Legal Writing - What's Next? Real-World, Persuasion Pedagogy from Day One

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LEGAL WRITING--WHAT’S NEXT? REAL-WORLD, PERSUASION PEDAGOGY FROM DAY ONE

Adam Lamparello and Charles E. MacLean

INTRODUCTION

Do you remember your first day as a practicing lawyer? After three years of hard work, and a summer spent preparing for the bar exam, you’ve finally reached the Promised Land. Dressed impeccably in a fancy suit and overflowing with energy, you sit behind your desk with a huge grin and think, “I made it.” You have no idea what is about to happen.

After the firm’s orientation festivities end, a partner walks into your office with an assignment. “We’re so glad to have you on board,” the partner says, then continues:

I’ve got your first assignment. I need you to quickly draft a motion seeking injunctive relief. Our client is the manufacturer of ‘Make Me Happy Cola,’ an energy drink that has been a best seller over the last year. Unfortunately, one of our client’s former employees just violated a restrictive covenant and is revealing trade secrets to Bolt Cola, a direct competitor. Here’s the file. Get the brief to me by the end of the week.”

You panic. Anxiety grips the pit of your stomach.

I have no idea what I’m doing, you say to yourself. I don’t even know where to begin.

You feverishly search through the firm’s online files, looking frantically for a document to guide you. Nothing comes up. I’m going to screw up, you think. They’re going to fire me.

Why didn’t they teach me this in law school?

I. THE PROBLEM: LAW GRADUATES ARE NOT PRACTICE-READY BECAUSE THEY CANNOT WRITE EFFECTIVELY

Law schools are not preparing ‘practice-ready’ graduates who can succeed—from day one—in the ‘real world’ practice of law. Judges, seasoned practitioners, and clients consistently complain that recent law graduates: (1) cannot write; and (2) are not familiar with the vast
majority of litigation documents that attorneys use resolve disputes. A recent article in the American Bar Association’s online journal states as follows:

Ask judges and senior lawyers to identify the most disturbing aspect about younger lawyers, and they will reply in one voice, “They can’t write.”¹

United States Supreme Court Justice Antonin Scalia, known for his eloquent (and sometimes biting) prose, agrees:

[I]t became clear to me, as I think it must become clear to anyone who is burdened with the job of teaching legal writing, that what these students lacked was not the skill of legal writing, but the skill of writing at all * * * [T]he prerequisites for self-improvement in writing . . . are two things. Number one, the realization—and it occurred to my students as an astounding revelation— that there is an immense difference between writing and good writing. And two, that it takes time and sweat to convert the former into the latter.”²

As a result, law firms have been forced to train nervous—and unprepared—graduates and absorb the costs, as clients now refuse to pay for the time it takes for a new law school graduate to learn a skill that many believed should have been acquired during the new associate’s legal education.³ As one new associate at a large law firm stated, “[t]he big problem for many people is that law school and the practice of law are so different.”⁴

Ultimately, it is not just new lawyers that suffer. Experienced practitioners, who did not receive sufficient writing instruction while in law school, struggle throughout their careers, and some are even admonished by courts for their poor draftsmanship.⁵ Most importantly, clients

⁴ Id.
⁵ Christy Hall Benson, The Consequences of Bad Writing, PARALEGAL TODAY (March/April 2007) available at http://paralegaltoday.com/issue_archive/columns/LglWrtng_md07.htm (“A bankruptcy attorney in Minnesota was publicly reprimanded for unprofessional conduct and ordered to pay court costs after repeatedly filing documents the court considered "unintelligible" because they contained numerous spelling and typographical errors. Additionally, the attorney was required to attend legal writing courses”).
suffer, as does the quality—and reputation—of practicing lawyers. Law schools must address this problem by taking an innovative approach to legal writing instruction. Gerald Lebovits, a New York City Civil Court Judge and adjunct professor at Columbia Law School, recently argued for a new approach to legal writing:

[Law schools] must acknowledge that they are trade schools for a noble profession “that depends on flawless writing, logical reasoning, and persuasive argumentation.” To teach students their vocation, law schools must now, more than ever, augment their writing curriculum. Doing so will be expensive. Not doing so will be even more expensive.  

II. THE NEXT GENERATION OF LEGAL WRITING: REAL-WORLD, PERSUASION ONLY ADVOCACY

So, why didn’t they teach me this in law school?” The problem has nothing to do with ‘bad’ or uncaring teachers, but with a pedagogical approach that mistakenly divorces the acquisition of legal knowledge—and practical skills training—from their functional roles in the real world. In law school, students are typically required to write a memorandum or an appellate brief, but without knowing how each document fits into the broader context of actual law practice, the student’s ability to put that knowledge to practical use is limited.

Every litigation document, whether it is, for example, a legal memorandum, complaint, motion to dismiss, or first set of interrogatories, requires adjustments for tone, style, the audience, the applicable standard of review, purpose, and the objectives sought. Put differently, while students may spend one semester writing a legal memorandum, and another drafting an appellate brief, they are not getting a mental picture of where, when, why, and how these documents fit into the litigation process. It is akin to taking the word “abhor,” and in law school giving students only the “a” and “o.” The students (along with law firm training programs) are forced to fill in the blanks, and that is precisely why law school graduates are not practice-ready.

Furthermore, it is not enough to design a legal writing curriculum that, in the second and third years of law school, exposes students in non-linear ways to each litigation document. Instead of giving law students “abhor,” for example, you are giving them “ohrba.” As such, they are given the responsibility to unscramble the words, and that does not create a practice-ready graduate. Stated simply, if students don’t know how to correctly spell a word, it doesn’t matter if they have all the letters.\(^7\)

The current law school pedagogical approach is based on a false assumption about first-semester law students: that they should not—and cannot—be successful advocates without first mastering more fundamental skills such as legal reasoning, analysis, and objective writing. That assumption is erroneous. College graduates do not attend law school to read textbooks that tell them how to structure a legal argument or distinguish an unfavorable case. Likewise, these students are not interested in ‘learning by doing’ if the “doing” involves a dry (and often tedious) legal memorandum in the first semester, or appellate brief involving a breach of contract to sell 500 widgets. Law students have the desire—and the ability—to “learn by doing things that matter in the real world.”

Thus, the path to a practice-ready graduate begins with a legal writing curriculum that teaches persuasive written and oral advocacy from the moment a first-year law student walks into the classroom, in the context of actual cases that have substantial, real-world consequences. A Real-World, Persuasion Only pedagogy can be the bridge that connects law school to the

\(^7\) Likewise, classes that teach fundamental legal writing techniques, offer sound principles about the writing craft itself, and expose students to examples of outstanding written advocacy, have little practical value if students do not know how to use those techniques in a real world setting. It’s one thing, for example, to read textbooks offering a litany of legal writing tips, gain a theoretical understanding of the CRAC approach, and read the brief the Supreme Court called “the best it’s ever read.” It’s quite another for the student to take that knowledge and transform it into a practical, useable tool.
practice of law. Law schools should embrace this apprenticeship-like model and augment the legal academy with a litigation training ground.

How do schools accomplish this? To begin with, legal writing instruction should continue for all three years, not just two semesters. Moreover, since effective writing is a required skill in the legal profession, proficiency in that skill should be a prerequisite to graduation. Second, as a broad suggestion, the curriculum should consist of six courses (one per semester), that, over three years teaches the litigation process in from start to finish. Below is a suggested outline for a new legal writing pedagogy.  

A. Persuasive Advocacy I: Students as Amicus Curiae, Habeas Petitioners, or Pro Bono Advocates

Law school classrooms should mirror a law firm environment. As such, students should not spend their first semester in either a legal research course or an introductory writing course where they draft a legal memorandum analyzing whether Party X adversely possessed Party B’s property. The first semester should do what great briefs do—have a powerful introduction that merges law with life.

Hypothetical cases can be used in future Persuasive Advocacy courses, but such cases should not be a pedagogical tool in the first semester. Entering law students—like most people—do not feel passionate about or get motivated by imaginary people. Such an approach relegates the practice of law to an academic exercise precisely at the point when students need to understand that their words have consequences, and that their writing can make a difference in a person’s life. As inmate Bryant Wilson wrote in a letter to Indiana Tech Law School’s first-semester, first-year lawyering students, who helped to draft an Amicus brief for a pending case in

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8 Issues such as grading, of course, are within the professor’s discretion and thus not discussed.
the Indiana Supreme Court, \textsuperscript{9} “it’s on my heart to thank you all, your brief is outstanding.”\textsuperscript{10} Integrating legal writing with the real world doesn’t just prepare students for law practice—it makes them practitioners who provide a public service to the bench, bar, and broader community in their first semester.

Thus, instead of a traditional legal writing course, \textit{Persuasive Advocacy I} should use actual cases affecting the rights and liberties of real people. Students want to argue, and are hungry to have their voices heard on transformative legal issues such as the execution of a mentally-disabled defendant or the warrantless sampling of someone’s DNA.\textsuperscript{11} Imagine walking into a classroom on the first day of law school, and saying to your first-semester students:

We’re representing a death row inmate on a habeas corpus petition, and if the judge rules against him, he dies. I need your help now.

Legal writing professors can make that happen by coordinating with their law school’s \textit{Amicus} Project, Habeas Project, Innocence Project, or various Legal Clinics. In addition, professors can file \textit{Amicus} briefs on a \textit{pro se} basis, or assist other \textit{pro bono} organizations that enlist volunteers to file \textit{Amicus} and other briefs on important legal issues.

As the authors have witnessed in their lawyering skills classes, the students’ eyes light up, their passions ignite, and they dedicate every waking moment to producing their best work. The message they receive transcends mere legal research, analysis, and writing, although it includes all of these essential lawyering skills. This new all-persuasion legal writing pedagogy launches those brand-new law students into an emphasis upon public service, ethics, and giving

\textsuperscript{9} The Indiana Tech Law School Lawyering Skills Program, with the help of our first-semester, first-year students, drafted an \textit{Amicus} brief in \textit{Wilson v. State}, concerning the constitutionality of partially-consecutive sentences in light of a statute that required concurrent or consecutive sentences.

\textsuperscript{10} Upon receiving Indiana Tech’s \textit{Amicus} brief, the Appellant, Bryant Wilson, sent a thank you letter to the Lawyering Skills faculty for the brief that was filed in support of his interests.

\textsuperscript{11} The Lawyering Skills faculty recently filed a second \textit{Amicus} brief with the Maine Supreme Judicial Court arguing that negative inferences at trial, based on a suspect’s pre-arrest refusal to submit to a warrantless DNA sample, violate the United States and Maine Constitutions.
back to the community. Thus, *Persuasion I* introduces students to the practice of law through actual cases that implicate individual rights, liberties, and due process of law. As the semester ends, they (under close faculty supervision) experience the joy of seeing their brief filed in state or federal court. In our case, the students also had the benefit of receiving a thank you letter from an inmate who expressed shock that complete strangers had intervened on his behalf. Courses such as Persuasive Advocacy I have the ancillary benefit of establishing a favorable relationship with state Supreme Courts, who are eager to assign counsel to *pro se* inmates who are in the habeas process. This gives law schools greater visibility and enhances post-graduate employment outcomes for the students.

But how can students tackle this seemingly insurmountable task if they cannot distinguish holdings from *dicta*, or know the difference between the New York Supreme Court and the New York Court of Appeals? We’re setting them up for failure, and are at risk of providing ineffective representation to individuals whose lives may depend on our expertise, right? No.

Traditional legal research and writing should be thought of as the “lesser included offense” within *Persuasion I*, because the skills required to master objective writing are inextricably linked with real-world advocacy. Writing an *Amicus* brief in support of same-sex marriage, for example, requires that students learn how to read judicial opinions and distinguish dissimilar cases, reason by analogy, make strong policy arguments, and organize the law in a concise, straightforward manner. To be sure, *Persuasion I* encompasses other skills traditionally taught in objective legal writing, such as knowing your audience, addressing counterarguments, identifying favorable case law (which by implication teaches the important differences between primary and secondary sources), and telling an effective narrative. In other words, *Persuasion I* *implicitly* teaches legal analysis and writing, but in a context that *shows* students the
transformative effects that law can have in our society. Are we simply asking too much of students during their first semester? No. New law students resent canned and imaginary fact patterns involving Blackacre or Dewey, Cheatem, & Howe. Many, or perhaps most, of them went to law school to make a difference, and they enthusiastically respond to opportunities to help others even in the first semester of law school. They will willingly face these real-world challenges, and will respect the professors who genuinely believed in—and cared—about them from the very first semester.

B. Persuasive Advocacy II—Pre-Trial Litigation (Part One): The Client Meeting, Complaint, Motion to Dismiss, and First Oral Argument

Persuasive Advocacy II begins in the spring semester of the first year, and continues into the fall semester of the second year. Students will experience the litigation process as lawyers do: in a linear fashion that begins with a well-pleaded complaint and ends with an effective appellate brief. Learning how to litigate “in alphabetical order” (abhorr) shows law students what really happens after they graduate.

With respect to the course design, legal writing professors will have three (or more) options. They can: (1) use a hypothetical case to guide students through the adversarial process; (2) use actual clients through clinics or legal assistance programs; or (3) collaborate with doctrinal professors in crafting various assignments for each stage of litigation. The latter option, of course, can help to bridge the divide between doctrinal and skills professors, and show students how to apply the legal concepts that they learned in torts or contracts. The objective of Persuasive Writing II is to provide a functional understanding of the initial stages of pre-trial litigation. This includes, but is not limited to, the purpose of different litigation documents, the

particular writing skills that each one requires, and the strategic (and ethical) considerations that all attorneys must consider when representing a client. In this and all other courses, individual student feedback during conferences or office hours will be instrumental to maximizing student outcomes.

If the first option is chosen, for example, the course will begin with a client meeting, where the prospective client sets forth the facts upon which to base a potential lawsuit. Instead of giving students the facts on a sheet of paper, a client meeting will force students to uncover the relevant facts themselves (and distinguish irrelevant ones) through a conversation requiring effective interpersonal communication. In this meeting, students will learn, among other things, the following principles: (1) how you speak to a client matters just as much as what you say (especially for clients with cultural differences); (2) responding calmly, rather than reacting defensively, to unexpected statements from the client directly influences perception; and (3) the importance of honest and ethical advice.

After this meeting, the professor can require students to draft a retainer agreement, or proceed directly to a legal memorandum that discusses the relevant facts in light of applicable state or federal law, and comes to a conclusion regarding the likelihood of success. After the memo is drafted, students should draft a client letter summarizing their legal analysis, advising about the likelihood of success, and recommending a course of action. The professor may elect to have the students communicate with the hypothetical client electronically, thereby discussing the special considerations that arise in the context of email etiquette.

After the second client meeting, students prepare the complaint. This will require proficiency in substantive issues such as jurisdiction and venue, and teach the students how to draft a plain, concise, and well-pleaded complaint that complies with both state (or federal) rules,
and the local rules for that court. Each student can draft a complaint or, for example, students can be separated into groups and collaborate as a team.

The semester ends when the hypothetical adversary files a motion to dismiss on one of the enumerated grounds in federal or state rules, such as diversity, personal jurisdiction, or failure to state a claim upon which relief can be granted. This will re-orient the students with persuasive writing while teaching additional skills, such as the importance of knowing your audience, (a superior rather than appellate court judge), and understanding the applicable standards of review governing the motion to dismiss. Persuasive Writing II ends with a fifteen-minute oral argument before a panel of judges, where students are divided into pairs, represent opposing sides, and receive feedback on their performances. The class will not know the judge’s decision until they return for Persuasive Advocacy III, which continues to conclusion the pre-trial litigation process.13

C. Persuasive Advocacy III: The Answer, Discovery Requests, and Motion for Summary Judgment

In the fall semester of their second year, Persuasive Advocacy III begins by providing the students with the court’s written order—drafted by the professor—denying the motion to dismiss. The opinion can contain, for example, an assessment concerning the validity and persuasiveness of the parties’ factual and legal arguments. Each student will see how their arguments were analyzed by the court, essentially giving them “indirect constructive criticism” on their written and oral performances. The court’s decision will likely influence the students’ legal strategy (such as the theory of the case) as the litigation proceeds toward summary judgment and, ultimately, a second oral argument.

13 Persuasive Advocacy II would not displace or prohibit a student from participating in the law school Moot Court program.
Persuasive Writing III continues as students draft a well-pledged Answer that complies with all relevant state and local rules. Here, the students will learn how to properly respond to the complaint’s allegations, plead all relevant defenses (to avoid waiver), and assert counter-claims or cross claims as appropriate. In doing so, the students will apply the substantive law they learned in first-year civil procedure, i.e., identifying the substantive grounds for affirmative defenses or bases for removal. This highlights the potential value of collaboration between doctrinal and skills faculty to create real world assignments that merge theory and practice.

After the complaint and answer are “filed,” the students will be divided into two groups, whereby they draft the first set of interrogatories and document requests, draft responsive answers, and conduct a mock deposition. This part of the course will teach the students how to:

1. Draft questions that yield relevant information, while avoiding meritorious objections such as overbreadth and the attorney-client privilege;
2. Construct responsive answers that do not reveal unnecessary, privileged, or confidential information;
3. Write effective letters to opposing counsel when discovery responses are incomplete or objections are frivolous; and
4. Choose when to propound additional interrogatories (or document requests). Additionally, the mock deposition will provide experience in witness examination and the use of objections as provided by the evidence rules. During this process, the students will compile a factual record that sets the stage for the final Persuasive Advocacy III assignment: the summary judgment motion and supporting memorandum.

The students will draft:
1. A motion,
2. A statement of undisputed facts;
3. A brief that complies with local rules such as page limitation, font type and size, and characters per line; and
4. An affidavit (or declaration) by a party or witness. The brief will require students to craft their narratives and arguments in light of the applicable standards of review (which differ from the
motion to dismiss or appellate brief), and reinforce the value of knowing your audience.

*Persuasive Advocacy III* ends with the class again being divided into pairs, except that this time, students will switch the sides they were assigned for the motion to dismiss.

**D. Persuasive Advocacy IV—The Motion in Limine, Voir Dire, Direct and Cross Examination, and Closing Arguments**

In the spring semester, *Persuasive Advocacy IV* begins as the court issues a second decision denying the motion for summary judgment. Accordingly, the students begin pretrial preparation, requiring them, among other things, to design and draft: (1) mock ‘witnesses’ testimony; (2) potential questions for direct and cross-examination; (3) opening statements and closing arguments; (4) exhibits to be introduced at trial; (5) questions in preparation for *voir dire*; and (6) proposed jury instructions. Pretrial preparation will also involve strategic decisions by the students concerning the “story” or theme of the case, the order of witnesses, and unresolved evidentiary issues, including those that the adversary will likely raise.

Immediately prior to trial, the students could be asked to draft a Motion in *Limine* moving to exclude, on grounds such as relevance and prejudice, one of the adversary’s potential witnesses. At this point, the legal writing professor has the option of conducting a settlement conference or mediation, where students can practice their negotiation and counseling skills.

Finally, after a year of preparation in *Persuasive Advocacy II* and *III*, the trial will begin in the law school’s moot courtroom. Students will be divided into teams representing the side each was assigned on the motion to dismiss. The trial will begin with jury selection, where the students will have the opportunity to: (1) question potential jurors; and (2) use peremptory and for-cause challenges. After the jury is selected, the students will try their respective cases, during which time the court will issue several evidentiary rulings that ultimately form the basis for an appeal in *Persuasive Advocacy V*. Each student can be responsible for a portion of the client’s
trial, such as the opening statement or questioning of a witness, and the semester will end with closing arguments, deliberations, and the jury’s verdict.

E. Persuasive Advocacy V—The Appellate Process

The first semester of year three involves appellate litigation. After reviewing the trial transcript, the ‘losing’ side will decide upon the evidentiary rules that will form the basis of their appeal. The ‘winners’ will prepare a cross appeal involving, for example, the court’s unilateral reduction in the jury’s damage award. Persuasive Advocacy V teaches students the art of appellate advocacy, and can place particular emphasis on: (1) the applicable standard of review; (2) narrative storytelling; (3) the legal and factual issues that are within the scope of appeal; (4) effective use of the trial record; and (5) the importance of making strategic concessions, distinguishing unfavorable case law, and making policy arguments. Persuasive Advocacy will end with the students’ third—and final—oral argument of the course, which completes the litigation process.

F. Persuasive Advocacy VI—The Return to Amicus or Habeas

The students’ final semester will take them back to the beginning, when they walked into class on the first day of law school and encountered a case with real-world consequences. Persuasive Advocacy VI, in conjunction with a law school’s Amicus, Habeas, or Innocence Projects, or various clinics, will draft a brief involving a case of substantial public importance. During this semester, the students will see the extraordinary improvement in their writing and advocacy skills, and leave law school confident that they are practice ready.
CONCLUSION

Law schools have an ethical duty to train effective legal writers who understand that the skills acquired in law school are intended to serve something greater than themselves—the bench, bar, and broader community. Training good writers—and good people—can happen by creating a writing curriculum that focuses on persuasive advocacy, public service, and honest legal representation from the first semester to the last.

This change will be a challenge to legal writing professors everywhere, but with proper institutional support and collaboration, law schools can prepare their students for a profession “that depends on flawless writing, logical reasoning, and persuasive argumentation.”

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14 Viator, supra note 6.