Experiential Legal Writing: The New Approach to Practicing Like a Lawyer

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EXPERIENTIAL LEGAL WRITING
THE NEW APPROACH TO PRACTICING LIKE A LAWYER

ADAM LAMPARELLO AND CHARLES E. MACLEAN

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ABSTRACT

Doctrinal and experiential learning should be incorporated into the legal writing curriculum, not the other way around. For too long, law schools have exported legal writing across doctrinal and clinical courses. In so doing, they have failed to develop a curriculum that trains students in the most important lawyering skill: *experiential* legal writing. Doctrinal courses are not well-suited to writing and rewriting, formative and summative assessment, and developing real-world drafting skills. In clinics, students should focus on practicing law and applying their skills, not learning basic persuasive writing techniques. In short, to prepare students for law practice, complex legal problems and real-world simulations should be integrated into a six-semester experiential legal writing program that trains students in the core competencies and soft skills needed to successfully practice law. A critical part of that effort requires graduates to draft the most common litigation and transactional documents, apply their writing skills to different legal contexts, and learn how to be effective negotiators, not just litigators, and excellent re-writers, not just writers. In short, graduates must know how to think, write, advocate, *and* practice like lawyers. All of that can happen in a six-semester experiential legal writing program that writes more effectively across *and* throughout the curriculum.
INTRODUCTION

“As institutions, law schools have not been great innovators in defining the professional competencies our students should possess at graduation or developing effective methods to assess whether students have achieved those competencies. Although some have dared to be different, most have been content to use curricula and assessment techniques that date back generations. And most have been hesitant to define core competencies beyond those identified in the MacCrate Report.”

Law students should not write to be experiential. They should write because it is the essence of what it means to be experiential.

“[N]o proposal would more significantly raise the stature of [legal research and writing] programs, and improve legal writing, than requiring law students to write more.” In fact, no proposal would prepare students for the profession more than an assessment-based experiential legal writing program that incorporated drafting assignments across doctrinal courses, and required students to take six semesters of required experiential legal writing courses. Indeed, “writing skills are fundamental to success in the legal profession and serve as the foundation for effective communication.” This article makes the case for a new approach to legal education that trains students to practice like lawyers through drafting and re-drafting the most common litigation and transactional documents, and engaging in real-world simulations across and throughout the curriculum. The goals are to provide students with writing and re-writing instruction in a variety of factual and legal contexts, and to require them to draft the most

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2 Darby Dickerson, Building Bridges: A Call for Greater Collaboration Between Legal Writing and Clinical Professors, 4 J. ASS’N LEGAL WRITING DIRECTORS 45 (2007) (explaining that “[a]rticulating and assessing competencies is difficult work. Unfortunately, most law professors and administrators are not trained in education theory or assessment. For this reason, we need to build bridges to individuals and organizations with this type of expertise.”).


4 Kathleen Elliot Vinson, Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge, 21 TOURO L. REV. 507, 507 (2005) (explaining that lawyers are perceived as producing incomprehensible and confusing legal writing. Such perceptions about bad legal writing are not new.”).
common litigation and transactional documents. Indeed, when describing the “problem of legal writing,” Professor Tonya Kowalski explains, “[n]ot only do students often overlook applications for knowledge obtained in previous situations, they also sometimes appear to regress when asked to change contexts.”

At its core, experiential legal writing is an assessment-based pedagogy that is designed to maximize learning and employment outcomes. It has two independent focuses in the first year—large and small-scale sequencing—to ensure cohesiveness across the doctrinal and within the legal writing curriculum. Additionally, students take required experiential legal writing courses in each semester of their second and third years.

A. LARGE-SCALE SEQUENCING

The large-scale sequencing model results in a more principled version of writing across the curriculum. Large-scale sequencing begins in the first-semester of law school when faculty members create a multi-issue cross-curricular hypothetical that incorporates writing assignments and simulations into doctrinal courses in a chronological sequence that mirrors the practice of

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6 See, e.g., Victoria L. Van Zandt, Creating Assessment Plans for Introductory Legal Research and Writing Courses, 16 Legal Writing: J. LEGAL WRITING INST. 313, 317 (2010) (explaining that “[a]ssessment provides certain intrinsic benefits, including accountability to the law school’s constituencies, including its students and the legal community in which it operates, improved student learning, coherence of the curriculum, and the foundation for curricular reform”).

When engaging in this process, faculties need to be mindful of section (b) of the new Standard 303 that focuses on making sure law schools provide “authentic assessments” for their law students. These assessments are “similar to or embedded in relevant real-world activities” … The Council’s retaining the two legal writing experiences requirement confirms that this skill is considered essential to the law school’s educational program.

Id. (quoting Mary J. Allen, Assessing Academic Programs in Higher Education 8, 165 (Anker Publg. Co. 2004)).
law. Furthermore, legal writing and doctrinal professors collaborate to provide formative assessments and require students to re-write and revise their drafting assignments.

Writing across the curriculum, however, no matter how effective, does not give students sufficient time to develop their writing skills, draft-and re-draft the most common litigation and transactional documents, and participate in real-world simulations as they would encounter in law practice. For these reasons, the small-scale component of experiential legal writing is essential.

B. SMALL-SCALE SEQUENCING

Small-scale sequencing occurs exclusively in the legal writing curriculum, and consists of two subcomponents. First, students receive a multi-issue hypothetical in the first year that, like the cross-curricular hypothetical, is chronologically sequenced and takes students through each step of the litigation process while not duplicating cross-curricular assignments. Second, experiential legal writing continues in the second and third years, when students take one required legal writing course per semester and receive formative assessments. This provides students with sufficient time to develop their writing skills, draft and redraft the most common litigation and transactional documents, and engage in real-world simulations, client interviews, mediations, settlement negotiations, and oral arguments. Currently, because legal writing is limited to two or three semesters of law school, students do not have the “opportunity to learn material at a reasonable pace and, in later semesters, to reinforce and further develop key concepts.”

Ultimately, a six-semester writing program enables students to focus on the complex

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10 See Jeremy R. Foxhoven, Beyond Grading: Assessing Student Readiness to Practice Law, 16 CLINICAL L. REV. 335, 342-343 (2010) (discussing various core competencies that are relevant to the practice of law).
11 Dickerson, supra note 2, at 52.
and multi-faceted aspects of writing as a discipline, as a tool for persuasive advocacy, and as a vehicle to solve real-world problems.

Large and small-scale sequencing enables students to practice like lawyers “in natural laboratories [that] allow students to mix doctrine and skills [and] where students can experiment with applying legal doctrine to clients’ cases and communicating, in writing and orally, about those cases.”\(^\text{12}\)

<table>
<thead>
<tr>
<th>TABLE I</th>
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<tr>
<td>EXPERIENTIAL LEGAL WRITING</td>
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Indeed, real-world lawyering is not simply about “knowledge of substantive law.”\(^\text{13}\)

Instead, it requires “the ability to communicate the analysis of that complex law in a clear, concise, and coherent way”\(^\text{14}\) in various contexts, and with an integrated set of skills that involve

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\(^{12}\) *Id.* at 47 (brackets added).

\(^{13}\) Vinson, *supra* note 4, at 539.

\(^{14}\) *Id.*
reasoning, counseling, communicating, negotiating, and advocating.\textsuperscript{15} Experiential legal writing calls upon all of these skills, and does not merely blend theory with practice. It blends theory and practice with real-world legal writing. As Professor Dickerson explains:

The best curricular models are, therefore, concentric or iterative: they provide knowledge about the same subjects at different points in the curriculum, and the knowledge presented in later semesters builds on and reinforces what was taught and learned in earlier semesters. Stated differently, the curriculum is not linear and courses within it are not independent from one another; instead, the curriculum is more circular or spiraled, and courses are, to a significant degree, interrelated.\textsuperscript{16}

This pedagogical approach brings context and continuity to legal education, and focuses on developing the core competencies and soft skills that students must acquire to practice law successfully.\textsuperscript{17}

Ultimately, doctrinal instruction and experiential learning without legal writing—and analytical skills training—is like a Boeing 787 Dreamliner without its Rolls Royce engines.\textsuperscript{18}

\textsuperscript{15} See, e.g., Douglas M. Coulson, \textit{Legal Writing and Disciplinary Knowledge Building: A Comparative Study}, 6 J. Ass’n Legal Writing Directors 160, 196 (2009). Professor Coulson states as follows:

The real difficulties of legal writing ... are far more serious than technical problems of prose style; they are the irrelevancies that reveal the absence of disciplined thought. Out of sentimentalism, for example, some lawyers write statements of facts ‘like a novelist,’ in order to win the judge’s sympathy. Yet the pity in the tale vanishes when judges attempt to subsume the facts under a rule of law and are left on their own to discover which facts are legally relevant. \textit{Id.} (Richard Hyland, \textit{A Defense of Legal Writing}, 134 U. PA. L. REV. 599, 613, 620 (1986))

\textsuperscript{16} Dickerson, supra note 2, at 52.

\textsuperscript{17} Kristin Booth Glen, \textit{Thinking Out of the Bar Exam Box: A Proposal to “MacCrate Entry into the Legal Profession}, 23 PACE L. REV. 343, 379 (2003) (discussing the gap between the MacCrate Report’s recommendations and the skills tested on the bar examination).

\textsuperscript{18} See, e.g., Jessica Wherry Clark, Kristen E. Murray, \textit{The Theoretical and Practical Underpinnings of Teaching Scholarly Legal Writing}, 1 TEX. A&M L. REV. 523, 535 (2014). In arguing that law schools should maintain an upper-level scholarly writing requirement, the authors emphasize the importance of mastering analytical skills:

The research paper is a natural progression from the first-year curriculum; it builds on students’ mastery of basic legal analysis skills and sets the stage for deeper learning on more specific areas of the law. Encouraging students to think outside the box is welcome but hard to scale in terms of whether the specific non-traditional project meets the requirements for a robust writing experience; the research paper as the standard is a way to leverage the experience for most students.

\textit{Id.}
The aircraft may look imposing to the casual observer (a prospective law student), but underneath it has no thrust (real-world value). Similarly, analytical instruction without a comprehensive *experiential* legal writing program is like giving aspiring mechanics the tools to fix a car, but not telling them how to repair a broken transmission or replace a catalytic converter.\(^\text{19}\) Likewise, legal writing without experiential *and* analytical training is tantamount to taking a practice LSAT without any time constraints.\(^\text{20}\) In these scenarios, students are not learning under real-world conditions. The consequences, of course, should not be surprising: the Boeing 787 will not reach cruising altitude, the aspiring mechanic will install the catalytic converter negligently, and the prospective law student who scores 170 on an untimed practice LSAT will get a 149 on the real test.

Similarly, recent law graduates often have found themselves unprepared to practice law.\(^\text{21}\) Why? In law school, they did not learn how to practice as a lawyer. The frenzied and unquestioned rush to add more experiential learning requirements to the curriculum misses a fundamental point. Students must be critical thinkers and writers before they can draft an amicus brief or habeas petition competently, and before they can argue competently before a state court.


\(\text{20}\) See Barbara J. Busharis and Suzanne E. Rowe, *The Gordian Knot: United Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 308 (2000). The authors explain as follows:

> The process of legal writing is critical in the process by which students learn the legal profession’s language and conventions, which in turn are required for full membership in the profession. When writing is understood as a key in developing legal analysis and as having unique conventions that must be passed on to novices, the skill of legal writing can no longer be distinguished from the substance of legal education. The next step is to use writing to teach analysis throughout the law school curriculum. *Id.*

\(\text{21}\) Of course, law schools should concede, and the legal profession should acknowledge, that it is not possible to produce truly practice-ready graduates. The practice of law is complex and specialized, and neither legal education nor law students can be expected to master all of the tangible and intangible skills that the legal profession requires. Indeed, “[t]he skills and values of the competent lawyer are developed along a continuum … that continues throughout a lawyer’s professional career.”\(^\text{21}\) Law schools can, however, produce graduates that have a minimum level of competency and who can practice law at a reasonably self-sufficient level. In doing so, law firms would not be forced to implement formal training programs, and the incidents in which clients refuse to pay for hours billed by a first-year associate would likely be reduced.
appellate court. Clinics have obvious real-world value and are essential to producing quality graduates, but only after students are proficient in “grammar, logic, and rhetoric, which formed the basis of legal education for centuries.”22 Indeed, “[u]nless there’s some perverse pleasure to be derived from complaining, concrete steps should be taken to improve the legal writing of students and young associates.”23 As one New York City Civil Court Judge and adjunct professor at Columbia Law School states, “law schools must now, more than ever, augment their writing curriculum.”24

II. DEFINING EXPERIENTIAL LEARNING IN THE LEGAL EDUCATION CONTEXT

Experiential learning encompasses five elements: (1) experiencing, (2) reflecting, (3) processing, (4) generalizing (identifying learned principles), and (5) applying to different contexts the information learned from the initial experience.25 Experiential learning is a buzzword in legal education, but apart from the generally accepted definition of experiential learning,26 there is no consensus about what experiential learning should mean in law school and, more particularly, in practical skills courses in which litigation and transactional drafting occurs.27

The experiential learning cycle must be connected to the development of professional competencies, and students must acquire these competencies before they can apply them to

23 Shulman, supra note 3, at 13.
26 Id.
27 Michele Mekel, Putting Theory into Practice: Thoughts from the Trenches on Developing a Doctrinally Integrated Semester-in-Practice Program in Health Law and Policy, 9 IND. HEALTH L. REV. 503, 508-509 (2012) (discussing various types of experiential learning).
different contexts. Context is essential, because it often requires a student to apply or emphasize different skills. Thus, mastering a competency in one context, e.g., drafting an appellate brief, does not mean that a student can draft a motion to dismiss or a trial brief effectively. Likewise, oral advocacy skills at the trial and appellate court levels are fundamentally different. Thus, the skills a student acquires when drafting an appellate brief or arguing before an appellate court do not necessarily transfer to other litigation documents or stages of litigation. In other words, law schools must train students to master the skills that apply to specific documents in particular contexts, but that do not necessarily apply across contexts.

For that reason, repetition of the same activity and exposure to the various areas of litigation and transactional practice that a student will encounter in the real world are essential. Coupled with the fact that the skills required to competently practice law (including writing, reasoning and analysis, research, sound judgment, strategic decision-making, counseling, and negotiation) are inherently complex, students need sufficient time to repeat, reflect, and refine context-specific skills.

That, in a nutshell, is why experiential legal writing should be taught over six semesters—across the doctrinal courses and within the legal writing curriculum. It should incorporate simulations and require students to solve complex legal problems involving “messy,

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29 See Sherri Lee Keene, One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Curriculum, 65 MERCER L. REV. 467, 483 (2014).

[I]t would be exceedingly rare for students to simply gather their thoughts, write them down, and be finish. Most law students will instead engage in a process of writing, thinking, reading, rethinking, rereading, and revising, often over and over again. Through the process of writing and reflecting, the law student will work from a point of chaos to one of clarity. Instead of having to consider the many factors that go into their writing all at once, writers are encouraged to organize their thoughts as they write and revise, and then consider these thoughts, often focusing on a particular aspect of the overall legal problem. Id.
human facts,”30 and the “interplay of experience, analysis, understanding, and application.”31

After all, learning to write effectively takes time, and learning how to practice like a lawyer takes three—not two—years.32

A. DEFINING EXPERIENTIAL LEARNING BASED ON CORE COMPETENCIES AND SOFT SKILLS

How should law schools define experiential learning? The answer depends on a variety of factors, including the law school’s mission and the needs of its students. Despite these differences, most, if not all, law schools should consciously avoid changes that will make law school more akin to a trade school.33 Law schools should also recognize that clinical training, while important, is less meaningful if students do not master the fundamental skills that law practice requires.34 The practice of law demands graduates with superior analytical and writing abilities, who are trained to synthesize complex facts and legal principles and to solve problems in creative ways.35

31 Id. at 353.
32 Keene, supra note 28, at 494-495.

If law students’ legal writing practice experience in law school is limited to the first year, they not only miss out on the opportunity to further develop this skill, but also to receive the many benefits of engaging in the writing process. Additional practical legal writing opportunities during the second and third years of law school can provide students with an opportunity to continue to perfect the types of legal writing that they have already been introduced to and engage in new types of legal writing in different practice contexts (such as drafting contracts, negotiation documents, and pleadings).

34 Laws schools have increased the number of clinical offerings substantially, particularly in the third year. See Rebecca Sandefur & Jeffrey Selbin, The Clinic Effect, 16 CLIN. L. REV. 57, 78 (2009) (“Today there may be as many as 1,200 distinct clinics in 170 of the nation’s roughly 200 law schools, a substantial expansion from the several dozen programs just a half century ago.”)
The Carnegie Foundation identified three apprenticeships—thinking, performing, and acting like a lawyer—36—and the MacCrate Report identified ten core competencies, “Fundamental Lawyering Skills,” that are essential to the competent practice of law.37

<table>
<thead>
<tr>
<th><strong>TABLE II</strong></th>
<th><strong>MACR CRATE REPORT SKILLS AND VALUES</strong></th>
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<tbody>
<tr>
<td><strong>FUNDAMENTAL LAWYERING SKILLS</strong></td>
<td><strong>FUNDAMENTAL VALUES</strong></td>
</tr>
<tr>
<td>Legal Analysis and Reasoning</td>
<td>Providing competent representation</td>
</tr>
<tr>
<td>Problem Solving Skills (identifying problems and developing and implementing a plan of action to solve them)</td>
<td>Fairness and Morality</td>
</tr>
<tr>
<td>Legal Research</td>
<td>Striving to improve the profession</td>
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<tr>
<td>Factual Investigation</td>
<td>Professional Self-development</td>
</tr>
<tr>
<td>Communication</td>
<td></td>
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<tr>
<td>Counseling</td>
<td></td>
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<tr>
<td>Negotiation</td>
<td></td>
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<tr>
<td>Litigation and Alternative Dispute Resolution Procedures</td>
<td></td>
</tr>
<tr>
<td>Organization and Management of Legal Work</td>
<td></td>
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<tr>
<td>Recognizing and resolving ethical dilemmas</td>
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Employers in many professions also place a high value on soft skills,\(^{38}\) such as interpersonal and communication skills, working collaboratively with others, exercising sound judgment, and thinking “outside the box.”\(^{39}\)

Experiential legal writing effectively integrates the Carnegie Foundation’s three apprenticeships—analytical, practical, and experiential\(^ {40}\)—and enables students, over the course of three years, to acquire the core competencies and soft skills that include and go beyond those identified in the MacCrate Report as essential to the successful practice of law.\(^ {41}\) This process begins with improving law students’ writing and analytical skills, which have been subject to persistent criticism by members of the bench and bar.\(^ {42}\) This should be defined based on the core competencies and soft skills that students must acquire. We propose the following definition:

Experiential learning is a fully-integrated teaching pedagogy that incorporates experience and relationship-based learning into doctrinal, practical skills, and clinical courses, that provides students with formative and summative assessments, and that trains students in the core competencies and soft skills necessary to think, write, and practice like a lawyer, both within and across contexts, and through a curriculum that engages students in the tasks most commonly associated with the practice of law.

As discussed below, a carefully integrated and properly sequenced experiential legal writing curriculum can develop these skills by using assignments that require


\(^{39}\) Id.


\(^{42}\) Vinson, *supra* note 4, 508 (explaining that lawyers are perceived as producing incomprehensible and confusing legal writing. Such perceptions about bad legal writing are not new.”)

15
students to analyze complex legal problems critically, write persuasively, and develop counseling and communication skills through targeted simulations.

B. **The Legal Writing Mini-Apprenticeships**

Experiential legal writing, both across the doctrinal and within the legal writing curricula, develops real-world skills and values. First, the process of legal writing involves separate mini-apprenticeships that model the “thinking—doing—practicing” approach in the broader curriculum.

<table>
<thead>
<tr>
<th>Legal Writing Apprenticeships</th>
<th>Skills</th>
<th>Assignments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic and advanced writing composition</td>
<td>Writing with clarity and brevity; Avoiding legalese, fancy and esoteric words, and Latin; Sentence structure and word choice; Ensuring proper tense and tone; Avoiding pronoun usage; Limiting the use of adverbs; Defining essential terms; Avoiding emphasis and the excessive use of block quotes; Avoiding colloquialisms, contractions, and informal language; Flow and organization, including large-scale and small-scale IRAC/CRAC; Knowing your audience</td>
<td>Grammar and style exercises</td>
</tr>
<tr>
<td>Introductory drafting objective and persuasive</td>
<td>Objective and persuasive writing skills, analytical skills, research skills, problem-solving skills, factual investigation</td>
<td>Legal memorandum; Client letter; Persuasive brief (e.g., appellate or summary judgment brief, simulated oral argument)</td>
</tr>
<tr>
<td>Advanced, document and context-specific drafting</td>
<td>Advanced objective and persuasive writing skills, proficiency in drafting real-world documents, in-depth knowledge of writing techniques that apply to particular documents, writing, rewriting, and revising</td>
<td>Complaints, Answers, Motions to Dismiss, Interrogatories, Document requests, and Subpoenas, Summary Judgment Motions, Motions in Limine, Trial briefs, Jury questionnaires</td>
</tr>
</tbody>
</table>
Despite the depth, breadth, and complexity of the writing skills required to practice law competently, most law schools devote fewer than six credits to required legal writing courses. This is particularly troubling because “[i]t is a commonplace complaint that young lawyers can’t write.”

**Table IV**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>AVERAGE CREDITS DEVOTED TO LEGAL WRITING</th>
<th>SCHOOLS REPORTING</th>
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<tbody>
<tr>
<td>2014</td>
<td>5.71</td>
<td>178</td>
</tr>
<tr>
<td>2013</td>
<td>5.65</td>
<td>190</td>
</tr>
<tr>
<td>2012</td>
<td>5.60</td>
<td>184</td>
</tr>
<tr>
<td>2011</td>
<td>5.45</td>
<td>188</td>
</tr>
<tr>
<td>2010</td>
<td>5.36</td>
<td>191</td>
</tr>
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The growth of .35 credits per school over four years is equivalent to about sixty schools each adding one credit to their required LRW programs. The table below shows the number of required legal writing credits at approximately 140 ABA-accredited law schools, based on rank.

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It is not difficult to see, therefore, that even though law schools structure the curriculum based on the Carnegie Foundation’s three apprenticeships, they do not devote sufficient time or training to develop law students’ writing processes.\footnote{The schools that require the most credits are ranked in the bottom tier, in part because at Harvard and Yale, students may not need such an intensive focus on legal writing. When a law school’s incoming class has a grade point average of 3.0 and a median LSAT under 150, extensive training in analytical reasoning and practical skills is vital before placing students in externships or clinics. Importantly, however, all law schools, even Harvard and Yale, should require more than 5.71 credits of legal writing and should do so in a context in which they are drafting and redrafting memoranda, performing simulated client interviews, drafting motions to dismiss and preparing for oral argument, and drafting discovery documents while participating in a settlement conference.} Furthermore, because many students do not take a single practical writing course after the first two or three semesters of law school, their writing skills atrophy.\footnote{See, e.g., Kowalski, \textit{supra} note 5, at 290 (“one of the main reasons why the clinical scholarship has not deeply addressed the problem of legal writing is because it presumes that all of the fundamentals are covered during the first year and should not have to be addressed again with upper-division students”).} Thus, many students graduate with poor writing \textit{and} analytical skills.
because writing enhances analytical thinking. Given that effective writing is among the most important skills required to practice law competently, this represents a significant failing in legal education:

Written communication skills, rather than substantive legal knowledge, are deemed to be one of the most important skills necessary for beginning lawyers. Also, throughout a lawyer’s career, legal writing pervades every type of practice at every level. Thus, to enter the profession, obtain and maintain a legal job, and have a successful legal career, superior legal writing skills are required.

Moreover, because many students come to law school as poor writers, a focus on real-world writing is essential to a law school’s pedagogical mission.

To be sure, it is not sufficient for students to be given copies of litigation and transactional documents, or to have drafted a complaint in Civil Procedure or a lease agreement in Contracts if there is no opportunity for formative assessment, reflection, re-writing, and revision. In fact, given the limited number of credits that law schools devote to legal writing, it is unlikely that students are reflecting on their writing, improving through re-writing, or drafting various real-world documents to gain a broader understanding of how each document fits within the dispute resolution process. If students are not drafting these documents, they also are not participating in the types of simulations that will train students how to effectively counsel, communicate, negotiate, and strategize in various contexts, whether it is the types of questions to

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46 Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the ‘Casebook’ Classroom (Without Grading Papers)* 10 LEGAL WRITING: J. LEGAL WRITING INST. 23, 41 (2004) (“the student thinks in order to write and writes in order to think, and this thinking-writing connection provides rich teaching opportunities that can be exploited by all law faculty”).

47 Vinson, *supra* note 4, at 516-517.

48 Most law schools, however, permit students to satisfy their upper-level writing requirement by drafting a scholarly paper that has no real-world value, particularly when compared to an upper-level drafting course that requires students to draft and re-draft a motion for summary judgment, engage in a mock settlement negotiation and oral argument, and receive real-world assessment. Some law schools might say that it costs too much, but members of the bench and bar would surely respond that it is worth the price.
ask at a deposition, when to file a motion to dismiss instead of an answer, and when to settle in lieu of going to trial.\textsuperscript{49}

In addition, simply expanding clinical offerings or requiring students to take a minimum number of experiential learning credits will not solve the skills problem because clinics do not—and should not—teach students how to think analytically or write persuasively. Clinical professors and adjuncts typically are not trained in doctrinal or legal writing pedagogy, and in externships, professors often do not supervise their students. Furthermore, the supervision in clinics is done at satellite offices where students are presumed to know how to write effectively, persuasively, and efficiently. By the time students are assigned to clinic work, it is—in a very real sense—too late to begin teaching, or repairing, their legal writing shortfalls. In other words, clinics are the place where students apply their skills to real-world settings. As such, clinical work would be most valuable after most of the formal legal writing training has concluded.

Experiential legal writing focuses on the Lawyering Skills and Values that the MacCrate Report identified and fills these skill gaps. Ironically, however, the curriculum must ensure that apprenticeship integration is balanced with an independent curricular focus on doctrinal, practical, and experiential learning. As discussed below, a large and small-scale sequencing achieves these goals.

III. LARGE AND SMALL-SCALE SEQUENCING TO ENSURE SEPARATION—AND PURPOSEFUL INTEGRATION—IN LEGAL EDUCATION

A substantial challenge in legal education is ensuring that the three foundational pillars of legal education—analytical, practical skills, and experiential instruction—are fully integrated into a cohesive curriculum while also maintaining a separate focus on each pillar.

\textsuperscript{49} See Adam Lamparello and Charles E. MacLean, \textit{Training Great Writers—Not Just Legal Writers}, 37 CANADIAN LAW LIB. J. 1 (2014).
A. AN INDEPENDENT EMPHASIS ON DOCTRINAL, SKILLS, AND EXPERIENTIAL LEARNING

Each foundational apprenticeship focuses on different core competencies, and thus must be independently emphasized at certain points in the curriculum. At the same time, however, law students must integrate these apprenticeships fully to ensure that the curriculum gives students sufficient practice in real-world lawyering skills. To balance separation with integration effectively, the curriculum should be sequenced carefully both within and across apprenticeships. The Table below provides an example of a sequence that ensures sufficient separation.

TABLE VI
SEQUENCING THE THREE PILLARS OF LEGAL EDUCATION

In first-year courses such as civil procedure, contracts, and torts, law schools should emphasize analytical reasoning skills because students must learn how to “think like a lawyer” before they can write or practice like a lawyer. Moreover, despite its critics, the Langdell or case method has a valuable place in the curriculum, particularly in the first year, as students should be
reading cases and analyzing law and policy from a variety of perspectives.\textsuperscript{50} If experiential learning is overused in a first-year doctrinal course, it may interfere with substantive knowledge acquisition and development of critical thinking skills. Furthermore, if experiential learning exercises are unnecessarily duplicated, e.g., students draft a complaint in civil procedure and torts but receive minimal feedback, the value of an integrated curriculum lessens. Thus, an integrated curriculum must retain a separate focus on developing all three foundations skills, and ensure that they are placed sequentially in the curriculum to maximize learning outcomes in each of those skills.\textsuperscript{51}

Doctrinal courses should, however, incorporate more problem sets or fact patterns so that students can apply their legal knowledge to hypothetical or real-world problems. One way to facilitate this is by flipping the classroom, which requires students to watch short videos before class in which professors are outlining the substantive law. This allows the professors to spend less time in class discussing basic legal principles, and more time discussing real-world problems to which students must apply their knowledge. Such an approach is experiential in the sense that it trains students to be problem solvers, but it maintains the focus on developing critical thinking skills. Of course, this does not mean that practical skills instruction and experiential learning cannot be integrated in the doctrinal curriculum. It merely means that they should be limited, appropriately targeted, and include writing and clinical faculty when drafting exercises and

\textsuperscript{50} Jeffrey D. Jackson, \textit{Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?} 43 CAL. W. L. REV. 267, 277 (2007). Professor Jackson explains as follows:

The Socratic Method teaches legal reasoning in a variety of ways. The probing nature of the Socratic method teaches students the forms of argument that they will engage in as lawyers, as well as the need to justify that argument in a logical manner that can withstand scrutiny.\textsuperscript{52} Questioning through the Socratic method also helps highlight basic errors or flaws in reasoning so that students can understand their nature and how to avoid them in the future.\textsuperscript{53} The method also encourages students to engage in critical inquiry, not only of their own thoughts, but also of the thoughts of the professor and other students.

\textsuperscript{51} Additionally, for those law schools that accept students with lower incoming credentials, incorporating a one-credit critical thinking skills course that focuses on developing processing speed, short and long-term memory, and logical reasoning, would help students who have not yet developed such skills.
simulations, respectively. The Table below shows the emphasis that should be placed on each apprenticeship throughout law school.

**TABLE VII**

**ANALYTICAL, PRACTICAL SKILLS, AND EXPERIENTIAL LEARNING EMPHASIS**

![Bar chart showing the emphasis on different types of skills across the years of law school.]

Of course, law schools also must integrate these apprenticeships in a manner that ensures cohesion, continuity, and collaboration with the doctrinal, skills, and clinical faculty. The Table below illustrates how doctrinal, practical skills, and experiential learning are integrated throughout all three years of law school.

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52 See Dickerson, *supra* note 2, at 46.
B. MERGING THE THREE PILLARS OF LEGAL EDUCATION: TWO SEPARATE TRACKS FOR CONNECTING DOCTRINE, PRACTICE, AND EXPERIENCE

Separation must be balanced with skill integration. One might ask how an experiential legal writing program fits into or coalesces with these apprenticeships, particularly if the practical skills foundation must first teach basic legal writing techniques. The answer again lies in arranging the sequencing of apprenticeships to ensure that the experiential legal writing program is sequenced to complement the analytical-practical-experiential model.
One mistake law schools make is conflating practical skills and experiential learning. That causes students to enroll in clinics and externships before they are ready. Experiential legal writing, however, teaches practical skills, e.g., persuasive writing and client counseling negotiations skills, and improves analytical ability, both of which are essential to maximizing outcomes in clinics and preparing students for the real-world practice of law. In other words, experiential legal writing courses incorporate experiential elements, but are not experiential courses. These courses train students to be effective writers, researchers, advocates, and counselors, before engaging in clinical work and, ultimately, law practice. In so doing, both learning and employment outcomes are maximized.

1. LARGE-SCALE SEQUENCING—THE CROSS-CURRICULAR HYPOTHETICAL

Many versions of writing across the curriculum are ineffective. Most students will copy a form that they find on the Internet, change the facts and legal counts to match their assignment, and give it to the doctrinal professor who might give a minute or two to each document to ensure that there are no glaring errors.

Do students receive individualized feedback and formative assessment? No.

Are students given the opportunity to re-write and revise? No.

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53 Beazley, supra note 46, at 41.
54 Classifying experiential learning as a separate apprenticeship is consistent with the provisions of proposed revised ABA Standard 303(a)(3) which recognizes clinics, externships, and semesters-in-practice as experiential courses. This approach also provides ample opportunities for students to satisfy the ABA’s six-credit experiential learning requirement.
55 See generally Accomplishing Your Scholarly Agenda While Maximizing Students’ Learning (A.K.A. How to Teach Legal Methods and Have the Time to Write Too, 50 DUQ. L. REV. 545 (2012) “[c]ollaborative work also allows students to refine many interpersonal skills that lawyers use, but are not usually taught in law schools. For law professors, especially casebook professors, so much work is accomplished solitarily, that it is easy to forget that the practice of law involves working closely with other people”).
Do students have the opportunity to engage in peer review, and to draft an answer in response to the complaint, or a motion to dismiss if they determine that the complaint does not state a cognizable cause of action? No.

As such, the current version of writing across the curriculum is like training an athlete to run the world’s faster fifty-meter hurdle time when, in fact, the race is one-hundred meters. The student may learn how to prepare a good first draft, but as we know, first drafts are hardly drafts at all. In addition, students should be taught that writing techniques apply in different ways depending on the document and context. When drafting a Complaint, for example, students should write the facts to ensure that they state a claim and survive a motion to dismiss, but not include unnecessary detail except when the claim requires a litigant to plead with particularity. In addition, students may not understand that, for certain claims, an expert affidavit is required, and that heightened pleading standards apply when a litigant seeks punitive damages. These skills should be taught by legal writing faculty, as doctrinal professors are not trained in legal writing pedagogy, and likely will be reluctant to engage in copious proofreading, commentary, and review of re-writes and revisions. If anything, doctrinal professors should give students practice exams and focus on problem-solving skills while writing faculty review drafting assignments and provide formative assessment.

Importantly, however, writing across the curriculum can have more practical value if doctrinal and legal writing faculty collaborates in the first and second semesters of law school to provide students with formative assessments, and require re-writes and revisions.\[56\]

\[56\] See, e.g., Laurie C. Kadoch, The Third Paradigm: Bringing Legal Writing “Out of the Box” and Into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine, 13 LEGAL WRITING: J. LEGAL WRITING INST. 55, 68 (2007). Professor Kadoxh explains as follows:

In all law school courses, the analytic challenge for the student and the pedagogical goal for the professor are the same: the need to find a framework that fosters increasingly more complex thought processes about
To facilitate real-world writing across the curriculum, in the first semester, the faculty develops a single fact pattern that includes one substantive legal issue from each course, and incorporates real-world experiential learning exercises and drafting assignments in the order they would occur in actual practice. In addition, legal writing faculty reviews the drafting assignments, e.g., a memorandum and complaint, provides formative assessments to each student, requires rewrites, and measures outcomes. The table below provides an example of how experiential learning (and writing) would be integrated into first-semester doctrinal courses, by order of assignments.

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a given substantive topic. This goal creates a paradox for our students because it requires them to engage in sophisticated, flexible thought about complex issues, but to break that complexity into clear components and to show the interconnections clearly. They must also learn to articulate and communicate those thoughts to an audience with a clarity that illuminates both the forest and the trees and delineates the connections in between. Thus, the learning that takes place in our classrooms is (or should be) as complex as that which occurs in the doctrinal classroom.
By incorporating real-world drafting assignments and experiential learning exercises, this model provides students with context, continuity, and a more thorough understanding of the litigation process. This approach will avoid burdening doctrinal faculty, and the course focus will remain on acquiring and thinking critically about foundational legal principles. Below is a sample hypothetical that demonstrates how large-scale sequencing and experiential legal writing would unfold in the first semester of law school.
EXAMPLE

EXPERIENTIAL LEARNING ACROSS THE CURRICULUM (CROSS-CURRICULAR HYPOTHETICAL FOR CRIMINAL LAW, CONTRACTS, LEGAL RESEARCH, LEGAL WRITING, AND CIVIL PROCEDURE)

TO: FIRST-YEAR ASSOCIATE
FROM: MANAGING PARTNER
RE: NEW CLIENT
DATE: AUGUST 2014

A new client has contacted the firm seeking representation. We would like you to meet with our prospective client, and if you determine that there is a cognizable cause of action, proceed with litigation as appropriate. The facts, as we currently know them, are detailed below.

**********

Kirsten Smith, a resident of Los Angeles, California, recently has suffered a traumatic experience. While vacationing on Catalina Island, about twenty-two miles from Los Angeles, Kirsten went for a swim in the Pacific Ocean with friends. When Kirsten returned to Los Angeles a couple of days later, she developed a fever of 101.5 degrees, along with severe headaches, nausea, and a stiff neck. Kirsten scheduled an appointment with her general practitioner, Dr. Ian Keller, who stated that it was “probably the flu.” Dr. Keller gave Kirsten an antibiotic and ordered her to rest for several days. Dr. Keller also requested that Kirsten return to his office at 9 a.m. the next day “so that I can run a complete set of blood tests to rule out anything serious.”

When Kirsten returned home, her condition worsened. Given that it was not the flu season, Kirsten worried that she might have contracted a different illness. Kirsten began searching the Internet, curious to know if others in her area had struggled with these symptoms in recent weeks. Kirsten typed the words “fever, headaches, nausea what is it?” into Google and immediately reviewed listings for several popular websites, including WebMD and HealthCentral.com.

Kirsten also stumbled upon a website titled *The Immunity Cure* by Dr. Kenneth Wiley. Dr. Wiley practices holistic medicine in Syracuse, New York, and has a small satellite office in Berkeley, California. Dr. Wiley travels to Berkeley twice per year to visit friends he knew from his days as an undergraduate student at Stanford University. Dr. Wiley does not have a medical degree, but has a Master’s Degree in Alternative Healing Practices from *The Holistic Institute*, a regionally-accredited school that offers this degree online. The Master’s Degree Program in Alternative Healing Practices takes six months to complete, and requires enrollees to become well-versed in all areas of holistic medicine, including herbal remedies.

Prominently displayed on the front page of *The Immunity Cure* website was a flashing picture of a large yellow bottle, with the words *The Universal Remedy: The Only Cure You’ll
Need written in black letters on the label. Underneath the picture was a passage that read as follows:

This unique herbal remedy formula is the first of its kind that can cure any illness successfully, from the common cold to the rarest cancer. The proprietary blend in The Universal Remedy consists of herbal supplements that were carefully selected by Dr. Wiley and is based upon the latest advances in holistic medicine. The Universal Remedy’s ingredients bolster the immune system and produce rare antibodies that can cure all of the illnesses that have confounded modern medicine for centuries.

Kirsten briefly looked at the list of ingredients in The Universal Remedy, which included Slippery Elm Bark, Lemon Balm, Ginger, Turmeric, Chamomile, Lavender, and Oat Straw. Intrigued but skeptical, Kirsten sent an email to Dr. Wiley, which stated as follows:

Hi Dr. Wiley,

I’ve been suffering from really bad headaches, nausea, and a fever for the last couple of days. I think it’s getting worse. Before I buy your product, can you tell me if you have a medical degree and are a medical doctor, and if there is any evidence that your product really works?

Thank you.

Kirsten

An hour later, Kirsten received the following response:

Hi Kirsten,

Thank you for inquiring about The Universal Remedy. There’s a reason everyone in Syracuse calls me “Doc.” I am an expert in all areas of healing and preventative care. The Universal Remedy was designed using a secret formula that can boost immune response and successfully treat any illness. I can tell you without any hesitation that your headache, nausea, and fever will soon go away. Also, if you order within the next 12 hours, I will ship The Universal Remedy to you via overnight delivery for a modest additional fee of $9.99! This offer is only for you, and I’ll keep it open for the next 45 minutes.

Feel better soon.

Doc

Kirsten immediately replied, stating as follows:
Thanks so much Doc. I'll definitely get a bottle and accept your kind offer to ship it overnight.

Kirsten

Before completing her purchase, however, Kirsten hesitated and searched briefly for online reviews of The Universal Remedy. Kirsten found two. The first review stated as follows:

The best thing to happen to modern medicine in years! I had a strange illness that had confused my doctors for over six months. I bought The Universal Remedy, and in one week, I was back to my old self. Doctor Wiley is a brilliant man, a visionary, and someone of extraordinary compassion.

A Customer in Syracuse, New York.

The second review stated:

Total scam. Just a bunch of useless herbs. I tried to get a refund and got no response. SAVE YOUR MONEY! DO NOT PURCHASE.

Still Sick (Austin, Texas)

Kirsten was so heartened by the first review that she ordered a bottle of The Universal Remedy and contacted Dr. Keller’s office, canceling her appointment for the blood test because “I have figured out the problem, finally. But tell Dr. Keller I said thanks.” Kirsten purchased one bottle of The Universal Remedy and chose overnight delivery. The total price was $127.31.

Early the next afternoon, The Universal Remedy came in the mail. By that time, Kirsten’s temperature had risen to 103.8 degrees, and Kirsten had begun to feel disoriented. Kirsten ripped open the bottle and took twice the recommended dose, believing that a stronger dose would help her to heal more quickly.

Kirsten fell asleep and woke nearly 24 hours later, shaking, unable to move her legs, and struggling to breathe. Kirsten reached for her cell phone, dialed 9-1-1, and whispered into the phone, “Help, something is wrong. I’m at 1000 Hollywood Avenue in L.A. Call Dr. Keller.”

Twenty minutes later, police officers and an ambulance arrived. They found Kirsten lying in her bed, unconscious. Kirsten was rushed to Mass General Hospital, where she lapsed into a coma. Doctors at Mass General immediately contacted Dr. Keller, who ordered the blood tests that Kirsten would have had a day earlier. When the lab results came back, doctors discovered that Kirsten had contracted the brain-eating amoeba virus, Naegleria fowleri, most likely during Kirsten’s trip to Catalina.

Kirsten remained in a coma for two weeks, but the outstanding treatment Kirsten received at Mass General saved her life. After a lengthy rehabilitation process, Kirsten recovered. Unfortunately, however, Kirsten suffered permanent injuries, including paralysis of her right arm.
and damage to her short-term memory. Kirsten also struggles with frequent migraine headaches and was severely traumatized by this experience. She continues to see a psychologist on a weekly basis.

Kirsten scheduled an appointment with the firm to determine if she can sue the seller of *The Universal Remedy* for her damages, which include past and ongoing medical costs of over $500,000.

The managing partner has directed you to file a complaint against anyone who may be legally responsible for Kirsten’s injuries, and has requested that the complaint be filed no later than December 3, 2014.

**********

Based on this hypothetical, large-scale (cross-curricular) sequencing would proceed in the following manner.

<table>
<thead>
<tr>
<th>COURSE</th>
<th>ASSIGNMENT AND DUE DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Law</td>
<td>Client Meeting (Sept. 8)</td>
</tr>
<tr>
<td>Contracts</td>
<td>Retainer Agreement (Sept. 17)</td>
</tr>
<tr>
<td>Legal Research</td>
<td>Research—Offer and Acceptance (Sept. 24)</td>
</tr>
<tr>
<td>Lawyering Skills</td>
<td>Predictive Memorandum (Oct. 8)</td>
</tr>
<tr>
<td>Civil Procedure</td>
<td>Complaint (Nov. 10)</td>
</tr>
</tbody>
</table>

This model brings cohesion and purpose into the doctrinal, writing, and experiential components of legal education, and merges core competency and soft skill training into a pedagogy that bridges the gap between knowing how to think like a lawyer and understanding what it means to practice like a lawyer meaningfully. Students engage in simulations as they would occur in actual practice, and learn how to apply different writing techniques depending on
The Table below lists some of the skills that students would acquire under large-scale sequencing.

<table>
<thead>
<tr>
<th>COURSE</th>
<th>APPRENTICESHIP</th>
<th>CORE COMPETENCIES AND SOFT SKILLS</th>
<th>EXPERIENTIAL LEARNING EXERCISES</th>
<th>ASSESSMENT</th>
<th>OUTCOMES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Law</td>
<td>Doctrinal</td>
<td>Analytical ability; acquisition of foundational legal knowledge; problem-solving skills</td>
<td>Client Interview</td>
<td>Formal and summative (by doctrinal and legal writing faculty); End-of-the-semester examination</td>
<td>Improved analytical ability; knowledge of basic criminal law; problem solving, writing ability, communication, counseling, interpersonal communication</td>
</tr>
<tr>
<td>Contracts (three credits)</td>
<td>Doctrinal</td>
<td>Analytical ability; acquisition of foundational legal knowledge; problem-solving skills</td>
<td>Drafting Exercise: Basic Contract Retainer Agreement</td>
<td>Assessment by doctrinal and legal writing faculty, and opportunity for re-writing and revision; End of the semester examination</td>
<td>Improved analytical ability; knowledge of basic contract law; problem solving, writing ability</td>
</tr>
<tr>
<td>Legal Research</td>
<td>Practical</td>
<td>Legal and factual research ability; familiarity with paper and electronic research sources; primary and secondary authority</td>
<td></td>
<td>Assessment by legal research faculty; opportunity to refine research skills</td>
<td>Improved research and citation skills</td>
</tr>
<tr>
<td>LAWYERING SKILLS</td>
<td>Practical</td>
<td>Logical reasoning; legal research and</td>
<td>Drafting and Simulations Legal</td>
<td>Re-writing and Revision Individual</td>
<td>Improved writing, reasoning,</td>
</tr>
</tbody>
</table>

57 For example, the factual allegations in a complaint must be short and concise, but the statement of facts in a brief must tell a compelling narrative.
A more principled writing across the curriculum pedagogy also avoids the biggest problem associated with writing across the curriculum: students draft a litigation document, but do not receive evaluative and summative assessment, informal feedback, and the opportunity to rewrite. In many classes, for example, students will simply copy a form from the Internet, substitute the parties’ names and facts, and receive a *passing* grade for the assignment. In such a situation, students may be drafting real-world documents, but they are not receiving the type of feedback that will help to refine their skills.

Most importantly, an experiential legal writing program must incorporate formative and evaluative assessments and focus on maximizing learning outcomes. Below is a Table that sets forth a sample writing rubric that would supplement the rubrics that doctrinal professors use in their courses.

| CIVIL PROCEDURE (FOUR CREDITS) | Doctrinal | Analytical ability; acquisition of foundational legal knowledge; problem solving skills | *Drafting Exercise* Federal or State court complaint | *Re-writing and Revision* Individual conferences after drafting assignments (legal writing faculty), grading rubrics to guide rewriting; *End of the semester examination* | Improved analytical ability; knowledge of Federal Rules of Civil Procedure; problem solving skills, writing ability |

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2. SMALL SCALE SEQUENCING—THE LEGAL WRITING HYPOTHETICAL AND A REQUIRED EXPERIENTIAL LEGAL WRITING COURSE IN EVERY SEMESTER OF LAW SCHOOL

Small-scale sequencing has two elements: the first-year lawyering skills hypothetical and an experiential legal writing curriculum that requires students to take a drafting course in every semester that incorporates simulations as they would occur in actual practice.

Why create two hypotheticals in the first year? Students are able to draft a wider variety of documents, devote more time to improving their writing ability, and receive assessment from doctrinal and legal writing faculty. Below is a sample hypothetical that can be used in a first-year lawyering skills course.

**********

You’re sitting behind a desk on your first day as a practicing lawyer, filled with excitement and anticipation. Seasoned lawyers in fancy suits scurry through the hallways, talking to clients on their cell phones and discussing upcoming trials at the nearby federal courthouse. You’re eager to get involved and make a difference.

A few months ago, you graduated law school and, after a long and anxiety-filled summer, you took the bar examination. Now, it’s time to apply what you’ve learned in class to the real world, where clients are depending on your expertise, and the stakes are high.

As you’re getting settled into your new law office, a partner in the litigation department knocks on your door. “Welcome to the firm,” he says. “We’ve got something for you and it’s really important.”

This is your chance to make an unforgettable first impression. You smile, but inside you feel the jitters forming.

“This is an interesting, high-profile case,” the partner says. “Our client is Kirsten Waters, a former senatorial candidate, and she’s extremely upset. Here’s the situation.”

**********

Kirsten received her undergraduate degree from Stanford University in Palo Alto, California, and graduated at the top of her class from the University of California, Berkeley School of Law. Prior to entering political life, Kirsten was an attorney with the law firm of Jones, Davis, Bartlett, and Strom, LLP, where she worked her way from junior associate to managing
partner in the firm’s litigation department. She decided to challenge then-incumbent Robert Larson for one of California’s senate seats.

With the election only five days away, Kirsten was in a tight race with Larson, who was seeking re-election for the first time. By all accounts, the race was a statistical dead heat, and with one debate remaining, political commentators believed that the candidates’ performances might decide the election.

While Kirsten’s political views gained her substantial popularity among likely voters, many referred to her personal story as a source of inspiration and hope. Prior to the first debate, Kirsten acknowledged that, while in college, she struggled with alcohol and prescription drug abuse. Kirsten was very forthright about her past, and openly discussed the consequences substance abuse has had on her personal and professional lives. Kirsten’s honesty during the campaign, coupled with her inspiring story of recovery, garnered support among voters across the political spectrum. During her campaign, Kirsten vowed to increase funding for addiction recovery programs, and championed drug-free education in California’s public schools.

The final debate between Kirsten and Senator Larson was held at the Shrine Auditorium in Los Angeles. Before a sold-out crowd and a nationally-televised audience, the moderator, former governor Patricia Brown, began with the following question.

“Ms. Waters, can you talk about your personal struggles, how they have changed your life, and what impact, if any, they may have on you as a United States Senator?”

Kirsten responded as follows:

“Thank you, Governor Brown. I appreciate the opportunity to be here tonight with the voters of California and, of course, Senator Larson. As you know, I’ve been very forthcoming about my struggle—many years ago—with alcohol and prescription medication. It was the darkest period of my life. Perhaps the worst moment came on August 2, 1994, the summer of my junior year at Stanford when, due to a regrettable mistake in judgment, I was responsible for driving under the influence of alcohol and possessing an unauthorized controlled substance. For me, this was rock bottom and a wake-up call that I had to make immediate changes in my life. My first step was to accept responsibility for my actions, which I did. After being ordered to serve 30 days in the Palo Alto, County Jail, followed by a 90-day stay at a residential treatment facility, I continued the life-changing process of taking my life back. Looking back, I don’t know if I would be here tonight without having faced the consequences of my actions. From this experience, I learned what it means to truly struggle in life. I learned how to cope with adversity and life’s difficult challenges. I came to know the value of accountability, hard work, and perseverance. These are values, in my opinion, to which all of California’s voters, regardless of background or political party, can relate. If elected, I will be a compassionate senator who understands the struggles of all Californians and who believes in the value of honesty. Thank you.

Governor Brown then asked Senator Larson if he would like to respond. Senator Larson responded as follows:
First, I would like to thank you, Governor Brown, the voters of California, and Kirsten for giving me the opportunity to participate in tonight’s debate. I think we should all applaud Kirsten for her inspiring story and the courage she has displayed. I’m really looking forward to a lively debate on the important issues facing California.

After a spirited debate, commentators were divided sharply concerning how Kirsten’s eleventh-hour admission would affect her chances for election. Preliminary fact-checking confirmed that, on August 2, 1994, Kirsten was arrested and charged with Driving under the Influence of Alcohol, and possession of a controlled substance.

Five days later, in one of the closest elections in California history, Kirsten defeated Senator Larson by 314 votes.

Simon Harrison, originally from San Jose, California, is now a resident of Erie, Pennsylvania. Simon, who is a computer programmer, operates a well-known blog, www.justtellthetruth.com. Simon describes his blog as “telling the whole truth and nothing but the truth.” It seeks to expose corruption in all areas of public life. Simon’s website has been credited with, among other things, uncovering a bribery scandal involving Philadelphia’s mayor and exposing the use of performance-enhancing substances by several high-profile athletes.

Simon also attended Stanford University, and he met Kirsten during their freshman year. While they were friends throughout college, they went their separate ways and no longer remained in contact. Simon was, however, watching Kirsten’s final debate closely.

After Kirsten answered Governor Brown’s first question, Simon was flabbergasted. Simon was shocked to hear Kirsten discuss her past, particularly because Simon was very close to Kirsten at the time and knew the events in question very well.

After the debate, Simon posted an urgent message on www.justtellthetruth.com. The headline read, “Kirsten Waters blatantly lied at the final debate… Details coming shortly.” Approximately thirty minutes later, Simon posted the following statement on his blog.

Sadly, I have uncovered yet another politician who cannot tell the truth. Kirsten Waters intentionally lied during her debate with Senator Larson. Kirsten’s statements about her past struggle with substance abuse—obviously designed to sway California voters—are fabrications. I was Kirsten’s friend during college, and I unconditionally supported Kirsten while she struggled to overcome addiction. I am shocked that Kristen would exploit her past for political gain. More specifically, while Kirsten was arrested for Driving under the Influence of Alcohol and possession of a controlled substance, she was neither incarcerated nor ordered to spend even a single day in a residential treatment program. After pleading guilty, Kirsten was sentenced to 90 days probation and 100 hours of community service. Additionally, as part of the plea deal, the controlled substance charge was dropped. Kirsten only sought residential treatment because her parents threatened to stop paying her tuition at Stanford. Kirsten’s lies show that she is not fit for public office.
In addition, because I am committed to telling the whole truth, I must disclose that, while at Stanford, Kirsten engaged in highly questionable conduct. During our last two years at Stanford, Kirsten was engaged to a mutual friend (whose name I will not reveal at this time). Kirsten suddenly broke off the engagement and admitted to having a lengthy affair with another man throughout the duration of the relationship. I soon will release a letter Kirsten wrote to our friend admitting to the affair.

The whole truth is that Kirsten reluctantly sought treatment—only to save herself—while repeatedly lying to and eventually betraying a very decent man.

I would like to add one final comment. While at Stanford, Kirsten performed poorly in her studies. Kirsten was not a good student, and I doubt she has the ability to serve effectively in any elected capacity. I don’t know how she was accepted by the University of California-Berkeley School of Law. I do know this: her dad is one of Berkeley’s most generous donors. Kirsten’s admission to Berkeley wasn’t about merit. It was about favoritism and money. I also question how Kirsten ever graduated from Berkeley. I can’t imagine her passing all of those difficult law school classes without receiving significant help from her family.

Despite Simon’s best efforts, this information was not revealed publicly prior to the election. Everything changed, however, when Simon posted a letter Kirsten received from her probation officer, dated November 10, 1994. Among other things, the letter stated:

**Dear Kirsten:**

As you know, the court sentenced you to a probation term of 90 days, and 100 hours of community service. Having complied fully with these responsibilities, your sentence is hereby complete and this matter now concluded.

*******

One week after the election, Simon’s story became national news. Under extraordinary pressure from her party, coupled with damaging public opinion polls, Kirsten released the following statement:

I made certain inaccurate statements at my final debate with Senator Larson. Some of the details regarding my past were inconsistent with the facts. At no time, however, did I intentionally lie or mislead the voters of California. The additional statements made on Mr. Harrison’s website are intentionally and maliciously false. In the interest of sparing California any further attention to this matter, I will resign as your Senator, yet continue to fight for the vital issues affecting all citizens of this state. I do intend to pursue all available legal remedies against Mr. Harrison for what is nothing more than a callous attack on my character.

In response to Kirsten’s statement, Simon posted the following response.
Kirsten still can’t tell the truth. Should Kirsten file a baseless lawsuit against me, I will have an airtight defense: it’s the whole truth and nothing but the truth.

Two days later, Kirsten filed a complaint against Simon in the United States District Court for the Northern District of California. Kirsten is suing Simon for defamation and invasion of privacy under California law. She is seeking five million dollars in damages.

**********

“Wow, now I can understand why she’s upset,” you say.

“You have no idea,” the partner says. “She wants him to pay for this.”

You nod and muster a forced smile, trying to exude confidence. Inside, though, you’re not sure if you have the experience to handle such a high-profile case.

“I need you to get started right away,” the partner says. “Get us a victory—we’re counting on you.”

The partner gets up and walks toward the door, stopping to offer encouraging words.

“Remember—we wouldn’t have hired you unless we believed that you had the talent to litigate this case to a successful conclusion.”

Fear grips the pit of your stomach. A few moments later, the phone rings.

“How’s the big-shot lawyer doing?” your best friend asks.

“I’m having a panic attack,” you say. “I just got my first case, and have no idea what I’m doing.”

“Just apply what you learned in law school,” your best friend says, “and please try to relax.”

“You don’t understand. In law school, I wrote, like, one or two memos and an appellate brief, and I did those two years ago. They don’t teach this stuff in school. During my final semester I took two seminars—European Union Law and American Legal History.”

“Well, you’ve got to figure it out somehow,” your best friend says.

After the call ends, you sit in your chair, unsure where to begin.

I’m going to screw this case up. They’re going to fire me.

What should I do?

**********
The Tables below lists the assignments for the first two semesters of experiential legal writing.

### TABLE XIII
**EXPERIENTIAL LEGAL WRITING IN THE FIRST AND SECOND SEMESTERS**

**FIRST SEMESTER**

<table>
<thead>
<tr>
<th>DRAFTING ASSIGNMENT</th>
<th>EXPERIENTIAL LEARNING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Memorandum One</td>
<td>Client Interview</td>
</tr>
<tr>
<td>Client Letter</td>
<td>Oral Presentation to Partner</td>
</tr>
<tr>
<td>Memorandum Two</td>
<td>Second Client Interview</td>
</tr>
<tr>
<td>Memorandum Three</td>
<td></td>
</tr>
</tbody>
</table>

**SECOND SEMESTER**

<table>
<thead>
<tr>
<th>DRAFTING ASSIGNMENT</th>
<th>EXPERIENTIAL LEARNING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaint</td>
<td>Oral Argument</td>
</tr>
<tr>
<td>Motion to Dismiss</td>
<td>Simulated Depositions</td>
</tr>
<tr>
<td>Answer</td>
<td>Oral Argument</td>
</tr>
<tr>
<td>Discovery</td>
<td></td>
</tr>
<tr>
<td>Motion for Summary Judgment</td>
<td></td>
</tr>
</tbody>
</table>

For those instructors who chose to confine the number of assignments in the second semester, small-scale sequencing could be limited to the complaint, answer, and motion to dismiss, coupled with required re-writes. One example is below.
Simulated oral arguments also would be incorporated at the end of the second semester. This approach will help students to understand the role and purpose that each document plays in the litigation (or transactional) process, and understand that persuasive writing techniques apply in different ways depending on the document being drafted. Furthermore, in both introductory and upper-level courses, legal writing professors would be able to incorporate complex legal problems from various areas of the law, which would broaden the students’ substantive legal knowledge and, when combined with real-world writing assignments, refine the students’ analytical skills. The Table below shows how the cross-curricular and lawyering skills hypotheticals would be integrated in the first semester of the first year.
The almost obsessive focus on experiential learning is fundamentally misguided if intensive writing instruction, which is inherently experiential, is not incorporated throughout the curriculum. Requiring six credits of clinics or simulation-based courses, while valuable, is not

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58 In August 2014, the American Bar Association House of Delegates approved nearly all the proposals of the Section of Legal Education and Admissions to the Bar related to approval of law schools, including the requirement that all law schools require at least six credits of experiential learning. ABA Section on Legal Education & Admissions to the Bar, Explanation of Changes, available at,
nearly enough to train students in core competencies, and requiring fewer than six credits of required legal writing courses, often over two or three semesters, is nowhere near enough to train students in the art of persuasive advocacy.\(^5^9\) In fact, the minimal focus on legal writing is the biggest failing at law schools today.

Given the pervasive criticism from lawyers and judges about graduates’ writing skills, this raises the question of why law schools are doing nothing to address this deficiency. Many law schools tout the virtues of their experiential learning, but without comprehensive and continuous legal writing instruction, they are not experiential at all. This approach does nothing more than place students on the pitcher’s mound in an empty stadium.

The most harmful effect of a two or three-semester legal writing is atrophy. Whatever students learned during the first year of law school—while overwhelmed with first-year courses like contracts and civil procedure—is often forgotten and never refined. Thus, the skill that they need most—effective persuasive writing skills—is underdeveloped and resides in a forgotten land along with the Rule against Perpetuities and nearly thirty hearsay exceptions. If law schools required students to take one legal writing class taught by a legal writing professor in every semester of law school, professors would have the time to teach the nuances of persuasive writing and incorporate a wide variety of real-world assignments. In so doing, students would have the opportunity to re-draft some of the documents that were assigned in the first year, and draft documents that they would otherwise not encounter until they were practicing law. No amount of experiential learning can compensate for this deficiency. Indeed, if the term “practice ready” means anything, it means being prepared to write effectively in a variety of contexts—

from day one.\textsuperscript{60} After all, medical students do not graduate without knowing how to diagnose, treat, and cure a medical condition. The same should be true for law schools. Law students should not graduate without knowing how to diagnose, treat, and solve a legal problem. We should be preparing them for a career as legal writers, thinkers, researchers, analysts, and speakers; instead, we are kicking them out of the nest far too early.

As discussed above, large-scale sequencing (writing across the curriculum), no matter how effective, cannot and does not substitute for courses that focus primarily on developing a law student’s writing skills. First, students do not have the opportunity to draft and re-draft the types of documents that they will encounter in actual practice. Second, writing across the curriculum often occurs in doctrinal courses where students are acquiring foundational legal knowledge, and thus they cannot focus primarily on refining their writing skills. Finally, by incorporating simulations and other exercises into the writing curriculum, experiential legal writing provides students with real-world context. In these ways, writing into the legal writing curriculum is superior to writing across the curriculum, and is the ideal precursor to clinics and externships.\textsuperscript{61}

How would small-scale sequencing be structured in an experiential legal writing curriculum throughout all six semesters of law school? The table below provides an example of the types of documents and experiential learning exercises that would be incorporated. The Table below gives an example of how six semesters of experiential legal writing courses, using large and small-scale sequencing, train students in fundamental lawyering skills that would not be taught in two or three semesters of legal writing, in writing across the curriculum, or in clinics.

\textsuperscript{60} Legal writing is also connected to bar exam success. That graduate last had formal legal writing training one or two years before, and yet is about to apply those now-atrophied legal writing skills in the most important single event to that point in the graduate’s life.

\textsuperscript{61} Melissa A. Moodie, Brette S. Hart, *The Missing Link: The Need for Good Legal Writing Programs in Law Schools*, 74-JAN. J. KAN. B.A. 9 (”[l]egal writing should continue throughout the law school curriculum, not just the first year.”)
<table>
<thead>
<tr>
<th>TABLE XVI</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXPERIENTIAL LEGAL WRITING THROUGHOUT ALL SIX SEMESTERS OF LAW SCHOOL</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>COURSE</th>
<th>DRAFTING ASSIGNMENTS (INCLUDES RE-Writes)</th>
<th>CORRESPONDING EXPERIENTIAL LEARNING EXERCISE</th>
<th>CORE COMPETENCIES (MACCRATE) AND SOFT SKILLS (AFTER FORMATIVE ASSESSMENTS AND RE-Writes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experiential Legal Writing I</td>
<td>Legal memorandum, Client letter</td>
<td>Client interview (fact gathering prior to drafting the memorandum); presentation to partner</td>
<td>Problem solving, legal and factual research, legal analysis, communication, counseling, interpersonal skills, ability to collaborate and work well with others</td>
</tr>
<tr>
<td>Experiential Legal Writing II</td>
<td>Complaint, Answer, Motion to Dismiss</td>
<td>Oral argument, status conference, strategy session with partner formulating theory of the case and anticipating the adversary’s response</td>
<td>Problem solving, legal and factual research, legal analysis, litigation and alternative dispute resolution communication, counseling, interpersonal skills, ability to collaborate and work well with others</td>
</tr>
<tr>
<td>Experiential Legal Writing III</td>
<td>Discovery, Summary Judgment Motion</td>
<td>Deposition, settlement negotiation, oral argument</td>
<td>Legal analysis and research, oral advocacy, problem solving skills, context-based drafting negotiation, interpersonal skills, sound judgment and strategic decision-making, litigation and alternative dispute resolution</td>
</tr>
<tr>
<td>Experiential Legal Writing IV</td>
<td>Motion in Limine, Trial Brief</td>
<td>Mediation (or arbitration), oral argument, jury questionnaire, jury instructions, judicial opinion drafting</td>
<td>Legal analysis and research, oral advocacy, problem solving skills, context-based drafting, communication, negotiation, interpersonal skills, sound judgment and strategic decision-making, litigation and alternative dispute resolution</td>
</tr>
<tr>
<td>Experiential Legal Writing V</td>
<td>Appellate Brief</td>
<td>Oral argument, client meeting</td>
<td></td>
</tr>
<tr>
<td>Experiential Legal Writing VI</td>
<td>The Art of Rewriting</td>
<td>Oral argument</td>
<td></td>
</tr>
</tbody>
</table>
For students who prefer to focus on transactional work, the fourth, fifth, and sixth semesters will provide an alternative track whereby students can replace litigation-focused courses with transactional drafting.

**TABLE XVII**

**TRANSACTIONAL DRAFTING TRACK (SAMPLE LIST OF CLASSES)**

<table>
<thead>
<tr>
<th>COURSE</th>
<th>DRAFTING ASSIGNMENT (EXAMPLES)</th>
<th>CORRESPONDING EXPERIENTIAL LEARNING EXERCISE</th>
<th>CORE COMPETENCIES (MACCRAVE) AND SOFT SKILLS (AFTER FORMATIVE ASSESSMENTS AND RE-WRITES)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transactional Skills</td>
<td>Contracts, covenants not to compete, non-competition agreements, warranties, licensing agreement</td>
<td>Negotiating with opposing counsel, meeting with client</td>
<td>Legal analysis and reasoning, legal and factual research, problem solving, providing competent representation, counseling, negotiation (e.g., strategic decision-making), communication, interpersonal skills</td>
</tr>
<tr>
<td>(Required—replaces Experiential Writing IV)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wills, Trust, and Estates</td>
<td>Wills, trusts, advanced directives</td>
<td>Client interview</td>
<td>Legal analysis and reasoning, legal and factual research, problem solving, providing competent representation, counseling, communication, interpersonal skills</td>
</tr>
<tr>
<td>Business Planning or Corporate Governance</td>
<td>Partnership agreement, employee contracts, stock purchase agreements; registration and disclosure documents</td>
<td>Client interview; strategy meetings with partner or colleagues</td>
<td>Legal analysis and reasoning, legal and factual research, problem solving, providing competent representation, counseling, communication, interpersonal skills</td>
</tr>
<tr>
<td>Federal Income Tax</td>
<td>IRS forms, returns, financial disclosure statements</td>
<td>Client interview and follow-up meeting</td>
<td>Legal analysis and reasoning, legal and factual research, problem solving, providing competent representation, counseling, negotiation communication, interpersonal skills</td>
</tr>
<tr>
<td>Mergers and</td>
<td>Confidentiality and</td>
<td>Client interview,</td>
<td>Legal analysis and reasoning, legal and factual research, problem solving, providing competent representation, counseling, negotiation communication, interpersonal skills</td>
</tr>
</tbody>
</table>

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Thus, students will have the opportunity to draft a variety of real-world transactional documents, and having taken Experiential Legal Writing I-III, they also will have a foundation in predictive and persuasive writing in the litigation context. Indeed, even if students choose to pursue a career in transactional law, a foundation in litigation is essential because many transactional disputes are resolved through the litigation process. Thus familiarity with the skills and documents that students will encounter is essential.

Both in the litigation and transactional contexts, experiential legal writing develops difficult-to-teach skills, such as thinking critically and outside the box, writing well, but rewriting even better, knowing how to litigate and negotiate, and preparing effectively, but responding strategically to uncertainty. Most importantly, students are afforded the time and opportunity to focus on improving their writing skills in various legal contexts.
C. **Formative and Summative Assessments**

Of course, success of an experiential legal writing model depends on effective assessment, both at the formative and evaluative stage, that measure real-world skills and core competencies. Assessment serves a variety of purposes. Formative assessments allow law schools to identify at-risk students earlier in their law school careers, provide academic support where necessary, and identify individual and group strengths and weaknesses. This can help professors to tailor their instruction to particular areas, and to focus individualized feedback in areas where students need the most assistance. Summative assessment allows professors to measure student progress against the initial, pre-course assessment (if done), and over the course of a semester.

This enables the professors to refine particular courses to emphasize certain topics or assignments in areas where the class exhibited weaknesses, provided additional academic support or other instruction in those areas, and guide the students’ upper-level course selection. To maximize success on the bar examination, legal writing professors may consider employing cumulative or “mini-bar examinations” at the end of each year, testing student performance on bar exam topics taught to that point in the curriculum, and to assess the students’ analytical and writing ability in a context that simulates bar examination conditions.

The Table below sets forth a five-step assessment model for an experiential legal writing program that includes pre-course assessment, formative assessment and individualized feedback, opportunities for reflection and re-writing (or repeat performances for simulations and role plays), and outcome measurement. This article proposes a five-part assessment model that incorporates: (1) pre-course assessment; (2) course and apprentice-specific experiential learning
techniques; (3) formative assessment; (4) reflection and revision (in writing courses, writing and re-writing; repeat performance in other courses); and (5) outcome measurement.

**TABLE XVIII**
**FIVE-PART ASSESSMENT MODEL**

To enhance the value of formative and evaluative assessments, legal writing professors should create rubrics for each type of document, *e.g.*, complaint, interrogatories, appellate brief, that itself would be added to the universal writing rubric that was created in the doctrinal courses. Below are examples of rubrics that would apply to specific litigation documents in the small-scale experiential legal writing program. Below is an example of a rubric for a student’s first memorandum in lawyering skills, which focused solely on the “Legal Analysis” or “Discussion” section, followed by rubrics for client letters and a motion to dismiss.
<table>
<thead>
<tr>
<th><strong>Organization and Writing Style</strong> (1-5) (Poor, Below Average, Average, Above Average, Excellent)</th>
<th><strong>Legal Analysis</strong> (1-5) (Poor, Below Average, Average, Above Average, Excellent)</th>
<th><strong>Research and Citation</strong> (1-5) (Poor, Below Average, Average, Above Average, Excellent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Followed directions</td>
<td>Drafted a single-sentence Question Presented that incorporates some factual background and lets the reader know the applicable law</td>
<td>Sheppardized</td>
</tr>
<tr>
<td>Avoided conclusory language (e.g., “The standard is met because plaintiff has satisfied all four elements”)</td>
<td>Included a Brief Answer (brief discussion of the law and facts, and states a conclusion)</td>
<td>Began analysis with most relevant and binding authority</td>
</tr>
<tr>
<td>Clarity (avoided Latin, esoteric words, legalese, cloudy pronoun usage)</td>
<td>Included relevant and binding legal authority, both favorable and unfavorable (cases, statutes, regulations)</td>
<td>Thoroughly researched and identified governing law</td>
</tr>
<tr>
<td>Wrote concisely and eliminated excess words (e.g., avoided beginning sentences with “It is” “There are,”)</td>
<td>Avoided irrelevant or unnecessary case law</td>
<td>Used non-binding and secondary authority where necessary (e.g., no primary authority available, law is unsettled in jurisdiction, secondary authority is from well-known and respected source)</td>
</tr>
<tr>
<td>Avoided colloquial language (e.g., contractions)</td>
<td>Addressed threshold issues (e.g., jurisdiction, venue)</td>
<td>Discussed facts of prior cases if similar</td>
</tr>
<tr>
<td>Word choice, sentence and paragraph length (e.g., sentences under twenty-five words, paragraphs no longer than three-quarters of a page, chose simple rather than complex words)</td>
<td>Clearly set forth the rule and organized the rule explanation from broad to specific</td>
<td>Did not cite to overruled cases</td>
</tr>
<tr>
<td>Used headings and subheadings to guide the reader</td>
<td>Clearly set forth a conclusion that was supported by facts and law; wrote objectively, and did not advocate for a particular conclusion</td>
<td>Proper long and short-citation form (included pin-cites, avoided string cites, abbreviated case names correctly)</td>
</tr>
<tr>
<td>Flow (paragraphs did not discuss multiple elements, avoided repetition)</td>
<td>Synthesized the rule using relevant case law</td>
<td>Indicated that a case was reversed on other grounds (if applicable)</td>
</tr>
<tr>
<td>Avoided overuse of adverbs, prepositions, nominalizations (e.g., quickly, conceptualization)</td>
<td>Objectively analyzed the issue from competing perspectives</td>
<td></td>
</tr>
<tr>
<td>Avoided inflammatory language</td>
<td>Distinguished relevant facts from</td>
<td></td>
</tr>
</tbody>
</table>
and artificial attempts to persuade irrelevant facts
Flow (avoided repetition) Analyzed relevant counterarguments
Followed IRAC/CRAC (did not mix the law and facts) Analyzed policy considerations, if any
Free of spelling and grammar mistakes Did not attack the court or adversary

<table>
<thead>
<tr>
<th>TABLE XX</th>
<th>CLIENT LETTER</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FORMAT (1-5)</strong> <em>(Poor, Below Average, Average, Above Average, Excellent)</em></td>
<td><strong>APPROPRIATENESS FOR AUDIENCE (1-5)</strong> <em>(Poor, Below Average, Average, Above Average, Excellent)</em></td>
</tr>
<tr>
<td>First page heading contains letterhead, date, addressee’s address, subject line, and salutation</td>
<td>The tone of the letter is appropriate for the situation and the recipient (in particular, the client letter is not condescending)</td>
</tr>
<tr>
<td>Subsequent page headings contain a header with the addressee’s name and the date</td>
<td>The language used in the letter is appropriate for the recipient’s level of understanding</td>
</tr>
<tr>
<td>Body is formatted using a standard business letter format</td>
<td>The letter is written appropriately for the purpose. <em>(inform v. persuade)</em></td>
</tr>
<tr>
<td>The closing contains a signature block and any other appropriate notations (cc:, encl., initials, etc.)</td>
<td></td>
</tr>
<tr>
<td><strong>CRITERIA</strong></td>
<td><strong>SCORE</strong></td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td><strong>1-5</strong></td>
<td></td>
</tr>
<tr>
<td><strong>(POOR, BELOW AVERAGE, AVERAGE, ABOVE AVERAGE, OUTSTANDING)</strong></td>
<td></td>
</tr>
<tr>
<td>Greeted the client professionally (e.g., made the client feel comfortable, offered the client something to drink, explained the importance of being honest about the facts, and assured the client that the conversation is confidential)</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Provided a roadmap for the client (e.g., explained the purpose of the meeting)</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Asked open-ended, relevant questions that were reasonably calculated to uncover relevant facts (e.g., client’s background, chronology of events, potential witnesses)</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Based on the client’s answers, asked appropriate follow-up questions that probed relevant facts in sufficient depth</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Displayed effective interpersonal skills (e.g., eye contact, posture, sensitivity to the client’s concerns or emotions, and provided encouragement and reassurance where necessary)</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Displayed active and engaged listening skills (e.g., did not interrupt the client, answered the client’s questions directly, openly, and forthrightly)</td>
<td>1-2-3-4-5</td>
</tr>
<tr>
<td>Adjusted effectively to unexpected questions or admissions, maintained composure, and did not try to control the meeting or adhere to scripted questions</td>
<td>1-2-3-4-5</td>
</tr>
</tbody>
</table>
Provided a straightforward and understandable explanation of the steps in the legal process, and made accurate and realistic representations (e.g., the likelihood of success, cost, and length until resolution) | 1-2-3-4-5 |
---|---|
Provided a specific plan of action going forward, encouraged the client to call with follow-up questions or concerns, and asked the client for supporting documents as necessary | 1-2-3-4-5 |

**TABLE XXII**
SAMPLE RUBRIC FOR A COMPLAINT

<table>
<thead>
<tr>
<th>CRITERIA (1-5) (POOR, BELOW AVERAGE, AVERAGE, ABOVE AVERAGE, EXCELLENT)</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Checked local rules for form and other requirements.</td>
<td></td>
</tr>
<tr>
<td>Alleged subject matter jurisdiction, personal jurisdiction, and venue, citing specific statutes and cases</td>
<td></td>
</tr>
<tr>
<td>Researched to know if claims were cognizable and to know pleading requirements for each claim; considered pleading alternative claims, if appropriate; offered expert support for claims, where required.</td>
<td></td>
</tr>
<tr>
<td>Drafted a short and plain statement of the factual allegations</td>
<td></td>
</tr>
<tr>
<td>Alleged facts sufficient to support each cause of action to avoid motion to dismiss for failure to state a claim</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>If facts were lengthy or complex, used subheadings to guide the reader</td>
<td></td>
</tr>
<tr>
<td>Alleged all necessary facts without being overly specific</td>
<td></td>
</tr>
<tr>
<td>Drafted separate counts for each claim</td>
<td></td>
</tr>
<tr>
<td>Pled facts with particularity, where required (e.g., fraud)</td>
<td></td>
</tr>
<tr>
<td>Alleged facts sufficient to support claims for punitive damages and attorney fees</td>
<td></td>
</tr>
<tr>
<td>Attached and incorporated documents into the complaint, if appropriate</td>
<td></td>
</tr>
</tbody>
</table>
Of course, in the upper-level curriculum, legal writing professors also could provide formal assessments in courses such as Wills, Trusts, and Estates, Criminal Procedure, and Evidence, but unlike the first year, there would be no sequencing. Of course, some will argue that law schools do not have the time or resources to involve legal writing faculty throughout the first-year curriculum and require them to simultaneously teach first-year writing courses. At some law schools, this may very well be the case. The solution to this problem would be to involve legal writing faculty in assessing drafting assignments in one or two, but not all of the first-semester courses, or to engage other doctrinal faculty in assessing a part of a course. The use of a comprehensive and fully developed rubric will facilitate this process. In the upper-level curriculum, particularly in advanced drafting courses, adjunct professors can provide invaluable real-world teaching assistance.

IV.

ADDITIONAL CURRICULAR ISSUES

A. ENSURE THAT BAR EXAM PREPARATION DOES NOT HINDER THE DEVELOPMENT OF AN EXPERIENTIAL LEARNING CURRICULUM

Some law schools that have students with lower incoming credentials focus on identifying at-risk students very early in their law school careers, providing robust academic support, and preparing students for the bar examination. For example, some schools incorporate multi-state bar examination-style questions into their courses, focus on essay writing,

and require students to do basic logical reasoning exercises. This is undoubtedly valuable, but bar exam preparation should be a separate *addition* to the doctrinal and skills courses because it can interfere with the development of a fully integrated, cohesive experiential learning curriculum. Indeed, a professor cannot be expected to teach substantive law (or legal writing), include multi-state style questions and test-taking strategy, and incorporate simulations or drafting assignments in a single course. A better way would be to add a one-credit critical thinking skills course in the first two semesters (and throughout law school) that encompasses bar exam preparation. After all, law school should not be an extended bar preparation course. In doctrinal and skills courses, the focus should be on developing the core competencies necessary for success in the profession. This would result in a muddled curriculum.

**B. A Required Upper-Level Curriculum**

For some schools, a required upper-level curriculum can be useful to ensure that students take courses that will be tested on the bar exam and acquire the legal knowledge and practical skills that are relevant to the practice of law.

<table>
<thead>
<tr>
<th>COURSE</th>
<th>CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WILLS, TRUSTS, AND ESTATES</strong></td>
<td>Three</td>
</tr>
<tr>
<td><strong>ADMINISTRATIVE LAW</strong></td>
<td>Four</td>
</tr>
<tr>
<td><strong>COMMERCIAL LAW</strong></td>
<td>Three</td>
</tr>
<tr>
<td><strong>CRIMINAL PROCEDURE</strong></td>
<td>Three</td>
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<tr>
<td><strong>BUSINESS ASSOCIATIONS</strong></td>
<td>Three</td>
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<tr>
<td><strong>EVIDENCE</strong></td>
<td>Four</td>
</tr>
<tr>
<td><strong>EXPERIENTIAL LEGAL WRITING (III-VI)</strong></td>
<td>Four to Eight</td>
</tr>
</tbody>
</table>
CONCLUSION

IT’S TIME FOR THE AMERICAN BAR ASSOCIATION TO ACT

The ABA now requires law students to take six credits of experiential learning or simulation-based courses.63 But if students are not writing in those courses, they are not engaged in experiential learning at all. They are going through the motions, but graduating without the skills. The persistent criticism from judges and lawyers is telling. An increase in experiential learning courses has not stopped this criticism. An experiential legal writing curriculum will—and the ABA should require law students to take one required writing course in every semester of law school—now.

Change is always a bit scary, but it is time legal writing is recognized for its true foundational impact on our law school graduates. There is no more important class that any law student can take than a legal writing course taught by a capable and dedicated legal writing professor. To prepare our law students for practice, we must offer—and require—more legal writing credits spanning all six law school semesters. If law schools continue to train students to run 50 meters rather than 100, enrollment may continue to drop to half of what it was several years ago. It is time for legal writing instructors everywhere to make change happen, and to bring the legal writing curriculum to the forefront of legal education.