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LEGAL WRITING: A REVISED VIEW

J. Christopher Rideout* and Jill J. Ramsfield**

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I continue to share [the] vision of the potential for a course in which first year students are required to use the full range of skills which attorneys, judges, and other law-trained persons must use in dealing with real-life problems and are given rigorous, individualized evaluations of their efforts. Our increasingly competent first year students deserve no less.¹

I. INTRODUCTION

When Professor Marjorie Dick Rombauer concluded her landmark article twenty years ago, she expressed a hope that many law schools have yet to realize. While legal research and writing programs exist in all law schools,² many still have short-term and short-sighted programs.

1. Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. Legal Educ. 538, 552 (1973). Professor Rombauer knew then what we hope others will discover now: Legal writing is a complex act that requires rigorous and continuous training. Professor Rombauer, a pioneer in legal research and writing, compiled a history of legal writing programs. *Id.* She concluded that more needed to be done to develop legal problem-solving techniques, to increase credit load, and to raise the quality and the amount of feedback given to students. Having discovered faults and suggested solutions, she planted the first seeds for nurturing and developing legal writing courses. Her work has inspired hundreds of legal educators, especially those who continue to work in legal writing. Our deepest appreciation goes to her.

2. All of the 176 accredited law schools have legal writing programs. See Association of American Law Schools, *The AALS Directory of Law School Teachers* 1125-30 (1992-93). Of those accredited law schools, 126 schools responded to the Legal Writing Institute's 1992 survey on legal

Many, if not most, law students are not rigorously trained, do not experience sustained individualized instruction, and do not explore problem-solving in an environment that simulates either law practice or rigorous legal scholarship. After their first year, most students fend for themselves in an atmosphere that tests their writing abilities in only two of several potential genres—exams and seminar papers—and few are trained by legal experts whose experience and study offer the best methods for ushering novices into a new discourse.

Professor Rombauer's vision may not have been realized because many legal educators view the teaching of legal writing through glasses whose prescription is outdated. That prescription focuses on models of teaching writing that ignore the unique discourse community of law. Within that community, students must acculturate themselves to new uses of language, new paradigms of reasoning, new rhetorical considerations, and new conventions. If the focus is too narrow, such as on correcting sentences, students may still write poorly, resist learning, and discover too late the rich and complex role that writing plays for lawyers and legal scholars.

The current generation of lawyers is encountering a changing legal practice in which legal writing at once plays a more central role, and has gotten worse.³ As partners delegate more, they find they must fix more.⁴ The demands of modern legal practice are increasing; today's lawyers must incorporate new technology, create more versatile research strategies, and produce better products—faster. Yet legal education is not up to the task. Ironically, in an educational setting that must prepare students to become professional writers, training is still poorly funded,⁵

writing programs. See Jill J. Ramsfield & Brien C. Walton, *Survey of Legal Research and Writing Programs* (1992) (unpublished manuscript, on file with the *Washington Law Review*).

3. In many law practices, writing has become increasingly a replacement for speech: letters, in-house memos, and briefs substitute for meetings, courtroom conversations, and oral arguments. This is especially true in big practices. Yet, the more lawyers write, the more their readers complain. See, e.g., Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. Rev. L. & Soc. Change 519 (1985); James C. Raymond, *Legal Writing: An Obstruction to Justice*, 30 Ala. L. Rev. 1 (1978); Steven Stark, *Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389 (1984).

4. Our work in consulting has revealed supervising attorneys' disgruntlement; often they would rather do the work from the beginning themselves than rework what they consider the increasingly inferior product of new associates.

5. Salaries for most legal writing professors average less than \$35,000, much less than for professors and clinicians at the same schools. See Ramsfield & Walton, *supra* note 2, question 63. Of 77 responses, in 28 schools, the difference between law professor and legal writing professor salaries is more than \$35,000; in 21 schools, the difference is between \$20,000 and \$35,000; and in 28 schools, the difference is \$20,000 or less. *Id.* question 44. The discrepancy is somewhat smaller

poorly managed,⁶ and poorly understood.⁷ While legal writing professors are seeking to remedy that situation amidst bare budgets and broken spirits, most legal educators have responded poorly to the need for better legal writing training.⁸ No wonder there is such widespread criticism of law students' and lawyers' writing.

The criticism, some of which originates with the most powerful readers,⁹ comes easily. Yet few commentators have offered practical or

for clinicians: Of 58 responses, in 10 schools, the difference is more than \$30,000; in 20 schools, the difference is between \$10,000 and \$30,000; and in 28 schools, the difference is less than \$10,000. *Id.* question 45. Such discrepancies encourage turnover, promote poor morale, and lead to the failure to attract or retain highly qualified legal writing specialists.

In addition, the yearly budget for legal writing programs in 89 of 104 responding schools is less than \$50,000. *Id.* questions 56, 66, 76, 92. Eight schools have budgets of between \$50,000 and \$100,000, 2 schools between \$100,000 and \$150,000, and 5 schools have budgets of over \$150,000. One hundred four of 127 schools responded to questions about the size of their budgets; those who did not reply may not know because the legal writing professors who responded may have no say in the budget process.

6. Evidently mystified that their programs are not working and unwilling either to investigate the reasons behind their failure or to invest money in quality programs, schools regularly redesign programs. See Flora Johnson, *Legal Writing Programs: This Year's Models*, Student Law., Feb. 1980, at 11 (listing several different structures for legal writing programs). Quite often, these redesigned programs fail, too, thus leading faculty to the faulty conclusion that legal writing cannot be taught. It cannot, within their purview.

7. Many law professors see legal writing courses as necessary but unpleasant evils, a catch-up course for those who did not learn grammar in the first place. See *infra* parts IIA, IIC. Cf. Flora Johnson, *Teaching Legal Writing: An Idea Whose Time Has Come. Or Has It?*, Student Law., Nov. 1979, at 10.

8. In addition to keeping salaries for legal writing professors low, many law schools also limit the length of legal writing professors' contracts. This also lowers morale. Of 71 schools that employ full-time non-tenure track legal writing professors, 57 give only one-year contracts, 7 offer two-year contracts, 4 offer three-year contracts, and only 3 offer contracts that are five years or over. While every school but one responding offers renewable contracts, many limit the number of years that legal writing professionals can stay, and that limit is usually three years. Increasingly, schools are allowing legal writing professionals to stay—49 of 87 that have full time tenured or non-tenured faculty—but they are not increasing their salaries. The result is that legal writing professionals leave. In 45 of 85 schools that responded, legal writing professionals have stayed three years or fewer. Another 23 have stayed five years or fewer. Only 13 have stayed over seven years. See Ramsfield & Walton, *supra* note 2, questions 40, 41, 64, 65. Without the incentives of longer tenure and better salaries, legal writing professors cannot create and develop effective programs.

9. Judges are now writing and speaking about legal writing deficiencies. See, e.g., Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. Sch. L. Rev. 1 (1989) (complaining that briefs are deficient and that legal writing is a disservice to clients); Tom Goldstein, *The Law: Drive for Plain English Gains Among Lawyers*, N.Y. Times, Feb. 19, 1988, at B7 (describing Wisconsin Supreme Court Justice Bablitch's lecturing in Wisconsin to law students and lawyers about the poor condition of legal writing).

viable solutions.¹⁰ And few authors have gone beyond grammatical and lexical concerns to redefine legal writing problems in their social and intellectual contexts.¹¹ Linguists, composition theorists, professional writers, and writing teachers have explored writing contexts in other disciplines to uncover solutions to writing problems. Legal educators must now find similar solutions for the particular problems presented in the first years of learning legal discourse. The purpose of this Article is to assist them in doing so.

This Article begins with the premise that most law students will become professional writers: that is, they will make their living from writing, whether in practice or academia. As such, they should be confident and comfortable with legal discourse and composition in practical, social, and intellectual contexts.¹² That confidence must be based on good training throughout their law school careers, and that training must look beyond legal writing problems to solutions.

To suggest solutions to legal writing problems, this Article examines traditional definitions of legal writing, definitions that may themselves be impeding progress toward more effective training. It then offers a revised definition of legal writing and explores how that definition informs legal writing pedagogy. Finally, it uses that definition to suggest specific techniques for teaching legal writing, for designing legal writing programs, and for ensuring that techniques introduced in the academy can be carried over to law practice.

10. Some authors have offered specific solutions to short-term lexical concerns, much to the delight of their audiences. See, e.g., David Mellinkoff, *Legal Writing: Sense and Nonsense* (1982); Richard C. Wydick, *Plain English for Lawyers* (2d ed. 1985); Irving Younger, *Just the Facts, Please*, A.B.A. J., Feb. 1, 1988, at 104; Irving Younger, *Romancing the Verb*, A.B.A. J., Feb. 1, 1986, at 94; Irving Younger, *Skimming the Fat off Your Writing*, A.B.A. J., Mar. 1, 1986, at 92. The problem is that these sources deal with the end product, not the process, and therefore do not treat the cause of bad legal writing, but only the symptoms.

11. One of the noteworthy exceptions is Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 *Legal Writing* 1 (1991). Williams describes the movement that new legal writers are making from their previous discourses into legal discourse. See also George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 *Mich. L. Rev.* 333 (1987); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 *Vand. L. Rev.* 135 (1987); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *Sw. L.J.* 1089 (1986).

12. Legal research is included in the definition of legal discourse and composition here as part of the analytical and strategic process of problem-solving. We believe that legal research strategies control legal analysis. This Article does not, however, discuss the technical aspects of legal research.

II. TRADITIONAL VIEWS OF LEGAL WRITING AND THEIR CONSEQUENCES

Legal writing has come to mean so many things that legal educators must consider carefully its definition. To most, legal writing is, simply, what lawyers write. Many people think that legal writing is that body of legal documents such as contracts, wills, and leases. Many also associate legalese with lawyers' writing, which stereotypically uses doublets, polysyllabic words, Latin terms, conditionals, passives, and long sentences.¹³ Others focus on the evolution of legalese to Plain English,¹⁴ while inside the legal academy, students read legal writing that is burdened by traditional archaisms and by jargon.¹⁵

Legal educators, on the other hand, often see legal writing as quite simple if one knows how to write. They never had a course in legal writing and they did just fine.¹⁶ Without investigating further, these

13. See Brenda Danet, *Language in the Legal Process*, 14 *Law & Soc'y Rev.* 445, 473-82 (1980) (analyzing syntactical features of legal discourse). Danet explains that legal discourse is comprised of complex and specific syntactical devices, many of which are fossilized from language used in earlier periods of legal writing. Her article offers evidence that novices must understand traditional legal language well before they can begin to paraphrase it or translate it back to plain English for complex rhetorical purposes.

14. The Plain English Movement began in the 1970s, spurred in large part by consumer advocates who demanded that insurance documents and sales agreements be in language easily understood by the average consumer. Now at least 37 states have Plain English laws in one form or another, and the legal community has been forced to respond accordingly. In tandem with the larger movement, the legal writing community has long advocated clean, clear language. The Legal Writing Institute, whose members number over 900 legal writing professors internationally, recently adopted a Plain English Statement. Lynn N. Hughes, *Do We Need Charters for Plain Language?*, Second Draft (Legal Writing Inst., Austin, Tex.), Nov. 1992, at 1; see also Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Cooley L. Rev.* 1 (1992) (urging universal adoption of a Plain English proposal); Mary Aslanian-Bedikian, *Clear Expression in Labor Arbitration*, 63 *Mich. B.J.* 1068 (1984) (advising that simple, clear language protects arbitration decisions from being overturned by courts).

15. Students still are assigned casebooks as the primary text in most first-year courses. Cases often use weak reasoning, ineffective organization, poor paragraph structure, overly complex sentences, and archaic language. Cases rarely indicate careful consideration of rhetorical devices, such as purpose and audience. And rarely do cases demonstrate thorough research, appropriate legal schemata, or accurate citation form. But students naturally refer to these cases when they write. When students imitate what they read, their writing quickly becomes similarly incoherent, obtuse, and overly complex. In addition to casebooks, students need a clear definition of good legal writing.

16. It is likely that these educators were at the top of their law school classes. This implies that their orientation to the discourse was so swift that they may be unaware of the steps in the process, a phenomenon of which the other 90 percent of the class was keenly aware. See Philip C. Kissam, *Law School Examinations*, 42 *Vand. L. Rev.* 433 (1989). Kissam suggests that law professors have an interest in maintaining the status quo on law school examinations because their previous high performance secured them teaching positions. *Id.* at 462. He also notes that law students acutely perceive the hierarchy that grades create. *Id.* at 480.

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 lower¹⁷ academic institutions for failing in one of their purposes—to teach writing.

Both legal readers and writers may be unable to define legal writing because they are viewing it from traditional vantage points. These traditional views of legal writing, usually taken by those who do not teach it, have crippled legal writing programs because they have ensured that the complex task of introducing novices to legal discourse cannot be reasonably undertaken.¹⁸ Without fully understanding the epistemic, social, and process dimensions of legal writing, law schools do not assign the proper resources to developing good legal writers. Instead, they use traditional definitions to prevent legal writing programs from developing and thus minimize the students' possibilities of becoming good legal writers.

Traditional View #1: "Writing is writing."

Many traditional legal educators have insisted that writing is writing, whatever its context. This view suggests that the written product has universal characteristics and qualities, regardless of its genre.¹⁹ Legal writing, to the extent it should be taught at all, is merely a matter of remedial writing, existing primarily to correct what was not learned in undergraduate writing.²⁰ As long as secondary and tertiary schools

17. See Williams, *supra* note 11. Williams suggests that the idea of hierarchy is so ingrained in our educational system that we define most progress by using terms such as "higher," "upper," and "top." These terms suggest that blame can be appropriately placed on institutions whose standards are too "low." This hierarchical mindset works well with traditional views of legal writing because it suggests that by the time students reach law school, they should be writing at a "high" enough level that no more assistance should be needed. We disagree. See *infra* part III.C.

18. See Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 Alb. L. Rev. 298 (1980). Gale states that teaching legal writing requires adequate resources, careful study, and good training. Without these, legal writing programs are doomed. See also Gopen, *supra* note 11.

19. This thought that writing is writing comes from the current-traditional view of composition, which is the school of thought that was followed when many current professors were first writing. See *infra* part III.A for a full definition of the current-traditional view.

20. Typical of this attitude are statements such as the following:

I believe that, if young men [sic] entering law school possessed a good understanding of rhetoric and grammar, they would have the basic tools with which to go forward rapidly. No course in law school, whether you call it writing or that combination of words, legal writing, can make up for lack of early training.

continue to deteriorate, suggests this view, law schools will have to take care of the basics of writing. Writing instruction then becomes a repetition of what occurred at the junior high level: a remedial, backward glance at skills students should have had when they entered law school. Thus writing is defined by the final product, not what happens before and after. Once "good writing" is mastered, then good legal writing simply follows. Classes on legal writing should therefore focus mostly on grammar, the manifestation of poor sentence structure, transitions, and so on. Neither the legal writing process nor its context matters, suggests this view, so any kind of writing exercise will do. Legal research techniques and *Bluebook*²¹ conventions are the only law-specific items to be added to the class, plus perhaps some new legal vocabulary. That is all.

Consequence #1: "We don't need a legal writing course; if we do, it is remedial."

Writing-is-writing proponents think that legal writing courses should be marginalized or omitted. They do not see that either the legal writing process or its context should be explored. Focused on the product, they believe that a final draft is sufficient to measure a student's ability and that this ability is best measured in final exams and papers. Advocates of this position assume that writing had to be learned before law school and that law students are either not perceptive, malleable, or industrious enough to adapt their writing experience to a new field of discourse.

Such a view fails to explain, however, why some of the worst law school papers and exams are written by previously published authors and scholars, or why, even when grammar mistakes are repeatedly corrected, students' legal writing does not improve. The writing-is-writing position ignores the linguistic definitions of professional register and discourse community.²² Legal writing is the reflection of a complex series of

William C. Warren, The Teaching of Legal Writing and Legal Research, Panel Discussion (June 23, 1959), in *Proceedings of the Fifty-Second Annual Meeting of the American Association of Law Libraries*, 52 Law Lib. J. 312, 366 (1959). This view survives to this day.

21. *The Bluebook: A Uniform System of Citation* (15th ed. 1991). This text, now formally known as *The Bluebook*, is the official citator for most legal publications. The University of Chicago, in an attempt to simplify this system, publishes *The University of Chicago Manual of Legal Citation* (1989), informally known as the Maroon Book.

22. Linguists categorize legal writing as a professional register. See Danet, *supra* note 13, at 471. Cf. George Braine, *Writing in Science and Technology: An Analysis of Assignments from Ten Undergraduate Courses*, 8 Eng. for Specific Purposes 3 (1989); Richard C. Freed & Glenn J.

problem-solving decisions; it is the battle among disparate ideas; it is the effort of a creative mind trying to work within the rhetorical confines of the discourse. These complex analytical requirements can interfere with the novice's previous command of writing in another context. Such a view also denies the epistemic function of the writing act and as a result emphasizes instead editing skills, grammar, spelling, sentence clarity, and small-scale structure. In law, this is lethal. Law relies on a new understanding of rhetoric, schemata, ethics, and language. In law, language is not mere style; it is itself the law. These analytical and linguistic complexities call for a specialized pedagogy that includes, but travels well beyond, grammar.

Traditional View #2: "Legal writing is a talent; either you have it or you don't."

Conversely, some take the view that writing is a mystical process, an inarticulable series of steps taken best by the talented. Those who have this view may see themselves among the talented²³ and may find it difficult to articulate how to write, or how to fix problems in others' writing, as reflected in their experience reading exams and papers. Without any background in writing pedagogy and therefore without any understanding of the steps that lead to good writing, those who hold this view abdicate responsibility for and sabotage efforts to teach legal writing.

Consequence #2: "Writing can't be taught, so we shouldn't try."

Any attempts to teach writing are futile when writing is a matter of pure talent, say proponents of this view. The truly gifted will be able to adjust to legal writing without specific instruction ("I did"), but some people "just can't write." Those people will simply have to struggle as best they can. This position precludes any exploration of composition theory, rhetoric, or linguistics in the context of legal thinking. Of course if writing were only a matter of talent, most legal writers would perish. Language is a key to developing cognition, and a telescoped version of

Broadhead, *Discourse Communities, Sacred Texts, and Institutional Norms*, 38 C. Composition & Comm. 154 (1987); Ruth Spack, *Initiating ESL Students Into the Academic Discourse Community: How Far Should We Go?*, 22 TESOL Q. 29 (1988).

23. See *supra* note 16 and accompanying text.

this process begins when law students encounter legal discourse for the first time.²⁴

Legal writing is difficult, painful, progressive work that takes long, conscious reworking in stages. These stages can be defined in general and then redefined in legal writing. Legal writing is English for a Specific Purpose,²⁵ the methodologies of which can be transferred to the legal writing classroom.²⁶ These theories and their practice suggest that learning to write well within a specific discipline is much more than a matter of talent. Legal writing pedagogy must break down the discourse's features, capitalize on students' past experiences, and normalize the course to compensate for the vast differences among those experiences. A remedial course is not enough.

Traditional View #3: "Legal writing is ancillary to the real law."

Some others view legal writing as separate from legal analysis: a "skill," like carpentry.²⁷ The finer subjects, such as architecture or legal analysis, are taught by artists. This view may spring from early experiences in the controlled-composition school of teaching writing,

24. One rhetorician, for example, has developed five different stages writers use in developing language. These stages could correspond to the novice's development in legal discourse. They begin with *associative writing*, which associates written language with personal experience. From there, writers can progress through several learning stages. They advance to *performative writing* when they learn the rules of style and mechanics, *communicative writing* when they write within specified social contexts for particular audiences, and *unified writing* when they critically analyze concepts through writing. Some writers progress to *epistemic writing* as a method of reflecting, and even discovering truth. Carl Bereiter, *Development in Writing*, in *Cognitive Processes in Writing* 73 (Lee W. Gregg & Erwin R. Steinberg eds., 1980); see also *infra* part II.C.

25. English for a Specific Purpose has developed as a subset of linguistic study. The use of English in business, engineering, medicine—or law—can be defined and taught. See *English For Academic Purposes* (A.P. Cowie & J.B. Heaton eds., 1977); Anne J. Herrington, *Writing in Academic Settings: A Study of the Contexts for Writing in Two College Chemical Engineering Courses*, 19 Res. in the Teaching of Eng. 331 (1985); Anne M. Johns & Tony Dudley-Evans, *English for Specific Purposes: International in Scope, Specific in Purpose*, 25 TESOL Q. 297 (1991).

26. See *infra* part IV.C.

27. "Part of the answer lays [sic] in the facile, but false, dichotomy between 'substantive' and 'skills' courses. The former are regarded as courses in which 'the law' is taught and 'legal analysis' is learned, while the latter are regarded as courses in which some quasi mechanical ability is practiced." Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 Alb. L. Rev. 292, 295 (1980). Brand notes that, because the goals of legal writing courses are misunderstood, there is a false dichotomy between "skills" and "substance" and a belief that law professors do not want to teach legal writing. Brand argues that learning legal writing is learning legal analysis, then points out that this removes the distinction between substance and skill.

which held that writing was secondary to thinking.²⁸ This view probably also evolved from the experience that many professors had in law schools, when the controlled-composition view was popular; either there was no legal writing course or a poorly conceived and executed one.

Consequence #3: "Legal writing courses should not be integrated with substantive courses."

If writing is ancillary, so should the course that addresses it be ancillary, say the proponents of this view. Writing courses should be kept in their place, away from so-called substantive courses. Similarly, those associated with teaching writing should be relegated to lower pay and status. Yet the very proponents of this position, when asked how they think and write, may suggest that the two are interwoven, that their own creative thinking in the law progresses with and through their writing, that the process of writing is in fact the process of problem-solving and thinking.²⁹

In fact, writing is an integral part of thinking and cognitive development.³⁰ Note-taking, writing in class, writing papers, and reviewing others' writing all contribute to the cognitive process. The Writing Across the Curriculum movement suggests that writing could be

28. This view has been under attack in the English and linguistics academies for 25 years. See Tony Silva, *Second Language Composition Instruction: Developments, Issues, and Directions in ESL*, in *Second Language Writing: Research Insights for the Classroom* 11 (Barbara Kroll ed., 1990). In the controlled-composition school, student writers were led through carefully designed grammar and composition exercises. Those exercises concentrated on the sentence and paragraph level and allowed students to read a model and then respond by writing a slight variation of the model. The great gap between the controlled exercises and the students' abilities to write independently caused this school of thought to fall out of favor.

29. Writing is a personal phenomenon. In an informal poll of colleagues, all noted some degree of intimacy between legal writing and thinking. Some write at the computer, thinking by seeing and reacting to what they have written; some noted how the writing itself evolved away from a planned outline as the words themselves carried the writer to more complex thoughts; still others noted that writing is intellectually (and psychologically) cathartic, unleashing the writer's own thoughts and reactions to the subject, some of which might not be immediately acceptable. While we all experience something different through writing, we know that our focus does not begin and end with grammar.

30. See Janet Emig, *Writing as a Mode of Learning*, 28 *C. Composition & Comm.* 122 (1977) (describing how writers use writing to develop their thoughts); Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 *C. Composition & Comm.* 365 (1981) (using research to indicate how writers learn through writing); John R. Hayes & Linda S. Flower, *Uncovering Cognitive Processes in Writing: An Introduction to Protocol Analysis*, in *Research on Writing: Principles and Methods* 207 (Peter Mosenthal et al. eds., 1983) (introducing writing protocols as a research technique for examining writing as a cognitive process).

used to hasten and reinforce learning in all subject areas.³¹ Generally, while learners vary in their styles of learning, many find writing indispensable to the process.³² Similarly, as learners acculturate to legal discourse, writing may be their best ally. Using more writing in the law classroom should assist and reinforce learning. Far from being ancillary, legal writing should be an integral part of acculturation to legal discourse.³³

Traditional View #4: "Legal writing is legal drafting."

The only difference between legal writing and other writing, says another traditional view, lies in the peculiar requirements for drafting specific legal documents. In the context of wills, contracts, pleadings, legislation, and specialized forms for practice, such as memos or briefs, admits this view, the lawyer may encounter problems with forms or special terms. Again, the skills necessary to be a successful drafter are separate from legal analysis in this extension of the controlled-composition view. Drafting well is more a matter of practice and experience than of analytical writing, suggests this view.

Consequence #4: "Lawyers should teach this, not us."

Proponents of this view may think that lawyers rather than professors should teach drafting, in law firms rather than in law schools. Because these are exclusively practical matters, they should not absorb the

31. See, e.g., *Writing, Teaching, and Learning in the Disciplines* (Anne Herrington & Charles Moran eds., 1992); Anne J. Herrington, *Writing to Learn: Writing Across the Disciplines*, 43 C. Eng. 379 (1981); Susan H. McLeod, *Writing Across the Curriculum: The Second Stage, and Beyond*, 40 C. Composition & Comm. 337 (1989); David R. Russell, *Writing Across the Curriculum in Historical Perspective: Toward a Social Interpretation*, 52 C. Eng. 52 (1990); see also Robert Parker, *The "Language Across the Curriculum" Movement: A Brief Overview and Bibliography*, 36 C. Composition & Comm. 173 (1985).

32. See Linda Flower & John R. Hayes, *The Cognition of Discovery: Defining a Rhetorical Problem*, 31 C. Composition & Comm. 21 (1980), reprinted in *The Writing Teacher's Sourcebook* 92 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988). Flower and Hayes use thinking-aloud writing protocols to show how successful writers continue to develop and alter their representation of a problem throughout the writing process. *Id.* at 94-95. Their research indicates that writers continue to define their rhetorical problem and thus their rhetorical strategies as they write. *Id.* at 102.

33. See *infra* part IV.

resources of the academy. Indeed, few law schools offer drafting courses.³⁴

This traditional view, however, prevents law students from exploring crucial links between writing and legal analysis. Without practice, law students will not understand how analysis drives linguistic choices, how choosing the right form may be an integral part of strategy, how avoiding litigation may rely on making the correct lexical connection between legal ideas. This view also ignores the crucial interplay between language and thinking, between research choices and strategies, between understanding facts and the force of their precise expression for the purposes of drafting a specific document. This view also puts off until practice the role of negotiations, client counseling, strategizing, and careful reading, all of which contribute to the social context for legal writing.³⁵

Traditional View #5: "Teaching legal writing is anti-intellectual."

These traditional views that legal writing is a skill, that it cannot be taught, and that it is divorced from analysis suggest another traditional view: Teaching legal writing is not intellectual. Some go so far as to say that it is anti-intellectual because it distracts students from the real business of learning substantive law by competing with the rest of the curriculum for their study time. Lurking within this view is also the fear that the "trade-school" mentality will prevail and that students will learn more about the practical side of their careers and not enough about the theoretical, which they will never revisit.³⁶

Consequence #5: "Keep legal writing professors out of the academy."

As a consequence of this traditional view, those who teach writing in law schools are regarded as anti-intellectuals who should be excluded from the academy. At the least, traditionalists assert that legal writing professors should be allowed to stay only a short time until they find a more rewarding career elsewhere. In fact, many who hold this view worry aloud about such a disparaged job, warning legal writing

34. Only 17 of 122 responding schools offer courses that include drafting assignments. See Ramsfield & Walton, *supra* note 2, question 21.

35. See *infra* part IV.C.

36. See *infra* note 183.

professors that staying too long in such a position will endanger their careers and prevent them from developing intellectually. Proponents of this view go further: They warn students to minimize their time in writing courses; some professors routinely announce in their classes that students should dismiss legal writing assignments as unimportant. They vote to minimize credits and time allotted to writing throughout the law school experience.

This devastating position ironically weakens the academy.³⁷ Scholars and practitioners make their livings through writing, so ignoring or debasing writing specialists is a bit like chemists debasing the work of the Curies. Creating the proper methodology, devising techniques for helping students do their own legal problem-solving, and monitoring and tutoring each student require careful study of recent work in learning and writing theory. Also required are a good legal mind, the ability to design challenging assignments, and the intellectual acumen to analyze the causes of problems in legal writing. Indeed, writing may be one of the most complex intellectual acts we undertake, teaching writing one of the most difficult.

To allow students to cross over into effective legal discourse and composition, then, we need to reject these traditional, now tired, definitions. The traditional views have precluded a proper examination of the best approaches to preparing law students for practice and scholarship. The steps necessary for successful acculturation are missing. Instead, these traditional positions must give way to a new view of legal writing, one informed by extensive study of how writers develop and how they adjust to new discourse communities. With a revised view, both legal writing courses and law curricula at large will be able to more fully and effectively acculturate students into the legal profession.

III. A REVISED VIEW OF LEGAL WRITING

One way of addressing some of the unfortunate consequences of these traditional views is to address what is meant by legal writing. Modern

37. See *Legal Education and Professional Development—An Educational Continuum*, A.B.A. Sec. Legal Educ. & Admissions to the Bar (1992) [hereinafter *The MacCrates Report*]. *The MacCrates Report*, named for the chairperson of the Task Force on Law Schools and the Profession, suggests that law schools are remiss in their teaching of what are labeled “professional skills.” At a recent conference on *The MacCrates Report*, some educators once again presented their case for holding on to doctrine at the expense of application, something *The MacCrates Report* decries. *The MacCrates Report: Building the Educational Continuum*, Conference (University of Minnesota, Sept. 30–Oct. 2, 1993).

law and legal education are traditionally tied to written texts,³⁸ and thus the prevailing views of legal writing are largely textually oriented. As mentioned above, many legal educators still see legal writing, for example, as a matter of learning to avoid legalese, employ the active voice, and master citation conventions. This emphasis on the written text has traditionally prevailed in university writing instruction as well, but the past twenty-five years of research in composition and rhetoric have gradually shifted this emphasis to other perspectives. We would like to apply these perspectives to legal discourse as a way of arriving at a revised view of legal writing, one that allows for improved classroom practices, a more flexible and comprehensive program design, and a fuller understanding of writing for law practice.

A. *The Formalist Perspective*

The perspective we begin with we call the formalist perspective,³⁹ one that underlies the traditional view of legal writing and its instruction. The formalist perspective focuses on the formal features of legal texts—that is, on their formats, organization, and language and style. In it, the primary concern of the writer is with the subject, and with a text that communicates that subject well. It is based on an unproblematized view of language—that language does not contribute to the construction of meaning, but rather is a transparent medium for meaning. Thus, the primary formal concern in the writing of the text is with clarity—in organization, in style, in word choice—and with accuracy.

The formalist view, and its dominance in traditional approaches to teaching legal writing, may result from the prevailing instrumentalist views of language in law school.⁴⁰ This view also predominates in the

38. Peter Goodrich, *Reading the Law* 21–60 (1986).

39. See Lester Faigley, *Nonacademic Writing: The Social Perspective*, in *Writing in Nonacademic Settings* 231 (Lee Odell & Dixie Goswami eds., 1985). What Faigley calls the “textualist” perspective we call the “formalist” perspective.

40. Philip Kissam offers the following definition of legal instrumentalism as applied to writing:

[W]ith instrumental writing we are concerned primarily with the finished product of the writing and not at all with how the writing process might affect favorably or help create the very substance of our written thought. In other words, with instrumental writing we are concerned with the process only to the extent that the conventions and rules of grammar and vocabulary are applied correctly to thoughts that could be communicated orally but for considerations of efficiency and effectiveness.

The concept of instrumental writing is pervasive in American legal education and, I suspect, in the writing practices of most American lawyers.

Kissam, *supra* note 11, at 138.

most generally accepted approach to writing instruction since the Second World War, an approach that is often referred to as the current-traditional paradigm.⁴¹ This approach has led to what is called the product-centered classroom, in which writing instruction focuses on the written product, especially on its clarity and its accuracy, as mentioned above. This was certainly the common approach to legal writing instruction as well, into the 1980s. It is evidenced by the popularity of such legal writing textbooks as Henry Weihofen's *Legal Writing Style*, or of Richard Wydick's pamphlet *Plain English for Lawyers*.⁴² We do not mean to imply that a focus on the clarity and accuracy of the text, and on the careful development of its subject matter, is wrong; especially in a discourse like law, with its reliance upon written texts and their precision and thoroughness, this focus is essential.⁴³ Rather, this perspective, when used as the primary focus for instruction, omits important considerations in legal writing and its instruction and shortchanges our students.

Despite the textual emphasis of the formalist view and the teaching practices it fostered in legal writing, it also entails implicit assumptions about how legal writers compose, even if it does not explicitly acknowledge these assumptions in the classroom. For example, tacit advice on composing is often given when the organization of a legal document is used as a model for the steps involved in drafting it—first write the facts, then write the issue statement, then summarize the general rule of law, and so on.⁴⁴ However, explicit attention to the writing process was part of the “revolution” in writing instruction that occurred in the 1970s⁴⁵ and gives rise to what is often called the

41. Daniel Fogarty coined this phrase in *Roots for a New Rhetoric* (1959). Richard Young has identified the following features of the current-traditional paradigm: “the emphasis on the composed product rather than the composing process; the analysis of discourse into words, sentences, and paragraphs; the classification of discourse into description, narration, exposition, and argument; the strong concern with usage (syntax, spelling, punctuation) and with style (economy, clarity, emphasis)” Richard E. Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, in *Research on Composing: Points of Departure* 29, 31 (Charles R. Cooper & Lee Odell eds., 1978); see also James A. Berlin & Robert P. Inkster, *Current-Traditional Rhetoric: Paradigm and Practice*, *Freshman Eng. News*, Winter 1980, at 1.

42. Henry Weihofen, *Legal Writing Style* (2d ed. 1980); Wydick, *supra* note 10.

43. On law as a written text, see Goodrich, *supra* note 38, at 21–60; on features of legal language, see David Mellinkoff, *The Language of the Law* (1963).

44. Examples of this implicit approach are common in legal writing textbooks. See, as one of many examples, John C. Dermbach & Richard V. Singleton II, *A Practical Guide to Legal Writing and Legal Method* (1981).

45. See Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 *C. Composition & Comm.* 76 (1982).

“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.⁴⁶

B. The Process Perspective

Writing researchers began studying writing processes in the 1960s, an inquiry that dominated writing research well into the 1980s. By the early 1980s, two distinct groups of commentators on the writing process had emerged: the expressivists and the cognitivists.⁴⁷ The expressivists embraced a neo-Romantic view of writing, in which the task of the writer is to find a means of expressing her inner views, spontaneously and with originality and an authentic voice.⁴⁸ This view has had little influence on the teaching of legal writing, although, if attended to, it could address the common complaint of law students that they feel alienated from their writing in law school and that they have little personal investment in it.

The other group of researchers, the cognitivists, has had more of an influence on legal writing instruction and its attention to writing processes.⁴⁹ This group has looked to cognitive research in psychology and artificial intelligence; its work is characterized by an effort to construct accurate models of the composing behavior of writers.⁵⁰ Early cognitive researchers noted that the composing process as described in most textbooks did not seem to correspond to the behavior of actual writers and that the process of writing seemed much more complex than most implicit classroom models for composing allowed. Turning to cognitive theories of language, especially those of Jean Piaget and Jerome Bruner, these researchers posited a link between developmental theories of language and the mind and developmental models of the writer.⁵¹ Later researchers, most notably Linda Flower and John Hayes, used empirical methodology to arrive at fairly sophisticated models for

46. See Faigley, *supra* note 39, at 235. Faigley calls this the “individual” perspective, but is describing the same view. We call it the “process” perspective because the movement in writing instruction, and the teaching practices that it spawned, are often called the “process approach.” Faigley himself uses the term “process” in a related article, *Competing Theories of Process: A Critique and a Proposal*, 48 C. Eng. 527 (1986).

47. See Faigley, *supra* note 46, at 527–34.

48. *Id.* at 529–30.

49. Teresa Godwin Phelps notes this group and calls for more use of the process approach in legal writing pedagogy. Phelps, *supra* note 11, at 1094–95.

50. See Faigley, *supra* note 46, at 531–34.

51. See James A. Berlin, *Rhetoric and Reality: Writing Instruction in American Colleges, 1900–1985*, at 159–61 (1987).

the composing process, ones that captured some of the complexity of composing, that acknowledged ways in which composing processes intermingle (noting, for example, that writing and revising are not distinctly separate activities), and that accounted for differences between inexperienced and experienced writers.⁵² Flower also offered a powerful developmental model for writing, explaining that the features of what she called "writer-based prose" accounted for much of what others called bad writing: an egocentric focus, the lack of sophisticated organization, and the use of vague words and phrases, more meaningful to the writer than to the reader.⁵³ In Flower's view, much of this kind of writing can be transformed into what she called "reader-based prose," a prose that more successfully creates shared meanings between writer and reader and, thus, constitutes what others recognize as good writing.⁵⁴ Other researchers contributed to a common model of writing that was emerging by the early 1980s, noting for example that writing probably is a recursive, rather than a linear process,⁵⁵ or describing how experienced and inexperienced writers use substantially different strategies for revising their work.⁵⁶

Although process research has, to date, not resulted in a comprehensive theory of composing,⁵⁷ it has influenced writing pedagogy from grade school through law school.⁵⁸ Maxine Hairston has called the shift to process views of writing one of the clearest signs of a revolution in writing instruction and lists an emphasis on the process of writing as the first feature of a new paradigm for writing pedagogy.⁵⁹ At the most basic level, the process approach can shift some attention in the legal writing classroom from the written product to the ways in which law students arrive at that product. This shift from product to process is

52. Faigley, *supra* note 46, at 533. See Flower & Hayes, *supra* note 32; Flower & Hayes, *supra* note 30; Linda S. Flower & John R. Hayes, *The Dynamics of Composing: Making Plans and Juggling Constraints*, in *Cognitive Processes in Writing* 31 (Lee W. Gregg & Erwin R. Steinberg eds., 1980).

53. Linda Flower, *Writer-Based Prose: A Cognitive Basis for Problems in Writing*, 41 C. Eng. 19 (1979), reprinted in *The Writing Teacher's Sourcebook* 268 (Gary Tate & Edward P.J. Corbett eds., 1981).

54. *Id.* at 269.

55. Sondra Perl, *Understanding Composing*, 31 C. Composition & Comm. 363 (1980).

56. Nancy Sommers, *Revision Strategies of Student Writers and Experienced Adult Writers*, 31 C. Composition & Comm. 378 (1980).

57. See Lil Brannon, *Toward a Theory of Composition*, in *Perspectives on Research and Scholarship in Composition* 6, 13-14 (Ben W. McClelland & Timothy R. Donovan eds., 1985).

58. See Faigley, *supra* note 46, at 527.

59. Hairston, *supra* note 45, at 85-86.

no less important in law school than in earlier grade levels; in terms of writing abilities, law students are not a homogenous group, but rather arrive with varying levels of writing experience and competence. Few, if any, are ready to begin drafting legal documents on the spot and with mastery.⁶⁰ The process perspective also entails a developmental view of writing that strongly corresponds to a developmental view of legal education generally. Law schools should not only teach students to write legal discourse, in its analytical and persuasive forms, but they should also teach law students to write that discourse well.⁶¹ Implicit in the process approach is the assumption that the ways in which writers write are not only knowable, but that such knowledge allows writing teachers to intervene in the writing process with instructive guidance.

Although some awareness of process perspectives on legal writing had earlier infused legal writing in isolated ways—the work of Reed Dickerson on legal drafting comes to mind⁶²—broad discussion of the process perspective on legal writing most readily dates to 1984, when the Legal Writing Institute held its first biennial conference. At that conference, a keynote speaker reported on current research in revision, several schools described their efforts to incorporate features of the process model into the design of their legal writing programs, and a number of presenters offered advice on teaching methodologies that lend themselves to the process perspective, such as multiple-draft assignments and collaborative writing groups.⁶³ In 1986, when the Legal Writing Institute held its second conference, many more programs and presenters returned with reports on their efforts to employ process-oriented designs and methodologies.⁶⁴ Presentations based on the process perspective have become a common feature of conferences since then, both for the Legal Writing Institute and, in recent years, for the Legal Writing and

60. We do not mean to imply that most law students need only remediation and that this remedial need is the primary rationale for legal writing instruction. Legal discourse is complex and unfamiliar to any beginning law student, who is a novice and who can benefit from instruction not only in the genres, formats, and styles of legal discourse, but also in methods of composing it. See *infra* parts IV.A, V.C.

61. We want to avoid the implication that law students should be taught to mimic the writing style of lawyers, to “write like a lawyer,” given the generally poor reputation of lawyers’ prose mentioned above in this Article.

62. E.g., Reed Dickerson, *Materials on Legal Drafting* (1981); Reed Dickerson, *The Fundamentals of Legal Drafting* (2d ed. 1986).

63. See Teaching Legal Writing, Legal Writing Institute Conference Program (University of Puget Sound, August 15–16, 1984) (on file with the *Washington Law Review*).

64. See Legal Writing: The Next Step, Legal Writing Institute Conference Program (University of Puget Sound, July 17–19, 1986) (on file with the *Washington Law Review*).

Research section of the Association of American Law Schools. A few law reviews have published articles advocating process-oriented methodologies in legal writing programs.⁶⁵ A number of textbooks now acknowledge the process approach to legal writing.⁶⁶ And a few researchers have even begun to formally study legal writing and reading processes, most notably James Stratman in his extensive work on the reading of appellate briefs.⁶⁷

The process perspective on legal writing implies a corollary view, what is sometimes called the epistemic view.⁶⁸ The epistemic view grows out of the process perspective; if, in looking at legal writing, we should focus not only on the written product but also on the cognitive processes involved in writing that product, then we are really also looking at how writing is a mode of thinking.⁶⁹ Traditional views of writing—embodied in the formalist perspective—are characterized by a

65. In a recent article, for example, Bari Burke acknowledges the importance of the cognitive process perspective to the design of the legal writing program at the University of Montana, noting in particular how the program relies on writing groups. She also laments, however, that too few legal writing programs see legal writing as a cognitive process, largely because legal writing teachers usually lack exposure to composition studies and because institutional barriers to reform exist. See Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 Mont. L. Rev. 373, 398 (1991). In another recent article, Mary Kate Kearney and Mary Beth Beazley describe how the process perspective on legal writing instruction can enhance traditional methods of law school teaching. *Teaching Students How To "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885 (1991). Although Kearney and Beazley fail to distinguish between expressivist and cognitivist approaches to the composing process, their article leans more toward the former and thus offers considerable advice on how to make law students feel more powerful and successful as writers—that is, the article largely considers the affective side to writing, a strength of the expressivist approach.

66. One of the earliest of these "process textbooks" is Veda R. Charrow & Myra K. Erhardt, *Clear and Effective Legal Writing* (1986). We are compelled to add that, although this attention to the composing processes of legal writers in recent textbooks is laudable for the attention it brings to the process perspective, textbooks are by their nature prescriptive and seldom research-based. Thus, they may be clumsy or even inaccurate when they try to advise about the processes of legal writing. One pair of commentators notes that textbooks too often reduce the composing process to "stage-models," "pseudoconcepts" that are overly mechanistic and prescribe the same sequence of steps for all writers. See C.H. Knoblauch & Lil Brannon, *Rhetorical Traditions and the Teaching of Writing* 77-95 (1984).

67. See James F. Stratman, *Studying the Appellate Brief and Opinion Composing Process* (pts. 1 & 2), *Juris*, Fall 1984, at 9, Winter 1984, at 12; James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 *Legal Writing* 35 (1991). See also the call for more research into legal writing and reading processes in Chris Rideout, *Research and Writing About Legal Writing: A Foreword from the Editor*, 1 *Legal Writing* v, vi-vii (1991).

68. The term "epistemic" was first used in reference to rhetoric by Robert L. Scott, in *On Viewing Rhetoric as Epistemic*, 18 *Central States Speech J.* 9 (1967). Carl Bereiter uses the term in his article on writing processes and development, *supra* note 24. James Berlin offers a summary of the term's uses in contemporary writing instruction in Berlin, *supra* note 51, at 165-79.

69. For the best known discussion of this view in composition studies, see Emig, *supra* note 30.

sense that the primary function of writing is communication.⁷⁰ In the epistemic view, writing is used not only to communicate knowledge, but also to generate knowledge. That is, writing plays a role in thinking. As one researcher has put it, “Epistemic writing represents the culmination of writing development, in that writing comes to be no longer a product of thought but becomes an integral part of thought.”⁷¹ The epistemic view of writing emerges from a view of language as being dynamic rather than static and from a view of knowledge as being dialectical, the product of an interaction between the writer, reader, subject, and text.⁷² Knowledge does not exist except within linguistic forms that both construct and constrain it. Every act of writing, then, is an act of construction, and the task of the writer is not only to find the right words to describe the subject, as in the formalist perspective, but also to use language in such a way as first to generate, and then to embody, meaning.⁷³

Why is this view important in legal writing? Because a critical function of law school is to teach legal analysis and argument, a function in which legal writing instruction plays an important role. Especially for law students, but no less in law practice, the act of writing is intimately involved with the act of “constructing” the law—describing and synthesizing the applicable law, applying legal rules, drawing analogies and distinguishing facts, and developing legal arguments. One of the few commentators on the epistemic view of legal writing is Philip Kissam, in *Thinking (By Writing) About Legal Writing*.⁷⁴ Kissam notes that legal education has largely focused on what he calls “instrumental writing,” writing that is “concerned primarily with the finished product of the writing and not at all with how the writing process might affect favorably or help create the very substance of our written thought.”⁷⁵ In Kissam’s opinion,

70. On the functions of writing, see James Britton et al., *The Development of Writing Abilities (11–18)* (1975). James Kinneavy calls this communicative use of language its “referential” function. See James L. Kinneavy, *A Theory of Discourse* 73–210 (1971).

71. Bereiter, *supra* note 24, at 88.

72. See Berlin, *supra* note 51, at 166–67.

73. *Id.* at 167.

74. Kissam, *supra* note 11. Kissam, like many commentators on epistemic uses of writing, has been influenced by the Writing Across the Curriculum movement. See *supra* note 31 and accompanying text.

75. Kissam, *supra* note 11, at 138.

[t]his focus on instrumental writing misses the fundamental point that the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought. . . . [T]he actual writing of the analysis, be it in an appellate brief, law review article, memorandum, or estate plan, will allow *the writer as thinker* to develop new connections or new ideas about what the law is and how it should be applied in particular situations.⁷⁶

Kissam thus advocates more “critical writing”—his term for epistemic writing—in the law school curriculum, and he offers a number of pedagogical techniques to redress what he calls the failure of law schools to fully educate their students.⁷⁷ Moreover, this relationship between legal writing and legal analysis carries over into law practice. Legal practitioners, like everyone else, compose not only words but also thoughts when they draft their documents.

The process perspective, then, suggests the need for changes in teaching practices and even in our view of what legal writing instruction can accomplish. Yet, as a field of practice and research, legal writing professors remain underinformed about process views of legal writing.⁷⁸ The profession needs to learn more about the composing habits of legal writers and to continue our work on ways of incorporating process-oriented pedagogy into our legal writing classrooms. In addition, we recommend further exploration of the connections between writing and thinking and creation of pedagogies that allow for epistemic uses of writing.⁷⁹ We also recommend that law administrators and faculty promote such exploration by supporting research.

C. *The Social Perspective*

As helpful as the process perspective can be for legal writing, there is yet a third perspective that can enrich our understanding of legal writing even further: the social perspective.⁸⁰ The social perspective

76. *Id.* at 140.

77. *Id.* at 151–70.

78. See James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Res. 153 (1990).

79. For a recommendation that Writing Across the Curriculum pedagogies can be used in law school settings, see Christopher Rideout, *Applying the Writing Across the Curriculum Model to Professional Writing*, Current Issues in Higher Educ., No. 3, 1983–84, at 27. See also *supra* note 31 and accompanying text.

80. We borrow this term from Lester Faigley, who writes:

incorporates the process perspective, but broadens that perspective beyond a focus on the individual writer to acknowledge the social contexts within which writing takes place and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts. This broader perspective is especially important for a field like legal writing, which takes place within a discourse that is complex and highly conventionalized⁸¹ and which is also closely constrained by the institutional characteristics of law—the roles of lawyers, the organization of law practice, the purposes of law as a social and economic institution, and the underlying ideology of the law.

Patricia Bizzell, a social perspective researcher, convincingly criticizes the process perspective for its narrow individualist focus, a focus that implies that the individual is composing in a vacuum.⁸² For Bizzell, the process perspective is helpful in identifying ways in which writing is developmental, in tying writing to language learning, and, most importantly, in linking writing to thinking processes. She sees a danger, however, that the process perspective is too “inner-directed” and thus ignores important features of the link between writing and thinking.⁸³ Bizzell recommends a synthesis of “inner-directed” approaches with “outer-directed” approaches, with what we call the social perspective. She notes that many of the choices that writers must make, as described in models of the composing process, are choices that can be meaningful only when the writer makes them within linguistically defined social contexts, or discourse communities.⁸⁴ We offer the following simple example: The choice of a word or phrase is more than a writer’s mere choice of what will fit into the next available syntactic slot

Researchers taking a social perspective study how individual acts of communication define, organize, and maintain social groups. They view written texts not as detached objects possessing meaning on their own, but as links in communicative chains, with their meaning emerging from their relationships to previous texts and the present context. The social perspective, then, moves beyond the traditional rhetorical concern for audience, forcing researchers to consider issues such as social roles, group purposes, communal organization, ideology, and finally theories of culture.

Faigley, *supra* note 39, at 235–36. This perspective also may be called “social-constructionist.” See Kenneth A. Bruffee, *Thinking and Writing as Social Acts*, in *Thinking, Reasoning, and Writing* 213 (Elaine P. Maimon et al. eds., 1989).

81. See Mellinkoff, *supra* note 43; see also Peter Goodrich, *Legal Discourse* (1987).

82. Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need To Know about Writing*, 3 PRE/TEXT 213 (1982).

83. *Id.* at 215–17.

84. *Id.* at 217–20.

in the sentence, say the slot for a verb following a subject, and more even than the complex choice of what phrase best captures the idea that is emerging as the writer shapes not only the sentence but also the thought. The very choice of the word or phrase invokes not only the thought itself, but also the context within which the phrase has meaning. To use the invoked phrase, at least in ways that are meaningful to the intended readers, is not only to understand what it means for a particular community of readers, but also to understand the discourse conventions that are common to language use and reasoning within that community.

Every law student experiences consciously this broader act of creating meaning when first using the technical vocabulary of the law, its terms of art. To write using these terms of art, the student quickly finds that she must know more than the simple dictionary definition of the words, more even than the definition provided by a law dictionary. She senses that an entire set of discourse practices underlies the use of the term, an unwritten body of conventions and usages that determines which arguments are appropriate and meaningful and which are not.⁸⁵ The use of the term invokes all those conventions and usages, and the student will thus use the term masterfully or awkwardly depending upon her familiarity with them. Learning to write, within this perspective, entails something of a "Catch-22." One must master the conventions of a discourse in order to be a member of that discourse community and, hence, an accomplished writer within that discourse; but those conventions are, by definition, known only to members of that discourse community. They are the linguistic and rhetorical substrata that create the group. Learning to write as a lawyer writes means, in a very real sense, becoming a lawyer. When we teach people how to write, we are teaching them not only word choice, organization, or even composing habits; we are also inevitably leading them into the strategies and conventions of a particular discourse and thus offering them membership into that discourse community.⁸⁶ Thus, we should see their mistakes and confusion, more often than not, as signs that they are struggling to find their way into that discourse.

This model readily applies to legal writers. Joseph Williams notes that learning to write and think is not just a matter of cognitive growth

85. For an excellent discussion of these discourse practices, see James Boyd White, *The Invisible Discourse of the Law: Reflections on Legal Literary and General Education*, in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 60 (1985).

86. Bizzell, *supra* note 82, at 226-27.

but also of socialization into a discourse.⁸⁷ The consequence of this model is that we must view differently how we teach legal writing. Law students who have not yet mastered the discourse conventions of the law, who are “pre-socialized,” write as novices in that discourse. For example, they offer fairly concrete and superficial written responses to a legal writing assignment, eliciting the common response that their legal writing contains mainly a summary of the applicable law and very little analysis.⁸⁸ This concreteness, however, is symptomatic of the novice writer, who lacks a full understanding both of the case law that she is using and the discourse conventions that would enable her to weave that case law into an argument; her only strategies for constructing arguments inevitably appear superficial to someone socialized into the law. Williams offers an excellent illustration of how beginning law students, struggling to enter the discourse of the law, imitate the most prominent features of legal prose and thus use the very legalese and Latinate abstractions that their professors exhort them to avoid.⁸⁹ In his conclusion Williams, as does Bizzell, observes that the social perspective can enrich, rather than overshadow, the process perspective and that, through the metaphor of initiation into the discourse community, it should change both how we view our students and how we teach them to write legal prose.⁹⁰

In certain ways, the social perspective has a kinship with traditional views of legal education. For example, a common assumption is that law school teaches students to “think like a lawyer.” In other words, through their three-year exposure to law casebooks and oral questioning in class, students will be molded into lawyers. The social perspective allows for a similar view of writing. As Lester Faigley explains, writing “shapes the writer as much as it is shaped by the writer.”⁹¹ In other words, to learn legal writing is to learn how to write within the conventions and practices of a particular professional group more than it is to write original ideas that the law might then claim as its own, as being “legal.” This seeming loss of the ability to “be original” is something every law student encounters. Indeed, most writers—in all fields—make a commonplace assumption that, when they write, they are constructing original ideas that represent their own individual thinking. Thus, law students are

87. Williams, *supra* note 11, at 9, 13, 24–30.

88. *Id.* at 18–20.

89. *Id.* at 22–23.

90. *Id.* at 30–31.

91. Faigley, *supra* note 39, at 236.

frustrated by what they see as the lack of “creativity” in legal writing and analysis. In fact, they are learning to write within a highly conventionalized discourse, law, in which legal arguments are constructed according to certain unwritten discourse rules, or conventions.⁹² Because of their unfamiliarity with those conventions, law students are unable to see the creativity afforded them within the conventions, for example in constructing legal arguments.

As mentioned above, the social perspective need not replace the other two perspectives on legal writing that we have mentioned so far, but rather can enhance them.⁹³ For example, we often assume that law students enter legal writing courses as “mature” writers, students who have sufficient experience and skill with writing and who only need training in the methods of legal research and analysis, with some attention to such peculiar features of legal prose as how to handle legalese.⁹⁴ Conversely, if we find that students lack the kind of writing proficiency that we assume, we often treat them in remedial ways. In either case, we may be overlooking the fact that these writers, regardless of the level of writing proficiency that they may have attained before law school, are now novices entering a new discourse. Their unfamiliarity with legal discourse may disguise their successes as writers in the past, or may make them appear remedial when grammar or sentence drills are not what they need. They may appear to have difficulty developing legal arguments, but such difficulties need not be symptomatic of a writer who has difficulty developing arguments “generally.” Rather, a novice to legal discourse lacks the very methods of inquiry and internal dialogues available to someone who is “situated” within the law.⁹⁵ These types of

92. As mentioned above, the “invisible discourse of the law.” White, *supra* note 85, at 60–76. Stanley Fish has written at length about the ways in which law can be viewed as a discourse community, both defined and constrained by its discourse conventions. See Stanley Fish, *Doing What Comes Naturally* 87–140, 372–98 (1989).

93. Although the exact nature of the relationship between the social perspective and the cognitive process perspective is still debated within the field of composition, we believe that these perspectives offer complementary insights, and thus we adopt a conciliatory stance toward them, as have other recent commentators. See, e.g., Carol Berkenkotter, *Paradigm Debates, Turf Wars, and the Conduct of Sociocognitive Inquiry in Composition*, 42 *C. Composition & Comm.* 151 (1991).

94. See *supra* part II.

95. That is, the very process of constructing legal analysis and developing legal arguments can be seen as a social act. See Karen Burke LeFevre, *Invention as a Social Act* (1987). LeFevre makes the following points about invention, or the construction of arguments: that the writer’s self is socially constituted and thus that the acts of that writer are seldom individual acts; that writers use a “language” with meanings that are socially determined; that invention builds on a foundation of knowledge accumulated from previous generations—a social legacy; that invention may be enabled by internal dialogue with an imagined or constructed audience; that writers invent by involving other

observations apply to new lawyers, who are being socialized into unfamiliar writing conventions within law practice, as readily as they apply to law students.

The social perspective allows for other writing difficulties that law students and lawyers may encounter as well. For example, they are situated in several social settings at once. They are working within the law office and law school communities, whose members are making various and changing demands on the writer. They are usually also working within the larger legal community, whose members have set ethical and practice standards. And they come from different gender, race, and ethnic communities that may generate different learning styles and perspectives.⁹⁶

The revised view of legal writing, as described in this section, calls on legal educators to respond. In the rest of this Article, we explore some of the ways in which the revised view offers insights into how we teach and practice legal writing. We do not pretend to offer solutions to all of the challenges posed by legal writing instruction and practice. But we do believe that a broader perspective on writing, as a social practice, can enlarge our understanding of individual writers and particular texts in the law. This broader perspective is especially important to a field like legal writing, situated as it is within a discourse that is so rich in interpretive strategies and rhetorical forms, that forms a language of its own, and that is clearly informed by broader professional practices—a discourse, in other words, that is socially constituted in so many ways.

IV. IMPACT OF THE REVISED VIEW ON CLASSROOM PRACTICES

The most immediate consequences of a revised view of legal writing bear on the classroom practices for teaching legal writing, for the revised view alters our concept of the very nature of language, the commerce of the legal writing classroom. Under the formalist perspective, language functions as a passive vehicle for meaning, the medium for some extra-

people, as editors, collaborators, even adversaries; that invention is influenced by “invisible” communities that transmit expectations, constraints, methods of inquiry, types of evidence, and rhetorical forms; and that the reception and evaluation of writing depend upon social context. *Id.* at 33–35.

96. See, e.g., Mary Field Belenky et al., *Women's Ways of Knowing: The Development of Self, Voice, and Mind* (1986); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982); Patricia J. Williams, *The Alchemy of Race and Rights* (1991).

linguistic reality, whether that reality be the external world or internal thoughts.⁹⁷ According to this perspective, the role of language is instrumental;⁹⁸ language carries meaning, but does not generate it. It is this instrumental role of language that leads to metaphors of transparency for language: language should be “clear,” the meaning should “show through.” In an instrumentalist legal writing classroom, then, language is primarily dealt with as a problematic. Legalese, unwieldy sentences, and poorly organized paragraphs and sections all prevent the reader from “seeing” the meaning. In addition, the writer and her analysis are viewed as separate from her writing; thus, an unfortunately common diagnostic move in legal writing instruction is to consider whether a particular law student has a writing problem (that is, a problem with the use of language and its organization) or a thinking problem (that is, a problem with skills in legal analysis and argumentation that develops “prior” to the writing). In either instance, language is, at its worst, in the way, and at its best, invisible.

The process perspective takes one step toward healing this enforced separation of language from the writer, by incorporating thinking into the writing process—legal analysis and argumentation become integral parts of the act of writing, viewed as a whole.⁹⁹ Despite the importance of this linkage, in the process view language is still largely mimetic.¹⁰⁰ Words remain the vehicle for ideas that the writer develops prior to writing, remain the container for thoughts; if language has any power, it comes in the revising stage, where “better” words can be found to express emerging thoughts.¹⁰¹

In the social perspective, the role of language becomes fully generative. Our understanding of the very world, or worlds, we inhabit

97. See LeFevre, *supra* note 95, at 95.

98. See Kissam, *supra* note 11, at 138–40.

99. See, e.g., Diana V. Pratt, *Legal Writing: A Systematic Approach* 188–95 (2d ed. 1993). Most of these textbooks have come this far, at least in what they *purport* to teach, if not in what they actually teach.

100. See LeFevre, *supra* note 95, at 101.

101. In an early legal writing textbook that could be labeled a “process” textbook, and a fairly sophisticated one at that, Charrow and Erhardt echo formalist assumptions in their two major headings for revising: “Checking for Appropriateness” and “Checking for Effectiveness.” Charrow & Erhardt, *supra* note 66, at 163–69. The authors do note that appropriateness is a matter to be measured against readers’ expectations rather than a priori rules. But the danger of limiting the concept of revising through formalist assumptions persists, as is illustrated again in a later textbook, also well-conceived in general, which advises students that rewriting entails “attention to detail: wording, sentence structure, and paragraphing that is clear, concise, and forceful and that expresses exactly what the reader needs to know.” Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 49 (1990).

is constituted not only through, but by means of language.¹⁰² Furthermore, this constitution is not solely individual; it occurs as a dialectic between the individual and the social activity within which the individual is situated,¹⁰³ a dialectic that forms the boundaries of the language practices that we call discourse communities. The law is of course one of these discourse communities, well traversed by those familiar with law and its language, but somewhat unfamiliar territory for law students, especially beginning ones, and even for associate lawyers suddenly immersed in a new area of practice. Our role in the legal writing classroom is to lead students into the territory, not by instructing them in a language—legal discourse—that they can use simply to describe the uncharted lands, but rather by coaching them in opportunities to use the language, to understand how it not only describes but also evokes the world of the law, and especially to learn the ways in which it is generative. Students can thus realize, for example, how grasping the term “hostile” in adverse possession and understanding how the case law shapes its definition can in turn transform the term into a heuristic tool for legal analysis, for examining new fact situations, analyzing them, and arriving at “legally” sound conclusions about property disputes. But doing all of this requires that we modify our view of the classroom and what takes place in it.

A. A Revised View of the Student

In the revised view of legal writing, the first part of the classroom to change is the idea of who the students are. Students cease to be “empty” agents to be “filled” with the law and legal analysis so that they can produce legal writing—legal words to represent legal thinking; rather they become novices to be socialized into the discourse and its practices.¹⁰⁴ 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

102. See LeFevre, *supra* note 95, at 119.

103. See *id.*

104. See *supra* part III.C.

is sometimes unclear to them and arriving at that destination at different rates.¹⁰⁵

Students themselves also need to reexamine the role that they play in their own education. Under the revised view, they cannot afford to remain passive spectators in the legal writing classroom.¹⁰⁶ Their very participation in the dialogue of the classroom—its questioning about and inquiry into legal issues, its efforts at paraphrasing and synthesizing the law, and its analysis, debates, and conclusions—is essential to their socialization into legal discourse and, hence, their ability to write well within it. Through this participation, they will also be constructing themselves, rhetorically, as lawyer-writers, a construction that entails the development of a writer's persona and a professional voice.¹⁰⁷

The classroom, then, must provide the appropriate atmosphere for developing this persona. In classrooms dominated by lecture, students are empty agents to be filled with information; such a classroom, wittingly or not, promotes formalist views of language and writing and inevitably excludes social views. The classroom, rather, should be an interactive one, where students enter into dialogues of discovery about legal analysis. Unlike the Socratic method, dialogues about legal writing allow students to voice freely their questions on legal discourse, to share with peers their own concerns with legal audiences' expectations, to

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 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. See Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 Tul. L. Rev. 1237 (1988).

We also of course acknowledge other differences in students' abilities, more textual in nature, ranging from knowledge of the usage conventions of the language, such as spelling and punctuation, to an individual, almost artistic ability with, for example, the aesthetics of legal argument. We simply point out that the features of legal writing that underlie these differences, part of the formalist perspective, have traditionally been overemphasized to the exclusion of other important parts of a student's effort to learn legal writing. And, as we do throughout this Article, we claim that similar observations apply to practicing lawyers as well.

106. This move away from passivity is all the more difficult for law students because of the strong incentive to their remaining passive in the traditional Socratic classroom.

107. See Lisa Ede & Andrea Lunsford, *Singular Texts/Plural Authors: Perspectives on Collaborative Writing* (1990), for a more extensive discussion of the idea that the writer's self is socially constituted.

explore various generative and organizing schemata appropriate for legal problem-solving. Classes must also engage the students in writing to and for themselves, rather than in performing exercises.

Under the revised view, then, legal writing professors have a better chance of avoiding the ultimate mistake that results from treating students as if they were “passive writers,” writers who believe that writing lies out of their own control. That mistake emerges when students come to believe that writing is simply a guessing game, with rules known only by the professor, a game in which they must make largely uninformed efforts to write, without any certainty that those efforts will be satisfactory—without any certainty, that is, that their guesses will have been correct. In this scenario, all too common, students wait in anticipation for the return of their graded papers, only to suffer the blows of having “broken” particular rules, to try harder next time to master uncertain rules, and to hope for a better fate.¹⁰⁸

Students must be active writers in the classroom, must be engaged with legal language and discourse in ways that are fostered by the environment of the classroom. The classroom must trigger a dialectic among the individual student, language, and the contexts for legal writing, one that leads to writing in the fullest sense. Ideally, students should be able, while in the classroom, to first strike the chord of a professional legal writer, to begin to hear their voices as writers in the law, and to begin constructing the sense of rhetorical role and identity that will mark them as legal writers. A dialogue can begin, for example, with the legal writing professor asking each student to draft the issue for the current memo; then, students can discuss in pairs the reasons for choosing a particular version. Some students can volunteer to put their versions on the board. After the paired discussion, the class can examine those on the board to determine what features work best for those legal readers in the classroom and why. The legal writing professor can, if necessary, suggest nuances that experts will expect, and explain why, so that students gain confidence about their own developing professional voice.

108. We do not imply here that students should avoid learning rules for writing—whether rules for grammar and usage, rules for citation and format conventions, or the more difficult, because more invisible and embedded within the discourse, rules for analyzing and interpreting a statute. The difference between what students learn in a conventional classroom and in the classroom that we are describing may not be that great; the differences in how students learn and the differences in the corresponding attitudes that students may have toward their writing are.

B. A Revised View of the Legal Writing Professor

The revised view of legal writing must lead to a shift, as well, in our concept of the legal writing professor's role in the classroom. Legal writing professors cannot afford to be the constant focus of students' attention, to be the lone voice lecturing at the front of the classroom, to be the authority responsible for all that students acquire in the class; to do so is to deprive students of the very learning that is the primary goal of the class.¹⁰⁹ Rather, legal writing professors must learn to fill multiple roles—as guide, as facilitator, as coach, as editor—roles in which the professor is a mutual participant with the student rather than the font of knowledge. Communication in the classroom must move in more than one direction.¹¹⁰ The classroom itself must foster dialogue, for if writing is a social activity, then social interaction in the classroom is an important component of students' entry into legal discourse.

These changes in the role of teachers place new responsibilities on professors who are preparing to teach legal writing.¹¹¹ Legal writing professors must not only know the law and its sources, but must also have an awareness of how law is a discourse, constituted as a social practice and subject to its own set of discourse conventions, argumentative patterns, and interpretive strategies. Furthermore, they must be able to teach from a working model of the process of legal writing. They must be able to offer that model to students in instructive rather than prescriptive ways and to use it to help their students acquire proficiency in legal writing; and they must understand that, in many ways, this proficiency can only be acquired, not learned. With a fuller understanding of how writers write, legal writing professors should better

109. Donald Finkel and Stephen Monk call this traditional role the "Atlas complex," because in it teachers are responsible for carrying the weight of the entire classroom on their shoulders. Finkel and Monk describe its consequences thus:

. . . [A] teacher who takes responsibility for all that goes on in the class gives students no room to experiment with ideas, to deepen their understanding of concepts, or to integrate concepts into a coherent system. Most teachers agree that these processes, together with many others, are necessary if students are to understand a subject matter.

Donald L. Finkel & G. Stephen Monk, *Teachers and Learning Groups: Dissolution of the Atlas Complex*, in *Learning in Groups* 83, 88 (Clark Bouton & Russell Y. Garth eds., 1983).

110. See *id.* at 85–88. Finkel and Monk note that it is little better that communication move from student to teacher, for communication in this direction still places the teacher at the center of the classroom, responsible for all that takes place under her domain. "Teachers who view their classes as an elaboration of the two-person model are cut off from the potential energy and inspiration that lie in student-to-student interaction or in the mutual support that a group of individuals working toward a common goal can provide." *Id.* at 85–86.

111. See *infra* part V.D.2 on teacher preparation.

know how and when to intervene in their students' writing, guiding without taking over, and they should know the limits of their model—the point at which the model is overly general for particular students, who must become sensitive to their individual writing strategies as well. Finally, professors should be able to help students adapt their writing strategies to legal discourse, learning how to incorporate legal research into their writing process,¹¹² for example, or understanding the place for attention to such overt conventions of legal discourse as citations.

In addition, legal writing professors need to understand how law students learn law and legal discourse. In particular, that understanding needs to be tied to social-cognitive models of learning, so that teachers can more fully understand what appear to be “writing problems” in the broader context of students' struggles to acquire and master schemata in a discourse that is unfamiliar to them.¹¹³ Legal writing professors can also use this understanding to better coordinate their own classroom with the rest of the student's law school experience, for example tying the activity of case briefing to models for reading and writing,¹¹⁴ or noting the heuristic function of course outlining and its relationship to the heuristic function of planning and organizing in legal writing generally. To follow the individual throughout the year, legal writing professors can use a process profile at the beginning of class, a chart on which students can record their usual approaches to writing. The professor can meet with each student to discuss questions about the writing process, about legal discourse, and about how research is integrated with writing. These discussions can also address the student's experience thus far in writing; some students may be afraid of writing if they did little writing in college; others may assume that being a journalism major is enough to ensure that they will do well in legal writing. The legal writing professor can uncover attitudes, experiences, and questions that together will shape

112. See Phelps, note 11, at 1099–1100.

113. For more on schema theory in legal education, see John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. Legal Educ. 275 (1989). On schema theory generally, see George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (1987); Roger C Schank & Robert P Abelson, *Scripts, Plans, Goals and Understanding: An Inquiry into Human Knowledge Structures* (1977); P. Reimann & M.T.H. Chi, *Human Expertise*, in *Human and Machine Problem Solving* 161 (K.J. Gilhooly ed., 1989); Kurt VanLehn, *Problem Solving and Cognitive Skill Acquisition*, in *Foundations of Cognitive Science* 527 (Michael I. Posner ed., 1989).

114. See Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993), in which the authors offer a model that ties reading to writing.

his or her audience for the year. Then questions in the classroom will have not only a discourse context, but also an individual one.¹¹⁵

Whatever techniques the legal writing professor adopts, she should do so with a broader sense of the professor's role—certainly more than that of lecturer, or even of discussion leader, and perhaps with a sense of the role that extends as far as knowing when to recede into the background of the classroom, understanding that at some point a teacher's influence reaches most broadly into the classroom when the teacher is least visible.¹¹⁶

C. *A Revised View of the Legal Writing Classroom*

With changed roles for students and teachers, the legal writing classroom will inevitably change as well. Unlike so many other classrooms in law school, the legal writing classroom should cease to resemble a lecture hall: large, foreboding, and arranged into a rigid spatial order that also represents narrow roles for student and teacher. Rather, it should be more akin to a laboratory, or a workshop,¹¹⁷ open for discussion and writing, and most importantly, able to create contexts within which students can learn to write and think. Or, to borrow a metaphor from anthropology, it should become a site for inquiry into the law and its rhetoric, a site for investigation into the "local knowledge" of legal discourse, examined by students up close and with the fullest awareness possible of how legal writing is a practice as well as a text, of how legal writing is a way of understanding the world as much as it is a set of prescriptive rules for writing.¹¹⁸

115. While the time it takes to do this may seem daunting, it is well worth the investment. One of us did this with over 125 students each year at Georgetown. If asked to do so from one professional to another, students are quite willing to talk about writing process, about strengths and weaknesses, and about breakdown points. They are willing to talk about the extent of their writing experience, and many will say that they wish to concentrate on writing in law school. These discussions reveal a portrait of each year's class, allowing the legal writing professor to help students build on each other's strengths, identify their own weaknesses, and develop techniques in the legal writing context that work.

116. This would be an example of what Peter Elbow calls "embracing contraries in the teaching process." Peter Elbow, *Embracing Contraries in the Teaching Process*, 45 C. Eng. 327 (1983), reprinted in Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* 142 (1986).

117. See Carol Feiser Laque & Phyllis A. Sherwood, *A Laboratory Approach to Writing* (1977). "Workshop" has become the more common term.

118. The term "local knowledge" belongs to Clifford Geertz, an anthropologist who uses the metaphor of place to argue for socially situated and contextualized approaches to knowledge and understanding, approaches that acknowledge not only the faint theoretical underpinnings of

The fact that the legal writing classroom can broaden the roles available to students, even if those roles are only hypothetical, is important to the teaching of legal writing as a social practice. Law students need to experience legal writing in well-defined rhetorical contexts for thinking and writing, for it is those roles, in part, that enable students to use language “as a lawyer” and thus to experience legal discourse as generative—its very use will help to socialize law students into it. Fortunately, the legal writing classroom lends itself well to this rhetorical contextualization, given that law school is always surrounded by and aware of the larger activity of law practice and also given the existence of other contextualized activities at law school, ranging from moot court and the clinic to trial advocacy and client counseling courses. One of the most logical kinds of contextualization for a legal writing classroom is that of turning the class into a mock law firm, with partners, associates, and law firm activities.¹¹⁹ This kind of context is important for students, who can use it to situate themselves both rhetorically into their writing assignments, as an associate writing to a partner for example, and also into the discursive strategies of their legal writing itself, as when they must make decisions about, for example, which argument to highlight in a motion.

The legal writing classroom can encourage richer contexts for writing by virtue of the writing activities that take place within the class itself. For example, using the multiple-draft approach to writing instruction,¹²⁰ the legal writing professor can suggest that students bring their current drafts to class, just as they would bring them to a conference in a law firm. They can then discuss the problem in light of their writing, exchange papers, and respond to specific questions framed by the

knowledge but also the rich contexts within which knowledge becomes meaningful. Although he primarily concentrates on the social sciences, Geertz has become a central representative of social constructivism, and he reminds his readers constantly that knowledge and understanding are the products of local contexts and their discursive practices. His observations apply directly to law, as he reminds his readers at the beginning of one of his essays: “Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge. The instant case, Palsgraff or the Charles River Bridge, provides for law not only the ground from which reflection departs but also the object toward which it tends” Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *Local Knowledge: Further Essays in Interpretive Anthropology* 167, 167 (1983).

119. Bari Burke, for example, describes her use of this approach at the University of Montana Law School, where she organizes students into law firms as learning groups, to foster “active and collaborative learning.” Burke, *supra* note 65, at 391. Other legal writing programs have developed similar structures.

120. See *infra* part IV.D.

partner-professor. Those questions can correspond to earlier discussions about the purpose and audience of the memo, as well as about possible ways of approaching the analysis. This type of activity lends itself to the kind of role-playing mentioned above and reinforces the students' experience of language as social and, thus, generative.

The classroom itself can provide a context, especially for in-class writing assignments. Writing classes are, after all, about writing. Students can write in class to respond to an issue from the class discussion; to generate student "texts" for class discussion; or to make trial drafts as part of a larger assignment—for example, to draft trial issue statements in preparation for a longer assignment to write an office memorandum. In each of these instances, the in-class writing, when properly assigned, can reinforce students' sense of audience and of the ways in which writing is situated within contexts. At most law schools, the first-year legal writing classroom is also the one class small enough for students all to participate, exchange ideas—and writings—and respond to each other.¹²¹ In-class writing offers a powerful means for the legal writing classroom to make learning in law school local.¹²²

D. Using Effective Classroom Methodologies

Finally, a revised view of legal writing leads to a broader spectrum of classroom methodologies. If legal writing is a social activity as much as it is the product of a written text, if legal language is generative as well as communicative, and if law students must be socialized into legal discourse in order to write it proficiently, as lawyers, then the legal writing classroom must foster in students a sense of this social practice. Fortunately, a change such as this requires not so much the invention of new methodologies as it does the affirmation of methodologies that have slowly come into practice in the last decade or so. As mentioned above, many alternatives to mere lecturing now exist, most in the form of in-class activities—either writing activities or collaborative group activities.¹²³ Most writing teachers agree that students learn to write by writing and have developed a host of strategies for engaging students in

121. Although this point is often made, we repeat it to remind ourselves that new professors of legal writing commonly mimic the classroom with which they are most familiar—the Socratic lecture hall.

122. See Geertz, *supra* note 118.

123. Examples include writing, discussion, and reporting back to the class. See *Learning in Groups* (Clark Bouton & Russell Y. Garth eds., 1983).

writing not only outside the classroom, but also inside it.¹²⁴ To offer just one example, the legal writing professor can begin a class by asking each student to draft the issue for the current memorandum; students can then discuss in pairs the reasons for choosing a particular version of the issue. Some students can volunteer to put their versions on the board. After the paired discussion, the class can examine those on the board to determine what features work best for a legal reader, and why. The legal writing professor can, if necessary, suggest nuances that experts will expect and explain why, so that students gain confidence about their own developing professional voice.

Virtually everyone who has commented on writing as a social practice recommends extensive use of collaborative learning in the writing classroom to reinforce the practice of writing more as a generative social activity than a private, individual activity.¹²⁵ Collaborative learning has immediate practical consequences for the legal writing classroom, especially when peer groups are used by students to comment on each other's writing. Students can collect comments on their writing from several sources, not just from the legal writing professor, and use those comments to improve successive versions of the draft. At the same time, teachers can ensure that students receive more immediate responses to their writing and, depending on how the legal writing professor uses peer groups, can even reduce the burden of responding to so many papers or can assign more writing or serial drafts. Finally, collaborative writing groups can foster in students a greater awareness of the role of audience in writing and, concomitantly, can guide their sense of the need for revision.

But collaborative learning offers other forms of support for the legal writing classroom as well, support that touches more directly the goals of the revised view of legal writing. When students work collaboratively on their writing, they can begin to see writing as more than a solitary,

124. See, for example, the strategies inventoried in *Teaching Writing in All Disciplines* (C. Williams Griffin ed., 1982). Kissam offers a thorough discussion of several types of in-class writing activities, including activities that are appropriate for all courses at a law school, not just legal writing courses. Kissam, *supra* note 11, at 151–70. Kissam also advocates what he calls “critical reading” as a component of learning to write.

125. See LeFevre, *supra* note 95, at 129–34; Bruffee, *supra* note 80, at 213; Burke, *supra* note 65, at 404–06; John Trimbur, *Collaborative Learning and Teaching Writing*, in *Perspectives on Research and Scholarship in Composition* 87 (Ben W. McClelland & Timothy R. Donovan eds., 1985).

isolated activity.¹²⁶ They can, rather, begin to see how the choices they must make in any act of legal writing are rhetorical choices, choices that are best made when fully informed by the social contexts surrounding any act of writing and by the conventions and practices of legal discourse.

When the legal writing classroom becomes a site for writing as a social practice, then formal writing assignments can be made rhetorically much richer as well. For one thing, legal writing professors should continue the increasingly common practice of giving multiple-draft assignments, so that students not only have an opportunity to use earlier drafts as the basis for thinking through their analysis, but also so that they can benefit from "mid-stream" advice, either from teachers or from peers working collaboratively.

Furthermore, students will benefit most when these writing assignments are put into clear contexts and emerge from well-developed rhetorical situations, rather than being "canned."¹²⁷ For example, legal writing professors can rely on scenarios such as mock client interviews, whether staged by other students or videotaped, to present the facts for an office memorandum assignment. Simulated scenarios force the students to reconstruct the problem for themselves and to become conscious of how discourse constraints can shape the law's point of view and enable the legal issues to emerge. In canned assignments, too much of this activity is already accomplished, or else the assignment is too impoverished to allow for such activity. Engaging students with simulated scenarios for writing assignments can also lead to fuller discussions about the writing assignment itself. For example, in discussing the rhetorical shaping of the legal issues and the possible responses, the professor can also lead students into discussions of the nature of legal genres and formats, such as the office memorandum, and of how those genres and formats are tied not only to the specific rhetorical purposes of any given assignment, but also to the broader role that that assignment plays in the legal resolution of a problem. Finally, these fuller discussions can also provide an opportunity to talk with students about how a writing assignment fits within a developmental sequence of assignments, one that tracks not only students' acquisition of

126. See Richard Gebhardt, *Teamwork and Feedback: Broadening the Base of Collaborative Learning*, 42 C. Eng. 69 (1980).

127. See *infra* note 178 and accompanying text.

skills in legal analysis and research, but also their general socialization into legal discourse.¹²⁸

Different methods of assigning writing lead inevitably to questions about appropriate methods of responding to student writing. Again, a revised view of legal writing allows professors to rethink what they do when they comment on students' writing. To begin with, legal writing professors should consider their goals. Traditionally, the only goal was simple: to note errors in the text and to make an overall evaluation of the quality of the writing.¹²⁹ When professors understand that they are a part of the socialization of law students into legal discourse, however, they will also begin to see other goals as well: to coach as well as to correct students in their writing; to diagnose not only the writing product of students but also their process and development as legal writers; and, most importantly, to reinforce those writing practices of law students—whether in the product or the process—that mark students' emerging mastery of legal discourse, their developing understanding of its conventions and practices, their successful efforts to “write as lawyers.”

If legal writing courses include multiple-draft assignments, the professor should be aware of the different goals for responding to drafts and responding to the final written product. In responding to drafts, the professor should be critiquing the writing, offering selective comments that point toward the student's revision of the work. The professor's comments can be more reader-based,¹³⁰ ones in which the professor is reading the paper as another reader and thus offering the student guidance about the effects that the writing may have on an individual reader. This kind of response can reinforce the classroom dialogue between professor and student¹³¹ and also enhance students' awareness of the rhetorical nature of writing, as a transaction between writers and readers. Comments on the final written product can resemble the more

128. We advocate that legal writing professors, when giving a writing assignment, articulate as specifically as possible how their students should be at a particular stage of development as legal writers for that assignment and, as a result, also make their expectations of that assignment as clear as possible.

129. On the danger of viewing students' writing solely in terms of errors, the most powerful voice remains Mina P. Shaughnessy, *Errors and Expectations: A Guide for the Teacher of Basic Writing* (1977); on commenting more fully on student writing, and not simply focusing on errors, see Nancy Sommers, *Responding to Student Writing*, 33 *C. Composition & Comm.* 148 (1982).

130. On reader-based responses, see Peter Elbow, *Writing with Power: Techniques for Mastering the Writing Process* 240–51, 255–63 (1981).

131. See *supra* part IV.B.

traditional comments on student writing, as an evaluation of the formal features of the student's work.¹³² Even in this type of response, however, legal writing professors need to remember that their comments are dialogic: that is, that responding to a student's paper is an act of writing that, like all writing, is socially situated; that the final comments on student papers provide an important opportunity to communicate with students about their writing; and that, because of the power and authority that lie with the professor, these comments can easily discourage students and estrange them from any sense that writing is a generative social activity.¹³³

Rethinking the legal writing classroom and its methods entails rethinking the very design of legal writing curricula. If students and teachers are allowed broader roles in the classroom and if the classroom becomes a workshop more than a lecture hall, then the traditional models for legal writing programs are unavoidably impoverished. The next section of this Article considers some of the other possibilities.

V. IMPACT OF THE REVISED VIEW ON DESIGNING LEGAL WRITING PROGRAMS

The revised view can also have consequences for law schools searching to design better curricula. It can assist those schools in setting and implementing writing goals whose effects are lasting, both within the law school and beyond it. Law schools can begin to close the gap between theoretical and practical training;¹³⁴ better yet, law schools can blend theory and practice by using writing more in the classroom. Lawyers and legal educators all need to be better educated about what

132. What Peter Elbow would call "criterion-based" comments. *See* Elbow, *supra* note 130, at 240-45, 252-54.

133. Knoblauch and Brannon note this danger as follows:

[B]y sheer power of position teachers can demand that students begin to pay attention to their pronouncements about structure and convention, enjoying the modest benefits of one-way conversation. But the question of *quid pro quo* seldom arises, that is, the value, for communication's sake, of paying attention to what matters most to writers by starting with their meanings instead of teacherly priorities when responding to their writing. And what is jeopardized as a consequence is the possibility of real communication, the chance to make intellectual progress through purposeful dialogue.

Knoblauch & Brannon, *supra* note 66, at 119 (footnote omitted).

134. *The MacCrate Report* attempts to characterize the gap between theory and practice at law schools: "[P]racticing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation. . . . [M]any practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern." *The MacCrate Report*, *supra* note 37, at 5.

legal writing really means for the novice, the apprentice, and the expert. Having thought through the complexity of socializing novices into a new discourse community, legal educators should be able to make better choices about legal writing and its place in the curriculum, and better choices about approaches that are most appropriate for their students.

A. *Setting Appropriate Goals*

Legal educators should develop goals unique to their institutions. No one design for a legal writing program will suffice for every institution. The demographic differences among schools require that each institution's faculty build a program suited to its students' needs. To do so, faculty can examine the students' economic, cultural, and ethnic backgrounds, gender-based perspectives, and ultimate career choices.¹³⁵ These demographic factors should be fused with the revised view to develop specific goals.

If, however, legal writing programs are still proceeding under formalist views of legal writing, legal writing professors may find their goals at odds with those views. Formalistic views and the goals they foster often define the intended result of the program to be that students learn to write correctly using formal legal conventions. Such goals may focus on only one model of law practice, on IRAC¹³⁶ as the only reasoning method, on one strict memo format, or on the supremacy of correct sentences. As the revised view reveals, such a focus is too narrow. A consequence of the formalist view is that legal writing programs may erroneously set the goal of attempting to prepare students 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. Worse, if legal educators under the formalist view assume that one year is enough time to become proficient in the new discourse, they abandon students just as acculturation begins. Legal writing programs must set realistic goals that consider the different natures of the first and later years. The first year of law school is a transitional year

135. See Norman Brand, *Minority Writing Problems and Law School Writing Programs*, 26 J. Legal Educ. 331 (1974). Brand outlines identifiable areas of problems in the writing of minority students, one of which is a problem in confidence. This problem is not peculiar to minority students; all first-year students are subjected to several forces that rob them of independence, identity, and control. These forces create a lack of confidence that often plays out in the written product.

136. This acronym stands for Issue, Rule, Application, and Conclusion, an oversimplified version of deductive reasoning useful in some legal writing contexts as an introduction, but not in others.

that exposes students quickly to the differences between writing in their former discourses and writing legal discourse. A well-designed legal writing program can bridge the differences by acknowledging students' individual and collective experiences in other discourses; it can also usher them through the transitions, first, from other discourses into legal discourse, and second, from undergraduate and graduate schools into law school. Both transitions embrace awareness of rhetorical constraints—including changing purposes, audiences, scope, and ethics; of process—including changes in approaching writing; and of social context—including working on complex problems under pressure from supervisors and clients.

Rather, the questions should focus on the first stages of acculturation, such as shifts in each individual's writing process, learning new terms and their appropriate contexts, understanding new writing conventions, and exploring new analytical paradigms. This formalist focus needs to be widened to include the social constructivist idea that students must learn to develop complex schemata appropriate to the discourse, to incorporate strategies that address rhetorical contingencies, to understand more fully and effectively the legal writing process, and to use appropriate conventions.¹³⁷ Once the goals are specified for the institution, the program structure will emerge.

Overall, programs should hire legal writing professionals whose experience and expertise in writing theory and law practice can guide the program toward its goals: ensuring that the length of the legal writing program in their schools allows for adequate socialization into the discourse; putting legal writing on a par with other courses through grade averaging and credit allocation; and integrating the legal writing program throughout the curriculum. Further, long-term goals should include expanding writing requirements beyond the first year; increasing the amount of one-on-one teaching throughout the three years; giving legal writing professionals equal stature and pay; and teaching professors how to comment effectively.

B. Designing a Long-Lasting Program Structure

By setting goals that are specific to their own schools, legal educators can design program structures that will last beyond two or three years. The program structure should include mechanisms that allow students to develop steadily throughout the law school experience. Further, the

137. *See supra* part III.

structure ought to have a strong foundation in the first year that introduces students to the features and conventions of legal discourse, then builds upon that introduction in the second and third years.

1. *Assigning Length and Credits to the Course*

Socializing students into legal discourse requires considerable time, usually more than one year. Students need continued and repeated guidance from experts so that they can acculturate surely and steadily. That acculturation is endangered if the students themselves do not believe in the value of the course. The credibility of a legal writing course, especially for students, depends largely on the length of the course and the credits allotted. In 1992, most legal writing courses were only two semesters long,¹³⁸ and most were taught only in the first year.¹³⁹ Exclusive concentration in the first year is useful for inducting students into the discourse community of the law, but does not offer enough time and experience to explore shifts among genres such as memos, exams, and scholarly papers. Further, students must experience the subtle shifts among audiences who may be reading the same genre, such as various professors reading exams, judges and clerks reading briefs, and clients and opposing counsel reading pleadings. Some schools do require some kind of writing beyond the first year,¹⁴⁰ but this writing is usually taught by faculty untrained in writing pedagogy, which means that the value of the experience may be considerably diminished.

In addition to lengthening the legal writing requirement, law schools should increase the number of credits awarded. Acculturation takes time and widely varied amounts of effort; appropriating a substantial number of credits reflects a serious commitment to that acculturation process.¹⁴¹

138. See Ramsfield & Walton, *supra* note 2, question 5. Ninety-six out of 125 responding schools had two-semester classes.

139. See *id.* question 6. Ninety-three out of 125 responses indicated that legal writing was taught only in the first year.

140. *Id.* In the 1990 survey, 17 schools of 127 responded that they required more than two semesters of legal writing. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images—A Survey of Legal Research and Writing Programs*, 1 *Legal Writing* 123, 129 (1991). In 1992, that number increased to 22 of 125 responses. See Ramsfield & Walton, *supra* note 2, question 5.

141. Law schools balk at changing credit allocation, despite repeated attacks on the century-old Langdellian model. A number of schools are changing first-year curricula, either by changing course structure, content, or credit allocation. See, e.g., Neil P. Cohen, *The Process of Curriculum Reform*, 39 *J. Legal Educ.* 535 (1989); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 *Chi.-Kent L. Rev.* 243

Most schools assign two to four credits to the first-year legal writing course, although that number may be increasing.¹⁴² The acculturation process may be most keenly felt in legal writing courses, where individual performance is evaluated regularly throughout the year. The greater the number of credits assigned, the more importance students will correspondingly assign to the course. This should help to hasten the acculturation process. Thus the first-year legal writing course should probably be allotted six credits, which will allow students to immerse themselves in writing within the new discourse. To compensate, some traditional courses can be broken up and split between the first and second years.¹⁴³ The result should be better performance on exams and in the classroom as students take command of their writing.

Any structure should include systematic reinforcement and development of legal writing in the second and third years. Students should explore new genres after the first year, and program structures should reflect progress in acculturation. For example, if the first year introduces opinion letters, memos, and pretrial briefs, the second year can introduce complaints, contracts, wills, and appellate advocacy. The third year can introduce scholarly writing. Existing courses may be incorporated into the program structure if they already reinforce what is learned in the first year, introduce new genres, and utilize pedagogy from the Writing Across the Curriculum movement.¹⁴⁴ Those courses should

(1992); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. Tol. L. Rev. 1 (1992); *The MacCrate Report*, *supra* note 37. Traditional first-year curricula cover too much. They are structured essentially the same as they were a generation or two ago, but their content has become increasingly complex. Instead, more writing can be inserted, both in legal writing courses and within other classes. In Georgetown's new curriculum, for example, students write a paper each week during the first semester, and several papers in the second semester. These papers explore several genres, from essays to complaints, memos, and briefs, so student novices gain a wide variety of experience in legal writing.

142. These increases are modest, but encouraging. In 1990, of 124 responses, 2 schools gave one credit, 23 gave two credits, 35 gave three credits, 39 gave four credits, and 25 indicated other amounts. See Ramsfield, *supra* note 140, at 143. In 1992, of 126 responses, 4 gave one credit, 25 gave two, 24 gave three, 38 gave four, and 35 indicated other amounts. See Ramsfield & Walton, *supra* note 2, question 7.

143. This system has been used successfully at the University of Wisconsin for years.

144. See *supra* notes 31, 79, and accompanying text. Writing Across the Curriculum in law schools can take many forms. Students can write responses in class to questions posed by the professor, then use those answers as the text for class discussion. Students can draft what they think the contract looked like in a contracts case, or what it should have looked like to avoid litigation. Students can draft pleadings for a case in civil procedure, or write short arguments for or against a position in another case. Students can also write essays synthesizing a chapter in a casebook. Many of these writing experiences can be used for class discussion; professors can collect and review

also be allotted credits commensurate with their demands, probably a minimum of three credits each.

2. *Increasing Individualized Instruction*

Teaching writing has always worked best one-to-one. In that context, student and teacher can discover the means for working on the paper together; the student can actually write; and the teacher can be a direct, personal resource for the student.¹⁴⁵ When law schools decided to relegate apprenticeships to law firms and law firms subsequently abandoned that responsibility,¹⁴⁶ students were left to fend for themselves, mostly in large classes. A one-year experience in large classes cannot offer enough one-to-one experience to give the novice confidence and ability in legal discourse.

Currently, too many law schools still have large student-professor ratios in writing courses.¹⁴⁷ Although student instructors lower the ratio in some of the large schools, the direct interaction between novice and expert is limited. This phenomenon slows down, or even prevents, acculturation.

them, then write a general memo responding to them; or professors can give detailed comments on more formal assignments. The point is that students should see the role of writing in learning the discourse and generating thought; by writing more they will hasten acculturation and should become generally more articulate in the law.

145. See Muriel Harris, *Teaching One-to-One* (1986). Harris explores the one-to-one experience for writing teachers and students, suggesting that the one-to-one conference is a superb vehicle for teaching writing because it allows for individualized feedback and diagnosis, effective interaction, and differences in learning styles. See *id.* at 105. With the writing teacher as listener and coach, the student moves quickly according to his or her individual needs and gradually becomes independent.

146. See Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 Wash. U. L.Q. 597 (1981). McManis reminds us that there was a time when legal apprenticeships thrived. *Id.* at 601–04. But law schools chose to emphasize theory almost exclusively, and now law firms are increasingly reluctant to pay for the apprenticeships. The MacCrate Report: Building the Educational Continuum, Conference (University of Minnesota, Sept. 30–Oct. 2, 1993).

147. Nearly 40 percent of responding schools still have over 50 students per legal writing professor. See Ramsfield & Walton, *supra* note 2, question 16. This is appalling. Not only is writing best taught one-to-one, but the larger the group the greater the possibilities are for burnout in commenting on papers. Thus large class size can not only deprive students of effective individual instruction, but it can also ensure that legal writing professionals will become bogged down. Currently, 16 percent of responding schools have fewer than 36 students per professor, and 19 percent have fewer than 51 students per professor. In contrast, 23 percent still have ratios of 51 to 75 students per professor, 12 percent have between 76 and 150 students per professor, and 4 percent of schools have a ratio of over 150 students per professor.

Instead, one-to-one experiences can be increased both by lowering student-teacher ratios and by using other one-to-one experiences such as writing conferences, oral presentations, and oral arguments. Writing conferences are useful in allowing students to explore ideas and discuss the discourse,¹⁴⁸ and more formal oral presentations can force students to rehearse their new discourse in front of an audience. Most programs require oral arguments associated with a brief,¹⁴⁹ but few offer any practice in reporting information to a supervising attorney or in speaking to a client.¹⁵⁰ Similarly, motion arguments to a trial judge or negotiation sessions allow students to rehearse the language appropriate for those contexts.¹⁵¹ Such activities can assist students in capturing precise legal language without overburdening the professor, who must also comment on their papers. Some of these activities may even replace some written comments while preserving the one-to-one experience.

In addition, faculty experts who comment on writing in second- and third-year courses can increase the amount of time spent one-on-one with students by holding conferences and commenting effectively. Faculty should require at least one rewrite of assignments, so that they offer expert responses to students' writing. Conferences throughout the semester can also allow questions and answers on those rewrites. And faculty should hold weekly office hours for students to ask questions that may fall outside the context of specific assignments, but whose answers will help them adapt to the discourse community.

In all writing classes, professors can create more one-to-one experiences by keeping files on students. These files can begin with the student's self-assessment of writing strengths and weaknesses. Drafts of papers, in-class exercises, notes on conferences, and other matters can be accumulated to provide a continuing profile of the student's development. Handled well, these records can help student and professor see patterns in the student's socialization to the discourse and help compensate for high student-teacher ratios. Gradually, however, law

148. See Harris, *supra* note 145.

149. Of 116 responding schools, 103 require the appellate brief argument and 36 require a pretrial motion argument. See Ramsfield & Walton, *supra* note 2, question 22.

150. *Id.* Only 5 schools have such a requirement.

151. Oral language rehearsal can strengthen legal writing and vice versa, but this is not to say that students should use empty jargon. Rather, they must learn the difference between that jargon and precise terms of art used by lawyers in specific contexts. Equally, they must rehearse the translation process when they are working with nonlawyers in a negotiations session, for example, or in a client counseling session. Students must learn to interpret traditional language and translate that language into terms the appropriate audience can understand.

schools should move toward lowering the ratio in all writing classes and increasing the frequency of novice-expert interaction.

The inevitable questions of time commitment and resource allocation arise in this context of working closely with students and following their progress. Law schools can begin by strengthening programs already in place. For example, seminars are already structured for interaction because the student-teacher ratio is low. Rather than treating these as easier lecture classes that require only one draft of a paper at the end, faculty can use seminars to provide opportunities for more monitoring of the writing, more in-class writing, and more in-class discussion of the paper-writing process. Shorter in-class writing exercises offer a better means for learning the topic, yet need not be turned in or graded in detail. And faculty can be instructed in techniques for commenting more efficiently on those papers that are turned in.¹⁵² Together, these approaches should enliven discussion and raise the quality of the final written projects, a result many faculty would find engaging and satisfying.

Beyond this strengthening of programs, law schools can reallocate resources gradually. Instead of hiring doctrinal specialists and overloading the curriculum with topics that lawyers find do not assist them in practice,¹⁵³ law schools can replace retiring faculty with specialists in applied law. New doctrinal faculty can also be hired with the provision that they invest time in teaching through writing. To avoid commenting burnout, law schools can create incentives for those who are willing to work with students' writing, including smaller class size, higher pay, and more frequent sabbaticals. Over time, salaries for doctrinal faculty can be assessed on merits in addition to, or in place of, scholarship, such as excellence in teaching, experience in practice, or commitment to teaching legal writing.

3. *Integrating Legal Writing with Other First-Year Courses*

Integrating the legal writing course with other first-year courses can demonstrate how writing crosses all boundaries and is a useful tool for

152. In a recent experiment in a first-year class at a major law school, faculty volunteered to assign the legal writing project in small sections of constitutional law. While student assistants were trained and assigned to comment on the papers, the faculty also agreed to comment. The students who were trained wrote more comments in less time than the faculty, who spent a great deal of time trying to figure out what to write and how to write it. Training sessions could minimize commenting time, maximize students' involvement, and make for livelier classes and discussions.

153. See *The MacCrate Report*, *supra* note 37.

learning.¹⁵⁴ Assignments may gather more force and have a more lasting impact when they are based on concurrent classes in another subject, anticipate a subject matter for second semester, or supplement a class in which the professor cannot cover all subject areas. In some classes, legal writing assignments can substitute for class reading, then be incorporated into the final exam.

What integration requires is advance planning. Legal writing professionals must often research problems over the summer; discussions therefore must begin in the spring when faculty are assigned courses for the next year. If schools prevent legal writing professors from staying long-term, this problem is aggravated; legal writing professors barely have enough time to prepare and maintain their courses, much less coordinate with an unknown and perhaps hostile faculty.

Perhaps because of this extra work, most schools do not integrate legal writing courses with other courses by coordinating assignments.¹⁵⁵ Creating a joint assignment is not a venture between equals in many schools, and that may cause problems.¹⁵⁶ Some professors may not wish to work with legal writing professionals or may make them too keenly aware of their lower status. Often, other professors do not understand the differences between designing an exam question and designing a good legal writing assignment, so they may force a bad subject upon the legal writing professional. Unfortunately, divorcing legal writing in this way from other courses may inadvertently reinforce its ancillary status.

To promote integration, legal writing professors and other faculty should therefore plan ahead, creating assignments that not only integrate courses but also simulate real practice. If that simulation can be accomplished, integrating assignments can be a powerful way to socialize students. Each professor can reinforce the other in emphasizing the project's importance, the partnership between writing and analysis, and the complexity of the intellectual choices made in writing. Thus students will experience legal research and writing in a situation that simulates practice, but have the resources of experts on which to draw as

154. See, e.g., James D. Gordon III, *An Integrated First-Year Writing Program*, 39 J. Legal Educ. 609 (1989); Michelle S. Simon, *Teaching Writing Through Substance: The Integration of Legal Writing with All Deliberate Speed*, 42 DePaul L. Rev. 619 (1992).

155. See Ramsfield & Walton, *supra* note 2, questions 12, 13. Eighty-eight of 123 responding schools do not coordinate legal writing with other first-year courses. Eight schools coordinate on one assignment, 6 schools coordinate on two, 5 on three, 4 on four, and 9 schools coordinate on over four assignments; the rest do not coordinate.

156. Marilyn R. Walter, Address at the Association of American Law Schools Workshop on Legal Research and Writing (July 31, 1993).

they discover solutions to the legal problem. Such guidance, if integrated, should focus on individual questions so that both the writing process and the context can be seen from several points of view and then assimilated into the writer's repertoire of approaches.

C. Designing Useful Program Content

The revised view suggests that a program designed to introduce students to legal discourse should simulate practice. Directors of legal writing programs should consider carefully what analytical strategies, research strategies, genres, points of view, organizational strategies, rhetorical considerations, and formal conventions they will teach. For many directors, such considerations may need to be revisited, especially if the program was originally based on current-traditional notions of teaching writing. Once the overall goals and structure are established, course content should move students incrementally toward those goals. Legal writing directors and professors should choose carefully their approaches to introducing analytical paradigms, research sources and strategies, rhetorical differences, and citation conventions, for example. They can also create class sheets, syllabi, and texts to achieve the program's goals, then use these to train new legal writing professors. To create these materials, directors might consider the following.

1. Introducing an Awareness of Social Contexts for Legal Writing

In its overall approach, each program should ensure that students perceive and ultimately experience writing in the social context unique to law. In practice, clients, supervisors, and courts demand much of lawyers, and these demands differ. Lawyers must create unique strategies suited to each project, their experience in that topic, the client's budget limitations, and available resources. Students can rehearse working within these social contexts by asking specific questions when the project is assigned and designing varied research strategies that consider practical limitations. They can anticipate questions with no definite answers and learn to harmonize inconsistent feedback from varied audiences. As a practical matter, they can experience working within tight deadlines, balancing writing projects with other law school assignments, and writing more than one project at a time. The social-constructivist perspective suggests that programs should be structured so that pressures in the writing class reflect similar pressures students will encounter in the profession, but are clearly modified to fit the transitional

nature of the first year. The legal writing course content can begin with projects that work within a narrow research and analytical universe with minimum practical constraints.¹⁵⁷ Gradually, however, more complex analysis can be required and new constraints added, accompanied by advice on various techniques for researching and writing well under pressure. With those techniques, students can explore their own legal writing processes and begin to create approaches uniquely suited to themselves as situated writers.

2. *Introducing Writing Process*

Just as lawyers collect facts, talk to others, research, outline, talk more to others, draft, and redraft, so can students. This means that research and writing must be integrated. Part of the lawyer's analytical process includes sorting through sources and choosing which are relevant. Students must do the same. They must develop strategies appropriate to each project, and ground those strategies in a thorough understanding of research sources. That understanding must include not only information about *what* the source is and *how* it works, but also *when* to use it and most importantly, *why*.

Therefore the course should be built around an approach to the legal writing process that helps students understand and develop a personal model.¹⁵⁸ That model can be reflected in both the legal writing course structure and the titles of the classes. Each writing assignment can be designed to emphasize specific stages in the process while rehearsing all stages. For example, the first project can emphasize researching statutes and revising for the legal audience, while students research, take notes, draft, redraft, and incorporate feedback on the first draft in the final draft. The next project can introduce effective note-taking for legal research, or choosing a structure that addresses the paper's purpose and audience.

The classes themselves can emphasize these techniques. A class can introduce brainstorming techniques when the assignment is distributed or strategies for revising as the class examines several sample papers. Classes can also introduce techniques by requiring students to analyze

157. See *infra* note 178 and accompanying text.

158. See *supra* part IV.C. Legal writing professors might discuss writing process and introduce a very general sense of the legal writing process to which they can refer throughout the semester. For ideas, see Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 354–59 (2d ed. 1993); Linda Flower & John Hayes, Technical Report No. 1: A Process Model of Composition (Aug. 15, 1979), reprinted in Karen Burke LeFevre & Mary Jane Dickerson, *Until I See What I Say: Teaching Writing in all Disciplines* 150–51 (1981).

actual legal documents and revise them together. And collaborative work in class can develop techniques for editing others' writing.¹⁵⁹ The syllabus can be built around process, incorporating process terminology in class titles.¹⁶⁰ Overall, the legal writing course should introduce the legal writing process as one that incorporates several steps, steps which require students to consider adequately any new questions about legal writing projects.

3. *Introducing Different Genres and Topics*

To achieve the level of versatility and agility required in the legal writing process, students should explore more than one genre in the first year. Various genres introduce differences in rhetorical considerations of audience, purpose, scope, and ethos. Students can transfer concepts from one genre to another and learn to make rhetorical adjustments for each. These adjustments develop techniques that may be applied in successive years within law school and afterward. For example, the persuasive writing techniques crucial to a successful brief may be useful in a negotiating exercise but inappropriate in an office memorandum; the purpose of a brief might be to persuade the court to decide in the writer's favor, but the contract is intended never to be seen by a court. Students should practice writing these genres so that they can compare and contrast the rhetorical decisions required for each one. Similarly, they should explore the formal features of each genre, learning to be comfortable among these differences. For example, the appellate brief must conform to the Rules of Appellate Procedure within a specific jurisdiction, including rules about page length and cover color, but the office memo may require only an informal introduction.

Exposing students to these genres requires careful planning so that the legal writing course content balances reinforcement with versatility. Rather than jumping from genre to genre, students should be afforded the opportunity to rewrite and perhaps repeat one genre such as the memo. This repetition reinforces genre-specific techniques. Then those

159. Classes need not be the only place legal writing professors teach process. *See supra* part IV. Legal writing professors can help students develop their own processes by using a writing process profile and referring back to it throughout the year. Such an approach will not only help students develop effective techniques, but will also help them diagnose causes of writing problems. Those problems may have occurred because of steps skipped in the process, such as failing to take effective notes during research, failing to create several plans and then choose the most effective one, or failing to allow enough time to rewrite.

160. *See Ray & Ramsfield, supra* note 158, at xii–xvi.

techniques, once reinforced, can be contrasted with those used in other genres, whose rhetorical constraints vary. If possible, the course should be structured to build upon concepts learned in writing each genre. For example, the question presented in the memo can be compared to the issue statement in the brief and the statement that raises the question in the opening of a client letter. Once the genres are selected, the topics chosen similarly should assist students in building legal writing techniques.

Only topics that can be realistically researched with no academic limitations simulate practice's social context. Topics should offer a variety of research strategies; a specific analytical paradigm, such as case synthesis or statutory interpretation; several structural choices; and clear choices of legal conventions.¹⁶¹

Another method that introduces social context is for legal writing professors to role-play in giving written assignments. Legal writing professors can introduce assignments with memos from the supervising attorney to the new attorney, similar to those written in practice. Those memos can suggest the client's limitations, as well as a possible time limit for the project.¹⁶² Alternatively, students can take notes during a client interview and have a short discussion with the supervising attorney later.¹⁶³ Or students can receive the assignment on e-mail, which is being used increasingly in law practice communication.¹⁶⁴ Students can then turn in their research to a supervising attorney, the legal writing professor, who can then suggest other places to look or affirm the writer's findings. By exploring different genres, realistic topics, and practical techniques within the context of legal practice, students can discover, create, and articulate legal prose.

161. One way to begin the year, for example, is to give students a statutory problem that has no cases construing it. Students will find the statute without being pulled into other sources. Then, once students are comfortable finding and using statutes, the next problem can be a statute with cases construing it, the third a case analysis problem, and so on.

162. These memos should also be examples of how to give good instructions. In fact, one of the biggest problems in the academy and in practice is that assigning attorneys give vague directions. They do not discuss purpose, audience, scope, time limits, resource limits, and so on. Much of the student's or new attorney's time is spent figuring out the instructions or, worse, misinterpreting them and working counterproductively.

163. The interview can be taped if students need to refer back to it to see whether or not their note-taking techniques were effective.

164. Some academic institutions are using e-mail more effectively between professors and students. Ralph L. Brill, Address at the Association of American Law Schools Workshop on Legal Research and Writing (July 30, 1993).

D. *Staffing Programs for Long-Term Quality*

1. *Choosing Professors Committed to Legal Writing*

Legal writing courses should be staffed by scholar-practitioners who can play equally well the versatile roles of theorists and experts.¹⁶⁵ To usher students gracefully into legal discourse, these professors should be well-versed in its features and in the theory behind teaching the new discourse. Perhaps as importantly, they should have experience in the practical contexts within which the discourse is practiced. But most importantly, they should be allowed time to develop their theories, classroom practices, and commenting and conferencing techniques. This means that schools should be recruiting talented practitioners who have also studied composition theory and classroom technique. And, because teaching writing requires so much individualized attention, these professors should be given ample time to regenerate their thinking and produce their own scholarly writing; they will need more breaks.

Currently, most schools still turn the wheel too frequently, usually within three years.¹⁶⁶ With such frequent turnover, the legal writing program's inability to develop is virtually ensured. Little study of pedagogy or theory is possible, and many professors fall into the current-traditional paradigm, probably relying on the methods they experienced in their last college or high school English class. Despite the efforts of the Legal Writing Institute to introduce process-oriented discussions, many professors do not absorb this training in time to use it effectively; they simply will not be teaching for more than a few years.

Staffing models contribute to turnover. The two most popular models for staffing legal writing programs are the full-time non-tenure track model and the adjunct model.¹⁶⁷ Although a small group of schools employs full-time tenure track legal writing professors, nearly as many relegate the teaching of this critical subject to students.¹⁶⁸ In all models

165. Legal writing professors must be committed to this subject area, not interested in using this job as a stepping stone to another. Marjorie Dick Rombauer, Address at the Association of American Law Schools Workshop on Legal Research and Writing (July 31, 1993). Theory, methodology, and practical application must be researched and articulated, and legal writing professors must be committed to this process to establish and define their profession.

166. For a variety of reasons, including low salaries, imposed limits on contracts, and being shut out of faculty votes, most legal writing professors stay three or fewer years. *See supra* note 8.

167. *See* Ramsfield & Walton, *supra* note 2, questions 63, 73. Of 126 schools responding, 85 have full-time non-tenure legal writing professors; 37 have part-time adjuncts.

168. *Id.* questions 52, 83. Of 126 responses, 19 schools have full-time tenure track professors; 17 have students teaching or assisting in teaching.

except the full-time tenure track model, the turnover is high. Establishing a sound pedagogy is next to impossible under these circumstances, which may explain why so many schools have attempted to restructure their programs each year.¹⁶⁹ Instead, law schools should consider hiring and training professors who have the job security that allows them to develop programs and generate scholarship in legal writing.

2. *Training Legal Writing Professors for Long-Term Results*

Legal writing professors' training should include rigorous exploration of composition theory that extracts the methodologies most useful in teaching legal writing. Training should begin during the summer before professors begin teaching and explore theory,¹⁷⁰ examine writing protocols for clues to the legal writing process,¹⁷¹ study linguistic perspectives on professional register,¹⁷² and analyze small-scale structure in legal prose.¹⁷³ Some readings might also cover methods for teaching students for whom English is a second language, more of whom are entering law schools.¹⁷⁴ Subsequent training should include interactive discussions on these perspectives, practice in specific methodologies, lesson planning, and discussions that generate classroom exercises.

169. In both the 1990 and 1992 surveys, the return rate was near 80 percent, which is high for surveys. One reason may be that schools are desperate for definitions of legal writing programs. Not having analyzed soundly the theory behind teaching writing, many schools continue to use the current-traditional view, keep turnover high, and thus weaken the legal writing program.

170. See Harris, *supra* note 145; Erika Lindemann, *A Rhetoric for Writing Teachers* (2d ed. 1987); Bereiter, *supra* note 24; Emig, *supra* note 30; Flower & Hayes, *supra* note 32.

171. See Flower & Hayes, *supra* note 30.

172. See *supra* note 22 and accompanying text; see also Deborah Schiffrin, *Discourse Markers* (1987). Schiffrin's perspective on professional register defines and analyzes discourse markers as "sequentially dependent elements which bracket units of thought." *Id.* at 31. In particular, she analyzes such discourse markers as connectives (*and, but, or*) and those that indicate cause and result (*so, because*). In legal discourse, similar analysis can be made of conventional markers such as the use of *whether* to introduce issue statements, or *therefore* and *thus* to mark results, for example.

173. See, e.g., George D. Gopen, *Let the Buyer in the Ordinary Course of Business Beware: Suggestions for Revising the Prose of the Uniform Commercial Code*, 54 U. Chi. L. Rev. 1178 (1987).

174. English as a Second Language (ESL) students may encounter problems that differ from those encountered by native speakers. For example, ESL students may be accustomed to using different rhetorical paradigms and must adjust accordingly. See Robert B. Kaplan, *Cultural Thought Patterns in Intercultural Education*, 16 Language Learning 1 (1966); Robert B. Kaplan, *A Further Note on Contrastive Rhetoric*, *Comm. Q.*, Spring 1976, at 12; Fan Shen, *The Classroom and the Wider Culture: Identity as a Key to Learning English Composition*, 40 C. Composition & Comm. 459 (1989). These authors suggest that rhetoric, like language, is not only culture specific but also specific to individuals within that culture.

Legal writing professors together should create long-term objectives for the course and short-term objectives for each writing assignment. By resisting the formalism that makes teaching legal writing in the short run easy but in the long run useless, legal writing professors can also create approaches that keep students engaged in learning about the legal writing process. Similarly, professors should practice commenting, doing several rounds until they decide together on approaches that are best suited to maximizing the students' acculturation.¹⁷⁵ Related to these comments should be discussions about holding effective conferences,¹⁷⁶ which should not rehash the comments, but rather develop further legal thinking by using the student's reactions to the comments.

Because writing assignments are the "textbook" for the course, training should explore effective techniques for designing assignments. Many new legal writing professors mistakenly design assignments that are too complicated and fail to build on each other, leaving students frustrated and angry; or assignments that are too formalistic and too guided, leaving students unchallenged and smothered.¹⁷⁷ Instead, assignments can use original rather than canned research,¹⁷⁸ build analytical strategies from the simple to the complex; and engage students in social context challenges, such as writing in a new genre, discussing

175. See Sommers, *supra* note 129.

176. See Thomas A. Carnicelli, *The Writing Conference: A One-to-One Conversation*, in *Eight Approaches to Teaching Composition* 101 (Timothy R. Donovan & Ben W. McClelland eds., 1980); Donald M. Murray, *The Listening Eye: Reflections on the Writing Conference*, in *The Writing Teacher's Sourcebook* 232 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988).

177. Directors should work closely with new legal writing professors to go beyond formalism. As they design assignments, legal writing professors may create an ideal text within their minds of the one way the paper should be written. This stifles students' creativity. Instead, the legal writing professor should design assignments that can be presented using several correct schemata. Precisely because the professor's comments are based in theory, they should respond specifically to the learner's development stage in understanding the problem rather than force the learner to conform to a predesigned structure and approach. Within that context, the professor-as-expert must note inaccuracies and incorrect use of the law, for example, so that the novice does not continue making mistakes. But the professor-as-expert must also be open to presentations that are more innovative and deft than those he or she imagined. This entire process requires extensive training, experience, and monitoring.

178. "Canned" assignments are writing assignments that provide students with all research. Students are free to concentrate on the project without having to go to the library. Unfortunately, this is not only an unrealistic situation for lawyers, and therefore not useful from the social constructivist perspective, but it also eliminates difficult research aspects of legal problem-solving. This approach therefore may mislead students about the complexity of the legal research and writing process, such as the recursive interaction between research and writing. The answer is rather to design problems that can be researched and written successfully without undue limitations in the library.

what questions to ask the assigning attorney, or incorporating comments in a final draft.

Implementing these assignments should also engage the students in other challenges, such as working with limited resources, reporting back to the client or partner, meeting deadlines, or responding to two different sets of comments. Requiring two drafts reinforces the importance of the process and of having experts intervene along the way. Legal writing professors can be trained to implement other kinds of intervention as well, such as asking students to bring outlines to class, having one or more students run the "meeting" on the topic, or having students report their findings to the "partner," the legal writing professor, in individual conferences. Introducing these techniques during the training process will help legal writing professors explore and define their various, non-formalist roles.

Some training may also be necessary in more formal areas, such as grammar and local conventions. Legal writing professors may not have studied grammar formally and may be basing their editing judgments on outdated predispositions for certain conventions. So that legal writing professors can articulate clearly the stylistic conventions of legal discourse and the preferences of the modern legal reader, they may have to revisit grammar from the composition teacher's perspective. Therefore, built into the training should be a review of current expectations in the legal discourse community.¹⁷⁹

With a strong theoretical foundation, legal writing professors should generate objectives and methods during their initial training. In subsequent training, professors can generate methodology suited to the program's students. Legal writing professors will have invested their ideas in the course, will continue to develop as professionals, and will be more inclined to stay involved in the development of the program.

3. *Evaluating Legal Writing Professors for Continued Improvement*

Directors responsible for evaluating legal writing professors should first establish objectives and standards, preferably together with professors. Once they establish these standards, they should regularly evaluate performance by attending classes, discussing teaching techniques, commenting on comments, and meeting to discuss progress

179. Several current sources are available. See, e.g., Bryan A. Garner, *A Dictionary of Modern Legal Usage* (1987); David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* (1992); Ray & Ramsfield, *supra* note 158.

toward objectives. Novices at teaching need expert advice, too. Most new legal writing professors are not accustomed to discussing law as a discourse; rather, they see it as rules and cases. They need to become comfortable in the meta-discourse of legal writing. To accomplish their own acculturation, legal writing professors must be given time to develop and improve. Many legal writing professors may not have had teaching experience before teaching this difficult subject, so evaluations at each semester and the end of each year are appropriate. Nevertheless, new legal writing professors need at least three years to develop sound methodologies.

E. Evaluating Students Effectively

Student evaluation is tricky. The process view suggests that students should be rewarded for engaging more fully in the legal writing process, for exploring techniques for operating within the new discourse, for developing new approaches to written analysis, and for revising extensively. Similarly, the social perspective suggests that students should be allowed to adapt to the demands of the new discourse, which include creating appropriate strategies but still fulfilling the rhetorical and cognitive demands of the problem. Neither view lends itself to traditional evaluation. At the same time, students want signals about their progress in acculturation to legal discourse. Legal writing professors act as coaches and helpers, but also as experts. Because of the contraries inherent in these roles, law schools should examine the distinction that they make, if any, between evaluation (which lends itself to the former role) and grading (which lends itself to the latter). Probably students should not be graded at all in the first year because their rates of acculturation depend on so many factors, such as undergraduate major, work experience, race, gender, and economic stability. Nevertheless, whatever the school's choice in assigning grades, all courses, including legal writing, should be graded in the same way so as not to create any artificial distinctions in acculturation stages.

In 1992, most schools assigned letter grades to legal writing and averaged that grade into the grade point average (GPA).¹⁸⁰ Others assigned numbers, but also averaged those into the GPA.¹⁸¹ Only sixteen

180. See Ramsfield & Walton, *supra* note 2, question 10. Seventy of 124 responded that legal writing is graded by letter and averaged into the GPA.

181. *Id.* Eighteen of 124 responding schools use numbers and average into the GPA.

schools still used the pass-fail system.¹⁸² Only the first of these groups has truly integrated the course. In the others, students quickly perceive that legal writing is less important, especially when given pass-fail status. Such a message is devastating to proper socialization because students will not take seriously the necessary developmental steps in learning the new discourse. When these steps are skipped or disdained, students write poorly on exams, on papers, and after graduating, a phenomenon beyond the control of the legal writing professor.

If grades are assigned, they are probably more useful and fair when they are weighted at the end of the course, as most are. Legal writing professors should explain this process to students. In the writing course, assignments and rewrites can increase in percentage value as the year progresses. In clinics and seminars, grades can be similarly weighted, including a progress grade on a mid-term draft that discourages students from waiting until the end to complete all of the work. The latter method impedes acculturation because it reinforces undergraduate haste rather than promotes professional writing processes.

Perhaps the best informal method of evaluation is to comment on papers. Legal writing professors can keep a folder on each student's writing to observe patterns that appear from one project to the next and to suggest techniques accordingly. This form of evaluation can promote understanding of schemata, of various approaches to writing in a social context, of individual writing habits that are emerging from one document to the next, and of format requirements unique to specific legal documents. The comments should embrace the contraries among process and convention by striking a balance between indicating the student's progress and drawing the student closer to the legal audience's expectations.

Taken together, these considerations for long-term goals, program design and content, staffing, and evaluation require dedication, energy and vigilance on the part of law schools. By setting long-term objectives that meet the needs of their communities, law schools can begin to design programs that will be structurally and intellectually dynamic. Law schools must then hire directors who have broader views of writing and who can design and implement effective programs. Directors must in turn hire professors who are committed to this specialized field and train them to teach according to sound writing theory. And both legal writing directors and professors must be allowed to stay long enough to test and develop programs uniquely designed for each law school.

182. *Id.*

Further, legal writing should be integrated with the entire law school curriculum so that novices have ample opportunity to develop over the three years. Rather than using a piecemeal approach that introduces legal discourse but fails to reinforce and build acculturation techniques, law schools must require students to practice steadily. Only then will they become more articulate, more proficient, more prepared as scholars and lawyers.

VI. IMPACT OF THE REVISED VIEW ON ATTORNEY PRACTICES

Acculturation to legal discourse continues well after law school. Precisely because the process is a gradual one in which novices learn techniques that move them closer to expert status, the first stages of acculturation give way to more sophisticated techniques in practice.¹⁸³ Writing in law practice is situated differently than writing in law school; it has a wider range of institutional influences. These influences shape the manner in which recent graduates approach writing, so the acculturation process that should begin systematically in law school must continue in law practice.

In the first years, writing in practice is transitional, as new lawyers move away from academic legal discourse to practical legal discourse. The socialization process that took place in the first years of law school is replicated in the first years of the career, when new constraints are put on the novice attorney or clerk. In addition, in most professional situations, the writing process becomes more difficult because of the increasing number of tasks and the resulting time pressure.¹⁸⁴

The revised view offers practical solutions. Indeed, as the revised view reveals, there is more to the problem than inefficiency or poor ability in grammar. When legal writers can articulate the differences

183. A popular dispute has raged in the academy for long enough: Are we a trade school or a graduate school? Both. Just as medical schools train doctors to understand science and apply it, so do law schools need to train lawyers to understand legal theory and apply it. What begins in law school must continue in practice just as what is learned in medical classes is applied in internships and residencies.

184. Precisely because law schools often offer such a bankrupt view of legal writing, new lawyers often are ill-equipped to transfer techniques learned in the classroom to their internships and early years in practice. The rhetorical context changes, the genres are different, and new lawyers are unprepared. They fall back upon old techniques that may be rooted in undergraduate norms. These old techniques work until the second or third year of practice, when the number of projects begins to multiply. By then, it is more difficult to develop new approaches, and old academic habits no longer work.

among specific rhetorical and social contexts, they become more aware of how to write useful documents. And when legal writers learn techniques for planning, drafting, and reviewing their own documents, they become more efficient and effective writers. The understanding of legal discourse that should begin in law school continues and becomes more refined in specific professional contexts.

A. *Starting Projects*

To make the transition from law school to the legal profession, legal writers can use specific techniques for understanding the problem and the audience. They can learn to make a rhetorical assessment and, in doing so, understand that the assessment is constrained in part by the nature of the practice, the firm or agency's size, its legal culture, and so on. New lawyers can adapt more quickly to these constraints if they have practiced writing within them in law school. To start a project, for example, they can ask questions about a supervising attorney's writing preferences and approaches. They can ask for copies of good examples written by attorneys in that office. And they can try to learn more about clients' needs and expectations. This more detailed understanding of the audience will better inform the writer of what strategies to use when addressing the audience's needs.

The revised view suggests that writers start projects by systematically recording purpose, audience, scope, and context.¹⁸⁵ The institutional constraints of writing in a particular practice indicate that writing is more than the final product, that the social context can influence and change the writing process and writing habits, and that new approaches to writing can be put to advantage by the new lawyer. Systematic and continued writing in the new environment can help acculturate the new lawyer to the analytical, linguistic, and stylistic expectations of all audiences. By writing down answers to questions, then, future questions

185. So that new lawyers can be prepared for an array of possible contexts and directions, the revised view suggests developing a system for taking notes during the assigning interview. That system can include questions for collecting as many facts as possible, such as using who, what, where, when, why, and how. Then those facts might be put into context with appropriate questions: Is this a part of a larger case? What part? Where in the proceedings are we? How does this issue fit into the larger issue? And, to be sure that there is a mutual understanding of the substantive direction of the project, the new lawyer might repeat the issue: "You want me to research and write a memo on whether or not *X* can file for bankruptcy when . . ."

about the direction and context of the case can be verified, compared, or reviewed specifically.¹⁸⁶

B. Researching Within Defined Contexts

Once they leave law school, new lawyers encounter another constraint in researching projects. Efficiency in the library is measured in billable hours or in overall productivity; supervising lawyers value speed and accuracy. Yet fewer resources may be readily available than in law school. New lawyers should therefore consider carefully the nature of the problem, the amount of time it is expected to take, the level of thoroughness required to achieve the project's purpose, and the expected result. To research strategically, lawyers must also factor in their experience with the topic, accessibility to sources, and the amount of research the client can afford. The revised view suggests that planning for these constraints leads to a more efficient process and a more precisely framed product.¹⁸⁷

Perhaps more crucial to the acculturation process is the potential for each research project to introduce new language within the discourse. Often that language is a subset of the law's professional register and offers an enlarged vocabulary for terms of art. For example, a new lawyer may have become familiar with the language used to analyze contract questions, but may be unfamiliar with tax language. So added to the preliminary questions and the research strategy might be a method for taking notes; that method can offer the writer the means for capturing the precise language, analytical paradigms, argumentative approaches, and conventions used by experts in that subset of the law.

Beginning lawyers often ignore the role of note-taking in gathering information, keeping it organized, and translating it into prose. Without a note-taking system, the writer may revert to a formalized presentation

186. Writers can use a chart to record this information, with notes on the right side of the margin and citations on the left. Often a supervising attorney will recommend a case or other reference, and this can be used to begin the research. Whatever the method, the writer should clarify the assignment completely before leaving the office so as to prevent having to return repeatedly with questions as the research develops. Such an interview, then, serves two functions: to begin capturing the linguistic dimensions of a specific legal question, and to develop means for fulfilling a specific audience's expectations.

187. See Ray & Ramsfield, *supra* note 158, at 259–62. The research strategy chart here suggests a series of steps lawyers may take to ensure shaping research to the situation. The chart also suggests questions a lawyer may ask in beginning a project, including asking about the purpose, audience, and scope of the assignment. Lawyers should adapt these steps and questions to fit each project or, better yet, create their own systems.

of a new area of law, copying quotes from cases, relying on formal language, and adding analysis at the end as an afterthought. With a system, the writer can capture the specialized language and analytical patterns and, in so doing, get a clearer sense of his own process, of the need to acquire that language, and of means for “speaking” that language in the context of that area of the law.¹⁸⁸

C. *Creating a Redefined Legal Writing Process*

The revised view, with its emphasis on the social and process aspects of writing, reveals how planning activities, analysis, and writing are inextricably linked. Students who have been taught about the social contexts of legal writing understand their task in terms of choices presented by their discourse community. The better the understanding of those rhetorical, analytical, and practical choices, the better able the writer will be to meet the reader’s needs and to generate techniques that will mature and adapt to new writing situations.

New lawyers need to develop an understanding of these choices in the writing process. They must also redefine approaches to structuring, drafting, and revising the legal writing project. This redefinition of the writing process will be unique to each writer and project. New lawyers should be aware of a variety of approaches to process that are practiced by experts. For example, experienced lawyers use law, custom, knowledge of audience, and strategy to design documents.¹⁸⁹ New lawyers need to note the techniques for choosing the appropriate design. Similarly, new lawyers must choose techniques for drafting the document, whether by dictating, using a computer, or writing by hand.¹⁹⁰

188. See *id.* at 177–78 for ideas on developing various approaches to taking notes while researching. Eventually, the new lawyer will be able to speed up the analytical process that leads to the desired result. The revised view suggests that an effective note-taking technique promotes faster and surer assimilation into the new discourse field by enabling the new lawyer to capture specific legal terms and manipulate and synthesize the concepts associated with those terms.

189. Often there are several possibilities, one of which best suits the document’s purpose, audience, and scope. This does not mean that the others are wrong. Rather, it means that the reader will find one more useful than another and that the writer must become attuned to those needs. Those needs may well shift from the inception of the project to the drafting stage. Thus, the writer should keep alert to those shifts by talking with the supervising attorney or client and by turning around the project quickly. Another technique might be to present two or three of the possible schemata to the assigning attorney for approval before the draft is written. Such an approach is essential to building an effective legal writing process.

190. Even these choices can confound the new lawyer who has had no training in using the Dictaphone, for example. Many experts use the Dictaphone exclusively because it saves time and improves oral presentation abilities. Students and new lawyers tend to cling to old habits and thus

The revised view suggests that, in addition to incorporating new techniques for these stages in the legal writing process, the new lawyer must include a reviewing stage to examine whether or not the document fits its purpose and is directed properly to its audience.¹⁹¹

This reviewing stage in the process becomes the laboratory for moving from writer-based to reader-based prose, from legal novice to legal expert. By checking her choices with those of experienced lawyers, by matching her choices with those that ultimately are accepted, and by reviewing her reasons for choosing the content and order she chose, the novice can become more fully sensitive both to the rhetorical demands of the writing task and to the complexity lent to the writing task by the social and institutional context. Legal writing, in this view, is not a unitary, idealized, universalized practice, but rather one that shifts with the topic or audience, and also with the setting. Thus complaints within firms may arise not because new lawyers are bad writers, but rather because they are unsocialized or unacculturated to that firm's expectations for the legal writing process. The approach to writing used previously by a student or new lawyer may not work for the office's or client's needs, so the writer's understanding of her writing process must be flexible enough to adapt to those needs. The revised view suggests that a pliable approach to the legal writing process, one which has been introduced and rehearsed in law school, can make adapting to new practical situations smoother and more effective.

D. *Working Within the Social Context*

Legal writers will often discover a tension during the writing process between meeting the audience's needs and meeting the writer's needs.¹⁹²

retain an outdated process unless they are instructed in the advantages and disadvantages of using technology to draft.

191. So legal writers might develop a kind of triage for rereading their documents. This triage might begin with reviewing the client's needs, the original question, the answer, and the means for getting to that answer. Further, the writer should check for content and accuracy: Does the document contain all pertinent information and law, nothing more and nothing less? Is everything stated accurately? Does the organizing schema fit the purpose? Can any legal reader follow the schema? If not, what changes need to be made and why? For a further discussion of this triage and suggestions for questions to ask when first reviewing a draft, see *id.* at 263–65, 356–59.

192. Practical matters constrain writers more than might be expected: A client may be unwilling to spend the amount necessary to do a scholarly report on the subject; or a partner may have forgotten how many sources must be checked to give a definitive answer. Such constraints place the writer in a difficult position and suggest alternative writing strategies. Those strategies might

This tension recalls the difference between the current-traditional view of the utopian writer and the social perspective of the writer as a situated individual. What begins as a textual question becomes a matter of the writer's composing process and, finally, a question to be resolved only by turning to the context for the writing. Legal writing's context requires the new lawyer to ask about all constraints, such as accepted strategies in the firm, limitations imposed by the client, and the partner's stylistic preferences.

The legal writer cannot write in a vacuum and is not free to pursue writing at leisure. Rather, the situated legal writer must instead learn to write in a new institutional setting, learn a new local practice, and react positively to new and changing circumstances. The revised view suggests that she must build techniques that allow her to respond effectively to the writing demands made of her while at the same time reshaping her writing process.

Taken together, these adjustments to a new social and writing context challenge the new lawyer, who is entering a complex world with high stakes. Writing in the practical context requires well-developed techniques, sharpened tools, and cool heads. Law school can offer time to discover and rehearse these techniques so that the new generation of lawyers is well-equipped to communicate effectively within a rapidly changing practice. Law schools should therefore change their approaches to teaching writing so that novices practice research and writing throughout law school, receive steady and expert feedback, and graduate competent and comfortable to begin whatever legal career they choose.

VII. CONCLUSION

Law schools need a revised view of legal writing. Traditional views have hindered students from learning legal writing as effectively as possible and have ignored the importance of easing students into the discourse community of the law. Rather than socializing students into the rich arena of language practices that comprise the law and that mark the writing of attorneys, judges, and other law-trained persons, many law schools offer students only one brief year of introduction, relying on

include finding another lawyer who has worked on this issue and borrowing her work as a starting point, calling someone within a government agency for information rather than trying to find it in a looseleaf, researching only primary law without looking in persuasive jurisdictions, and so on.

formulaic prescriptions and taboos for writing. And rather than providing professional, well-informed guidance for students' efforts, many law schools are leaving the job to novices or are limiting the long-term effectiveness of legal writing professors.

The revised view suggests that law school offers an invitation into one of the richest and most complex of the professional discourses: a community that is demanding in its argumentative and analytical paradigms, challenging in its research and writing processes, and complicated by its social pressures. Such a complex discourse and its accompanying social contexts require strategies for discovering and mastering its conventions, for writing as a situated member of the legal community. The legal writing classroom should, appropriately, initiate students into these conventions and practices. And that process of initiation should continue through the three years. In law school, students can acculturate to legal writing, in the fullest sense, under the careful tutelage of professionals. There, they can come to their own discovery of techniques for using writing to develop legal thinking and for integrating writing with all stages of problem-solving. Then, and only then, will Professor Rombauer's vision become focused into a clear and useful approach to legal writing, one that extends beyond the first year for law students, and one that extends beyond the short term for law schools.

