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Improving Legal Writing Courses: Perspectives From the Bar and Bench*

Susan McClellan**
Constance Krontz

In my twelve years on the bench, I have seen much written work by lawyers that is quite appalling.

— Hon. Harry T. Edwards

Legal writing teachers constantly fine-tune legal writing courses to better prepare students to enter legal practice. That practice, however, is rapidly changing and evolving. Although we, as teachers, may think we understand the changes in legal practice, the judges and attorneys who supervise the work of new members of the bar can help us evaluate the strengths and weaknesses of both our graduates' skills and our programs.

The literature reveals few surveys that address specific aspects of materials taught in basic legal writing courses, and fewer still that tap the expertise of these judges and attorneys. Most surveys and critiques of legal education, from the MacCrate Report3 in 1992 to the present date, address broader educational con-

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* The Authors presented this material at The Legal Writing Institute's Summer Conference in July 2000. They conducted the survey between January and May 2000.

** The Authors teach legal writing at Seattle University School of Law. Susan McClellan, who is in her twelfth year of teaching, clerked for Justice Robert F. Utter at the Washington Supreme Court and spent several years in private practice with Karr Tuttle Campbell. Constance Krontz, who is in her tenth year of teaching, clerked for Justice Barbara Durham at the Washington Supreme Court and spent several years handling criminal appeals for the former Washington Appellate Defenders Association. The Authors would like to thank Aprille Walker for her assistance in researching this Article.


3 ABA Sec. Leg. Educ. & Admis. to the B., Legal Education and Professional Devel-
cerns. One survey, however, conducted by the University of Montana Law School in 1994, specifically addressed judges' preferences in briefs. Although the survey provided useful suggestions for

opment—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (ABA 1992) [hereinafter MacCrate Report]. In its Statement of Fundamental Lawyering Skills and Professional Values, the MacCrate Report addressed concerns about communication generally, not separating writing skills from skills in oral argument. The Task Force Recommendations, however, specifically addressed writing: "In view of the widely held perception that new lawyers today are deficient in writing skills, further concerted effort should be made in law schools and in programs of transition education after law school to teach writing at a better level than is now generally done." MacCrate Report, supra, at 332.

4 E.g. Edwards, supra n. 3. Judge Edwards's comments focus on the gap between the teaching and practice of law. He criticizes most heavily the preference for teaching and writing about theory detached from doctrinal realities, the lack of attention paid to legal pedagogy, and lack of training for ethical practice. To support his argument that law schools have strayed too far from "their principal mission of professional education and training," Edwards surveyed his own previous law clerks, asking them to reflect on the connection between their own education and practice. Id. at 41-42. The thirty clerks graduated from ten different prestigious law schools. The commentary and the clerks' reflections call for a number of changes in legal education, including a few that relate specifically to legal writing. Edwards noted, as a "serious concern," the lack of good training in legal writing. He added that clerks faulted their legal writing programs, with good cause, because law school exams and seminar papers do not provide sufficient training for practicing lawyers. Id. at 63.

Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing, i.e., things that serve to facilitate communications between lawyers and clients, lawyers and opposing counsel, and lawyers and governmental decisionmakers or policymakers.

The more serious problem in legal writing, however, is what I would call a lack of depth and precision in legal analysis. For example, too many lawyers demonstrate a lack of familiarity with or understanding of controlling or analogous precedent. Too many advocates are unable to focus an argument, so as to highlight and concentrate on the principal issue(s); and too many attorneys fail to assess how an action in a particular case may affect future cases or future developments in the law. These failings, I think, are attributable in no small measure to failings in "doctrinal education."

Id. at 64-65; see Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. Leg. Educ. 469 (1993) (discussing two surveys, sent to law firm partners and to junior practitioners in the Chicago area, designed to assess the MacCrate Report skills, some skills from a survey completed in the 1970s, and the "dirty' skills of obtaining and preserving clients"). Garth and Martin's respondents ranked written and oral communication skills atop the hierarchy of "extremely important skills" needed by new practitioners, id. at 474, but the surveys did not ask them to address discrete skills in the area of writing and oral argument.

5 Sharon K. Snyder, Judges Know a Good Brief When They See One, 20 Mont. Law. 11 (June 1995). To complete the survey, judges answered thirty questions about "what does, and does not, persuade them in legal writing." Id. The survey appears to have focused on briefing in the practice of law generally, not on the specific skills of first-year associates or
briefing, it did not evaluate law school graduates' performance in their first year of practice or judicial clerking. To improve the skills of recent graduates, academics and judges have called for increased collaboration among legal educators, the bench, and the bar.⁶

To further this collaboration and to gain insights from the bench and bar, we sent a survey to judges and practicing attorneys who supervise the work of first-year associates or judicial law clerks.⁷ We selected attorneys from a variety of practices in Washington State, including offices of public defenders and state prosecutors, the Attorney General's office, and private firms of various sizes.⁸ Although all the practices are Washington based, many of them hire attorneys from law schools across the country, and several firms have offices in other states. We sought information about the performance of all first-year clerks and associates, without reference to where they obtained their law degrees. Knowledge of the bench and bar's perception of the oral and written performance of recent law school graduates generally can inform all legal writing programs. Such knowledge can help legal writing professors determine whether the skills we are targeting are those the students will need when they begin clerking or practicing law.

We presented the results of the survey at The Legal Writing Institute's Summer Conference in July 2000.⁹ As part of the program, a panel consisting of a judge and two attorneys commented on specific points raised by the survey. The panel members were judicial law clerks. The one-page article summarizing the results emphasizes organization, logical analysis, effective use of both supporting and adverse authority, proper English grammar and punctuation, and accurate citation.


⁷ The Authors would like to thank all the judges and attorneys who spent the time and effort to respond to the survey. The responses reflected considerable thought and a desire to contribute to our mission.

⁸ For obvious reasons, we did not include solo practitioners. We selected attorneys and judges who regularly supervise the work of new clerks and associates.

⁹ The Authors presented this material in concert with Molly Lien's presentation titled "Training Tortoises to Trot."
Judge J. Dean Morgan\textsuperscript{10} of the Washington State Court of Appeals, Division Two; William Bailey,\textsuperscript{11} a partner with Mills Meyers Swartling, a medium-sized Washington firm; and Elaine Winters,\textsuperscript{12} a supervising attorney with the Washington Appellate Project.\textsuperscript{13}

This Article describes the survey, summarizes the results, and offers some suggestions for rethinking areas of emphasis in legal writing programs. The discussion includes some of the panelists' comments as well as those made by the survey's respondents. In addition, Judge Morgan's Top Ten List for Legal Writers appears in the appendix.\textsuperscript{14} The entire survey, with tabulated results, is on file with the Authors.

\section*{I. THE SURVEY}

The survey includes three basic sections: a chart-form checklist for evaluating performance on specific skills; questions seeking comments about areas in which new associates and judicial law clerks seem best prepared and areas legal writing programs should stress more heavily; and questions relating to the responding attorney's or judge's practice. In designing questions for each section, we tried to balance the goal of obtaining as much information as possible with the need to keep the survey short enough to ensure responses from busy judges and practitioners.\textsuperscript{15}

\textsuperscript{10} Judge Morgan formerly served as a partner in a major Seattle law firm, as a public defender, as a superior court judge, and as the Former Chief Presiding Judge statewide for the Court of Appeals. He has also taught extensively at two law schools and at both the Washington State and National Judicial Colleges.

\textsuperscript{11} Mr. Bailey previously served as a partner at Lane Powell Spears Lubersky LLP, one of the largest Seattle law firms, and as a Deputy Prosecuting Attorney. He has been named the American Board of Trial Advocates' Washington State Trial Lawyer for 2000. He is also a fellow in the American College of Trial Lawyers.

\textsuperscript{12} Ms. Winters served as a public defender in Seattle for more than twenty years, working as both a trial attorney and an appellate advocate. In her current position, she supervises attorneys representing indigent clients in the Washington Court of Appeals and Supreme Court.

\textsuperscript{13} John D. Lien, who is a partner in the Chicago office of Foley & Lardner, a large firm with nearly 1,000 attorneys and sixteen offices nationwide, also served on the panel, but his remarks were directed to points made in Molly Lien's presentation. \textit{Supra} n. 9.

\textsuperscript{14} Judge Morgan prepared his \textit{Top Ten List for Legal Writers} as part of his presentation for the panel's review of the survey.

\textsuperscript{15} The Authors would like to thank the following members of the Seattle University
The checklist in section one asks the respondent to rate performance on specific skills divided into six parts:

- Legal Research
- Presenting Legal Analysis in Briefs and Office Memos
- Writing
- Mechanics
- Manner of Working
- Oral Communication Skills

Each part lists four to eight specific skills that generally receive some emphasis in legal writing courses.

The questions in section two are open ended. The intent was to allow each respondent to express personal observations about strengths and deficiencies in new associates' or judicial law clerks' performance in legal research and writing. The questions also seek recommendations about skills legal writing programs should stress more heavily. The respondents' observations and recommendations could and did exceed the scope of questions asked in section one, and they added depth to an otherwise impersonal checklist.

The questions in section three, which relate to the nature of the respondent's practice, seek information about the size of the firm, the percentage of time new associates and clerks spend writing different types of documents, the length of internal (objective) office memoranda produced, and the manner of reviewing work. This information provides insight into the way associates spend their time in practice and raises questions about the types or length of writing assignments that might be most appropriate for law students, especially first-year law students. Additional ques-

School of Law faculty for reviewing the survey and offering their suggestions: Professor and Associate Dean Janet Ainsworth, Associate Professor Maggie Chon, Writing Advisor Anne Enquist, Clinical Professor of Law and Director of Externships Betsy Hollingsworth, Associate Professor John Mitchell, Legal Writing Director Laurel Oates, and Legal Writing Professor Mimi Samuel. Additionally, we would like to thank Lori Lamb for her assistance in formatting and distributing the survey and in tabulating the initial results.

16 Judicial clerks' activities are generally far more limited than those of new attorneys in practice. This question, therefore, focused on associates in practice.

17 For example, if most firms expect new attorneys to write only three-to-five-page objective office memoranda, writing programs might consider restricting most assignments to that length. Similarly, if firms dispense with objective memoranda altogether, writing programs might revise the relative emphasis given to objective office memoranda and per-
tions in section three relate to the respondent’s length of time in practice and the nature of training in legal writing received in law school.

II. THE SURVEY RESULTS

Overall, the results seem to support the focus of modern legal writing programs, but they also indicate areas for additional emphasis. As expected, the respondents generally gave higher marks for the rudimentary skills that are easier to teach, such as stating the legal rule clearly, than for the more difficult skills, such as using persuasive techniques effectively or writing concisely. The lower marks for the difficult skills do not necessarily indicate monumental deficiencies. As one of the respondents explained, “My rationale for marking ‘fair’ rather than ‘good’ is generally to highlight areas where improvement is desirable. It is not my intent to indicate that overall work product is not good.” Improvement is always desirable, but the number of fair and poor ratings for certain skills deserves discussion.

A. SECTION ONE, PART ONE: LEGAL RESEARCH

As the chart below demonstrates, respondents favorably rated new associates’ and clerks’ knowledge of how to use print and computerized sources to research legal issues.

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18 Legal writing programs usually teach students to frame, research, and analyze an issue; to present that analysis in an effective manner in a conventional format, usually in an internal office memorandum, a persuasive memorandum or brief, or an oral argument to a court; and to use proper tone, grammar, and citation forms in each document. See generally e.g. Laurel Currie Oates, Anne Enquist & Kelly Kunsch, The Legal Writing Handbook: Analysis, Research, and Writing (2d ed., Aspen L. & Bus.1998); Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, Writing & Analysis in the Law (4th ed., Found. Press 1999). Although texts often spend some time discussing opinion letters, negotiations, and client counseling, they emphasize briefs and memos, correct and effective writing, and oral argument.

19 The instructions for completing the chart read as follows: “Please rate the ability, generally, of first-year associates or judicial law clerks to perform the following skills (Excellent = E, Good = G, Fair = F, Poor = P, No Basis to Assess = N).”
PART ONE: LEGAL RESEARCH

1. Understand which sources to use to begin researching an issue?
   - E: 4, G: 19, F: 6, P: , N: 

2. Understand how to use print sources to research legal issues?
   - E: 3, G: 22, F: 4, P: 1, N: 

3. Understand when to use print sources to research legal issues?
   - E: 3, G: 16, F: 10, P: 1, N: 

4. Understand how to use computerized sources?
   - E: 12, G: 15, F: 3, P: , N: 

5. Understand when to use computerized sources?
   - E: 2, G: 17, F: 10, P: 1, N: 

6. Understand how to use the Internet to find factual.
   - E: 6, G: 5, F: 5, P: 13, N: 

7. Research efficiently, in a cost-effective manner?
   - E: 3, G: 11, F: 11, P: 1, N: 3

Twenty-seven respondents (ninety percent)\(^{20}\) gave "good" or "excellent" ratings to knowledge of how to use computerized sources, while only three (ten percent) gave "fair" ratings.\(^{21}\) In fact, the excellence rating for this skill (forty percent) is higher than for any other skill in the survey.

The ratings drop markedly, however, for understanding when to use computerized sources and for researching efficiently. While the number of "good" ratings remains about the same for the "when" question, the ratings for "excellent" and "fair" essentially reversed: two (seven percent) excellent, seventeen (fifty-seven percent) good, and ten (thirty-three percent) fair.\(^{22}\) The results for researching efficiently are even lower; the "good" ratings drop to thirty-eight percent and three respondents rated performance as poor.

The results for "researching efficiently" are not surprising, considering the difficulty in both teaching and learning that skill. It necessarily includes the concepts in questions three and five, understanding when to use print and computerized sources. As one respondent noted, "[S]ome are less adept in using print resources — though sometimes one simply has to do it the old fash-
ioned way.” Panelist Winters suggested that, regardless of the me-
dium used, new attorneys could streamline their research by
learning to use secondary sources more efficiently. Nonetheless,
respondents’ comments indicate that new associates and clerks
have good research skills, especially for state law issues and for
substantive areas in which they have taken classes.

B. SECTION ONE: PART TWO, PRESENTING LEGAL
ANALYSIS IN BRIEFS AND MEMOS

Overall, the scores are lower for presenting the analysis than
for researching.

<table>
<thead>
<tr>
<th>PART TWO: PRESENTING LEGAL ANALYSIS IN BRIEFS AND MEMOS</th>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Organize content in a manner that meets conventions and readers' expectations?</td>
<td>16 (PLUS 1-G/F)</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2. Structure analysis around legal principles and use authorities to illustrate how the principles have been applied in similar cases (rather than focusing on a case and stating the point later)?</td>
<td>17 12 (PLUS 1-F/P)</td>
<td></td>
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<tr>
<td>3. State the applicable rules clearly and concisely?</td>
<td>3 17 9 (PLUS 1-F/P)</td>
<td></td>
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<tr>
<td>4. Develop strong arguments by comparing the reasoning and facts from analogous cases to facts from the attorney’s case?</td>
<td>1 13 14 1</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>5. Present the arguments based on mandatory authority before those based on lesser authority?</td>
<td>2 18 8 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Make the entire argument or discussion section read smoothly?</td>
<td>11 (PLUS 1-G/F) 14 3</td>
<td></td>
<td></td>
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<tr>
<td>7. In briefs, use persuasive techniques, including acknowledging, but minimizing, the opponent's best facts, cases, or arguments?</td>
<td>4 18 5 3</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>8. Present thorough, yet succinct, analysis?</td>
<td>8 (PLUS 1-G/F) 18 (PLUS 1-F/P) 2</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Perspectives from Bar and Bench

As might be expected, the ratings are higher for the writing skills that are easier to teach (numbers 1, 2, 3, and 5) than for the more complicated or global skills (4, 6, 7, and 8).

Although all of the ratings indicate that improvement is needed, the last three show that writing programs need to emphasize making an argument section read smoothly; using persuasive techniques to address the opponent’s strongest points; and presenting thorough, yet succinct, analysis. None of the respondents rated performance on any of those three skills as excellent, while several rated performance as poor.

Skill number seven, using persuasive techniques to address the opponent’s best points, received the lowest rating of any skill in the survey. No respondents rated skill performance as excellent, while only fourteen percent gave good ratings; fifty-nine percent, fair; and seventeen percent, poor. Comments in section two of the survey underscore the ratings and stress the need to confront adverse authority: “[Legal writing teachers] should stress [the] need to maintain credibility with decision-makers, and to clarify that [the] advocate’s role does not include overlooking contrary facts/authority.” Panelist Judge Morgan highlighted the need to deal with the weak points:

23 Judges regularly praise succinct writing. E.g. Brent T. Adams, Writing for Lawyers, 2 Nev. Law. 21 (Feb. 1994) (district judge; “Rule 2: Make it short. Senior United States District Judge James M. Burns often remarks that nothing is persuasive after five pages.”); Christine M. Durham, Writing a Winning Appellate Brief, 10 Utah B.J. 34 (Oct. 1997) (“Never forget that appellate judges regularly face mountains of briefs — they want to learn what they need to know quickly and efficiently.”); Charles Wood, How to Write Appealing Briefs, 25 Mont. Law. 29 (Oct. 1999) (quoting Montana Supreme Court Justice William Leapheart’s advice: “First I look to see how long a brief is. A brief should be punchy and get to the point.”). Retired Judge Alba L. Whiteside has stressed the need to be brief but to present thorough analysis. Alba A. Whiteside, Ohio Appellate Practice: How to Write the Appellate Brief — Helpful Hints and Suggestions Oh. App. Prac. T. 5.28 (West 2001) (“Effective writing is hard work and requires that you devote the necessary time and effort to create a brief, simple, clear, thorough, complete, and effective appellate brief.”). Briefs should be thorough, but most judges do not want to see the academic treatment required for law review articles. David R. Fine, What It Takes to Write a Great Brief, 20 Pa. Law. 30, 31 (June 1998). Judge Ruggero Aldisert estimates that he has read about 12,600 briefs, or some 630,000 pages — about 400,000 of which were unnecessary. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 194 (rev. 1st ed., NITA 1996). Judge Aldisert quotes and discusses comments about brevity and coherence made by chief justices of state supreme courts. Id. at 191-196.

24 Three respondents indicated no basis to assess.
To a limited extent, the court is interested in your strong points. To a greater extent, the court is interested in your weak points— in other words, in exploring the bad things that may happen if it embraces your position. What any judge really wants to know is this: If I jump over the cliff in the direction you are urging, how far will I fall?  

To be persuasive, an attorney should strongly make her own point in such a manner that it discredits her opponent's point: "Briefs should be written from the offensive standpoint rather than from the defensive standpoint." Judge Morgan emphasized the need to "play your own game first." He advised attorneys to "[d]escribe your theory in complete and cohesive form; then rebut your opponent's theory." Three other respondents stressed the need for persuasive, effective advocacy that does not misrepresent authorities. Judge Morgan concurred: "Don't overstate your facts or your authorities."

Similar comments highlight the need to focus on skill number 8: presenting thorough, yet succinct, analysis. One comment relating to question 8 indicates that analysis might be thorough, but not succinct. Another states that we need to stress "the need to write actively and avoid redundancy. Few courts have time to read law review articles in the guise of briefs." On the brighter side, one respondent noted some improvement in this area:

I have noticed a great improvement over the last ten years in law clerks' abilities to write clearly and concisely. Since I am a great believer in The Elements of Style (Strunk &

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Do make sure your narrative contains not only the good but at least some of the bad and the ugly. "While it's obviously important to be a good advocate and emphasize your strong points, it's silly to ignore conspicuous holes in your case," says Judge John P. Doyle, now a judge of the unified Los Angeles Superior Court. . . . "If you address any difficulties with your case candidly, the judge thinks, 'How refreshing that [counsel] has chosen to talk about them a little bit.' Not mentioning them, on the other hand, is sometimes like trying to ignore the elephant in the room."

Dustman, supra, at 100.

White) and The Elements of Legal Style (Bryan Garner), I think every lawyer should own a copy of each – from the first day of law school and forevermore.

Other comments stress the need to teach not only concise writing but also the “ability to develop concise legal arguments” – with power and style. “Brevity is an art form.”

All three panelists also emphasized the need to teach students to write concisely. Ms. Winters said, “Thank you, thank you, thank you for teaching them plain English,” but teach them to write as succinctly as possible. Attorneys in her firm are paid on a per case basis, so they must figure out the main points as soon as they can and focus on stating them succinctly in briefs. Judge Morgan stressed the goal: to communicate clearly and quickly. To accomplish the goal, he added, attorneys should strip away excess verbiage and use short words, short sentences, and short paragraphs.

Concise writing goes hand in glove with skill number 6: making the entire argument or discussion section read smoothly.27 Most responses were in the “good” to “fair” range, with a few “poor” ratings. The comments focus on problems with organizing and supporting arguments. Some problems arise from failing to think before writing; in addition, several respondents indicated that new associates tend to have trouble applying the law to the facts of their cases. One respondent noted that new associates were very good at finding and stating the law, but need to work on using “topic sentences that develop the point and distinguishing between mandatory and persuasive authority. [They] need to take on a project as if it is [their] own – not just an academic exercise – and make arguments/conclusions accordingly.” Revising for flow and coherency has both analytical and writing components. The writing portion is addressed more thoroughly in the next section.

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27 Judges regularly plead for readable briefs: “I only read a brief once; I don’t have time to reread it — so you’d better hope that I understood it that one time through.” Wood, *supra* n. 25, at 29 (quoting Montana Supreme Court Justice William Leapheart).
C. SECTION ONE, PART THREE: WRITING

Even if new clerks' and associates' analysis proceeds fairly well, the responses show that the manner of presenting that analysis still needs more improvement.

**PART THREE: Writing**

1. **Start a paragraph with a principle-based topic sentence and develop that point in the sentences that follow?** (Sample A is principle-based; sample B is not.)

   **Sample A:**
   
   COURTS HAVE READILY FOUND THAT FLIGHT COUPLED WITH VIOLENCE OR PHYSICAL RESISTANCE CONSTITUTES OBSTRUCTION. *E.g., State v. Little*, 116 WN.2d 488,
   
   **Sample B:**
   
   IN STATE V. LITTLE, 116 WN.2D 488, 492, 806 P.2D 749 (1991), POLICE OFFICERS INVESTIGATING A GROUP OF JUVENILES BELIEVED TO BE INVOLVED IN A CRIMINAL TRESPASS IDENTIFIED THEMSELVES AND YELLED FOR LITTLE TO STOP AS LITTLE RAN OFF.

2. **Use appropriate transitions between sentences and paragraphs?**

3. **State points clearly, accurately, and in plain English?**

4. **Write in a fluid, concise, readable style?**

   For each skill, except skill number 2, approximately half of the ratings are in the "fair" range or below.

   One respondent suggests the problem is simply a lack of experience with writing:

   In our type of firm (large corporate), the new associates tend to have excellent legal analytical skills. The writing shortfalls, generally, involve how to structure paragraphs and larger pieces of prose. It's not a "legal" writing failure, nor is it an intellectual failure -- most of them are smarter than I am -- [i]nstead, they just haven't had enough exposure in their careers to writing, period. The associates
with business experience, after college, in areas where they needed to write, are generally better prepared.

Panelist Bailey voiced a similar concern: Many attorneys have not read enough good writing. He suggested that they read The New York Times, Gunther’s biography of Learned Hand, and Judge Posner’s opinions.

While the lack of experience with writing is a problem, perhaps the lack of experience with rewriting or redrafting is an even greater problem. Every respondent stated that attorneys in the firm, agency, or court write multiple drafts. The words of one respondent should be chiseled in the portals of every legal writing department across the country: “As the founding partner of my law firm often remarked, ‘There’s no such thing as great writing. There’s only great re-writing.’” Judge Morgan’s directive is equally memorable: “Write, re-write, and re-write some more.”

Great rewriting can lead to clear, direct, coherent, concise writing; many respondents suggested stressing those skills more heavily. Coherency is key. “Above all, make sense,” Judge Morgan advises. He suggests asking whether your barber or grocery clerk would understand why you are right; “If not, go back and start again!” In writing or re-writing, as Judge Morgan noted, “[e]ach paragraph should have a topic sentence that proceeds linearly from the last to the next.” We all think we do stress clear, direct, coherent, concise writing, but those skills are harder to teach than the mechanics, which fared better in the ratings.

D. SECTION ONE, PART FOUR: MECHANICS

Although some respondents noted continuing problems with mechanics of grammar, punctuation, citation, and court rules, the overall ratings were fairly good.


29 Judges regularly stress rewriting and editing: “Be candid with the court. Don’t file a brief, whether prepared personally or otherwise, without having edited it yourself at least three and preferably four or five times.” Aldisert, supra n. 25, at 264 (quoting Frank X. Gordon, Former Chief Justice of the Arizona Supreme Court).

30 See Snyder, supra n. 7 (discussing Montana judges’ preferences for organization using strong topic sentences and short paragraphs).
Some of the scores, however, are low, and some respondents lamented the continuing need to re-teach skills that should have been learned in elementary or secondary school. Moreover, the higher ratings in this area might also reflect the preliminary selection process some firms use. At least one firm sends all applicants' writing samples and cover letters to a grammarian; if she does not find them acceptable, the applications never reach the hiring committee.31 Similarly, another hiring coordinator, who has excellent skills in writing and grammar, stated that the hiring committee never sees applications when the cover letter contains grammatical errors. These considerations emphasize the need to continue systematic efforts to improve students' basic skills in grammar and punctuation.32

E. SECTION ONE, PART FIVE: MANNER OF WORKING

New associates and clerks received better scores for working well with little supervision than they did for completing work products efficiently or for submitting work products that require little reworking by supervisors.

31 The information is from a phone conversation with the hiring coordinator, who is not an attorney, for one Seattle/Portland-based firm. We assured all survey participants that all information would be discussed anonymously.

32 See Snyder, supra n. 7 (noting that “54 percent of Montana judges responded that proper English grammar and punctuation are important in legal writing because poor grammar and punctuation detract from the attorney's legal analysis”).
Skills 1 and 3 necessarily require excellence in all the other skills rated in the survey. The lower scores are hardly surprising, but they should stimulate thought for developing systematic methods of teaching efficiency.

F. SECTION ONE, PART SIX: ORAL COMMUNICATION SKILLS

The ratings for oral communication skills are generally higher than those for writing skills, but a number of respondents had no basis to assess those skills. Some of those respondents were judges; judicial clerks write internal memoranda and draft opinions, but they do not present oral arguments.33

Only question 3, returning smoothly to an argument after answering a question, received somewhat low marks. That rating is not surprising considering the difficulty of both responding to judges’ questions and teaching students to respond to them.

33 Other respondents apparently supervised written work but not the oral arguments of new associates.
G. SECTION TWO: RESPONDENTS' GENERAL COMMENTS AND SUGGESTIONS

Section two contained only two questions. The first asked the respondents to comment on research and writing areas in which the new associates or law clerks seem best prepared. The second asked for the converse: areas, either those addressed in section one or other areas, that legal writing programs should stress more heavily. A number of the respondents' comments have already been incorporated into the appropriate areas of the Section One discussion above. A few other comments, however, are worth noting, as are some of the respondents' comments about legal writing programs in their own law schools.

Comments indicate that new associates and clerks seem best prepared to conduct research, particularly on-line research; draft objective memos and single-issue briefs; and "make straightforward comparisons with case law and distinguish their own facts when necessary."

Suggestions for improvement seem to focus on three areas: organizing arguments, writing concisely, and writing persuasively. The latter two combine well in the words of one respondent: the ability "to concisely make an argument with power and style."

Several respondents stated that the legal writing programs in their own schools could have been improved by focusing more on memoranda or briefs supporting motions, particularly summary judgment motions, and by requiring more writing. Some of that writing could take the form of other common drafting documents, such as complaints and answers. One person suggested assigning multiple writing projects and providing more feedback.

Some comments reflect practice issues that normally do not receive formal instruction. For example, one respondent suggested teaching students to juggle multiple projects at the same time. Another suggested teaching ways to help clients do things, within the limits of the law, rather than tell clients why they cannot do things. The same respondent suggested hiring legal writing teachers who have spent a number of years in private practice.

Some comments suggest that writing programs either be longer or offer additional legal writing classes. Several respondents lauded their schools' programs for having small classes with intensive, hands-on instruction and realistic projects. Other
strengths identified in programs included good research training, good workshops and exercises for grammar and punctuation, good emphasis on Plain English and editing, and good instruction for the structure of objective memoranda and briefs. The best feature of any legal writing program may well be, in the words of one respondent, "the opportunity to make my first 100 mistakes before clients were paying for my time."

H. SECTION THREE: THE RESPONDENTS' PRACTICES

This section of the survey was designed primarily to determine the percentage of time new associates spend writing different types of documents, the length of office memoranda new associates are asked to write, and the amount and type of review new associates' work receives.

We knew that judicial clerks spend a good portion of their time writing bench memos and drafting opinions, but we wondered whether there is any correlation between the size of firm or agency and the type of documents most frequently produced. We divided the firms and agencies into three size categories: small (six to twenty); medium (twenty-one to sixty); and large (more than sixty). Although the type of document varies according to the type of practice, the results show quite a range.

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34 This survey was not sent to firms employing fewer than six attorneys because they would not hire new associates frequently enough to warrant completing the survey.
### FIVE SMALL FIRMS (6-20 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Briefs</strong></td>
<td>90 80 20-30 10 5</td>
</tr>
<tr>
<td><strong>Contracts/Leases</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Court Documents</strong> (Pleadings, etc.)</td>
<td>10 20 10</td>
</tr>
<tr>
<td><strong>Discovery Documents</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Internal (Objective) Office Memos</strong></td>
<td>*40 55</td>
</tr>
<tr>
<td><strong>Other (Describe)</strong></td>
<td></td>
</tr>
<tr>
<td>* Usually turned into brief or demand letter.</td>
<td></td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>20% argument and and correspondence.</td>
</tr>
<tr>
<td><strong>Note</strong>: # some overlap</td>
<td></td>
</tr>
</tbody>
</table>

### FOUR MEDIUM FIRMS (20-60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Briefs</strong></td>
<td>#30 30 20-25 10</td>
</tr>
<tr>
<td><strong>Contracts/Leases</strong></td>
<td>#small 10-15</td>
</tr>
<tr>
<td><strong>Court Documents (Pleadings, etc.)</strong></td>
<td>#30 25 30</td>
</tr>
<tr>
<td><strong>Discovery Documents</strong></td>
<td>25 30 20</td>
</tr>
<tr>
<td><strong>Internal (Objective) Office Memos</strong></td>
<td>25 15 10 50</td>
</tr>
<tr>
<td><strong>Opinions</strong></td>
<td>25 0-5</td>
</tr>
<tr>
<td><strong>Opinion Letters</strong></td>
<td>25 10</td>
</tr>
<tr>
<td><strong>Policies</strong></td>
<td>0-5</td>
</tr>
<tr>
<td><strong>Other (Describe)</strong></td>
<td>*letters to clients  *small</td>
</tr>
<tr>
<td>* Some overlap</td>
<td></td>
</tr>
</tbody>
</table>
SIX LARGE FIRMS (MORE THAN 60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>#15 40 25 20 #30</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>10</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>10 25 15 20</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>40 25 10 10</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>*50 50 20</td>
</tr>
<tr>
<td>Opinions</td>
<td></td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>5 20 25</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>* includes e-mail ** client letters **10</td>
</tr>
</tbody>
</table>

# This varies widely depending upon the practice area in which the associate works. In my particular practice area, which is a mix of business advice and litigation, it breaks down along these lines.

## Litigation associates spend most of their time working on research and preparation of legal memoranda, motion preparation and response, and document discovery. Business associates research business and commercial issues and draft commercial and corporate documents.

FOUR COURTS

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prehearings/Bench Memos</td>
<td>70 #100</td>
</tr>
<tr>
<td>Draft Opinions</td>
<td>30 #100 100 **100</td>
</tr>
</tbody>
</table>

* True only for commissioners' law clerks.

** Commissioners' law clerks write draft rulings rather than draft opinions.

# Includes research and writing.

FIVE SMALL AGENCIES (6-20 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>5 20 #5 20 #35</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>10</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>5 20 15 20</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>1 5 30 20</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>1 75 50 30</td>
</tr>
<tr>
<td>Opinions</td>
<td></td>
</tr>
<tr>
<td>Policies</td>
<td>5</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>* Correspondence to public ** Client correspondence **10</td>
</tr>
</tbody>
</table>

# Percentages include research time.

## Percentages are time spent writing; we also have oral arguments and telephone calls with clients.
TWO MEDIUM AGENCIES (20-60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>20 2</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>10 15</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>10 5</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>2</td>
</tr>
<tr>
<td>Opinions</td>
<td>&gt;1</td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>&gt;5</td>
</tr>
<tr>
<td>Policies</td>
<td>&gt;1</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>*</td>
</tr>
</tbody>
</table>
* Most time is spent doing oral arguments
** Jury Instructions

FIVE LARGE AGENCIES (MORE THAN 60 ATTORNEYS)

<table>
<thead>
<tr>
<th>Project</th>
<th>Percentage of Time Spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briefs</td>
<td>20 30 10 8 70</td>
</tr>
<tr>
<td>Contracts/Leases</td>
<td>2</td>
</tr>
<tr>
<td>Court Documents (Pleadings, etc.)</td>
<td>3</td>
</tr>
<tr>
<td>Discovery Documents</td>
<td>30 2</td>
</tr>
<tr>
<td>Internal (Objective) Office Memos</td>
<td>50 70 85</td>
</tr>
<tr>
<td>Opinion Letters</td>
<td>20</td>
</tr>
<tr>
<td>Other (Describe)</td>
<td>* 70</td>
</tr>
</tbody>
</table>
*Internal office memorandum intended to analyze and resolve a discrete legal issue for a client. The memos are not necessarily “objective” as stated above.
** Oral argument Trials

We anticipated that new associates in small firms would produce fewer objective office memos than those in large firms. That assumption proved to be only partially correct. Although three of the five small firms surveyed indicated that new associates spend no time on objective memos, the other two indicated that they spend forty to fifty-five percent of their time on them. The four medium firms indicated percentages from ten to fifty, while the six large firms listed zero to fifty.³⁵

The agencies also suggest quite a range for the percentage of time spent producing objective memos. The five small agencies

³⁵ One respondent provided the following comment instead of percentage ratings: “Litigation associates spend most of their time working on research and preparation of legal memoranda, motion preparation and response, and document discovery. Business associates research business and commercial issues and draft commercial and corporate documents.”
reported percentages from zero to seventy-five; the two medium agencies, zero to two; and the five large agencies, zero\footnote{This respondent added the following note: "Internal office memoranda intended to analyze and resolve a discrete legal issue for a client. The memos are not necessarily 'objective' as stated above."} to eighty-five, with three of the large agencies reporting seventy or higher.

The length of memos requested varies greatly depending on the task, but most firms and agencies indicated that the average length is five single-spaced pages. Several estimated the length as five to ten single-spaced pages, which is similar to the lengths given for bench memos in courts.

Surprisingly, in a number of firms and agencies, the percentage of time new associates spend writing briefs is lower than the time spent writing internal office memos, but that statement does not hold true across the board\footnote{The agencies surveyed included offices of state prosecutors, public defenders, and attorney general divisions of other state agencies. At least one firm and one agency do only appellate work.}. Three of the four small firms reported percentage of time spent briefing as five to twenty to thirty, but the remaining two firms reported eighty and ninety.\footnote{The latter firm does only appellate work.} Medium firms reported ten to thirty percent, while large firms reported fifteen\footnote{The respondent noted, "This varies widely depending upon the practice area in which the associate works."} to forty. Four of the five small agencies listed percentages as five to twenty, but the fifth listed seventy-five (including oral arguments and calls to clients).\footnote{This agency does only appellate work.} The medium agencies listed two to twenty percent, while four of the five large agencies listed eight to thirty, and the fifth listed seventy.

Firms and agencies generally listed ranges for time spent writing court documents, such as pleadings, as ten to thirty percent and discovery documents about the same. Some firms and agencies, however, reported that associates spend no time creating these documents.

The judges’ and law firms’ approaches to reviewing the written work of new judicial clerks and associates vary greatly. Even within a firm, attorneys have differing attitudes: "Our firm has varying opinions on how to improve a new associate’s skills. Some [have a] ‘sink or swim’ attitude, others provide one-on-one help..."
when asked, others seek out new associates and offer assistance.”
Nine of the respondents indicated that the individual attorney
produces the work product independently, with one noting that an
appellate brief is peer reviewed. Six respondents stated that the
firm or agency uses some form of peer review. Fifteen respondents
indicated that a senior attorney or judge regularly edits a new as-
sociate’s work, but five others stated that the practice varies or
that help is given only when requested.

Some firms have organized professional development pro-
gams. Most of the large firms and some smaller firms and agen-
cies provide group seminars and encourage new associates to at-
tend CLE’s about legal writing. Some firms assign a mentor to
each new attorney, and some combine several techniques. The bot-
tom line seems to be that new attorneys cannot count on receiving
on-going, systematic training or assistance with legal writing in
some practices.

III. SUGGESTIONS FOR RETHINKING AREAS OF
EMPHASIS IN LEGAL WRITING PROGRAMS

This survey provides some important foundation data for
evaluating whether current legal writing programs are meeting
the needs of today’s courts, public agencies, and law firms. The
data provide information about how well first-year clerks and as-
sociates perform certain skills and about the types of documents
that are most prevalent in firms and agencies of different sizes.
Both types of information can help writing professionals refine
their programs.

Legal writing programs, the survey indicates, have had some
success in teaching the basic concepts of research, writing, and
oral argument, but innovative methods of teaching certain skills
could benefit graduates. Although new associates seem to under-
stand how to research legal issues, particularly how to research
on-line, they need more training in researching efficiently. That
skill involves judgment and a more thorough picture of both re-
search skills and a given area of law. In addition, training should
emphasize how to organize a coherent legal argument that moves
smoothly, persuasively, and concisely from one point to the next.
To improve writing skills, programs need to provide a number of writing assignments, not just one or two. To be consistent with most objective memoranda produced in practice, most writing assignments for office memos should be limited to five single-spaced or ten double-spaced pages. Those memos should remain an important part of legal writing programs, given the percentage of time many new associates spend writing them in a number of firms and agencies.

In Seattle University’s program, we are addressing some of these concerns by trying a revised curriculum for our first-year course, which is the portion of our required writing program in which we teach objective writing. Instead of requiring four memos that are 10-15 double-spaced pages, we will be assigning about ten projects, most of which are considerably shorter than the assignments in previous years. We hope that the shorter assignments will serve three pedagogical goals: 1) provide students with more frequent writing experiences; 2) allow us to focus more on developing clear, coherent, succinct writing; and 3) more closely reflect the length of memos associates currently produce in practice.

Although objective memos are important, persuasive writing should receive additional emphasis. That emphasis should contain

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41 Laurel Currie Oates, I Know That I Taught Them How to Do That, 7 Leg. Writing 1, 7-8 (2001) (citing studies of “transfer,” the problem of teaching students to use a known structure to solve a similar problem). “[I]n teaching our students how to organize a discussion section that involves the analysis of elements, we should provide multiple examples.” Id. (citation omitted). Director Oates suggests that multiple memo problems in different areas of law would be desirable, but in the interests of limited time, several sample memos provided in the assigned reading and during class will help. Id. at 8; see id. at 12-14.

42 This survey addresses only practice-oriented concerns. Similarly, this Article discusses only reasonable inferences from the respondents’ ratings or comments. For a discussion of other pedagogical reasons that support continued emphasis on objective memoranda, see Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 Leg. Writing 1, 20-22 (2000).

43 Legal Writing Professors at Seattle University have discretion in determining the exact number of assignments.

44 In her keynote address to the AALS conference in 1999, former Attorney General Janet Reno praised the legal preparation of young attorneys in the Justice Department, but noted areas for improvement:

First of all, you haven’t taught them how to write yet, and I don’t mean writing a legal brief, I mean writing a memo that will prepare a client to make a decision, or one that will explain a legal position. One of the things I treasure and sometimes save in a drawer as an example is a beautifully written memo-
three components. First, students must realize that good advocacy requires addressing, not avoiding, the opponent's strongest points. Addressing those points does not mean repeating the opponent's arguments, but rather using persuasive techniques to minimize their importance. Second, students must understand the audience and realize that good briefs are not law review articles. Students must concisely and persuasively apply the law to the facts of the case, not give the entire history of the point of law. Audience is important in the final point as well; students should receive training in writing motion briefs as well as appellate briefs. The concerns of appellate and trial court judges are not synonymous.45

To the extent possible, legal writing programs should teach students to draft other types of legal documents as well as briefs and office memoranda. Although the initial legal writing course might be over-taxed to include additional documents, advanced legal writing courses, drafting labs, or skill components in doctrinal courses could provide this training.

For all types of writing, legal writing teachers must stress rewriting, editing, and proofreading. Before the editing and proofreading begin, the argument or analysis must be coherent and easy to read. Once the writing is clear, graduates must eliminate surface errors in resumes, cover letters, and writing samples if they hope to pass the first hiring hurdle in some firms, by obtaining the grammarian's approval. Once hired, a new associate must carefully edit work if he or she hopes to avoid having a supervisor "edit what the new associate believes to be the 'final draft.'" It is often difficult to explain to students that grammar and punctuation really matter. The comments from responses to this survey might help make the point.

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randum that is comprehensive, that flows so that you don't have to go back and forth and back and forth to see which phrase modifies which phrase.


45 Students must understand that trial judges focus on applying the law to the facts of the case, so arguments based on the underlying facts and on the burden of proof are key. While facts are still critical at the appellate level, appellate courts focus primarily on trial court error; in reviewing that error, questions relating to the preservation of error, the standard of review, and harmless error are key. E.g. Oates et al., supra n. 20, at 260. In close cases, the appellate courts also focus on the burden of proof.
Finally, legal writing teachers must develop some methods for teaching students to research and write briefs and memos efficiently. Respondents consistently gave new associates and judicial clerks lower marks for researching efficiently and for producing a work product that requires little reworking by the supervising attorney. We have made progress, but significant challenges remain, especially in teaching efficiency.
Judge J. Dean Morgan's Top Ten List for Legal Writers

I offer ten suggestions for legal writing. Each is a generalization that will help many, but not all, situations.

1. **Short words, short sentences, short paragraphs.**
The goal is to communicate clearly and quickly. A writer is more likely to achieve that goal if he or she uses common words, simple sentences, and a separate paragraph for each idea.

2. **Strip away excess verbiage.**
Communication requires clarity. To achieve clarity, one must expose the essence of the case. To expose the essence of the case, one must strip away the superfluous.

3. **Play your own game first.**
Describe your theory in complete and cohesive form; then rebut your opponent's theory. If you rebut your opponent's theory in the midst of discussing your own, you risk obscuring your own.

4. **Recognize and deal with your weak points.**
To a limited extent, the court is interested in your strong points. To a greater extent, the court is interested in your weak points — in other words, in exploring the bad things that may happen if it embraces your position. What any judge really wants to know is this: If I jump over the cliff in the direction you are urging, how far will I fall?

Distinguish volunteering your weak points from the need to deal with them. Although it may not be necessary to volunteer weak points that your opponent is not putting in issue, it is crucial to discuss those that your opponent is putting in issue.

5. **Don't overstate your facts or your authorities.**
If you don't follow this tip, your credibility will suffer—in this case, and perhaps in future cases also.
6. **Write, re-write, and re-write some more.**
   As someone once said, there's no such thing as great writing; there's only great re-writing.

7. **Write a roadmap.**
   A “roadmap” is a statement of each proposition essential to your analysis, in linear order. If you can’t write a roadmap, think about settling.

8. **Each paragraph should have a topic sentence that proceeds linearly from the last to the next.**
   If you have written a roadmap, this step will not be hard; if you haven’t, this step may be impossible. To do this is to avoid redundancy.

9. **Follow the usual rules of good writing.**
   Examples include but are not limited to:
   a. Active over passive
   b. Singular over plural
   c. Present tense over other tenses
   d. Parallel subjects within the same paragraph
   e. One meaning per pronoun within the same paragraph
   f. Transition words to relate ideas (e.g., accordingly, hence, thus, therefore, consequently, additionally, alternatively, finally, lastly)
   g. Subject and verb as close together as possible

10. **Above all, make sense.**
    Would your barber or grocery clerk understand why you are right? If not, go back and start again.