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No Shoehorn Required: How a Required, Three-Year, Persuasion-Based Legal Writing Program Easily Fits Within the Broader Law School Curriculum

By Adam Lamparello and Charles MacLean

Adam Lamparello is an Assistant Professor of Law and Charles MacLean is an Assistant Professor, both at Indiana Tech Law School in Fort Wayne, Ind.

Part I

Introduction

In prior articles,¹ we advocated for a required fifteen-credit, three-year, persuasion-based, linear legal writing curriculum. Our model begins with persuasive advocacy from the first day of law school, and takes a sequential approach that mirrors the practice of law—from the initial client meeting to the appellate brief. It includes a separate track for those interested in transactional work, incorporates alternative dispute resolution and settlement simulations, and involves students in researching and drafting *amicus* briefs before federal appellate courts. Students are also offered several electives each semester to complement their required course load, and receive intense training in narrative storytelling, rewriting, and editing.

In this article, we incorporate our proposal into the broader curricular context, and argue for more separation, not more integration, among the analytical, practical, and experiential pillars of legal education. All three are indispensable—

and independent—pillars of real-world legal education:² (1) the analytical focuses on critical thinking; (2) legal writing combines—and refines—thinking through practical skills training; and (3) experiential learning involves students in the practice of law. To help law students master all three, the curriculum should be designed in a largely sequential (although sometimes concurrent) order, to embrace, not blur, their substantive differences, and to approach inter-foundational collaboration with caution. Broadly speaking, analytical training should dominate the first year in legal writing, but should include an experiential component. The second year should combine analytical and practical skills training, and the third year should focus extensively on clinical work.

Of course, as stated in a prior article, a linear approach is not necessarily the best or most effective way to incorporate more writing classes into the curriculum. But three years of required legal writing, however structured, will likely benefit law students and the legal profession. As a recent article in the *Wall Street Journal* reported, college graduates “lack writing skills,” in part because “schools are not placing sufficient emphasis on writing and grammar.” Coupled with the substantial criticism from lawyers and judges about recent graduates’ weak writing skills, this places a high burden on law schools to focus more extensively

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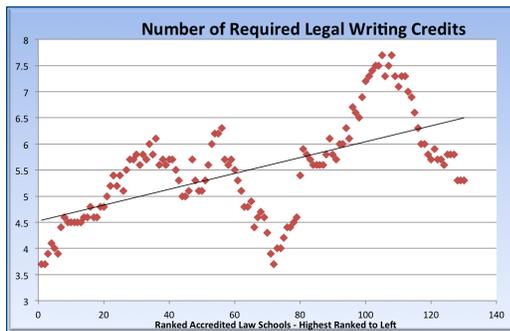
¹ See Adam Lamparello & Charles E. MacLean, *Requiring Three Years of Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It*, Houston Law Rev. Online (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385744; Adam Lamparello & Charles E. MacLean, *Legal Writing—What’s Next? A Real-World, Persuasion Pedagogy from Day One*, New Eng. L. Rev. On Remand (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363108.

² See, e.g., Ann Marie Cavazos, *Next Phase Pedagogy for the Twenty-First Century Legal Education: Delivering Competent Lawyers for a Consumer-Driven Market*, 45 Conn. L. Rev. 1113 (2013) (analogizing American legal education to barrister training in England, which has “three main phases ... academic, vocational, and pupillage”).

“[T]he goal in legal writing pedagogy should not simply be to produce good thinkers and writers, but also lawyers who understand context, exercise sound judgment, and practice strategic decision making.”

on writing, composition, and legal drafting.³ That takes time—certainly more than a year.

We also recognize that law schools have different missions, and that the caliber of students can vary significantly. Our suggestions, therefore, may not be appropriate or desirable at many law schools, particularly when considering the value of different pedagogical approaches. In fact, as shown in the graph below, we surveyed the top 140 law schools and found substantial differences in the number of required legal writing credits. Our survey also revealed that lower-ranked law schools tend to require significantly more legal writing credits than the top schools:



Many reasons may support this, such as an increased focus on practical skills training, or the quality of writing and analytical skills that students at various law schools exhibit.

Ultimately, however, while each law school may take a different path, the goal in legal writing pedagogy should not simply be to produce good thinkers and writers, but also lawyers who understand context, exercise sound judgment, and practice strategic decision making. That may require five credits at one school, or fifteen at another. In our view, the more required writing courses, the better. Good writers know the value of repetition, rewriting, and reflection. So should law students.

Part II discusses how the analytical, legal writing, and experiential components can be best organized to maximize outcomes for students. Part III sets

forth a sample curriculum, illustrating how this approach—along with a six-semester legal writing program—would manifest itself over three years.

Part II

The Three Pillars of a Real-World Legal Education: Legal Writing That Incorporates Thinking with Writing, and Prepares for Real-World Lawyering

With the Carnegie Report’s call for more practical skills training,⁴ and the neurobiology of learning which demonstrates that students most effectively remember and organize knowledge when it is applied to real-world problems,⁵ law school is on the precipice of change. And there is good reason for change. Law schools should not be think tanks. But they are not trade schools either.

It is in the middle of these two extremes where students learn context, meet clients, deal with the “messy, human facts, in ways that real lawyers might,”⁶ and have an emotional stake in the problems they solve,⁷ that students can *truly* think, write, and negotiate like lawyers. It is also where students meet the law’s rich complexity, and learn to exercise professional, strategic, and ethical judgment.⁸

Put differently, the problem is not that law schools are failing to provide practical or experiential learning. Criticism from lawyers and judges is not focused on what “recent graduates can or cannot do,”⁹ but on the failure to train beyond “judge-centered thinking.”¹⁰ In

³ *Our College Graduates Can’t Write*, Wall St. J. (Oct. 9, 2013), available at <http://blogs.wsj.com/experts/2013/10/09/our-college-graduates-cant-write/>.

⁴ American Bar Ass’n Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/macgrate.htm>. See Carnegie Foundation, *Educating Lawyers*, (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

⁵ See, e.g., Michelle LeBaron, Mario Patera, *Reflective Practice in the New Millennium* 31 *Hamline J. Pub. L. & Pol’y* 405, 414-16 (2010).

⁶ See Kirsten Holmquist, *Challenging Carnegie*, 61 *J. Legal Educ.* 353, 356 (2012).

⁷ LeBaron & Patera, *supra* note 5, at 415.

⁸ *Id.*

⁹ Holmquist, *supra* note 6, at 353.

¹⁰ *Id.* at 354.

other words, law schools need to foster *client-centered* thinking, where students can write and advocate in ways that understand the complexities of human relationships. Professor Holmquist states as follows:

Law students need to learn to recognize the complexity of their clients' stories and desired outcomes. The clients' problems may be messy, with difficult-to-determine facts, legal and nonlegal aspects, and multiple potential outcomes that may differently serve one or many of the clients' goals and aspirations. Second, law students should acquire a broad historical and contemporary sense of lawyers' varied roles in relationship to their clients, within and among institutions, and in society at large. A lawyer's ability to move the world closer to her client's desired endstate is intimately bound up with her ability to understand, and act within, these institutions and roles. Finally, students need to begin to develop the confidence and judgment that experience brings. For example, sharp analysis of the kind rewarded on an exam may suggest three lines of argument, but judgment might lead a lawyer to decide that her client's stated goals are better served by pursuing only one or two of them.¹¹

In discussing the shortcomings of legal education with a panel of eminent lawyers and judges, Professor Holmquist noted that "the discussion ... turned to the interplay of experience, analysis, understanding, and application,"¹² to graduate lawyers "who will contribute to the public good and who will serve their clients effectively and ethically."¹³ The message is clear: law schools may teach students to think critically, but not in a manner that transcends rules and legal analysis.

Additionally, law schools do not spend enough time teaching students the art of persuasive writing as a craft, a lawyering skill, and as a tool that requires

strategic decision making. Thus, at a time when law schools cost too much, and employ too few,¹⁴ change is essential. As professors, who do not have the power to reduce prices, our only choice—and job—is to increase value.

Part of meaningful curricular change, however, is recognizing that, the more things change, the more they should remain the same. The consistent call for law schools to produce practice-ready graduates¹⁵ begs the question of what "practical" and "experiential" training should mean in a law school setting where analytical reasoning is—and should be—at least equally important. Too much interplay risks undermining the value of each, but too much separation compromises their interrelatedness.

Achieving pedagogical harmony depends in large part on where, when, and how each pillar is incorporated into the curriculum. For example, should experiential components be included in the analytical or legal writing pillar (or both), and be taught in the first year? Conversely, should the analytical and experiential pillars be incorporated into legal writing courses? As explained below, the first question should, for the most part, be answered in the negative.

The answer to the second question is "yes," based on the fact that the legal writing curriculum occupies a unique status as the in-between, and most complex, pillar. It is the bridge that connects analytical to experiential learning, and theory to practice. Unlike the other pillars, however, legal writing involves the application, acquisition, and creation of knowledge. To maximize outcomes in this challenging context, however, and to prepare students for the real world, the legal writing curriculum

“As professors, who do not have the power to reduce prices, our only choice—and job—is to increase value.”

¹⁴ See, e.g., Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 Iowa L. Rev. 1579, 1624-25 (2011).

¹⁵ See, e.g., David M. Moss, *The Hidden Curriculum of Legal Education: Toward a Holistic Model of Reform*, 2013 J. Disp. Resol. 19, 19 (2013) ("law schools have an intensified ethical responsibility to examine their curriculum in deep and meaningful ways in order to best ensure their graduates are prepared to enter the legal profession as it exists today").

¹¹ *Id.* at 353-54.

¹² *Id.* at 353.

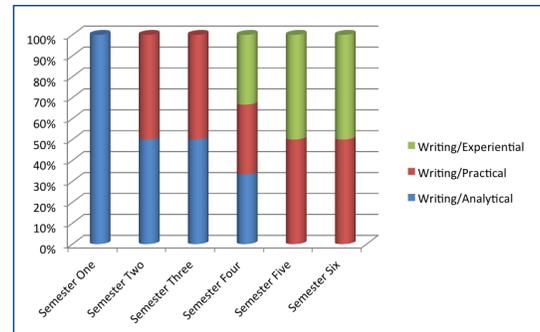
¹³ *Id.* at 353.

should not try to *be* like the real world. Instead, it should put the practical before practice itself.

More specifically, legal writing professors should import doctrinal subjects into their assignments;¹⁶ they should not export writing projects across the curriculum. By importing doctrinal subject matter into the legal writing assignments, students will learn the substantive law in a more engaging manner, and receive sufficient feedback on written assignments. This model not only prepares students for real-world lawyering in clinics, but also justifies a three-year, linear, and persuasion-based program that gives students sufficient opportunities to progressively refine their writing skills. Of course, while there are experiential components, *e.g.*, oral advocacy and simulations, the focus should be on writing, rewriting, and revising, and on training students to present complex legal arguments with persuasive prose.

For these reasons: (1) the analytical pillar should dominate during the first year, focusing on developing students' critical thinking skills; (2) the legal writing (practical) curriculum should span all three years;¹⁷ and (3) clinical training (experiential) should begin in the second semester of the second year, and be a primary focus in the third year. One might envision this as follows:

Fig. 1: Arraying the Three Pillars in a Required Three-Year Legal Writing Program



A. The Analytical Pillar—Critical Thinking and Limited Experiential Learning

Despite ongoing criticism,¹⁸ the analytic method,¹⁹ where students learn to think like a lawyer,²⁰ analyzing complex legal problems from different perspectives, distinguishing legal holdings from policy arguments, and presenting nuanced arguments,²¹ is the foundation upon which real-world lawyering builds. Of course, while critical thinking skills are only a part of thinking like a lawyer, they are essential to the development of practical legal reasoning.

Put differently, law students cannot be effective *legal* writers or advocates if they are not creative, logical, and critical thinkers, just as novelists cannot write great literature without first reading great books.²² Certainly, revisions to the Langdell,

¹⁶ For example, DePaul University College of Law's Legal Analysis, Research, and Communication Program has specialized legal writing sections that allow first-year students to "apply for one of three special sections focusing on child and family law, intellectual property law (including IP Law, IP: Information Technology Law and IP: Arts and Museum Law) and public interest law." See <http://www.law.depaul.edu/academics/larc/>.

¹⁷ Cathleen A. Roach, *Is the Sky Falling? Ruminations on Incoming Law Student Preparedness (and Other Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 *Legal Writing: J. Legal Writing Inst.* 295, 321 (2005).

¹⁸ Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 *Wash. U. J.L. & Pol'y* 195, 215-16 (2003).

¹⁹ Todd E. Pettys, *The Analytic Classroom*, 60 *Buff. L. Rev.* 1255, 1313-20 (2012) (discussing and proposing changes to the analytic method).

²⁰ See, e.g., Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 *Campbell L. Rev.* 413 (describing the cognitive skills involved in learning how to think like a lawyer).

²¹ *Id.*

²² See, e.g., Linda Edwards, *The Writing Life*, 61 *Mercer L. Rev.* 867, 881 (2010) (advising that, before writing a law review article, authors should "begin by reading. At this stage, you'll be reading for at least three critically important reasons. First, you need to study the genre so you can recognize good articles and identify the criteria that make an article good).

“By importing doctrinal subject matter into the legal writing assignments, students will learn the substantive law in a more engaging manner, and receive sufficient feedback on written assignments.”

or “case method” approach,²³ where more problem-based textbooks are used,²⁴ and students apply the law to real or hypothetical problems,²⁵ would prove beneficial. It does not mean, however, that the analytical pillar should fall.

It does suggest that an excessive emphasis on experiential learning—or legal writing—in doctrinal courses is not advisable *in the first year*. This is not to say, of course, that the writing process does not significantly improve the thinking process itself; in many ways, the “development of communicative skills is inseparable from the development of analytical skills.”²⁶ As one scholar notes, “legal composition and legal subject matter interact in ongoing rhetorical activity and . . . are best understood and best studied together.”²⁷

Professor Mary Beth Beazley explains that “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.”²⁸ Moreover, “experts have existing frameworks (or schemas) to allow them to integrate new knowledge efficiently,” and therefore “can integrate new knowledge with little cognitive load.”²⁹ Thus, this would enhance students’ understanding of the substantive law³⁰ because students learn more effectively when they combine “analysis and its application,”³¹ through “acting like a lawyer and engaging in lawyer activity.”³² But in the first year—especially the first semester—faculty should be cautious. The mutual benefits that thinking and writing afford each other should not be misunderstood to imply that the cognitive processes involved in analytical reasoning and writing proficiency are the same. They are not.

Legal writing does not just analyze law. Professor Terrill Pollman explains that “writing is actually a different mode of thinking, a different method of learning,”³³ and the main difference, argues Professor Beazley, “is one of process.”³⁴ Indeed, the process of becoming “legal authors,”³⁵ combines acquired

“The mutual benefits that thinking and writing afford each other should not be misunderstood to imply that the cognitive processes involved in analytical reasoning and writing proficiency are the same. They are not.”

²³ See, e.g., Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. Legal Educ. 241, 249-50 (1992). Quoting the 1992 AALS report, Professor Moskowitz states:

[U]nder the “problem method” deduction of legal principles becomes not the end of legal education, but the means to an end—that, the adequate solution of the legion of problems which a dynamic society precipitates in ever-new combinations. . . . The “problem method” recommends itself as a pedagogical device for re-orienting legal education to its major, basic task The merit of the problem method is that it more effectively forces the law student to reflect on the application of pertinent materials to new situations and accustoms him to thinking of case and statute law as something to be used, rather than as something merely to be assimilated for its own sake. *Id.* at 249.

²⁴ See, e.g., Shirley Lung, *The Problem Method: No Simple Solution*, 45 Willamette L. Rev. 723 (2009) (discussing the advantages and potential drawbacks and using a problem-based approach).

²⁵ See, e.g., Selma Wasserman, Introduction to Case Method Teaching: A Guide to the Galaxy 18 (1994).

²⁶ Carol Parker Roach, *Writing throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 560, 562 (1997).

²⁷ Susan Thrower, *Teaching Legal Writing through Subject-Matter Specialties: A Reconceptualization of Writing Across the Curriculum*, 13 Legal Writing: J. Legal Writing Inst. 3, 17 (2007) (quoting Leigh Hunt Greenshaw, *To Say What the Law Is: Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861, 867 (1995)).

²⁸ 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).

²⁹ Hillary Burgess, *Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 Quinnipiac L. Rev. 1, 30-31 (2011).

³⁰ See, e.g., Susan L. DeJarnatt, *In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 J. Leg. Educ. 50 (2000).

³¹ Suzanne E. Rowe and Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Integrate the Law School Curriculum*, 1 J. Ass’n Legal Writing Directors 218, 222 (2002).

³² Bryan Vaaler, *Composition Practice: A Comment on “Liberal Education in Law,”* 1 J. Ass’n Legal Writing Directors 148, 152 (2002); see also Joseph Glannon, et al., *Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment*, 47 J. Legal Educ. 246, 246 n.1 (1997).

³³ Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing Building*, 85 Marq. L. Rev. 887, 902-03 (2002).

³⁴ Beazley, *supra* note 28, at 40.

³⁵ Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621, 633-34 (2006).

“[D]rafting a complaint or contract will not substantially improve writing ability if there is insufficient time for rewriting and revision. And too much focus on writing in a doctrinal course can hinder the acquisition of substantive law ...”

knowledge and critical thinking to synthesize, communicate, and *create* legal arguments.³⁶

This does not mean, however, that during the first year, in addition to including more problem-based textbooks, doctrinal faculty cannot include writing assignments, such as drafting a complaint in civil procedure, a client letter in torts, or a retainer agreement in contracts. If, however, law schools extensively integrate writing assignments into doctrinal courses *in the first year* it may compromise a student’s acquisition of both skills.³⁷ For example, drafting a complaint or contract will not substantially improve writing ability if there is insufficient time for rewriting and revision. And too much focus on writing in a doctrinal course can hinder the acquisition of substantive law, or the depth of material that is covered.

Thus, the better answer is to incorporate doctrinal writing assignments into legal writing courses, not incorporate writing assignments into doctrinal courses. As one scholar explains, “the same goals [in writing across the curriculum] are just as achievable by *exporting* discipline-specific work to the legal writing classes.”³⁸ Furthermore, the marriage between writing and thinking works best when students have a core foundation of legal knowledge³⁹ because it enables legal writing

professors to “help students build bridges between what they already know and ... what they are trying to learn. In the second and third years, however, after students have both an analytical and practical foundation, writing assignments should have a broader role in doctrinal offerings.⁴⁰

B. The Writing (Practical) Pillar—Three Years, Integrating the Analytical and Practical, with Strategically Placed Experiential Learning

Legal writing is the bridge to, not a centerpiece of, experiential learning, and an “excellent and easily adaptable venue,”⁴¹ for including substantive law. The writing pillar is where law students refine their analytical skills and learn the art of persuasive argumentation, arguably the most important skill a lawyer must possess.⁴²

1. Writing Is a Separate Discipline

While sharing similarities with the analytical and experiential pillars, legal writing is its own discipline, and involves two distinct skills. The first is “composition and writing theory.”⁴³ The second, and more difficult, skill, involves the “construction of thought,” not simply the “construction of a

³⁶ Pollman, *supra* note 33, at 902-03.

³⁷ See, e.g., Stefan H. Krieger & Serge A. Martinez, *A Tale of Election Day 2008: Teaching Storytelling through Repeated Experiences*, 16 *Legal Writing: J. Legal Writing Inst.* 117, 127-28 (2010). Professor Krieger and Martinez explain as follows:

If the instructional format requires students to engage in cognitive activities that are irrelevant to the pedagogical goals, knowledge acquisition can be impeded. They simply become overwhelmed, turn off, and cannot develop effective schemas. Accordingly, this theory suggests that educational experiences should be fashioned in ways that do not impose a heavy extraneous cognitive load but instead help the student develop sound schemas for tackling similar situations in the future. *Id.* at 128.

³⁸ Thrower, *supra* note 27, at 17 (2007) (quoting Leigh Hunt Greenshaw, *supra* note 25, at 867); see also Jennifer R. Gavin, *Child Welfare Law Curricula in Legal Education: Massachusetts Untried Opportunity*, 7 *B.U. Pub. Int. L.J.* 9, 36 (1998).

³⁹ See generally Norman Brand, *Legal Writing, Reasoning, & Research: An Introduction*, 44 *Alb. L. Rev.* 292, 295 (1980).

⁴⁰ Timothy W. Floyd, Oren R. Griffen, and Jaren J. Sneddon, *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 *Ohio N.U. L. Rev.* 266, 293-94 (2011) (discussing the incorporation of drafting exercises in a Trusts and Estates course).

⁴¹ Diane Penneys Edelman, *It Began at Brooklyn: Expanding Boundaries for First-Year Law Students by Internationalizing the Legal Writing Curriculum*, 27 *Brook. J. Int’l L.* 415, 416 (2002) (describing how international law was incorporated into a first-year writing course).

⁴² See, e.g., Pamela Lysaght and Cristina D. Lockwood, *Writing-across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 *J. Ass’n Legal Writing Directors* 73, 74 nn.8-9 (2004).

⁴³ Beazley, *supra* note 28, at 41, 49. Professor Beazley describes “critical writing” or “epistemic writing” theory as follows:

[It] encourages a writer, by herself and possibly with the assistance of others, to enter into a sustained and serious dialogue about the subject under consideration. This dialogue can generate a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communications alone or in a strictly instrumental process of legal writing. The critical writing dimension (and thinking about writing as critical writing) is thus an integral aspect of effective legal analysis. *Id.* at 49 (quoting Philip C. Kissam, *Thinking (by Writing) about Legal Writing*, 40 *Vand. L. Rev.* 135, 140-41, 151-70 (1987)).

document.”⁴⁴ In essence, legal writing is a “cognitive apprenticeship,”⁴⁵ where “thinking [is] made visible.”⁴⁶

As new rhetoric theories and empirical research show, writing involves unique cognitive processes. Professor Terrill Pollman states as follows:

The process of writing is the process of creating knowledge. As writers experience the reciprocal nature of the process, writing and then reading what they have written, negotiating meaning between writer and text, reader and text, writer and reader, meaning is created . . . writing is actually a different mode of thinking, a different method of learning.⁴⁷

As such, legal writing involves “the creation of entirely new knowledge structures or the restructuring of old ones.”⁴⁸ As Professor Berger states, it requires “the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language.”⁴⁹ She further explains as follows:

In critical writing for example, the writing process itself serves as “an *independent source* . . . that alters and enriches the nature of legal thought [by providing a] continuous and reciprocal feedback . . . between a writer’s partially completed text or texts and her thoughts, memories, and instincts about a chosen subject . . . this process requires the writer to “confront and control hard issues more directly and more creatively than is possible with non-written thought.”⁵⁰

Thus, while legal writing and casebook courses are “courses about how to think like a lawyer,”⁵¹ the “main difference is one of process.”⁵² As Professor Berger explains, “knowledge and truth are created *by* the process, rather than existing *outside* the process.”⁵³ Professor Beazley describes this process as follows:

In most casebook courses . . . [s]tudents read appellate decisions and dissect them as a group . . . discovering in the process the “thinking like a lawyer” that led to the various decisions of both attorneys and judges along the way. Ideally, the students learn both the doctrine of the particular subject matter as well as protocols for how to think like a lawyer in various situations. In the Legal Writing course, in contrast, the students work from the bottom up instead of from the top down. Typically, teachers present the students with a set of facts and ask the students to research like a lawyer, think like a lawyer, and write like a lawyer . . . [o]f course, this does not mean that the process of Legal Writing has three discrete steps; it is recursive, with the writer moving among thinking, researching, writing, and revising.⁵⁴

Furthermore, the “critical thinking skills that students use in their efforts to contribute knowledge . . . [are] not necessarily found in source texts but [are] nonetheless carefully linked to the texts [students] read.”⁵⁵

Moreover, the elements of the communication process—writer, audience, reality, language—“do not simply provide a convenient way of talking about rhetoric,”⁵⁶ but also form “the elements that

⁴⁴ Venter, *supra* note 35, at 634.

⁴⁵ Beazley, *supra* note 28, at 41.

⁴⁶ *Id.*

⁴⁷ Pollman, *supra* note 33, at 902-03.

⁴⁸ *Id.* (quoting Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 *Legal Writing: J. Legal Writing Inst.* 1, 14 (2000)).

⁴⁹ Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 *Legal Writing: J. Legal Writing Inst.* 57, 58 (2000).

⁵⁰ Linda L. Berger, *Do Best Practices in Legal Education Include Emphasis on Compositional Modes of Studying Law as a Liberal Art?* 1 *J. Ass’n Legal Writing Directors* 158, 160 (2002) (emphasis added).

⁵¹ See, Beazley, *supra* note 28, at 40-41.

⁵² *Id.* at 40.

⁵³ Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 *J. Legal Educ.* 155, 157 (1999) (emphasis added).

⁵⁴ Beazley, *supra* note 28, at 40-41.

⁵⁵ *Id.*

⁵⁶ Berger, *supra* note 53, at 157 (quoting James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, 44 *C. Eng.* 765 (1982)), (reprinted in Gary Tate, et al., eds., *Writing Teacher’s Sourcebook* 9, 17, (3d ed. 1982)).

go into the very shaping of knowledge.⁵⁷ This includes “the articulation of complex thoughts, and the recognition of the subtleties, nuances, and qualifications that are so important to the art of lawyering.”⁵⁸ It also requires students to “describe and synthesize the law, apply legal rules, analogize and distinguish, create arguments, use authority appropriately, and persuade their audience.”⁵⁹

To maximize outcomes, therefore, students “must be given strategies to enable them to process, analyze, and synthesize information,”⁶⁰ so that they can “engage in ongoing conversations of the law,”⁶¹ and find their “personal and professional voice.”⁶²

2. Writing Should Be Taught Throughout—Not Across—the Curriculum

One size may not fit all, but one year of legal writing fits no one at all.⁶³ A two- or three-semester legal writing program is not sufficient to help students transition from “writer-based prose”⁶⁴ to “reader-based prose.”⁶⁵

As one scholar explains, “neither a single ‘rigorous writing experience’ [the old ABA standard for law school accreditation] nor a first-year legal writing class is sufficient to provide basic competence in written communication.”⁶⁶ The goal is “a more advanced end ... using upper-level courses to provide increased opportunities to write more ... and to develop more thoroughly their analytic templates.”⁶⁷

Professor Nancy Levit explains as follows:

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Venter, *supra* note 35, at 629.

⁶⁰ *Id.* at 630.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Roach, *supra* note 17, at 323.

⁶⁴ Linda S. Flower & John R. Hayes, *Problem-Solving Strategies and the Writing Process*, 39 *College English* 449, 459-60 (Dec. 1977).

⁶⁵ *Id.*

⁶⁶ Roach, *supra* note 26, at 562.

⁶⁷ Roach, *supra* note 17, at 324.

We must abandon the hurriedness of trying to shoehorn research and writing training into two or three required semesters of standard LRW training. It likely was never a good idea to limit such training to two or three semesters in the first place; it is now apparent, given the remedial needs of many incoming law students, that the standard required two or three semesters is definitely not adequate.⁶⁸

In fact, a truncated legal writing curriculum leads to “analytic template deficiencies which result from years-long deprivation in the frequency and difficulty of writing, synthesis and research experiences.”⁶⁹

Accordingly, a three-year, persuasion-based, linear legal writing curriculum that carefully includes fictional (and real) clients, includes targeted simulations,⁷⁰ and focuses on strategic, context-based decisionmaking, is vital to developing each student’s “personal and professional voice.”⁷¹ It also serves to “expose students in a comprehensive way to a full range of skills that are required in the profession to gain experience in their post graduate professions.”⁷²

Acquiring these skills, however, takes time. It requires both reflection and self-assessment by students.⁷³ Indeed, to impart the “practical skills [that are necessary] to be able to competently practice law upon graduation,”⁷⁴ students need training in writing, rewriting, revising, and editing, assisted by

⁶⁸ *Id.* at 323.

⁶⁹ *Id.* at 324.

⁷⁰ See, e.g., Jennifer S. Bard, “Practicing Medicine and Studying Law”: How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them, 10 *Seattle J. for Soc. Just.* 135, 174 (2011) (“[r]esearch suggests that practicing skills in a realistic setting improves student performance when actually using those skills with a real patient”).

⁷¹ Venter, *supra* note 35, at 629.

⁷² Ann Marie Cavazos, *Demands of the Marketplace Require Practical Skills: A Necessity for Emerging Practitioners, and Its Clinical Impact on Society—A Paradigm for Change* 37 *J. Legis.* 1, 9-10 (2011).

⁷³ See, e.g., Filippa Marullo Anzalone, *It All Begins with You: Improving Law School Learning through Professional Self-Awareness and Critical Reflection*, 24 *Hamline L. Rev.* 324, 337 (2001) (“self-reflection empowers students, teachers, and practicing lawyers to become more aware of what they do and, thus, more able to improve what they are doing”).

⁷⁴ Cavazos, *supra* note 72, at 36.

“[A] three-year, persuasion-based, linear legal writing curriculum that carefully includes fictional (and real) clients, includes targeted simulations, and focuses on strategic, context-based decisionmaking, is vital to developing each student’s “personal and professional voice.”

individual attention and feedback. They must also learn, among other things, objective and persuasive writing techniques, narrative storytelling, the use of literary techniques,⁷⁵ and the organization of factual and legal arguments. As Rome was not built in a day, so legal writing cannot be effectively taught in a year.

Consequently, if the goal is to “provide increased opportunities to write more,”⁷⁶ then the goal should be to expand the required legal writing curriculum, not outsource writing into doctrinal areas. Indeed, as Professor Kowalski notes, “clinicians commonly experience the frustration that students seem to come to the clinic deficient in many legal writing skills.”⁷⁷ A linear approach that spans three years, and combines fictional and real clients, is an effective way to connect critical thinking to writing—and real-world lawyering. Otherwise, “[s]tudents [will] have no model for sequencing steps in the handling of a case or for integrating facts, law, personal doubts, client pressures, and values.”⁷⁸

Accordingly, the legal writing curriculum should extend throughout—not across—the curriculum.⁷⁹ If law students graduate without ever having *meaningfully* drafted a complaint, a motion to dismiss, an answer, discovery documents, an appellate brief, a settlement agreement, a contract, or jury instructions, then law schools are not doing their job. They are not creating legal authors.⁸⁰

⁷⁵ See, e.g., Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing: J. Legal Writing Inst. 127 (2008).

⁷⁶ Roach, *supra* note 17, at 324.

⁷⁷ *Id.*

⁷⁸ Jeff Giddings, *Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum*, 34 Wash. U. J. L. & Pol’y 261 (2010).

⁷⁹ Nancy Levit, *The Theory and the Practice: Reflective Writing Across the Curriculum*, 15 Leg. Writing: J. Legal Writing Inst. 253 (2009).

⁸⁰ See, e.g., Linda Edwards, *supra* note 22, at 881. Professor Edwards explains the writing process as follows:

There are times during the creative process when the work is slow and its outcome seems doubtful. But patient work through all the necessary stages can produce something new and interesting, substantively strong, useful, and even aesthetically pleasing. Your writing will be a reflection of a part of yourself. You will learn to know yourself better as you write, and your writing will be your introduction

Of course, while writing across the curriculum sounds promising,⁸¹ the devil is in the details.⁸² First, there are legitimate questions about its value. If improperly administered, it risks compromising the core analytic mission of doctrinal courses. In addition, the assignment’s insignificance in grading, the unavailability of substantive writing-focused individual feedback, and the lack of any opportunity to rewrite and revise, may undermine the value of this approach as a writing enhancement tool. The same issues arise with respect to collaboration with doctrinal faculty members. They may decline to participate, or be hesitant to allow participation by legal writing faculty in the creation, review, or assessment of their students’ work.⁸³ Of course, if doctrinal professors want to include writing assignments in their courses, then by all means they should.⁸⁴

But law schools should recognize that, while “requiring law students to write more in doctrinal and clinical classes, and not just in LRW, increases essential opportunities to write,”⁸⁵ it is quality, not quantity, that matters. Without sufficient time for individual feedback and revision, the rote drafting, for example, of an Answer is not going to improve writing or thinking skills. Knowing how to strategically respond to a party’s factual allegations, however, and understanding when a motion to dismiss makes strategic sense, is preparing students to do what *real* lawyers do. Those skills will improve by “exporting discipline-specific work to the legal

to a larger world. In the final analysis, it is the highly personal, creative nature of the writing process that will call you back time and again to the keyboard and the screen. *Id.* at 881.

⁸¹ See Andrea McArdle, *Writing Across the Curriculum: Professional Communication and the Writing that Supports It*, 15 Leg. Writing: J. Legal Writing Inst. 241, 243 (“There is a growing and valuable body of scholarship embracing writing across the law school curriculum”).

⁸² Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Business Lawyer*, 55 Clev. St. L. Rev. 59, 98 (2007).

⁸³ *Id.*

⁸⁴ See, e.g., Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum*: 108 Nw. U. L. Rev. Colloquy 80 (2013).

⁸⁵ Roach, *supra* note 26, at 562.

“Knowing how to strategically respond to a party’s factual allegations, however, and understanding when a motion to dismiss makes strategic sense, is preparing students to do what real lawyers do.”

writing classes,⁸⁶ where students can rewrite and revise, and develop an authentic writing process.

3. Targeted Experiential Learning

Experiential learning can certainly enhance legal writing courses, but excessive emphasis can detract from the focus on writing as a discipline, and hinder the acquisition of effective writing and argumentation skills. As such, experiential learning should have a modest, yet targeted role in legal writing courses. It can, for example, give students the opportunity to “work on real clients’ actual legal problems,”⁸⁷ whether through *amicus*, habeas, innocence, or other clinical projects.⁸⁸

Indeed, empirical evidence suggests that “[l]earning is best when students are self-regulating, engaged, and motivated learners, and when the learning process is active, experiential, collaborative, and reflective.”⁸⁹ Professor Thrower also explains that “this high interest level ... sustains them through the difficulties inherent in learning a new skill in a foreign environment.”⁹⁰ As one scholar explains:

Neurobiological findings suggest that learning is optimized when ... the learning atmosphere is encouraging and supportive. We also know that when strong emotions are summoned in a training session, lessons are more easily recalled and applied in actual negotiating situations. Repetition and incremental deepening of ideas are also important to the synthesis and application of learning. Given these findings, effective training should include ample time for reflection, assimilation and integration of ideas. It should also involve a focus on actual situations that evoke authentic emotions, departing from the ubiquitous

focus on simulations that characterize so much negotiation training.⁹¹

Thus, targeted experiential learning can create a dynamic learning environment,⁹² and turn writing into a “collaborative—not a competitive—act.”⁹³ Likewise, actual or simulated client interviews, depositions, mediation and settlement conferences, and oral arguments,⁹⁴ will assist in developing judgment and strategic decision-making skills.

Ultimately, the ability to create legal authors who can write—and think—and understand the strategic roles that lawyers—and litigation documents—play in the dispute resolution process is what separates the lawyers who simply write well from those who write like lawyers. None of this is possible “without a commitment to slowing down the process of researching and writing,”⁹⁵ and, we submit, maintaining a focus on the writing craft. To be sure, writing is the one skill that weaves through all specializations and is required in nearly all legal proceedings. It is the method by which lawyers communicate, make arguments, and resolve disputes. Despite its prominence, both practicing attorneys and judges continue to criticize the writing skills of recent graduates, and have called upon law schools to reform their legal writing curriculums.⁹⁶ Part of that reformation, however, depends on recognizing that doctrinal courses or clinical training (the “doing”) cannot *by themselves*

⁸⁶ Cavazos, *supra* note 72, at 36.

⁸⁷ Thrower, *supra* note 27, at 34-35.

⁸⁸ See, e.g., Charles E. MacLean & Adam Lamparello, *Amicus Briefs: Friends of Lawyering Skills Pedagogy*, The Law Teacher (forthcoming Spring 2014).

⁸⁹ Floyd, et al., *supra* note 40, at 266-67.

⁹⁰ Thrower, *supra* note 27, at 34-35.

⁹¹ LeBaron & Patera, *supra* note 5, at 415.

⁹² See, e.g., Jessie C. Grearson, *Teaching the Transitions*, 4 *Legal Writing: J. Legal Writing Inst.* 57, 62 (1998).

⁹³ *Id.*

⁹⁴ See generally, Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public Interest Partnership*, 8 *Legal Comm. & Rhetoric: JALWD* 191 (2011); Darby Dickerson, *Building Bridges: A Call for Greater Collaboration Between Legal Writing and Clinical Professors*, 4 *J. Ass'n Legal Writing Directors* 45, 52 (2007) (“as pedagogical innovators, we [legal writing and clinical faculty] can join together to teach other faculty about the value of techniques such as simulations and live-client experiences, drafting assignments, and regular feedback that does not restrict time for class preparation, scholarship, or university service”).

⁹⁵ See Roach, *supra* note 17, at 323.

⁹⁶ Sharon D. Nelson and John W. Simek, “Why Can’t Law Graduates Write?” 36 *A.B.A. J.* 6, available at http://www.americanbar.org/publications/law_practice_magazine/2012/november-december/hot-buttons.html.

“[B]oth practicing attorneys and judges continue to criticize the writing skills of recent graduates, and have called upon law schools to reform their legal writing curriculums.”

teach students how to be effective legal writers, and may, in fact, be unduly burdened if their analytical and experiential functions included mentoring and reviewing legal writing assignments.⁹⁷

In other words, writing is the prerequisite to a meaningful experience in clinics. Of course, while some of the assignments in clinics overlap, *e.g.*, brief-writing and motion practice, clinics are not the place to teach IRAC, the art of writing concisely, organizing arguments, citing correctly, avoiding redundancy, or responding to counterarguments. Clinical training is where legal education meets practice, requiring students to interview and represent clients in criminal and civil matters, prepare for trial, and draft *amicus* and habeas petitions. These skills are not—nor should they be—a *primary* focus in legal writing courses, just as style and grammar proficiency should not detract from the transformative work legal clinics perform.⁹⁸

C. The Clinical Pillar—The Place for Experiential Learning, and Integrating the Analytical with the Practical

Good legal writing is never good enough. Law students will not learn how to write—or think—like the best lawyers unless they know how to win the game. Litigation is a game, and law students need to understand how it is played, and who the players are. Professor Susan Thrower explains as follows:

It is true that the short shrift that law school gives to most experiential or applied learning is problematic on a practical level, as Carnegie makes clear, because students graduate from a professional school largely unprepared for day-to-day practice. But law school may fall short in an even more fundamental way. Our pedagogy and curriculum—an over-reliance on neatly edited cases *to the exclusion of working with messy, human facts, in ways that real lawyers might—obscures the inter-dependence of knowing and doing that is at the heart of thinking like*

*a lawyer. It obscures the context and content that lawyers work within while, together with their clients, solving problems. Students' lack of applied learning opportunities may deny them the ability to write a fantastic brief. But the narrow focus on case-method learning may also deny students the opportunity to engage in sophisticated higher-order thinking about law and policy, problems, and goals, and about potential paths, obstructions, and solutions.*⁹⁹

Without a real, messy human context, it does not matter how much the curriculum resembles “real-world” litigation. It does not resemble the *real world* at all.

And that fact will not change, regardless of how many simulations are conducted or actual litigation documents are drafted.¹⁰⁰ Without producing strategic decision makers and contextual thinkers,¹⁰¹ law students will not master the art of persuasion. After all, law school, like the profession it serves, should unfold in an interpersonal—and interdisciplinary—context.¹⁰² You cannot strategically plan your next move, or craft a compelling narrative, until you can predict with reasonable certainty how the other players—judges, lawyers, juries, mediators, and experts—are likely to respond.¹⁰³

For these reasons, clinics are an invaluable part of legal education, where critical thinking, writing, and practice are combined in a real-world setting.¹⁰⁴

⁹⁹ Holmquist, *supra* note 6, at 356-57 (emphasis added).

¹⁰⁰ *Id.* at 353-54.

¹⁰¹ See, *e.g.*, Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 Wm. Mitchell L. Rev. 491, 511 (1997) (“[e]xperienced legal supervisors and decision-makers expect young lawyers to use a purposeful knowledge-adaptation strategy to reconstruct pre-existing legal authority in support of a rhetorical purpose, either to predict how a future decision-maker will decide the case or to make persuasive arguments to that decision-maker in order to advance the client’s paramount interests”).

¹⁰² See Amy G. Applegate, Brian M. D’Onofrio, & Amy Holtzworth-Munroe, *Training and Transforming Students Through Interdisciplinary Education*: 47 Fam. Ct. Rev. 468 (2009)

¹⁰³ Baker, *supra* note 101, at 511.

¹⁰⁴ See, *e.g.*, Maureen E. Laflin, *Toward the Making of God Lawyers: How an Appellate Clinic Satisfies the Professional Objectives*

⁹⁷ Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Education*, 13 Clinical L. Rev. 231, 237 (2006).

⁹⁸ Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 Clinical L. Rev. 285, 300 (2010).

“Without a real, messy human context, it does not matter how much the curriculum resembles ‘real-world’ litigation. It does not resemble the real world at all.”

Students “represent clients directly while being able to turn to faculty members for guidance,”¹⁰⁵ thus offering “high quality skills training directly modeled in the clinical training of medical students.”¹⁰⁶ While “the primary goal of clinical legal education ... [is] to teach students how to learn from experience,”¹⁰⁷ it also “is a place where students learn not only the techniques of advocacy, but also the importance of advocacy in helping individuals solve their problems.”¹⁰⁸ In so doing, students learn “that legal advocacy can make a real difference for real people.”¹⁰⁹ The twin aims of clinical teaching show that, like the analytical and practical, it is a discipline. And students, particularly in the third year, should be allowed to go beyond the classroom, and into practice.

Importantly, however, clinical training would be burdened by excessive collaboration with legal writing or analytical faculty. Professor Kowalski states that “[m]entoring legal writing is extraordinarily time-consuming and, if unchecked, can detract from other important clinical teaching goals.”¹¹⁰ Indeed, many practitioners “bristle at th[e] description”¹¹¹ of clinics as “general skills training.”¹¹² Emphasizing extensive collaboration with legal writing faculty, therefore, would compromise a writing pedagogy that emphasizes “composition theory and cognitive psychology,”¹¹³ and a clinical focus on “overriding social-justice

commitments.”¹¹⁴ And law students will suffer. The separation between each component of legal education is vital to a law student’s step-by-step progression from *thinker* (analytic), to *writer* (practical), to *lawyer* (application).

Clinics are where law school should mirror medical school.¹¹⁵ Medical education is based on “formal analytic reasoning in the sciences, coupled with clinical education in teaching hospitals.”¹¹⁶ Professor Peterson explains as follows:

[T]he American medical education system is thought to be one of the most successful in the world because of its emphasis on experiential learning, critical thinking, and the integration of theory, skills, and the values that are learned, in part, by seeing, doing, and teaching within the appropriate structured educational setting.¹¹⁷

The focus on “problem-based learning”¹¹⁸ is designed to “educate the student ... in a traditional curriculum ... apply that learned knowledge to patient care ... [and] train the student to be a lifelong learner.”¹¹⁹ In fact, “clinical legal education has become its own sub-specialty with its own scholarly agenda, rather than just a training venue.”¹²⁰

To be sure, this does not mean that clinical and legal writing faculty should never collaborate.¹²¹ In various ways, each can certainly enhance the other. As discussed above, involving first-year students in an *amicus* or habeas project provides a more dynamic context within which to teach legal research and objective writing, and expose

of the *MacCrate Report*, 33 *Gonz. L. Rev.* 1 (1998) (describing how the University of Idaho’s Appellate Clinic successfully incorporated legal analysis and persuasive writing)

¹⁰⁵ Bard, *supra* note 70, at 201.

¹⁰⁶ *Id.*

¹⁰⁷ Keith A. Findley, *supra* note 97, at 237.

¹⁰⁸ *Id.* at 203 (quoting Stephen Wizner, *Beyond Skills Training: Toward a Pedagogy for Legal Writing in Law School Clinics*, 17 *Clinical L. Rev.* 285, 300 (2010)).

¹⁰⁹ Findley, *supra* note 97, at 237.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Sarah O’Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Faculties*, 14 *Clinical L. Rev.* 300, 333-35 (2007).

¹¹⁴ *Id.* at 306.

¹¹⁵ See Beverly Peterson Jennison, *Beyond Langdell: Innovating In Legal Education*, 62 *Cath. U. L. Rev.* 643 (2013) (comparing the medical and law school models, and offering proposals for change in legal education).

¹¹⁶ *Id.* at 648.

¹¹⁷ *Id.* at 648-49.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Bard, *supra* note 70, at 203.

¹²¹ See, e.g., Dickerson, *supra* note 94.

“[C]linical training would be burdened by excessive collaboration with legal writing or analytical faculty.”

students to social justice issues.¹²² In addition, since “one of the major legal skills students use in almost every law school clinic is advanced legal writing,”¹²³ the legal writing faculty can provide support in reviewing and giving individual feedback to students. Clinical and legal writing faculty can also collaborate when creating assignments, such as real or simulated client interviews, mediations, oral arguments, and settlement conferences.

Despite the invaluable contribution of clinics, however, a mandatory, fifteen-credit “experiential learning requirement,”¹²⁴ is excessive. As several scholars at Yale Law School correctly explain, “students need to be provided with the analytical framework and knowledge necessary for solving complex legal problems and policy issues.”¹²⁵ Moreover, the “needs and resources of our schools and our students are too diverse for ... [a] one-size-fits-all proposal.”¹²⁶ To be clear, experiential learning, through clinics or externships, is enormously valuable and should be an important part of any law school curriculum.¹²⁷ But no amount of clinical—or legal writing—instruction can, *by itself*, teach the critical-thinking skills that doctrinal courses emphasize. This does not mean, however, that clinics should not be required at all. A six- or eight- credit requirement, however, which would allow students to participate in multiple clinics, particularly in the third year, may strike a better balance.

¹²² Tonya Kowalski, *supra* note 98, at 285 (proposing “a comprehensive pedagogy for teaching and supervising legal writing in clinic”).

¹²³ *Id.*

¹²⁴ See, *CLEA Calls on ABA to Require Fifteen Credits of Experiential Learning*, (July 1, 2103), available at <http://bestpracticeslegaled.albanylawblogs.org/2013/07/01/clea-calls-on-aba-to-require-15-credits-of-experiential-learning/>.

¹²⁵ See Letter, dated January 29, 2014, available at [http://www.law.yale.edu/documents/pdf/News_&_Events/Standard_303\(a\)\(3\)_Revisions_RCP_Response_1-22-2014.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/Standard_303(a)(3)_Revisions_RCP_Response_1-22-2014.pdf).

¹²⁶ *Id.*

¹²⁷ Susan L. Brooks, Robert G. Madden, *Epistemology and Ethics in Relationship-Centered Legal Education and Practice*, 56 N.Y.L. Sch. L. Rev. 331, 337-340 (2012) (advocating for the use of experiential techniques, including Relationship-Centered Lawyering, in legal education).

Ultimately, the Carnegie and *Best Practices Report* recommendation, while not more of the same, is not the right kind of different. The real change that has to occur is in the third year, where students are given “messy, human facts,”¹²⁸ and are shown how to create order from a universe that extends beyond legal rules. Otherwise, even the most “real-world” assignments will be marred by the taint of a hypothetical cosmos.

Part III

Thinking, Writing, and Practicing for the *Real World*: How a Three-Year Writing Curriculum Fits into the Three Pillars

In an earlier article,¹²⁹ we set forth a proposed three-year, fifteen-credit, required legal writing curriculum that began with a fictional case (and client), and took law students on a linear path from the initial client meeting to the appellate brief. We also provided an alternative path in the third year for those students wishing to pursue a transactional career. As we stated in that article, our proposal was the beginning of a conversation, and not a rigid prescription for the future. It was designed, however, to show that legal writing courses can be distributed throughout the curriculum in a comprehensive yet manageable way, without drastic changes to the curriculum or substantially increasing the cost.

Here, we offer a second, closely related proposal and fit it within the broader law school curriculum. In so doing, we: (1) place the pillars in a mostly sequential, and somewhat concurrent order; (2) rank them, for each year, based on relevance and value; and (3) incorporate game theory into specific parts of the curriculum.

The American Bar Association’s 2002 Survey of Law School Curricula¹³⁰ showed that private

¹²⁸ Holmquist, *supra* note 6, at 357.

¹²⁹ See Lamparello & MacLean, *supra* note 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385744.

¹³⁰ See American Bar Association, *A Survey of Law School Curricula 1992-2002*, available at http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum_Survey.authcheckdam.pdf.

“[N]o amount of clinical—or legal writing—instruction can, by itself, teach the critical-thinking skills that doctrinal courses emphasize.”

and public law schools required 88 and 87 credit hours for graduation, respectively.¹³¹ The curriculum below is based on an 84-hour requirement, because that includes all but seven law schools. We follow each year's proposal with a discussion of schools where various aspects are already part of the curriculum, and explain why it is an effective pedagogical approach.

A. The First Year—The Analytical and Part-Experiential Model

In the first year, course instruction should focus on four things: (1) knowledge acquisition (learning substantive law and process); (2) critical thinking; (3) the impact of law on individual rights; and (4) strategic decision-making.

First Semester

- Civil Procedure (Four credits)
- Contracts (Three credits)
- Constitutional Law (Four credits)
- Negotiation and Dispute Resolution (includes simulations) (Two Credits)
- Persuasion I: Research, Reading, and Citation in the *Amicus* Context (Two Credits)

Total

15

Second Semester

- Statutory Interpretation (Three credits)
- Criminal Law (Three credits)
- Torts (Three credits)
- Property (Four credits)
- Persuasion II—Legal Memorandums in the *Amicus* or Storyline Context (Three credits)

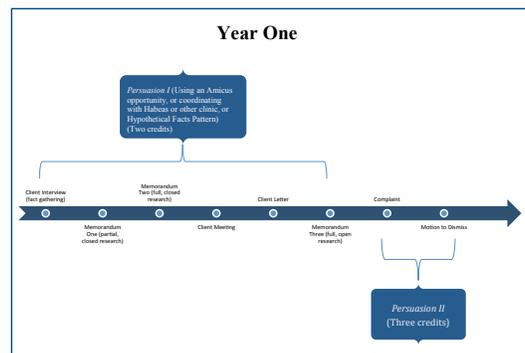
Total

16

Total for the Year

31

¹³¹ *Id.*



The sample first-year curriculum places heavy emphasis on the analytical pillar, providing substantive knowledge about the structure of government, the processes governing civil lawsuits, and basic principles of contracts. The focus on abstract and critical reasoning is complemented, however, by experiential learning techniques that begin teaching students how to think in an adversarial, real-world (or hypothetical) context. Finally, the research component is taught against the backdrop of an *amicus* (or other selected clinical project) to increase first-year students' motivation and show them that "legal advocacy can make a real difference for real people."¹³²

Additionally, the research and citation component contains a reading requirement, which is based on the assumption that, before they write well, students must read excellent legal and literary works.¹³³ Moreover, substantive legal writing does not begin until the second semester, for the purpose of easing the students' transition into law school, and to ensure that they begin the writing process with a foundation in analysis, research, and citation.¹³⁴ As described

¹³² *Id.*

¹³³ For example, a brief written by Chief Justice John Roberts when he was a partner at Hogan and Hartson, L.L.P., is an excellent example of outstanding writing and persuasive argumentation. The brief is available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-658/02-658.mer.pet.pdf, and an article discussing its effectiveness is available at <http://www.legalwritingpro.com/articles/john-roberts.php>.

¹³⁴ This approach is followed by Mercer University's Walter F. George School of Law, which offers eight credits of legal writing that is focused in the second and third years of law school. See <https://www.law.mercer.edu/academics/legalwriting/approach>.

“The sample first-year curriculum places heavy emphasis on the analytical pillar, providing substantive knowledge about the structure of government, the processes governing civil lawsuits, and basic principles of contracts.”

in an earlier article,¹³⁵ our proposed legal writing curriculum begins with student participation in an actual *amicus* project, followed by a hypothetical case (and fictional client), that takes students through two client interviews, a client letter, and three objective memorandums (one partial, one closed, and one open). Included within our courses are additional opportunities to participate in *amicus* or habeas projects, in addition to clinical offerings.

Finally, as suggested above, legal writing instructors can also, to the extent feasible, offer legal writing courses in specialized doctrinal areas to increase student enthusiasm.¹³⁶ The objective is three-fold: training students to think like lawyers, negotiate like lawyers, and understand the value of public service.

Importantly, although constitutional law is typically taught in the second semester of the first year, its placement in the first semester will enhance students' abstract and critical thinking skills, while also providing foundational knowledge about the structure of government and individual rights.¹³⁷ The inclusion of a course on negotiation is intended to enhance the students' strategic decision-making and professional judgment through understanding the rules affecting human behavior.¹³⁸ Indeed, William Mitchell College of Law has pioneered a program entitled "Writing and Representation: Advice and Persuasion" (WRAP), where first-year students "learn fundamental research, analysis, and writing skills, as well as techniques for counseling and representing clients."¹³⁹ Students also "acquire additional skills for use in the various

settings where lawyers persuade other lawyers and judges, including in contract negotiation, dispute mediation, and motion practice."¹⁴⁰ One suggestion would be to incorporate basic instruction on game theory as a way to develop students' skills as negotiators, drafters, and oral advocates.

B. The Second Year—The Analytical and Practical Skills Model

The second year is where the analytical and practical combine to help students "weave thought and knowledge through language,"¹⁴¹ and continues the emphasis on analytical and practical skills training. In *Persuasion III* students draft a complaint in federal court, a motion to dismiss under Federal Rule of Civil Procedure 12, and participate in a mock settlement conference.¹⁴² In the spring semester, *Persuasion IV* requires students to draft an answer, conduct discovery, and to file a motion for summary judgment. We also introduce a clinical component in the second semester of the second year, to give students the opportunity to "act like lawyers," which we believe will spark their enthusiasm in public service and help to prepare them for summer internships. Of course, since the second (and third) years are primarily, if not exclusively, elective, we include only suggested courses.

First Semester

Evidence (Four credits)

Remedies (Three credits)

Business Associations (Three credits)

Persuasion III (Two credits)

Professional Responsibility (Two Credits)

Law Review or Moot Court (or elective) (Two credits)

Total

16

¹³⁵ Lamparello & MacLean, *supra* note 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385744.

¹³⁶ This approach is used at in DePaul University College of Law's Legal Analysis, Research, and Communication Program. See <http://www.law.depaul.edu/academics/larc/>.

¹³⁷ Cornell Law School, for example, requires students to take a four-credit constitutional law class during their first year. See http://www.lawschool.cornell.edu/admissions/admitted/first_year.cfm.

¹³⁸ Game theory is currently offered at the University of Minnesota Law School. See <https://www.law.umn.edu/current/alphabetical-course-list/details.html?courseNumber=6897>; see also Douglas Baird, Robert H. Gertner, & Randall C. Picker, *Game Theory and the Law* (Harvard University Press 1994).

¹³⁹ Gregory M. Duhl, *Equipping Our Lawyers: Mitchell's Outcomes-Based Approach to Legal Education*, 38 Wm. Mitchell L. Rev. 906, 912 (2012).

¹⁴⁰ *Id.*

¹⁴¹ Berger, *supra* note 49, at 58.

¹⁴² See Lamparello & MacLean, *supra* note 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363108.

“The second year is where the analytical and practical combine ...”

“[E]xperiential learning should be the centerpiece of third-year education ...”

Second Semester

Administrative Law (Four Credits)

Trusts and Estates (Three Credits)

Criminal Procedure (Three Credits)

Persuasion IV (Three Credits)

Clinic (Two Credits)

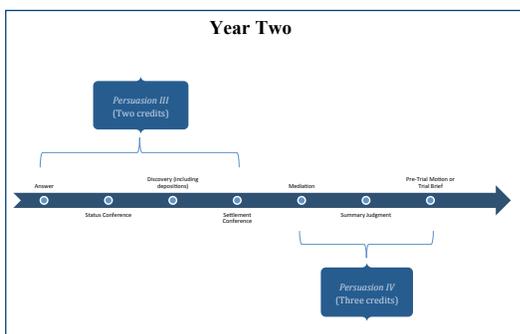
Law Review or Moot Court (or elective, if desired) (Two credits)

Total

15-17

Total for the year

31-33



C. The Third Year—The Experiential and Apprenticeship Model

Some scholars have argued for the elimination of the third year of law school,¹⁴³ while others have advocated for major reforms.¹⁴⁴

Professor Karen Tokarz explains as follows:

When you haven't changed your curriculum in 150 years, at some point you look around: “[S]cores of scholars, judges, and practitioners have written withering critiques of law school, usually focusing on the latter half of school

¹⁴³ See, e.g., Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. Legis. & Pub. Pol’y 599 (2012); see also The Honorable Jose A. Cabranes, U.S. Court of Appeals for the Second Circuit, Remarks at the Annual Luncheon of the AALS: Legal Education Today and Tomorrow 7-9 (Jan. 6, 2012).

¹⁴⁴ Mitu Gulati, Richard Sander, Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. Legal Educ. 235, 235 (2001).

and usually suggesting fairly fundamental changes,” notes Professor Mitu Gulati [sic] and his coauthors in their provocative empirical research article on the “happy charade” of the third year of law school. Their research demonstrates that “a very large proportion of third-year students at most schools do not regularly attend class ... [and] [a]mong the third-year students who do attend class, there appears to be little engagement with course work—a complete turnabout, of course, from the intense first year of law school.”¹⁴⁵

Significantly, though, research also reveals that “third year students have a hunger for applying what they have learned in law school to client problem solving ... [and] seem to have a definite agenda that links career goals to serving clients and working on real-world problems.”¹⁴⁶ They have little interest in the third year of law school “because it does not seem very relevant to that agenda.”¹⁴⁷

For that and other reasons, experiential learning should be the centerpiece of third-year education, with students taking at least two clinics, and also registering for other experiential learning courses in addition to the mandatory writing courses.¹⁴⁸ *Persuasion V* requires students to draft a motion for summary judgment and the appellate brief, while *Persuasion VI* focuses on the art of rewriting and revising.

¹⁴⁵ Karen Tokarz, *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!* 43 Wash. U. J.L. & Pol’y 11, 32 (2013) (quoting, Galati, *supra* note 144, at 236, 243-44, 259).

¹⁴⁶ Tokarz, *supra* note 145, at 32 (quoting Galati, *supra* note 144, at 259.)

¹⁴⁷ *Id.* at 32.

¹⁴⁸ *Id.* at 33. Professor Tokarz explains as follows:

There are multiple low-cost options for a more integrated, experiential three-year curriculum that would impart the three Carnegie apprenticeships and accomplish our proposal of twenty-one experiential course credits—including five clinic or externship credits—such as “ditching” the casebook in upper-level courses, appending skills components or practice labs to core courses, infusing new experiential methodologies across the curriculum, and exploring increased capacity for law clinics and externships through hybrid, community collaboration models. *Id.*

First semester

Persuasion Five (with alternative drafting option for students wishing to pursue transaction work) (Three Credits)

Clinic or Externship (Two Credits)

Professional Responsibility (Two Credits)

Advanced Negotiation and Dispute Resolution Strategy (Two credits)

Law Review or Moot Court (or other elective) (Two credits)

Total

11 credits

Second semester

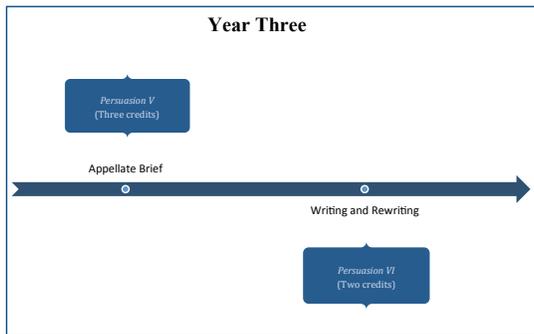
Persuasion VI (Two credits)

Clinic or Externship (Two credits)

Electives (Eight credits)

Total

12 credits (84 credits completed)



Under our model, students would, at a minimum, take six credits worth of clinics, over two or three semesters, combined with fifteen writing credits, spread over three years, for a total of twenty-one credits involving practical and experiential training. This approach spreads out the writing process, but

concentrates the clinical courses so that students gain significant experience prior to entering practice. The goal should be to create a curriculum “that makes sense for the third-year student,”¹⁴⁹ “meets the practical needs of students who are likely to practice on their own or in small firms,”¹⁵⁰ and “provides an educational benefit that aspiring lawyers of substance could not afford to pass up.”¹⁵¹

Conclusion

Law school is not very different from life. Our relationships with other people depend in substantial part on how we communicate, both in what we say and how we say it. That requires an understanding of human behavior, which cannot be learned from a book or a set of rules. It comes from experience. Real-world knowledge requires interaction with people, just like legal “street smarts” require experiential learning.

But we cannot simply throw law students into the “experience” and tell them to figure it out. Rules—and skills—are the legal upbringing that prepares students for successful interaction with clients, lawyers, and other judges. If the foundation is weak, the experience will be too. And if the foundation is strong, but the experience is lacking, the graduate will, sadly, be forced to figure it out. That hurts more than the law student. It damages the legal academy, the profession, and the clients we serve. This proposal will hopefully begin a meaningful process of collaboration and collegiality—to make law school more like life.

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“[W]e cannot simply throw law students into the ‘experience’ and tell them to figure it out.”

¹⁴⁹ Estreicher, *supra* note 143, at 609-10, 607.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*