, the recognition of patterns and routines is simply more difficult than it is for experts, and this should be anticipated.⁵⁷ While many legal educators treat legal writing as a singular activity, legal educators will better meet the needs of their students if they recognize that legal writing takes various forms, covers different subjects, speaks to different audiences, and serves different purposes. Students will be better served if professors acknowledge the breadth of legal writing and avoid setting expectations for them based upon a one-size-fits-all perspective.

While the above study focused on exemplary legal writing and sought to illustrate the best that legal writing professors can realistically expect of their students, it must also be acknowledged that not all students will be able to reach this level of proficiency when they complete their first year. Many students, despite their best efforts, simply do not fully grasp legal writing by the end of their first year of law school. As two legal scholars aptly pointed out, becoming an effective legal writer is a journey that will naturally take longer for some than others:

Students cannot have the law and legal patterns of analysis drilled into them so much as they must acquire them, in a manner analogous to the ways in which other students learn a foreign language. When students have difficulty writing legal analysis or making strong legal arguments, they are not necessarily hindered by poor thinking so much as they are struggling with the unfamiliarity of legal discourse and striving to master their entry into it. To label them as faulty writers is misleading; they are more like travelers, searching for a destination that is sometimes unclear to them and arriving at that destination at different rates.⁵⁸

56. See Kowalski, *supra* note 25, at 290 (discussing the problem of transfer of knowledge and noting that the correct question is “how can [professors] help students to transfer their learning . . .”) (citing SARAH LEBERMAN, LEX MACDONALD & STEPHANIE DOYLE, *THE TRANSFER OF LEARNING; PARTICIPANTS’ PERSPECTIVES OF ADULT EDUCATION AND TRAINING* 1–8 (2006)).

57. See Schrup, *supra* note 2, at 315–16 (discussing experts ability “to detect and remember patterns in complex phenomena that are essentially invisible to novices”) (quoting Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 344 (1995) (explaining that experts are more able to recognize and remember patterns)).

58. *Id.* at 63–64, n. 105 (“This is evidenced most clearly by the phenomenon of different first-year law students ‘getting the hang of’ legal analysis at different points during the first year (and some not until the second year). Using the journey metaphor, we do not intend to

For those students who are not as successful in their first-year legal writing courses, it seems that their problems with legal analysis and writing may be compounded in later years. These students' less impressive work in legal writing may signal that they did not fully understand the relevant law and aspects of legal practice needed for successful legal analysis, or that even if they did, they were unable to communicate their analysis in a manner that is effective in a legal practice context. Their work suggests that they need additional practice engaging in legal analysis and writing under the close supervision of professors with expertise in its teaching. When these students leave the legal writing classroom, most legal writing professors would not be surprised to learn that they struggle as they confront new legal problems and writing assignments that vary in substance and form from the work they previously did, with less expert guidance.⁵⁹ For example, these writers may not adapt easily when they are called upon to make additional considerations in their analysis and writing as they take on the additional responsibility of navigating attorney-client relationships in their legal clinics.⁶⁰

CONCLUSION

Professors' concerns about student writing may stem in part from their observations that students are entering law school increasingly less prepared. However, legal educators must be careful not to overestimate the extent of this problem. Many problems with students' legal writing have long been assumed to be indicative of students' lack of general writing ability, rather than being acknowledged as unique to the type of analysis and writing that is required in legal practice.⁶¹ Students' initial struggles with legal writing often have less to do with technical writing skills, and more to do with

imply that all students are equal in their traveling abilities; different students arrive at expertise at different speeds (and, occasionally, do not arrive). That is, different students master the conventions and strategies of an unfamiliar discourse, and especially of a difficult one like law, at different rates, drawing upon different abilities and prior learning experiences. The point, however, is that their mastery is largely developmental, and especially in the early stages of law school, marked differences in performance can in many ways be attributed to different positions along a developmental scale—or along the journey.”)

59. See Lysaght & Lockwood, *supra* note 4; Rideout & Ramsfield, *supra* note 4.

60. See Schrup, *supra* note 2, at 317 (discussing the differences between legal writing and clinical teaching methodologies and explaining how legal writing professors necessarily focus more on an “institutionalized legal audience” and that “teaching styles must by their very nature be directive,” while clinical faculty embrace “progressive, client-centered lawyering” and adopt teaching methods “that are experiential, reflective, and non-interventionist.”).

61. See Rideout & Ramsfield, *supra* note 4, at 75 (“A consequence of the formalist view is that legal writing programs may erroneously set the goal of attempting to prepare students

the process of introducing these legal novices to the new experience of writing in a legal context.⁶²

More important than identifying appropriate expectations, is the task of trying to figure out how legal educators are to address students who, despite their best efforts, are unable to reach a sufficient level of proficiency in legal writing in only two semesters. The ABA has recognized the importance of teaching legal writing by requiring law schools to establish learning outcomes designed to help students gain competency in this skill. In order to meet the needs of all students, law schools must establish goals that go beyond introducing students to legal analysis and writing. Students will benefit if more law schools commit to exposing their students to increasingly complex legal analysis and engaging students repeatedly in the worthwhile activity of writing, with the needed level of faculty supervision. Perhaps, instead of setting expectations that are realistic for some, but not all law students, more law schools can take a closer look at what their students need to learn in order to become sufficiently prepared to write when they enter legal practice, and adapt their existing curriculums in order to better meet this worthwhile goal.

for law practice in only one year. When the program fails to meet this goal, questions are raised; but this question-raising ignores students' novice status and the time it takes each student to become properly socialized.”).

62. See Williams, *supra* note 54; Rodriguez, *supra* note 54.

