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Research and Writing about Legal Writing: A Foreword from the Editor

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More has been said about the writing of lawyers and judges than of any other group, except of course, poets and novelists. The difference is that while the latter have usually been admired for their writing, the public has almost always damned lawyers and judges for theirs. If this state of affairs has changed in recent times, it is only in that many lawyers and judges have now joined the rest of the world in complaining about the quality of legal prose.

In response, many law schools are now adding programs in legal writing, or are reforming and expanding existing programs. Even the legal profession has responded with calls for better legal writing, with an increasing number of seminars and CLE forums on improving legal writing, and with legislative efforts at language reform, including plain English statutes. Some large law firms have even hired full-time writing specialists.

This growing attention to the quality of legal prose is laudable. But more fundamental inquiry into legal writing and its associated activities, research and analysis, is needed as well. Before we can offer more comprehensive attention to legal writing, we should understand more about what the characteristics of legal writing are, how it is written, and how it is used. This journal calls for the inquiry to begin and offers one forum for publishing the results. I should add that inquiry into legal writing should not be conducted solely in response to perceived needs for reform. Legal prose itself, in its history, in its complexity, and in its uniqueness, deserves more careful attention than it has received. What follows are a few of the initial questions, then, for this investigation and research.

What Is Legal Writing?

Perhaps the first question to ask is, what do we mean by legal writing? Legal language is often treated as a special kind of discourse by philosophers and linguists. As any layperson would tell you, lawyers and judges do seem to write in their own specialized language. To the extent, then, that legal discourse is specialized, we need to know how its features might make unusual demands on the writing done within it. For example, of what consequence for legal writing are the well-established formulas for statutory language and interpretation, or the formulaic nature of many pleadings?

Another important inquiry is into what is called legal reason-

ing. Just as legal discourse has specialized features, is legal reasoning also a specialized form of argumentation, and, if so, how does it differ from other forms of analysis and argumentation? In addition to needing a comprehensive model for legal reasoning, legal writing teachers also need to know how students learn, or acquire, legal reasoning. What relationship exists between mastering legal reasoning and learning to write for legal settings? Attention to such questions is valuable because, given the nature of legal discourse, the structure of legal reasoning is central to other issues in legal writing. Furthermore, these inquiries can benefit from recent, more general work on writing and thinking: from the attention being paid to critical thinking, to research in cognitive psychology, to problem-solving models for thinking and writing, to studies in the social nature of thinking and writing.

How Is Legal Writing Read and Written?

Much of the existing literature about legal writing focuses on the written text, offering fairly prescriptive advice about organization and style. Very little of this advice, however, is based on research into the ways in which legal documents are actually written or read. Rather, it largely depends upon time-honored, general maxims for writing, translated into the language of legal writing (e.g., "avoid the passive voice" becomes "the passive voice is less persuasive in brief writing"). In this respect, research into legal writing lags far behind research into many other areas of writing.

This lack is especially distressing given the common and often unavoidable complexity of legal prose. We need to know what a judge responds to stylistically in a brief, or a client in reading an opinion letter, a will, or a contract. Research is also needed into the composing processes of both law students and legal professionals. What differences exist between the composing habits of novice writers, say first-year law students, and those of more expert legal writers—third-year students, for example, who are more socialized into legal discourse, or practicing professionals? Do certain writing habits transfer into legal writing classes from previous writing experiences, whether in college or at a job? Similarly, do legal writers vary their writing practices according to the writing task—does an attorney make the same kinds of composing choices when drafting a will as when writing a pleading?

These questions are worth asking because the answers will provide direction and purpose to the teaching of legal writing. We need to understand better the kinds of choices that legal writers make, in a variety of situations, as well as how readers respond to

the various kinds of legal documents, before we can offer instruction that does more than rehearse the accepted, but often unexamined, platitudes.

What Broader Issues Exist For Legal Writing?

The last decade saw a number of state legislatures pass plain English laws for consumer documents, a movement that has come to the attention of the legal profession. Several American and Canadian institutes actively promote plain English, and the use of plain English is often advocated in law school writing courses. Conversely, others have questioned whether plain English can be meaningfully defined, or have criticized the usefulness of the so-called readability formulas used to produce plain English. The issue of plain English—how to define it and how it can be used—calls for further discussion, then. At the same time, plain English should be examined as an outgrowth of broader historical efforts at the reform of legal language, going back at least to the nineteenth century. One question that both proponents and opponents of the current plain English movement might consider is the achievements and failings of earlier reform movements and what can be learned from them.

Another area of inquiry involves examining the contexts within which legal writing is done. The varied settings for legal writing offer an excellent opportunity for studying the ways in which it is shaped by social, political, and bureaucratic influences. One of the most common settings for legal writing is the law firm, where the writing of new associates is often scrutinized by the partners; in many firms, perceived deficiencies in writing abilities are grounds for dismissal. At the same time, many firms operate a mentor or apprentice program, in which the partners will review and guide the associates in their writing. What are the differences between the writing of these "mentors" and of their "pupils"? How does this mentor system alter the character of writing within the legal profession, and in what ways does it perpetuate certain practices—for example, in style and use of language? Since this mentorship also applies to law students, who often are given writing advice during clerkships and internships, one might well ask how this system compares with the legal writing instruction that those students receive simultaneously in law school.

How Should Legal Writing Be Taught?

Much of the preceding discussion has alluded to the consequences that this kind of research will have for the teaching of le-

gal writing. Other teaching issues remain, however. One problem that looms for all law schools is that of the level of writing proficiency with which students enter law school. What differences exist among the respective writing proficiencies of individual law students and how transferable are their existing writing skills to the kinds of writing they will be doing in law? Answers to questions like these are important if legal writing programs are to offer more useful instruction in both basic and advanced writing skills.

These questions also bear on the design of legal writing curricula. To what extent can "generic" legal writing skills be taught, under the guise, for example, of the office memorandum? On the other hand, what is the place of more specialized courses, for example, in appellate writing or in drafting? If the need for the latter kind of writing courses is strong, are these subjects better taught as separate courses, or as part of a trial advocacy program, or as part of advanced law seminars?

Even a traditional, first-year course in legal writing does not address the disparity in the levels of writing proficiency mentioned above. How is remediation best offered: through special courses and workshops, through individual consulting and writing centers, or through writing programs conducted the summer before students enter law school?

Other questions are triggered by some of the points made earlier. Any investigation of the relationship between legal writing and legal reasoning will raise the question of whether legal reasoning is in any way separable from legal writing. Should legal writing courses also focus on what might be called critical thinking or problem-solving skills, as is increasingly being done in undergraduate curricula? Or should legal writing courses be taught in conjunction with, or as adjuncts to, targeted first-year courses in doctrinal areas? To what extent would this pairing between a legal writing course and a doctrinal course provide any better exposure to legal reasoning than first-year students currently receive?

Discussions such as the one above presume that legal writing is taught primarily in law schools, and yet much legal writing instruction exists in other settings. The value of undergraduate courses in writing deserves further investigation. To what extent are their goals the same and diffferent? In what ways do they offer preparation for law school-level writing and analysis? In a similar fashion, the goals and curricula of writing courses for legal paraprofessionals, who often receive only stripped down versions of law school writing, deserve examination.

This foreword cannot begin to ask all of the questions related to the emergence of legal writing as a field of teaching and research, but it does attempt to establish some starting points. Our knowledge of legal writing, and how best to teach it, is still at the pre-paradigmatic stage, despite the four decades in which it has found some place within the law school curriculum. Both the teaching of legal writing and the limited inquiry into it so far are still very much characterized by a plurality of approaches and descriptions, a fact that speaks to the rich potential of the work ahead.

The articles offered in this inaugural volume should, I hope, encourage a continuing conversation about legal writing and demonstrate the plurality of approaches possible. The first, "On the Maturing of Legal Writers," by Joseph M. Williams, discusses two models for the growth of students as legal writers and notes the consequences of our choice of a model. It employs theoretical research in psychology, linguistics, and education. "Teaching Lawyers to Revise for the Real World," by James F. Stratman, examines the reading processes of appellate judges and applies the results to the teaching of legal writing. The work for the article is based on a form of empirical research known as protocol analysis. The third article in this issue, "The Professor and the Professionals," by George D. Gopen, demonstrates the usefulness of key rhetorical principles for teaching writing to lawyers and judges.

This first issue of *Legal Writing* ends with two pieces important to the identity of legal writing as a field of teaching and research. The first, "Legal Writing: A Bibliography," by George D. Gopen and Kary D. Smout, presents a bibliography of books and articles published on legal writing up to Summer 1991. The second, "Legal Writing in the Twenty-First Century," by Jill J. Ramsfield, offers the results of a survey of legal writing programs taken in 1990. It shows where the field is now and hints at the work to be done.

I hope that all of these articles will interest you, will be of value to you in your work, and will encourage you to make your own contribution to this growing and important field. To that end, this journal will dedicate itself.

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