A Proposal to the ABA: One Required Legal Writing Course For All Six Semesters of Law School

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A PROPOSAL TO THE ABA

ONE REQUIRED LEGAL WRITING COURSE FOR ALL SIX SEMESTERS OF LAW SCHOOL

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The biggest failure at most law schools is the dearth of seriously good skills courses, especially training in legal writing.

We all have dreams. In order to make dreams come into reality, it takes an awful lot of determination, dedication, self-discipline and effort.

I. INTRODUCTION

THE MARATHON RUNNER AND THE LEGAL WRITER

Somewhere in the world someone is training when you are not. When you race him, he will win.

If you decide to run a marathon, but stop training after the eighth week of a sixteen-week training schedule, you will not finish. Why? Your muscles atrophied, and your stamina declined. If you stop writing after the second or third semester of law school, you will not become a good legal writer. Why? Your skills atrophied. You did not develop mental memory—just like the marathon runner did not develop muscle memory.

Why did the marathon runner stop? Maybe life got in the way, or training became too hard. But it’s the difficult moments—the grind—that separates the marathon runner from the one-mile wonder. If you are not willing to go through the pain, you will not reach the finish line.

Why do law students stop writing after the second or third semester of law school? Because they are not required to take upper-level writing courses. Upper-level electives are not

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1 Assistant Professors of Law, Indiana Tech Law School.
3 Jesse Owens, track-and-field star of the 1936 Berlin Olympics.
4 Tom Fleming’s Boston Marathon training motto.
sufficient because they are not taught by core legal writing faculty, often do not require multiple re-drafts, and are usually not taken by those who need additional writing instruction the most. Perhaps those who did not excel in the first two or three required semesters of legal writing bristle at the thought of a poor grade, or shudder at the thought of another re-write. And the best writers, who received ‘A’s’ in their core legal writing courses, might get lulled into a false sense of security, believing that they have already reached the finish line. They have not—and are being set up for failure.

The solution is not to merge legal writing with clinical training or experiential learning courses because they are fundamentally different disciplines. Legal writing is marathon training. Clinics—and the practice of law—is the marathon. Put differently, legal writing is not experiential learning. It is where students acquire practical skills training to propel them into a meaningful clinical experience—and a profession that demands good writers. But that is not happening in law schools. Indeed, to the extent that upper-level writing requirements exist, they are often satisfied in a seminar where students write scholarly papers. You cannot, however, prepare law students for clinics or real-world legal drafting by allowing them to write a paper analyzing the origins of dicta in 17th Century Slovenia. As Tonya Kowalski explains, “clinicians commonly experience the frustration that students seem to come to the clinic deficient in many legal writing skills.”

That has to end—now. The time has arrived for law schools to make the legal writing curriculum a separate pillar of legal education, independent of the analytical and clinical pillars. Legal writing enhances cognitive thinking, prepares students for clinical training, and is the bridge to the real world practice of law. It is time for law schools—and the ABA—to fill the

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pedagogical gap in legal writing curricula by requiring students to take one legal writing course taught by legal writing faculty during all six semesters of law school. Law students need it. They must learn to think like readers, re-write like editors, and analyze like judges. Future employers want it. The legal profession demands it—now.

II. THE PROPOSAL—ONE REQUIRED WRITING COURSE FOR EACH SEMESTER OF LAW SCHOOL.

The race does not always go to the swift, but to the ones who keep running.7

Law school enrollments are plunging. Applications continue to decline. Criticism of the legal academy has been relentless. One thing, however, has remained impervious to change: legal writing is “the single most time-intensive subject, and the least respected.”8 That is ironic, given that writing is one of the most important skills that a lawyer must possess. Strangely, law schools devote, on average, only 5.65 credits—or approximately seven percent of the law school curriculum—to legal writing.9 After that point—for twelve or eighteen months prior to graduation—law students largely stop writing. They stop re-writing. They stop applying the skills that lawyers need to effectively—and ethically—represent clients.

A. THE LEGAL PROFESSION IS DEMANDING—BUT NOT GETTING—EXCELLENT LEGAL WRITERS

Not surprisingly, when asked to identify the most glaring weakness in young lawyers, judges and senior attorneys argue that “[t]hey can’t write.”10 Professor Bryan Garner, among others, has argued law students “are not mastering the essential skills.”11 Importantly, however, neither law students nor legal writing professors deserve the blame. Rather, “the biggest failure

7 Anonymous.
8 Bryan Garner, supra note 2.
11 Garner, supra note 2.
at most law schools is the dearth of seriously good skills courses, especially training in legal writing.”12 After all, how can new graduates run the marathon that is law practice when they have never felt the pain that writers feel after numerous re-writes and revisions? They cannot. But they must. Their success as lawyers depends on it, as does the credibility of legal education.

To be sure, recent graduates’ inexperience has forced law firms to implement formal training programs. Clients have refused to pay for the work performed by young attorneys.13 The burning question facing law schools, therefore, is this: What is being done to solve the crisis in legal writing education? Not enough. And that has to change—now. Law students need more opportunities to write, re-write, reflect, and refine. This is particularly true given that high school and college graduates are not proficient writers,14 and lack “soft skills,” such as interpersonal communication, critical thinking, creativity and collaboration.”15 Thus, law schools—not legal employers—should compensate for this deficiency through a comprehensive legal writing pedagogy.

In other words, reforming the legal writing curricula is not just about practical necessities. It is an ethical obligation because clients deserve competent graduates, and law students should expect that their tuition will yield practical results in the real world. Stated simply, the time has arrived for legal writing professors and organizations to put forth a proposal that gives students the training they need, produces graduates that employers want, and trains the type of attorneys that the profession demands. We advocate for the following proposal:

12 Id.
Every law school shall require students, as a condition of graduation, to take one writing legal writing course in each of the six semesters of law school, to be taught by legal writing faculty.

The ABA’s Standards currently require two semesters of legal writing. One must occur during the first year, while the second can occur in either the second or third year. After that, students are not required to draft a single document. Furthermore, many law schools allow students to satisfy the upper-level writing requirement by drafting a scholarly paper. This does not prepare students for the practice of law. It sets them up for failure.

B. ONE SIZE DOES NOT FIT ALL—LAW SCHOOLS NEED FLEXIBILITY

To be clear, our proposal is not a one size-fits-all solution, and avoids the mistake made by the Clinical Legal Association in its recent proposal to require every law school to impose a fifteen-credit experiential learning requirement. The substantial backlash by professors at various law schools rightfully resulted from the belief that such an inflexible requirement infringed upon academic freedom and disregarded their diverse pedagogical missions. After all, law schools should not be bullied into twenty-first century legal education. That may have been one of the reasons why the ABA approved only six experiential learning credits.

Our proposal does not seek to impose a rigid credit requirement on law schools. And for good reasons. The focus should not be on prescribing an exact number of required credits, but

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16 2013-2014 ABA Standards and Rules of Procedure for Approval of Law Schools, R. 302(a)(3), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf (requiring “at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year”).
17 Id.
on increasing the quality of instruction. We also recognize that schools like Harvard and Yale, which attract students of extraordinary ability, likely need not require the same number of writing credits as those at lower-ranked schools. Our proposal does argue, however, that while each school should be different, every school, including Harvard and Yale, should be doing more. Specifically, between eight and fifteen credits of the law school curriculum should be comprised of required legal writing courses. Maybe Harvard will require eight, with two credits in each of the first two semesters, and one credit per semester thereafter, and emphasize policy-driven or scholarly papers throughout. Maybe the lower-ranked law school will require fifteen credits, and focus on real world litigation and transactional documents throughout. In fact, the trend among all ABA accredited law schools is in precisely that direction.20 All we are saying is that schools should keep moving in that direction. More opportunities to write—with legal writing professors—yields better lawyers and thinkers.

Such qualitative changes, which eschew “pedagogical mediocrity,”21 will build a bridge to a more meaningful clinical experience, and a confident graduate who can practice law effectively in the real world. Importantly, however, law schools should recognize that “to be the kind of writer you want to be, you must first be the kind of thinker you want to be.”22 Put differently, the analytical foundation is an indispensable tool to helping law students to ‘think like lawyers.’ All we are saying is that they should learn both to ‘think like writers’ and write like lawyers. The writing, incidentally, improves the thinking.23

21 Garner, supra note 2.
As Professor Garner states, “for starters, the second and third years of law school ought to include much more research, writing, and editing.”\textsuperscript{24} One judge argues that, “[t]o teach students their vocation, law schools must now, more than ever, augment their writing curriculum.”\textsuperscript{25} Experience—and common sense—support this approach.

A. CONTINUITY

Developing good writers requires \textit{continuity}. In other words, the problem is not with the quality of current legal writing instruction. It is the lack of time. As one scholar explains:

The 57.3 percent of respondents [judges, practitioners, and legal writing professors] who did not think new graduates write well is not necessarily a reflection on students’ legal writing instruction in law school. It may just be that recent graduates have not yet had time to develop their writing skills as professionals. Another possibility is that legal writing instruction in law schools is adequate, but students have insufficient opportunity in the second and third years to hone their writing skills.\textsuperscript{26}

Law schools have no excuse for failing to provide these opportunities, particularly given the consequences that befall students when they graduate. If students stop writing, they get rusty. Some may forget basic skills, or not even receive instruction in advanced writing techniques. Those who performed well in their writing courses—and are already strong writers—will not have the opportunity to become outstanding writers.

B. REPETITION

To produce great writers, law schools must emphasize \textit{repetition}. Students must receive extensive feedback from legal writing instructors, and have the opportunity to reflect upon and

\footnotesize{\textsuperscript{24} Garner, supra note 2.}


\footnotesize{\textsuperscript{26} Susan Hanley Kosse, David T. ButleRitchie, How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study, 53 J. LEGAL EDUC. 80, 83 (2003).}
revise their work product. That is where “writing across the curriculum”\textsuperscript{27} fails. Students may draft a complaint in civil procedure or a basic agreement in contracts, but without feedback and revision, they are not refining their writing skills. They are not engaged in the writing process. In short, even though they are writing, they are not learning how to write. In other words, legal writing is its own discipline, and the writing curriculum should be its own institution in the academy. Writing throughout—not across—the curriculum can achieve this goal, and bring legal writing professors the parity they deserve.

C. RE-WRITING

Great writers know the importance of \textit{re-writing}, and understand that “[i]f it sounds like writing . . . [you should] rewrite it.”\textsuperscript{28} To be an effective legal writer, you must also be a good editor—at the macro and micro level. As a famous judge once said, “[t]here are a few rare individuals who can get it right the first time . . . I have to rely on my three indispensable rules of writing: (1) rewrite; (2) rewrite; and (3) rewrite.”\textsuperscript{29}

Many law students, however, believe that their first draft is the final draft. They hit spell-check and hand in a memorandum or brief, expecting to receive an “A” from the professor, who calls it an “epic masterpiece.” Instead, the student gets a paper littered with red ink. Confusion sets in, as the student tries to decipher the professor’s handwritten notes. Confidence drops. That student didn’t realize that a first draft is only the first step. The two steps—re-writing and revising—involve different skills. They require the student to think like a reader, and review the text like an editor. Without the time, and repeated opportunities, to perform this three-step


\textsuperscript{28} ELMORE LEONARD, ELMORE LEONARD’S TEN RULES OF WRITING (William Morrow 2007).

process, law students are not developing their own writing process, and learning to be great writers, not just legal writers.

D. EXPOSURE

Great writers know their genre. Great legal writers must know their genre, as well.

Legal writing programs should expose students to the real-world documents that they will encounter in practice. Students hoping to pursue a career in litigation should draft, among other things, complaints, motions to dismiss, answers, interrogatories, motions for summary judgment, voir dire questions, jury instructions, settlement agreements, and appellate briefs. In previous articles, we advocated for a linear approach to litigation drafting that mirrors the litigation process. Students would proceed from the initial client meeting to the appellate brief, and thus understand the context within which specific documents are drafted, and learn to engage in strategic decision-making. Our way is not the only way. But it is one way—and it requires students to keep training for the marathon until the day of the race. It also shows them how law is practiced in the real-world.

Additionally, those interested in transactional law should draft and re-draft merger agreements, real estate closing documents, and covenants not-to-compete. If law students never learn how to draft these documents, they will never realize that different persuasive techniques—and strategic considerations—apply to each one. If students have only drafted an appellate brief in their first-year lawyering skills class, they may not realize that a summary judgment motion requires a statement of undisputed material facts. That is a recipe for malpractice, or a lot of time that law firms have to write off.

E. SEPARATION FROM EXPERIENTIAL LEARNING

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30 See Adam Lamparello & Charles E. MacLean, Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It, 4 HOUSTON L. REV. ONLINE 95 (2014).
To train outstanding legal writers, law schools should recognize that legal writing and experiential learning are not synonymous. It is not enough, as the Carnegie Report states, to advocate for an increased emphasis on practical skills and professionalism.\(^{31}\) Law schools must separate the practical from the experiential, thus recognizing that you cannot “do what lawyers do,” until you first know how to write like lawyers. In other words, the legal writing curriculum is a separate pillar of legal education. Thus, while legal writing courses can have experiential aspects, it should not be conflated into an all-inclusive definition of “practical skills training.” That would be tantamount to treating marathon race day as your first training session in a very long time. You will not be in shape for the race, and will not reach the finish line. It is a lose-lose situation.

Instead, legal writing courses should remain focused on writing, and not place excessive emphasis on simulations, mock interviews, or oral arguments. The almost-exclusive focus on writing serves to prepare students for the real-world settings that clinical instruction offers, and is a bridge to the real world. Indeed, the ABA’s Rules already recognize the difference. Rule 302, for example, requires “substantial instruction”\(^{32}\) in “legal analysis and reasoning, legal research, problem solving, and oral communication,”\(^{33}\) and “writing in context.”\(^{34}\) Rule 302(b)(1) focuses separately on experiential learning, requiring “live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their


\(^{33}\) Id.

\(^{34}\) Id.
The rules relating to promotion and retention also distinguish between legal writing and clinical faculty. And they should, because legal writing and experiential learning involve different, albeit overlapping, skills. To be sure, the ABA’s recently-adopted rule requiring six credits of experiential learning is only the beginning. A new rule for legal writing instruction should now follow—one required course, every semester, taught by legal writing faculty. After all, legal writing is its own discipline, and the legal writing curriculum should be its own institution in the academy. Writing throughout—not across—the curriculum is the path to parity.

F. TIME AND REFLECTION

To produce great writers, law schools must embrace the fact that time and reflection are indispensable components of the writing process. United States Supreme Court Justice Antonin Scalia states as follows:

[I]t became clear to me, as I think it must become clear to anyone who is burdened with the job of teaching legal writing, that what these students lacked was not the skill of legal writing, but the skill of writing at all * * * [T]he prerequisites for self-improvement in writing . . . are two things. Number one, the realization—and it occurred to my students as an astounding revelation – that there is an immense difference between writing and good writing. And two, that it takes time and sweat to convert the former into the latter.”

Furthermore, and as recent studies show, students are more likely to be found texting or tweeting than sitting at a computer drafting a paper. As a result, they come to law school with minimal experience in basic composition, and no familiarity with how to use language as an analytical or persuasive tool. To them, writing is like another language.

35 Id.
Furthermore, students take first-year writing courses while simultaneously grappling with the language of law. They must learn, among other things, the structure of the state and federal court system, how to read and research case law, identify a holding, perform a legal analysis, reason by analogy, use IRAC, and accurately cite to authority. Thus, asking law students—or anyone—to master basic and advanced writing techniques, in predictive and persuasive contexts, is akin to giving someone a week to train for a marathon. It leads to cognitive overload, or what runners might call “hitting the wall.” Furthermore, the process of becoming a great writer is an evolutionary—not finite—one. Students and lawyers can always improve, no matter what level of proficiency. Why, then, would we stunt their growth as writers? And for those who do require upper-level writing courses, why are they satisfied by drafting a scholarly paper on the meaning of “consideration” in 18th Century parlance? This is not legal writing—or real-world—writing, and often not taught by legal writing professors. It is, to be candid, a wasted opportunity.

G. PERSUASION FROM DAY ONE

In the real world, persuasion is everything. Law students must learn how to make—and win—an argument. That includes, for example, learning how to distinguish unfavorable law and facts, mastering the arts of narrative storytelling, counterargument response, and timing for when not to respond to an adversary’s argument. Persuasive writing also includes intensive instruction on writing composition and technique, proper style, clarity of expression, and grammatical proficiency. In addition, these techniques apply in nuanced ways, depending on the document being drafted, the applicable standard of review, and the audience. Stated simply, persuasive writing is like flying a plane. You need the right touch—and a lot of lessons.

So, why wait?
Law students typically spend their first semester drafting objective memorandums that analyze hypothetical legal issues. They do not start writing persuasively until the second semester, and often have only one or two semesters to learn this complex skill. In fact, sometimes a persuasive writing course is worth only two credits. As one scholar notes, “some students, at least, are doubtless persuaded by these status issues to take their legal-writing studies less seriously than they otherwise might.” After all, would you value the importance of writing in that context, particularly when faced with four-credit constitutional law and property courses in the same semester? Possibly—if you knew that the writing would continue for all six semesters.

Law students should walk into law school on the first day excited to practice law, motivated to become members of the profession, and be part of a community that seeks to make a difference in the community. Legal writing professors can spark their students’ passion—on the first day—by involving them in an amicus or habeas project. The traditional skills—research, citation, and predictive writing—will still be taught, but students will know that their work will have an impact upon real people. By beginning with persuasion from day one, the legal writing curriculum can teach writing as a means to achieve justice, and bring the real world into the classroom. A legal writing curriculum that is only two, three, or four semesters, however, sends a message that writing is less important, and that practical skills are less valuable, than all that follows in the upper-level curriculum. The opposite is true in the real world.

H. Atrophy

There is one critical distinction between the law student and marathon runner. The runner who cannot finish the race can train for the next one. Law students cannot go back to law school. They cannot teach themselves while also learning the nuances of law practice and experiencing the pressures of billable hours. In other words, if law students do not finish the race, they cannot train anymore. This not only threatens a young lawyer’s career, but it prejudices clients who depend on lawyers for competent representation at difficult points in their lives. Imagine, for example, a recent graduate who has not written a brief in twelve or eighteen months but decides to enter a small firm or be a solo practitioner. That means immediate responsibility. Not a marathon, but a sprint—right out of the gate. If the young lawyer decides to represent a client who is appealing the decision of a state superior court, how effective—or ineffective—will that lawyer be? To even ask the question highlights the problem.

III. Change the Tenure Requirements for Legal Writing Faculty

*Mental will is a muscle that needs exercise, just like the muscles of the body.*

A required legal writing course each semester will place additional burdens on legal writing faculty, particularly if they teach upper-level doctrinal courses. Indeed, imagine teaching two legal writing, and one doctrinal course, in a single semester, to sections of twenty-five students. The sheer amount of grading that will be required, coupled with feedback, reviewing re-writes, and conducting individual conferences, will tax even the most experienced legal writing instructor. Thus, should law schools still require legal writing professors to publish one or more traditional 20,000 word law review articles per year, replete with 350 footnotes? No.

40 Lynn Jennings (three-time winner, World Cross Country Championship).
Legal writing professors may choose to do so, but it should not be required for tenure. They spend more time inside and outside of the classroom that the professor who teaches criminal law and gives one exam at the semester’s conclusion. Neither professor, of course, is more valuable than the other. That is precisely the point—they are equal partners in legal education, but they have different responsibilities. The ABA’s tenure requirements for legal writing professors should therefore be altered, and emphasize teaching excellence—which is a service to the profession itself—as the primary factor.

IV. DOES IT COST TOO MUCH?

_Failing to prepare is preparing to fail._

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It depends. A writing course each semester will require additional textbooks, materials, and personnel. It may require schools to hire more legal writing faculty, or raise salaries for existing professors. The cost can be mitigated, however, in two ways.

A. LAW SCHOOLS NEED NOT CREATE A LITANY OF NEW LEGAL WRITING COURSES BECAUSE WRITING ASSIGNMENTS CAN BE INCORPORATED INTO UPPER-LEVEL SUBSTANTIVE COURSES.

Professors who teach second and third-year elective courses can incorporate a writing requirement into their substantive courses, either independently or in collaboration with legal writing professors. Additionally, legal writing professors who teach _substantive_ upper level courses (and advanced drafting courses) can include writing assignments in their syllabus. In so doing, law schools can avoid the arduous task of creating new legal writing courses, and merge analytical skills training with legal writing instruction. Furthermore, this approach will enhance the theoretical and real-world value of their curriculum. As Ohio State law professor Mary Beth Beazley states, “the student thinks in order to write and writes in order to think, and this

41 Benjamin Franklin.
thinking-writing connection provides rich teaching opportunities that can be exploited by all law faculty.”

B. ADJUNCTS BRING REAL-WORLD KNOWLEDGE INTO THE CLASSROOM

Adjuncts are can add practical and experiential value to the law school curriculum. Experienced practitioners—and judges—may be well-suited to teach courses on pre-trial motions, summary judgment, discovery, and transactional drafting. And students can benefit from adjuncts who can tell them ‘how it really works’ in the real-world.

Of course, there may be some concern that adjuncts can detract from a law school’s emphasis on tenure-track faculty, and negatively affect the U.S. News and World Report rankings. These concerns, however, misperceive the complementary role that adjuncts play in enhancing the legal writing curriculum. They help to alleviate the overwhelming workload that tenure-track legal writing professors might face in a six-semester curriculum, and are a valuable resource to law students. With respect to the rankings, one might say this: if a law school’s ranking drops after incorporating a six-semester legal writing program because of adjunct faculty hires, then the rankings—like two, three, or four semester legal writing programs—are disconnected from the real world.

No matter how each law school meets this one required legal writing course per semester requirement, it need not be the same lock-step courses for all students. Some schools may develop different legal writing tracks and perhaps, specialties, for litigation/ADR and transactional. But the point is that each law student, in each of the six law school semesters, would be required to take one of the approved legal writing courses taught by legal writing

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faculty, never turning away from the “marathon” training that the legal writing curriculum must become.

CONCLUSION

Imagine crossing the finish line at the marathon. You didn’t think you could make it, especially during the last grueling mile. You walk back to your car exhausted, but proudly wearing the medal commemorating your achievement.

You call your best friend.

“I’ll never do that again,” you say, sighing but grinning with pride. “But now I know I can do it.”

“And if you ever want to do it again,” your best friend says. “You know how to get there.”

I know how to get there.

That should be the focus of law schools throughout the country—to create outstanding lawyers who value ethics and are passionate about helping to improve the lives of their clients. We must show, not tell, students how to get there. It takes three years of training, with one required legal writing course in every semester that is taught by legal writing faculty.