

**A PROPOSAL TO THE ABA: INTEGRATING LEGAL
WRITING AND EXPERIENTIAL LEARNING INTO A
REQUIRED SIX-SEMESTER CURRICULUM THAT TRAINS
STUDENTS IN CORE COMPETENCIES, ‘SOFT’ SKILLS,
AND REAL-WORLD JUDGMENT**

ADAM LAMPARELLO AND CHARLES E. MACLEAN*

*“The biggest failure at most law schools is the dearth of seriously
good skills courses, especially training in legal writing.”¹*

I. ABSTRACT

Experiential learning is not the answer to the problems facing legal education. Simulations, externships, and clinics are vital aspects of a real-world legal education, but they cannot produce competent graduates alone. The better approach is to create a required, six-semester experiential legal writing curriculum where students draft and re-draft the most common litigation documents and engage in simulations, including client interviews, mediations, depositions, settlement negotiations, and oral arguments in the order that they would in actual practice. In so doing, law schools can provide the time and context within which students can truly learn to think like lawyers, do what lawyers do, and exercise real-world judgment. Simply put, merging experiential learning into the legal writing curriculum is the path to producing competent graduates and a legal education that maintains relevance in a changing world.

In this article, we set forth a proposal to the American Bar Association advocating for a three-year experiential legal writing curriculum that requires students to take one legal writing course during each semester of law school and directs law schools to devote between eight and fifteen credits to experiential legal writing instruction.² We also include a comprehensive, six-semester curriculum that incorporates doctrinal, skills, and clinical courses.³

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* Adam Lamparello and Charles E. MacLean are Assistant Professors of Law at Indiana Tech Law School in Fort Wayne, Indiana.

¹ Bryan A. Garner, *Three Years in Law School, Spent Better*, N.Y. TIMES (July 21, 2011), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>.

² See *infra* Part III.A.

³ See *infra* Part IV.A.

The Clinical Legal Association recently lobbied the ABA for a mandatory fifteen-credit experiential learning requirement.⁴ The ABA approved only six.⁵ It is time for the Legal Writing Institute to make its own proposal and give law students the education that members of the bench and bar demand.

II. INTRODUCTION

The problem with experiential learning, and current reforms to legal education, can be summarized in the following passage: “If students successfully learn the analytical skills that are traditionally the heart of the first-year curriculum—case analysis, generating broad and narrow case holdings, rudimentary policy analysis, and statutory interpretation—as well as basic legal doctrine, they are typically ready to begin client representation”⁶ That is wrong. Dead wrong.

If law students cannot write effectively—in a persuasive context—they will fail as advocates, counselors, and negotiators. Indeed, persuasive writing ability, logical reasoning skills, and sound judgment are the most valuable lawyering skills.⁷ Merging experiential learning into the legal

⁴ See Michele Pistone, *CLEA calls on ABA to require 15 credits of experiential learning*, BEST PRACTICES FOR LEGAL EDUCATION (July 1, 2103), <http://bestpracticeslegaled.albanylawblogs.org/2013/07/01/clea-calls-on-aba-to-require-15-credits-of-experiential-learning/>.

⁵ See Michele Pistone, *ABA Standards Review Committee votes for 6 credits of experiential learning*, BEST PRACTICES FOR LEGAL EDUCATION (July 17, 2013), <http://bestpracticeslegaled.albanylawblogs.org/2013/07/17/aba-standards-review-cmte-votes-for-6-credits-of-experiential-learning/>.

⁶ Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 LEGAL WRITING: J. LEGAL EDUC. 51, 64–65 (2001).

⁷ See Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699, 709 (2012). Professor Gantt explains as follows:

[T]he heart of legal problem solving skills[] [is] the analytical and critical thinking skills that make up the cognitive components of thinking like a lawyer. Such cognitive components include linear thinking, searching for coherence, crafting arguments, attending to detail, assessing relevance, perceiving ambiguity, dissecting thought, seeing others’ perspectives, and logical thinking.

Id.

writing curriculum can create a cohesive program where these skills are taught in a real-world context.

Members of the bench and bar are not clamoring for more experiential learning in law school.⁸ They are criticizing the poor quality of graduates' writing skills.⁹ 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.'"¹⁰

New York Circuit Judge and Columbia Law Professor Gerald Lebovits states as follows: "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."¹¹ The legal profession "depends on flawless writing, logical reasoning, and persuasive argumentation."¹²

As Professor Bryan Garner explains, "the biggest failure at most law schools is the dearth of seriously good skills courses, *especially training in legal writing*."¹³ Law students "are not mastering essential skills,"¹⁴ which has forced law firms to implement formal training programs¹⁵ and led to clients refusing to pay for the time billed by first and second year associates.¹⁶

Professor Bryan Garner advocates for the following solution:

⁸ Sharon D. Nelson & John W. Simek, *Why Can't Law School Graduates Write?*, 38 LAW PRACTICE 22, 24 (2012).

⁹ *Id.* at 24.

¹⁰ *Id.* See also Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 275–84 (2002).

¹¹ Gerald Lebovits, *Legal Writing in the Practice-Ready Law School*, N.Y. ST. B.J. Sept. 2013, at 67 (quoting James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 756 (2012)).

¹² *Id.* (internal quotation marks omitted).

¹³ Garner, *supra* note 1 (emphasis added).

¹⁴ *Id.*

¹⁵ See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0.

¹⁶ *Id.* See also Catherine Ho, *Group pushes for practical training for law students*, WASH. POST (July 14, 2013), http://articles.washingtonpost.com/2013-07-14/business/40575393_1_law-schools-barry-currier-law-placement.

For starters, the second and third years of law school ought to include much more research, writing and editing, with three to six short papers required in each course Each paper should be subjected to rigorous editing, then rewritten and resubmitted. . . . Short of such reform, the future for new law school graduates looks dismal [I]aw schools should get their priorities straight and better meet the needs of their students' future employers.¹⁷

If there has been one problem in legal education, it has been the failure to provide students with comprehensive instruction in predictive and persuasive writing. This is “frequently described as a core skill for new lawyers.”¹⁸ Law students must draft and redraft the most common litigation and transactional documents, including pleadings, briefs, letters, contracts, and wills. To be good lawyers, students must learn to think like readers, re-write like editors, analyze like judges, and communicate like counselors.

How many times must lawyers and judges criticize the writing skills of recent graduates before law schools commit to a comprehensive and real-world writing program? Currently, most law schools only devote 5.65 credits—approximately seven percent of the curriculum—to legal writing.¹⁹ Many law students graduate without ever having drafted a complaint, motion for summary judgment, merger agreement, lease, or settlement agreement.²⁰ They graduate with an average debt of \$100,000 and often earn a salary that makes their future more, not less, uncertain.²¹ There is no excuse for such an anemic approach to writing. It sets students up for failure in the profession.²²

¹⁷ Garner, *supra* note 1.

¹⁸ Julie Macfarlane & John Manwaring, *Reconciling Professional Legal Education with the Evolving (Trial-Less) Reality of Legal Practice*, 1 J. DISP. RESOL. 253, 262 (2006).

¹⁹ See Assoc. of Legal Writing Dirs. & Legal Writing Inst., *Report of the Annual Legal Writing Survey*, 7 (2013), <http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf>.

²⁰ *Id.* at 5, 9.

²¹ See Law Sch. Admission Council, *Financial Aid For Law School: A Preliminary Guide* 8 (Oct. 5, 2014), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/financial-aid-brochure.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/financial-aid-brochure.pdf).

²² See Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 618 (2010) (“Requiring two rigorous legal
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In this article, we propose a six-semester, required experiential legal writing curriculum that strives to create outstanding legal writers, problem solvers, and self-directed learners able to practice competently from day one. Law schools would be required to devote between eight and fifteen credits to the legal writing curriculum, and every law student would take one legal writing course during each semester of law school. We recognize law schools are not trade schools and they are fundamentally different from medical, dental, engineering, and architectural schools. The development of analytical ability and logical reasoning is vital, and persuasive legal writing is the *sin qua non* of effective legal advocacy.

We also propose incorporating experiential learning techniques into the curriculum because lawyers do not just write. They counsel clients and interact with partners. They negotiate settlements and argue before trial, appellate, administrative, and bankruptcy courts through motion practice or the few cases that go to trial. Thus, our proposal requires students not only to draft real-world litigation *and* transactional documents in the same order as they would in practice, but also to engage in simulations, such as client interviews, presentations to partners, oral arguments, mediations, and negotiations that correspond to each stage of litigation. In addition, students will receive feedback, guidance, and formal assessments from legal writing instructors and can improve their skills through repetition and re-writing.

An experiential legal writing curriculum merges the analytical and practical components of legal education into a real-world pedagogy, emphasizing core competencies and the ‘soft’ skills demanded by employers.²³ After all, to be outstanding lawyers, graduates must be leaders, problem-solvers, collaborators, and creative thinkers. They must be self-sustaining learners, able counselors, smart businessman, and innovative entrepreneurs.

The American Bar Association must act now. Scholars must start questioning the credibility of the Carnegie and MacCrate Reports.²⁴ Both

writing experiences should just be a start as these two experiences will not be enough to reach competent levels of mastery of the learning outcomes.”).

²³ See Hannah Morgan, *The Soft Skills All Employers Seek*, U.S. NEWS & WORLD REPORT (March 19, 2014), <http://money.usnews.com/money/blogs/outside-voices-careers/2014/03/19/the-soft-skills-all-employers-seek>.

²⁴ See Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 447–48 (2009); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, <http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession->

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reports advocate for more practical skills training in law school. They do not, however, emphasize the importance of effective legal writing. To be sure, “the [MacCrate] Report has been criticized for its failure to focus more on research and writing.”²⁵ In fact, “[T]he MacCrate Report appears to have been relatively unimportant in the design of first year skills programs.”²⁶

Scholars and professors interpreted this to mean that law schools should be more experiential.²⁷ They are wrong. Law schools should teach writing—persuasive writing—in each semester of law school. It is time to stop treating legal writing professors like the stepchildren of the academy.

The persistent criticism from members of the bench and bar underscores the urgency for comprehensive curricular reform to legal writing programs:

Much has been said about the declining written communication abilities of today’s law students, as students spend less and less time learning basic writing in their pre-law school education. If students arrive at law school with less developed writing skills than they had in the past, teaching them legal writing will necessarily require more time and effort. By definition, this will reduce the amount of time available to train those students in other skills. . . . [U]nlike other skills, research and

law. See also ABA, *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development: A Continuum*, 236 (July 1992), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf.

²⁵ Lucia Ann Silecchia, *Legal Skills Training in the First-Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 261 (1996).

²⁶ *Id.* at 261–62. Professor Silecchia explains as follows:

Of the 111 schools responding, only three reported that the MacCrate Report had a “significant impact” on their program design. In fifty-two schools, the Report was deemed to have had “some influence” on program design, while fifty-four directors reported that the Report had “no influence” at all in the design of their first year skills programs.

Id.

²⁷ See Mark Feldman & Jay M. Feinman, *Legal Education: Its Cause and Cure*, 82 MICH. L. REV. 914, 929–31 (1984) (reviewing ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983)).

writing skills are the ones that legal employers expect students to bring to their jobs when they graduate from law school.²⁸

Despite this, there is the need to extol the virtues of experiential learning and repeatedly emphasize the benefits of simulations, externships, and mentorships.²⁹ These are indispensable components of a comprehensive and real-world legal education,³⁰ but they are not the solution.

According to the critics, law graduates cannot write.³¹ A law school that “pay[s] more than lip service to produce better legal writing” is the law school that can train the twenty-first century lawyer.³² Professor Vinson explains as follows:

²⁸ Silecchia, *supra* note 25, at 270–71, 279.

²⁹ See Kris Franklin, *Sim City: Teaching “Thinking Like a Lawyer” in Simulation-Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861, 864–65 (2008) (discussing the benefits of clinical and simulation-based teaching).

³⁰ See, e.g., Jordan Furlong, *Core competence: 6 new skills now required of lawyers*, LAW 21 (July 4, 2008), <http://www.law21.ca/2008/07/core-competence-6-new-skills-now-required-of-lawyers/> (discussing the importance of collaboration, emotional intelligence, financial literacy, project and time management skills, and technological proficiency). See also Marni Becker-Avin, *Developing Lawyers’ “Soft Skills”—A Challenge for the New Era in Legal Services*, LAW PRACTICE TODAY (May 2014), http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/may14/developing-lawyers-soft-skills-a-challenge-for-the-new-era-in-legal-services.html; Joanne Lipo Zovic, *The Top Five Skills Necessary to Be a Lawyer*, MARQUETTE UNIV. LAW SCH. FACULTY BLOG, <http://law.marquette.edu/facultyblog/2012/02/08/the-top-five-skills-necessary-to-be-a-lawyer/> (last visited Oct. 21, 2014).

³¹ See Kathleen Elliott Vinson, *Improving Legal Writing: A Lifelong Learning Process and Continuing Professional Challenge*, 21 Touro L. REV. 507, 511 (2005). Professor Vinson states as follows:

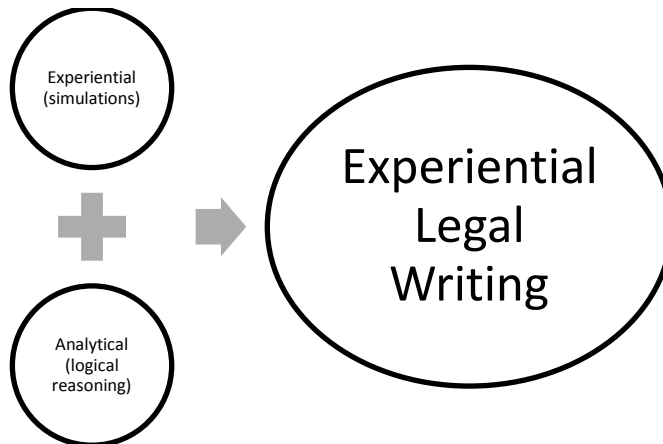
[E]ven if lawyers acclimate to legal practice without losing their writing skills, many lawyers have not received adequate writing instruction beyond a freshman English composition course or a legal writing and research course in the first year of law school. As their legal knowledge progresses, they need to improve their writing skills to reflect more sophisticated analysis.

Id. at 534–35.

³² *Id.* at 514. See also Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473–76 (1993) (including surveys
(continued)

After all, “[p]erhaps no aspect of legal life is more important, yet more widely misunderstood, than legal writing.” Until the legal profession shows it values legal writing and offers opportunities to improve it, the quality of legal writing will continue to suffer. Indeed, law firms should recognize “the market value of clear writing.” Overall, improving legal writing will ultimately promote professional development and provide both lawyers and the legal profession with the tools necessary to realize their full potential.³³

As one scholar notes, “the development of communicative skills is inseparable from the development of analytical skills”³⁴ as “[l]egal composition and legal subject matter interact in ongoing rhetorical activity . . . [that is] . . . best understood and best studied together.”³⁵ Our approach can be summarized as follows:



showing that legal writing and analysis are among the most important skills valued by employers).

³³ *Id.* at 514–15.

³⁴ Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB L. REV. 560, 562 (1997).

³⁵ Susan Thrower, *Teaching Legal Writing through Subject-Matter Specialties: A Reconception of Writing Across the Curriculum*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 3, 17 (2007) (quoting Leigh Hunt Greenhaw, “*To Say What the Law Is*”: *Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861, 867 (1995)).

This article sets forth a proposal to the ABA and sample curriculums that describe the courses and skills that students will acquire.

These examples can be starting points for discussions about curricular reforms that link law schools closer to law practice. “Crucial to the social vision of legal education is a belief in the necessity of law and the importance of what lawyers do.”³⁶ Experiential *legal writing* is what lawyers do, and it should be done at law schools everywhere.

III. LEGAL WRITING IS REAL-WORLD EXPERIENTIAL LEARNING

Experiential learning—a teaching tool that has been around for nearly a century³⁷—is the new “it” factor in legal education. This is evidenced by catchy buzzwords such as “practice-ready” and “client-centric,”³⁸ promising to change how law students are educated.³⁹ Experiential learning brings about positive change. It does not, however, result in the change law schools desperately need.

A. *Experiential Learning by itself cannot Produce Competent Graduates*

Law graduates can never be truly “practice-ready.”⁴⁰ With vast and complex practice areas, different procedures governing each jurisdiction, and numerous specialized courts such as administrative, bankruptcy, and tax, law schools cannot fully prepare graduates for the practice of law. Instead of listing the competencies the legal profession demands, law

³⁶ Feldman & Feinman, *supra* note 27, at 923.

³⁷ Tarah Sharon Alexandra Wright, *Feeling Green: Linking Experiential Learning and University Environmental Education*, 2 HIGHER EDUCATION PERSPECTIVE, (Special Issue) 74 (2006).

³⁸ Kirsten A. Dauphinais, *Using an Interviewing, Counseling, Negotiating, And Drafting Simulation in the First-Year legal Writing Program*, 15 TRANSACTIONS: TENN. J. BUS. L. 105, 107, 134 (2013) (emphasizing the “importance of doing client-centric simulations”).

³⁹ See Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL’Y 11, 12 (2013) (noting the “increased market demand for ‘practice-ready’ law graduates; and increased numbers of law grads going into solo and small firm practice”). See also Filippa Marullo Anzalone, *It All Begins with You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 HAMLINE L. REV. 324, 350 (2001) (discussing the value of self-assessment in refining skills and understanding).

⁴⁰ Margaret Martin Barry, *Practice Ready: Are We There Yet?* 32 B.C. J.L. & SOC. JUST. 247, 247 (2012) (“The assertion that law schools aim to graduate practice-ready lawyers lies at the heart of the debate about the role of legal education in preparing students for the profession.”).

schools should maintain a practical focus on the core competencies that graduates must possess: effective writing, reasoning, persuasive ability, sound judgment, and problem-solving skills.

Although instructors define experiential learning in different ways,⁴¹ most agree it involves simulations, clinics, and externships.⁴² These are effective tools because they provide real-world experience and may allow students to represent actual clients.⁴³ If law schools are serious about the commitment to produce competent graduates, experiential learning is not sufficient. Unlike the medical, dental, engineering, and architectural professions,⁴⁴ the legal profession relies heavily on persuasive writing and argumentation skills as the primary form of communication and advocacy.⁴⁵ One scholar explains as follows:

Lawyers need to practice, refine, and further develop their legal writing skills as if their professional life depended on it because it often does. “Law is a profession of words.” Thus, written communication skills, rather than substantive legal knowledge, are deemed to be one of the most important skills necessary for beginning lawyers. Also, throughout a lawyer’s career, legal writing pervades every type of practice at every level.⁴⁶

⁴¹ See, e.g., Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 403 (2012) (identifying three core aspects of experiential learning and stating as follows: “[A]ll law students should have the opportunity to experience in law school: (1) simulated practice; (2) the “mentee” role; and (3) the “first-chair” role. These roles reflect increasing levels of responsibility along a continuum toward the assumption of the full role of attorney and, accordingly, can also be grouped in two broad categories: (a) simulated practice (e.g., interviewing and counseling courses; trial advocacy courses) and (b) supervised practice (e.g., externships/field placement programs and in-house clinics).”).

⁴² *Id.*

⁴³ *Id.* at 403–04.

⁴⁴ See Ira Steven Nathenson, *Navigating the Uncharted Waters of Teaching Law with Online Simulations*, 38 OHIO N.U. L. REV. 535, 571–72 (2010). Professor Nathenson states as follows: “The Carnegie Report compares legal and medical education, noting with great favor the heavy clinical bent of medical training. Although experiential learning in law schools should be expanded, the medical model is no panacea because of the great dissimilarities between law and medical schools.” *Id.* at 571.

⁴⁵ *Id.* at 544.

⁴⁶ Vinson, *supra* note 31, at 516–17 (quoting Debra R. Cohen, *Competent Legal Writing—A Lawyer’s Professional Responsibility*, 67 U. CIN. L. REV. 491, 492 (1999)).

Indeed, “to enter the profession, obtain and maintain a legal job, and have a successful legal career, superior legal writing skills are required.”⁴⁷ Rarely, however, is “practice ready” mentioned in the same sentence with legal writing.⁴⁸ That is the problem. Judges and lawyers are not complaining about the lack of experiential learning in law schools.⁴⁹ They are saying that law students cannot write.⁵⁰

Experiential learning gives students the opportunity to apply and practice their skills; it does not allow students to acquire basic competencies in writing and reasoning. Put differently, experiential learning is akin to putting a novice on the pitcher’s mound in Game 7 of the World Series. The player experiences the thrill of standing before a sold-out crowd and the pressure of performing before the live television cameras. Unless that pitcher can outthink the hitters, throw 90 miles per hour, and locate pitches effectively, he will not survive the first inning. The experience has style but does not *teach* the substance. The substance is far less glamorous but equally necessary.

B. Legal Writing is What Lawyers Do

Most cases never go to trial, and most lawyers do not spend their time in court arguing before a federal appellate court.⁵¹ Lawyers research, write, negotiate, and advocate.⁵² Two scholars explain this as follows:

We . . . recommended that a focus on written advocacy . . . reflect the comments made consistently by . . . focus group participants that oral advocacy is less central now to a lawyers [sic] work than written advocacy and negotiation. . . . Regardless of the evolution of the practice of law, lawyers still need to know the law or be

⁴⁷ Vinson, *supra* note 31, at 517.

⁴⁸ See Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 160 (2010) (stating that “legal reasoning has gone through three stages in the last century—formalism, analogy, and realism—and that all three stages are necessary for complete legal analysis. These stages have also been called, respectively: deduction, analogy, and practical reasoning”).

⁴⁹ Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 353 (2012).

⁵⁰ See Daniel John Meador, *THE TRANSFORMATIVE YEARS OF THE UNIVERSITY OF ALABAMA LAW SCHOOL, 1966–1970*, 95 (2012) (“One of the constant complaints from the bench and bar is that law school graduates cannot write.”).

⁵¹ See MacFarlane & Manwaring, *supra* note 18, at 253.

⁵² *Id.* at 262.

able to find out the relevant law. They need to be able to research a topic thoroughly and effectively regardless of the type of services they are providing their clients and of the likelihood of trial. If it is true that written advocacy is at least partially replacing oral advocacy . . . then writing skills are becoming more and more important. Our data suggests that this shift is real and significant.⁵³

Thus, if law schools only require students to draft an office memorandum and appellate brief in their first-year lawyering skills class, they are not preparing students for law practice. Graduates may not realize that a summary judgment motion requires a statement of undisputed material facts or that a motion in limine is typically limited to evidentiary issues.⁵⁴ Most importantly, graduates will not have sufficient time to re-write, revise, and to refine their writing skills. That is a recipe for malpractice or a significant amount of time that law firms have to write off.

To begin with, competent graduates should have at least drafted and re-drafted the following documents:

- Complaints;
- Client letters;
- Motions to dismiss;
- Answers;
- First set of interrogatories;
- Motions for summary judgment;
- Jury questionnaires and jury instructions;
- Mediation statements;
- Settlement agreements;
- Merger agreements;
- Stock purchase agreements;
- Leases;
- Wills and powers of attorney; and
- Covenants not-to-compete.

Simply stated, great writers know their genre. The above assignments provide real-world drafting experience to help students understand the

⁵³ *Id.*

⁵⁴ See 4 C.F.R. § 22.6(d)(2) (2014); Robert G. Allbee & Kasey W. Kincaid, *Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner*, 35 DRAKE L. REV. 1, 12 (1985).

strategic context within which each document is drafted, particularly if they are drafted in a sequential fashion that mirrors real-world litigation.⁵⁵

C. *Experiential Learning Enhances the Legal Writing Curriculum*

Although not independently sufficient, experiential learning techniques, including oral arguments, presentations to partners, and client interviews, can enhance the legal writing curriculum. Teaching students the role of context and strategic decision-making is a core lawyering skill.⁵⁶ Strategic decision-making includes decisions such as whether to file a motion to dismiss in lieu of an answer, settle or go to trial, file a motion to dismiss or for summary judgment, or mediate a claim. Law students must not only know *what* documents lawyers draft, but *why* these documents are drafted, *when* they are drafted, and *how* to effectively (and efficiently) draft them.

Instead of giving students a hypothetical fact pattern in their first-year legal writing course, students should gather facts in a simulated client interview. After drafting their first legal memorandum, students should meet with a “partner” to discuss their research and meet with a “client” to recommend a course of action. Motions to dismiss and motions for summary judgment should be followed by simulated oral arguments, settlement conferences, and mediations. Furthermore, by providing feedback and formal assessments, legal writing professors can create an outcome-based, experiential writing pedagogy that emphasizes core competencies for law practice.⁵⁷

⁵⁵ See Adam Lamparello & Megan E. Boyd, *Show, Don't Tell: Legal Writing for the 'Real World,'* LexisNexis (2014) (each chapter contains practical writing tips as they apply to each litigation document and includes fully drafted documents corresponding to each stage of the litigation process). A chapter outline is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436533.

⁵⁶ See Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 537 (1994) (quoting Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968 (1979)) (stating that “[p]roblem solving and decisionmaking will pervade our students’ professional work in whatever careers they choose. Although these tasks are performed ‘in the shadow of the law,’ they encompass and are often dominated by nonlegal considerations.”).

⁵⁷ See Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See Through the Eyes of the Reader*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 291, 291 (2008) (explaining that “students severely truncate the rewriting stage by focusing on mostly surface changes while ignoring whether the text makes sense to the reader”).

This program can also develop the “soft” skills, including interpersonal communication, creativity, time-management, multi-tasking, marketing, and confidence, critical to graduates’ success as lawyers.⁵⁸ Lawyers do not just sit in a dark room and write. They communicate with partners, judges, clients, and administrators; attend cocktail parties and network; send emails, participate in phone conferences, bill clients, maintain files; and manage trust accounts.⁵⁹ Lawyers must also adhere to ethical rules and demonstrate professionalism in all areas of their practice.⁶⁰ Thus, soft skills are equally as important as the technical skills students acquire.

Ultimately, the practice of law involves the “interplay of experience, analysis, understanding, and application”⁶¹ and the ability to work with “messy, human facts, in ways that real lawyers might.”⁶² Therefore, law students must be able to integrate and synthesize information, apply unsettled law to incomplete facts, and counsel clients through the uncertainty and emotional turbulence that often arises in the dispute resolution process. One scholar explains this as follows:

In addition to thinking like a lawyer, the other performance competencies, and the processes of coping with uncertainty, there is at least one additional, essential requirement of the model professional: judgment. The lawyer must apply legal ideas to factual problems, must deliberate by positing alternatives, considering options, and rehearsing consequences, must implement the choice,

⁵⁸ See *What Skills Are Employers Looking For?*, AARP FOUNDATION, <http://www.aarpworksearch.org/Inside/Pages/HowEmployableAmI.aspx> (last visited Oct. 21, 2014). See also Deborah Maranville, *et al.*, *Lessons for Legal Education from the Engineering Profession’s Experience with Outcomes-Based Accreditation*, 38 WM. MITCHELL L. REV. 1017, 1036 (2012) (“a second lesson from the engineering profession’s experience with outcomes-based accreditation processes is that ethics, metacognition, and other professional skills too often denigrated as “soft” can be included in an outcomes-based assessment of student learning.”).

⁵⁹ Dirk Gibson, *Legal Education and Communication Skills*, 9 LEGAL STUDIES FORUM 329, 330 (1985); Mary Kate Sheridan, *Networking Tips for Lawyers: The Art of Schmoozing*, LEXISNEXIS, (Mar. 2, 2011, 11:22 AM), <http://www.lexisnexis.com/legalnewsroom/lexis-hub/b/professional-networking/archive/2011/03/02/networking-tips-for-lawyers-the-art-of-schmoozing.aspx>.

⁶⁰ *Nix v. Whiteside*, 475 U.S. 157, 168 (1986). See also OHIO RULES OF PROF’L CONDUCT PREAMBLE (2014).

⁶¹ Holmquist, *supra* note 49, at 354.

⁶² *Id.* at 357.

and must then accept responsibility for the choice made. In sum, the lawyer's basic duty is to perform in the absence of certainty.⁶³

A six-semester experiential legal writing curriculum can present students with messy facts, complex legal questions, hypothetical (or real) clients, and involve students in a hypothetical lawsuit from beginning to end. Additionally, legal writing professors can guide students as they draft a complaint, counsel a client, argue a motion to dismiss, draft discovery, prepare a motion for summary judgment, take depositions, question potential jurors, negotiate a settlement, draft a contract for the sale of real estate, and participate in a mock closing.

Below on the next page is an example of how experiential learning and legal writing can coalesce to provide real-world skills training.

⁶³ Feldman & Feinman, *supra* note 27, at 929.

Practical Skills and Experiential Learning Interplay (Non-Exhaustive)

LEGAL WRITING	EXPERIENTIAL LEARNING
LEGAL REASONING AND RESEARCH	CLIENT INTERVIEW (FACT GATHERING), RESEARCH FOR STATE OR FEDERAL SUPREME COURT AMICUS BRIEFS
LEGAL MEMORANDUM	CLIENT LETTER, PRESENTATION TO PARTNER, AND CLIENT MEETING ADVISING ABOUT THE LIKELIHOOD OF SUCCESS AND RECOMMENDED COURSE OF ACTION
COMPLAINT	STRATEGY SESSION WITH PARTNERS AND OTHER ASSOCIATES TO DISCUSS ISSUES INCLUDING THE THEORY OF THE CASE AND LIKELY RESPONSES BY OPPOSING COUNSEL
MOTION TO DISMISS	ORAL ARGUMENT AND PRELIMINARY SETTLEMENT TALKS WITH OPPOSING COUNSEL
ANSWER	SETTLEMENT CONFERENCE
DISCOVERY	SIMULATED DEPOSITION, MEDIATION
MOTION FOR SUMMARY JUDGMENT	MOCK ORAL ARGUMENT
MOTION IN LIMINE	MOCK ORAL ARGUMENT
TRIAL BRIEF	VOIR DIRE, OPENING STATEMENTS, WITNESS EXAMINATION (DIRECT AND CROSS), CLOSING ARGUMENTS
APPELLATE BRIEF	ARGUMENT BEFORE APPELLATE BENCH

Furthermore, with opportunities to re-write and revise each assignment or to repeat a simulation, students can reflect upon and refine their real-world skills.

D. Experiential Learning in Doctrinal Courses and Writing Across the Curriculum in the First Year is Not as Effective

Many law schools largely focus on connecting experiential learning techniques and legal writing instruction to first-year *doctrinal* courses.⁶⁴ Importantly, applied or “blended” learning improves critical thinking skills, facilitates acquisition of substantive legal knowledge, helps students to understand the importance of context, and emphasizes problem-solving skills.⁶⁵ Although this approach is theoretically sound, its application to

⁶⁴ See Maranville, *supra* note 6 at 59 (noting that “the value of active learning generally, especially learning focused around problem-solving, has been demonstrated in an extensive literature”). Professor Maranville describes the active learning process as follows:

[It is] a four-part model of a cycle that moves from concrete experience through reflective observation to abstract conceptualization ending in active experimentation, a sequence that others have labeled “experiencing, examining, explaining, applying.” Underpinning this model is the view that complete learning requires integrating both the concrete and the abstract, as well as action and reflection.

Id. (internal citations omitted).

⁶⁵ See Eric Mills Holmes, *Education for Competent Lawyering—Case Method in A Functional Context*, 76 COLUM. L. REV. 535, 564 (1976). Professor Holmes states as follows:

Applied Skills Training has the merit of forging problem-solving judgment and the intellectual skills taught by the case method. Case-method analytical skill is inculcated through the reading-reasoning operations of law students. They acquire the ability to analyze, distinguish, reconcile and synthesize case and statutory rules, principles, concepts and standards, as well as the ability to make independent, critical commentary. Case-method training provides students with tools *to be applied* in performing lawyering operations. In turn, applied training enhances those case skills by using them in a functional context.

Id. See also Maranville, *supra* note 6, at 52 (“[W]e fail to provide the context for doctrinal learning that will both engage students and help them learn more effectively.”); Gerald F. Hess, *Blended Courses in Law School: The Best of Online and Face-to-Face Learning?*, 45 MCGEORGE L. REV. 51, 60 (2013). Professor Hess explains as follows:

(continued)

first-year doctrinal courses, rather than to the legal writing courses, has significant drawbacks.⁶⁶

In first-year doctrinal courses where students acquire foundational legal knowledge, there may not be sufficient opportunities for meaningful feedback or opportunities for reflection, self-assessment, re-writing, and revision.⁶⁷ Furthermore, because these courses are typically taught by

Effective blended learning courses require students to interact with each other, the content, and their own thoughts. Students need a way to not only take in information but also to process it: checking their understanding, organizing their knowledge, and making connections with what they already know. Blended learning that incorporates active learning strategies provides students with vehicles to help them do just that.

Id.

⁶⁶ See Thrower, *supra* note 35, at 31–32. Professor Thrower described the “writing in the discipline” approach as follows:

Teaching legal writing through specialized sections is a nonclassic, but equally effective, version of writing across the curriculum. It is a subset of the *learning to write in the discipline* approach to writing across the curriculum. Not only do . . . specialized students learn to write in the legal discourse community, but they also learn the particular language, customs, and ‘forms of life’ of intellectual property law, of family law, of health law, or of public interest law. Each of these discipline-specific areas has its own dialects, forms, and shoals that students, and lawyers, must learn and navigate.

Id. (internal citations omitted).

⁶⁷ See Pamela Lysaght, *Writing Across the Law School Curriculum in Practice: Considerations for Casebook Faculty*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 191, 195–96 (2006) (stating that “the time it takes to evaluate a writing assignment, which is considerably more than the typical essay exam, can act as a restraint for many casebook faculty with healthy scholarship agendas”). Professor Lysaght explains as follows:

Even if individual casebook faculty create highly nuanced examinations that require students to develop sophisticated analyses that ultimately advise the client on how to proceed in the given situation, it is unlikely the professor provides substantive feedback and suggestions for improvement—in analysis, writing, and organization—on each student's examination. Yet, meaningful feedback is important to the learning process.

Id. at 195.

non-legal writing faculty, it is uncertain to what extent the students' writing and practical skills will improve.⁶⁸ As one scholar explains, "[T]he very structure of casebooks, the typical examination style, and the distance from practice can make creating meaningful assignments more challenging."⁶⁹

In addition, the depth and breadth of material covered may be compromised if students are devoting inordinate amounts of time to re-drafting a complaint in civil procedure or a lease agreement in property. Compromising the analytical portion of legal education would be a mistake because "[t]o be the kind of writer you want to be, you must first be the kind of thinker you want to be."⁷⁰

Moreover, cognitive overload can result if students are required to draft litigation documents in addition to learning substantive law, briefing cases, and researching.⁷¹ Thus, although writing across the curriculum makes students write more, it does not necessarily make them better writers.

Rather than writing across the curriculum, doctrinal courses should flip the classroom.⁷² Flipping the classroom is an ideal method to facilitate applied skills learning and enhance critical thinking skills.⁷³

Some argue that online education can't teach creative problem-solving and critical-thinking skills. But to practice problem-solving, a student must first master certain concepts. By providing a cost-effective solution for this first step, we can focus precious classroom time on more interactive problem-solving activities that achieve deeper understanding—and foster creativity. In this format, which we call the flipped classroom, teachers have

⁶⁸ *Id.* at 196.

⁶⁹ *Id.* at 194.

⁷⁰ AYN RAND, *THE ART OF FICTION* 121 (Tore Boeckmann ed., 2000).

⁷¹ See generally Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 *CLINICAL L. REV.* 285, 301–02 (2010) ("While some professors in first-year programs do include such nuanced considerations as client voice and cross-cultural understanding, the packed 1L curriculum often does not allow for it, and it can cause a sort of "cognitive overload" if introduced before the second semester.").

⁷² See Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More "Same Old, Same Old,"* 45 *CONN. L. REV.* 1409, 1421 (2013).

⁷³ See *id.*

to interact with students, motivate them and challenge them.⁷⁴

Classroom instruction is more valuable if students apply legal rules to hypothetical or actual fact patterns in pending cases rather than discussing the facts and holdings of particular cases.

1. Law Students Should Learn and Write Across the Disciplines Not in or Across the Curriculum

The inclusion of thinking, writing, and doing into a first-year course is not inherently problematic, but the legal writing curriculum should be the centerpiece of that effort.

a. Interdisciplinary Coursework and Empirical Thinking are Essential to Producing Prepared, Competent Graduates

The legal profession is changing. Many graduates no longer begin their careers at large law firms, and those that do often intend to leave after less than five years.⁷⁵ Instead, law graduates are joining smaller firms and starting their own practices upon graduation.⁷⁶ Technology has also

⁷⁴ Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1301 (2012) (quoting Daphne Koller, *Death Knell for the Lecture: Technology as a Passport to Personalized Education*, N.Y. TIMES, Dec. 6, 2011 at D8.).

⁷⁵ See Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC'Y REV. 1, 29 (2007). The authors state as follows:

Respondents working in the largest private law firms and graduates of the most elite law schools have the highest odds of reporting that they intend to leave their employer within the next five years. For example, respondents working in megafirms (251 + lawyers) are more than twice as likely to be thinking of leaving their employer within five years as are respondents in small private firms (of two-20 lawyers).

Id.

⁷⁶ See Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision, and Evaluation*, 75 MO. L. REV. 831, 833 (2010). Professor Bernhard explains as follows:

Today's new lawyers likely need more assistance learning the business and the art of practicing law, but they are instead expected to do more on their own. The greater number of professionals working in solo or small firm practice without mentors or in large, impersonal bureaucracies with little guidance, coupled with the increasing complexity of legal work, has generated problems.

(continued)

changed the face of law practice with prospective clients increasingly using online legal services.⁷⁷ Given these facts, law graduates must assume more responsibility upon graduation and demonstrate their ability to attract clients, manage a business, and get favorable results. The graduate must be a self-reliant learner who can manage time effectively, think outside of the box, and make strategic choices based on legal, economic, and financial considerations.⁷⁸

Coursework focusing on essential non-legal, real-world skills can help students survive after graduation. Thus, students should take courses in economics, accounting, tax, formal logic, behavioral psychology, game theory, and negotiation. Law schools can either offer these courses as part of their curriculum or by partnering with other graduate schools. Ultimately, competent graduates must understand how *other* people think, be able to anticipate potential responses, and use logical ability and practical knowledge to negotiate effectively.

b. Legal Writing Courses Should Incorporate Substantive Law and Procedure into the Classroom

Legal writing instructors can integrate doctrinal subjects and experiential learning into the classroom by basing drafting assignments on a chronological or sequential model that mirrors actual practice.⁷⁹ This approach helps students understand law and writing in its broader context and not merely as an isolated set of tasks. Indeed, “the lawyer must have the ability to deal with facts, the capacity to discover and analyze both the

Id. at 834.

⁷⁷ See Stephanie L. Kimbro, *The Law Office of the Near Future*, 83 NYSBA ST. B.J. 28 (Sept. 2011) (discussing the increasing prevalence of online legal services).

⁷⁸ Feldman & Feinman, *supra* note 27, at 929. The authors explain as follows:

Lawyers must be competent at learning autonomously and learning with others. It is in this way that practitioners can constantly reeducate themselves. Autonomous learning, in turn, is furthered by and requires critical self-reflectiveness. It is critical self-reflectiveness that permits a lawyer to know of his or her need for further learning, it is critical self-reflectiveness that provides the means of judging one's own performance as a legal practitioner (rather than simply adopting prevailing standards), and it is through critical self-reflectiveness that one evaluates the operation of law in society more generally.

Id.

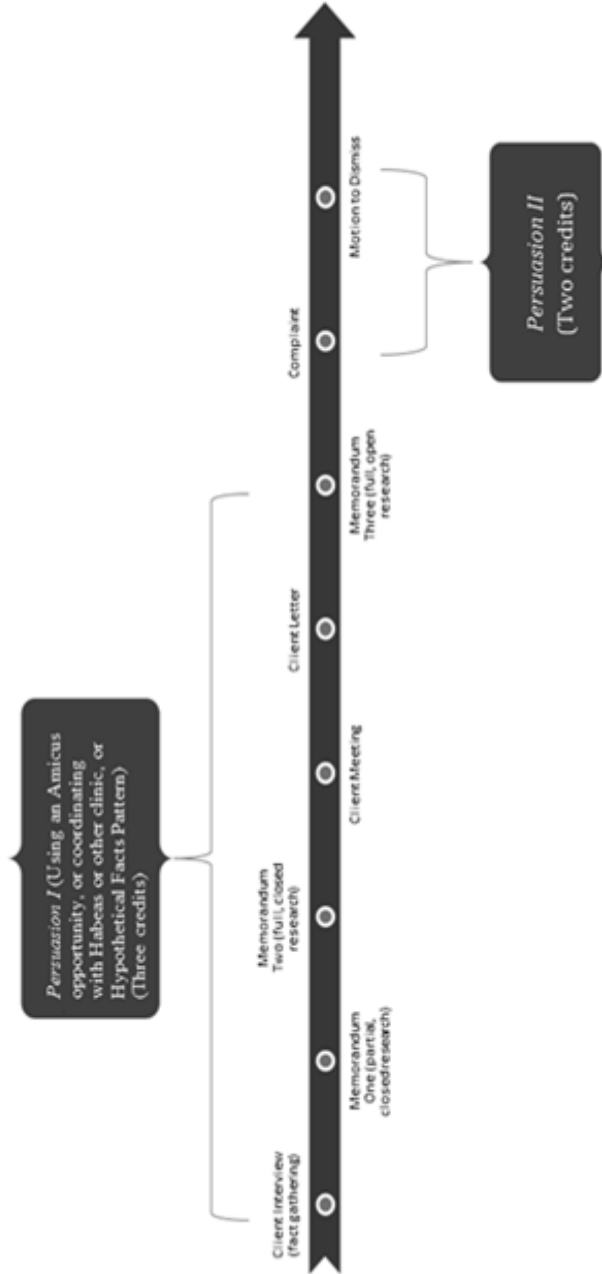
⁷⁹ See Lamparello & Boyd, *supra* note 55.

facts of particular matters presented and the contextual facts that shape the legal decisions to be made.”⁸⁰ When drafting a motion to dismiss, for example, students should understand the strategic considerations that support the decision to file this motion in lieu of an answer. Legal writing professors should also emphasize the importance of the standard of review, local court rules, and highlight the issues that arise with clients of limited resources or different cultural backgrounds.

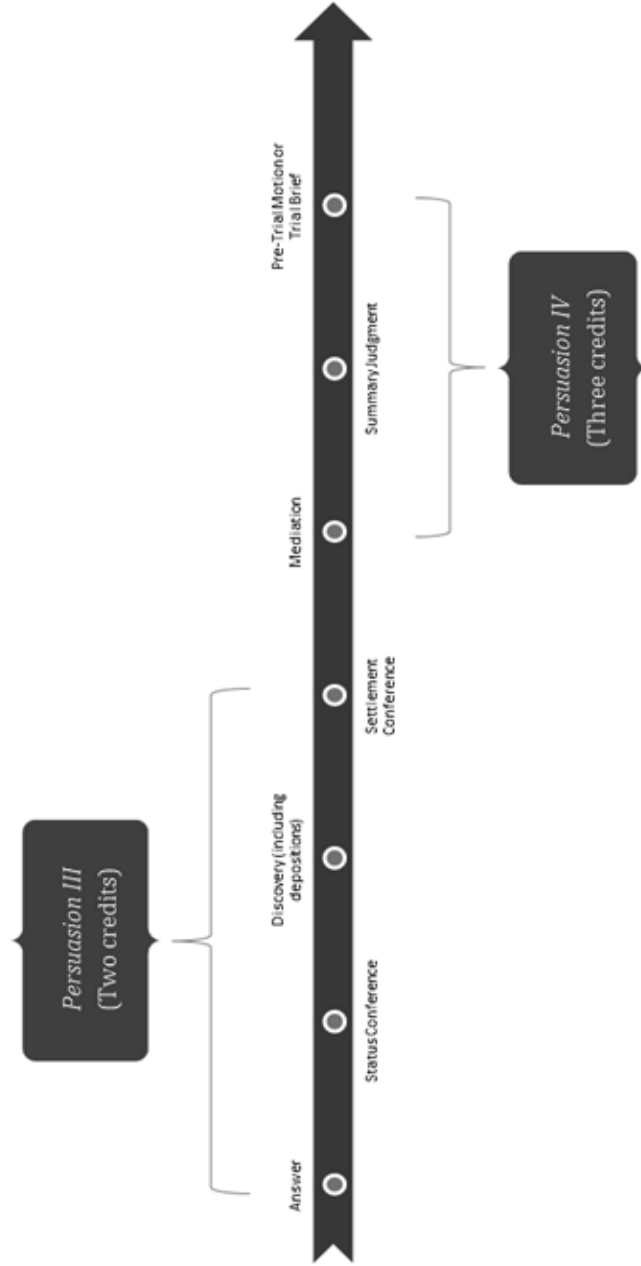
The diagrams on the following pages are one example of a sequential approach that combines experiential learning with legal writing.

⁸⁰ Feldman & Feinman, *supra* note 27, at 929.

Year One



Year Two



This model also addresses the primary criticism that a linear, or chronological approach, “introduce[s] students to new genres of legal writing rather than build[s] on prior instruction.”⁸¹

The instructor’s choice regarding the legal issues will have a substantial impact on the efficacy of the curriculum. A sequential model not only provides continuity and context, but facilitates the selection of legal issues that involve multiple procedural and substantive legal questions. Also, one well-developed hypothetical can serve as the foundation for successive writing courses. Instructors who prefer to incorporate different hypotheticals and legal issues into their courses can choose actual cases pending before the Supreme Court or dividing the circuit courts of appeal. These cases often present complex facts and unsettled law and can thus provide students with a rigorous writing experience.

2. *The Feasibility of a Six-Semester Curriculum*

a. *The Effects on Other Courses*

One challenge in designing and implementing this model is ensuring that it does not inordinately absorb the students’ time or burden students to the extent that it affects their performances in other courses. A six-semester curriculum strikes the proper balance by focusing on discreet—but not overly lengthy—assignments each semester, giving students sufficient time to develop their writing and advocacy skills, and emphasizing gradual—not unrealistic—progress.

Furthermore, drastic changes to the law school curriculum will not be required. Many law schools already offer a litany of advanced writing *and* substantive law courses that can be incorporated into the curriculum.⁸² Professors teaching upper-level elective courses, such as criminal procedure or evidence, can include a practical writing requirement either independently or in collaboration with legal writing professors. Advanced drafting courses that were once electives can become required courses. Thus, relatively minor changes can substantially enhance the real-world value of the law school curriculum because “the student thinks in order to

⁸¹ Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119, 132 (2004).

⁸² See *Legal Writing at Duke Law School*, DUKE UNIV. SCH. OF LAW <https://law.duke.edu/curriculum/legalwrit/> (last visited Oct. 20, 2014); *Upper-Level Requirements and Electives*, UNIV. OF RICHMOND SCH. OF LAW (2014), <http://law.richmond.edu/academics/curriculum/upper-level.html>.

write and writes in order to think, and this thinking-writing connection provides rich teaching opportunities that can be exploited by all law faculty.”⁸³ Finally, to the extent that new courses must be created, it is a worthy investment. Producing graduates that employers value increases the visibility, marketability, and relevance of law schools and serves members of the bench and bar.

b. Does it Cost Too Much?

No—for two reasons. In an upcoming article, Washington University Associate Dean and Professor of Law Robert Kuehn conducted a comprehensive study of the costs associated with increased clinical offerings and other experiential learning opportunities throughout the curriculum.⁸⁴ The results were startling. Costs would not rise.⁸⁵ In some cases, they would decrease.⁸⁶

This does not necessarily mean a three-year legal writing curriculum would not increase costs. Legal writing professors spend inordinate amounts of time grading and meeting with students. A three-year program would require additional instructors, textbooks, and other teaching material. Professor Kuehn’s article suggests, however, that the fears of a cost explosion may be exaggerated.⁸⁷ Regardless, costs should not be determinative. A three-year experiential legal writing program reflects an institutional commitment to law students, the bench and bar, and the community.

Law schools should also recognize that adjunct professors—most being lawyers in the community—can immeasurably enhance the legal writing curriculum. This is particularly true if they are teaching specialized subjects such as discovery, summary judgment, and transactional drafting. Adjuncts bring law practice into the classroom and are an invaluable resource to students. Adjuncts can alleviate the

⁸³ 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).

⁸⁴ See Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. U. L. REV. (forthcoming 2014) (manuscript at 1), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042. See also Lynda Ernde, *No Link Between Clinical Courses and Law School Expense, Research Shows*, CAL. BAR J. (March 2014), <http://www.calbarjournal.com/March2014/TopHeadlines/TH1.aspx>.

⁸⁵ See Kuehn, *supra* note 84, at 26–27, 38.

⁸⁶ See *id.* at 29, 47.

⁸⁷ See *id.* at 27.

overwhelming workload that tenure-track legal writing professors might otherwise face. Additionally, law students should have mentors both within and outside of legal academia. Attorney-mentors can guide students in their career choices, impart real-world advice, and emphasize the intangible skills that lawyers value.

There may be concern that adjuncts detract from a law school's emphasis on tenure-track faculty and negatively affect the U.S. News and World Report rankings. If a law school's ranking falls after incorporating a six-semester legal writing program because of adjunct faculty hires, then the rankings—like two or three semester legal writing programs—are disconnected from the real world.

c. Addressing the Tenure Standards for Legal Writing Faculty

A required legal writing course each semester will place additional burdens on legal writing faculty, particularly if they teach upper-level doctrinal courses. The sheer amount of grading involved, along with providing feedback, reviewing re-writes, and conducting individual conferences will tax even the most experienced legal writing instructor.

Thus, should law schools still require legal writing professors to publish one or more traditional 20,000 word law review articles per year, replete with 350 footnotes?⁸⁸ No. Legal writing professors may choose to do so, but it should not be required for tenure. They spend more time working with students inside and outside of the classroom than professors who teach criminal law and give one exam at the semester's conclusion. Neither professor is more valuable than the other. That, however, is precisely the point—faculty members across disciplines are equal partners in legal education but have different responsibilities. The ABA's tenure requirements for legal writing professors should therefore be altered to emphasize teaching excellence as the primary factor.

⁸⁸ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, R. 405-3 (2013–2014), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf. See also *Revised Standards For Tenure*, THE UNIV. OF TEX. SCH. OF LAW (approved May 2013), https://www.utexas.edu/law/faculty/tenure_standards.pdf.

IV. A PROPOSAL THAT INTEGRATES EXPERIENTIAL LEARNING AND LEGAL WRITING

The average law school devotes less than six credits, usually in two or three semesters, to legal writing.⁸⁹ That is not enough.

A. Six Semesters of Experiential Legal Writing

Below is our proposed standard to the ABA that would integrate experiential learning and legal writing into a required six-semester curriculum:

Law schools shall devote a minimum of eight to fifteen credits to practical legal writing instruction that requires students to take a minimum of one legal writing course in each semester of law school. The courses shall be taught by legal writing faculty who provide substantial instruction in drafting litigation and transaction documents commonly used in law practice. Law schools shall also use experiential learning techniques including, but not limited to, simulations that give students experience in client counseling and oral advocacy. Legal writing instructors shall provide formal assessments to students and strive to develop sound judgment, strategic decision-making, communication, problem-solving, and creative thinking skills.

The ABA's Standards currently require *two* semesters of legal writing.⁹⁰ One must occur during the first year, and the other in either the second or third year.⁹¹ After that, students are not required to draft a single document.⁹² Furthermore, many law schools allow students to satisfy the upper-level writing requirement by drafting a scholarly paper.⁹³

⁸⁹ See *supra* note 19 and accompanying text.

⁹⁰ See *supra* note 88 at R. 302(a)(3) (requiring "at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year").

⁹¹ See *id.*

⁹² See *id.* at R. 302.

⁹³ See Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Mastery in Written Legal Analysis and Advocacy*, 108 NW. U. L. REV. COLLOQUY 80, 98 (2013), http://colloquy.law.northwestern.edu/main/2007/01/editorial_note_.html ("After 1L year, the typical legal writing requirement combines a scholarly paper, a journal piece, or a moot court experience, but little or no mandatory practical writing instruction.").

This does not prepare students for the practice of law. It sets them, and their clients, up for failure.

Our proposal is not a one-size-fits-all solution; it avoids the mistake made by the Clinical Legal Association in its recent proposal to require every law school to impose a rigid fifteen-credit experiential learning requirement.⁹⁴ We recognize that schools like Harvard and Yale, which attract students of extraordinary ability, will not require the same amount of writing credits as those at lower-ranked schools. Although law schools will take different approaches, every school, including Harvard and Yale, should require students to write more. A range of eight to fifteen required legal writing credits provides flexibility but ensures comprehensiveness. Harvard might require eight credits with two credits in each of the first two semesters and one credit per semester thereafter emphasizing policy-driven or scholarly papers. Lower-ranked law schools might require fifteen credits, a greater focus on legal reasoning, and additional instruction in real world litigation and transactional document drafting. In fact, this trend is evidenced by the general direction of all ABA accredited law schools.⁹⁵ Law schools should keep moving in that direction. More opportunities to write—for legal writing professors—and to participate in real-world simulations will yield better lawyers *and* thinkers.

The substantial backlash by law professors rightfully resulted from the belief that such an inflexible requirement infringed upon academic freedom and disregarded law schools' diverse pedagogical missions.⁹⁶ After all, law schools should not be bullied into twenty-first century legal education. Some schools may develop different legal writing tracks or specialties—litigation or transactional law. But each law student, in each of the six law school semesters, would be required to take an approved

⁹⁴ See Pistone, *supra* note 4.

⁹⁵ See Adam Lamparello & Charles E. MacLean, *No Shoehorn Needed: How a Required, Three-Year, Persuasion-Based Legal Writing Program Easily Fits Within the Broader Law School Curriculum*, SOCIAL SCIENCE RESEARCH NETWORK. Mar. 1, 2014, at 1–3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403968 (including a graph that details the upward trend in required legal writing credits at lower-ranked law schools).

⁹⁶ See Letter from Robert C. Post, Dean and Sol & Lillian Goldman Professor of Law, Yale Law Sch., to Solomon Oliver, Jr., Chief Judge, Barry A. Currier, Managing Dir. of Accreditation of Legal Educ., and Council Members (Jan. 22, 2014) (on file with the Yale Law School), *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) (authored by several professors at Yale Law School, the letter argues that needs and resources of our schools and our students are too diverse for “a one-size-fits-all [proposal]”).

legal writing course to receive the type of instruction that produces effective legal writers and lawyers. The inflexibility may have caused the ABA to only approve six experiential learning credits.⁹⁷

Ultimately, these proposed changes eschew “pedagogical mediocrity,”⁹⁸ build a bridge to a more meaningful experience in clinics,⁹⁹ and produce a confident graduate able to practice law effectively in the real-world.¹⁰⁰

B. Why Do Law Schools Need Six Semesters of Required Experiential Legal Writing Courses?

Time, reflection, and continuity are essential elements of developing competent legal writers. United States Supreme Court Justice Antonin Scalia stated:

[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 later.*¹⁰¹

Furthermore, undergraduate institutions do not provide students with sufficient instruction in writing and analysis.¹⁰² College students are more

⁹⁷ See *supra* note 5 and accompanying text.

⁹⁸ Garner, *supra* note 1.

⁹⁹ See Kowalski, *supra* note 71, at 285 (“[C]linicians commonly experience the frustration that students seem to come to the clinic deficient in many legal writing skills.”).

¹⁰⁰ See Beazley, *supra* note 83, at 43.

¹⁰¹ *Scalia: Legal Writing Doesn't Exist*, ABA JOURNAL, (Aug. 9, 2008), http://www.abajournal.com/mobile/article/scalia_legal_writing_doesnt_exist (emphasis added) (quoting Justice Antonin Scalia, *Scalia Video Part 1 of 2*, YOUTUBE (Mar. 26, 2009), https://www.youtube.com/watch?v=8dHycZz_v40).

¹⁰² See Sara Rimer, *Study: Many Students Not Learning to Think Critically*, McCLATCHY DC (Jan. 18, 2011), <http://www.mcclatchydc.com/2011/01/18/106949/study-many-college-students-not.html> (“Many of the students graduated without knowing how to sift fact from opinion, make a clear written argument or objectively review conflicting reports of a situation or event.”).

likely to be found texting or tweeting than sitting at a computer drafting a research paper.¹⁰³ Thus, they begin law school with minimal experience in basic composition and no familiarity with using language as an analytical or persuasive tool.¹⁰⁴ To them, writing is like another language.¹⁰⁵

1. It Takes Time to Be an Excellent Legal Writer

Proficiency in legal writing is a complex and difficult process that involves two distinct steps. First, students must acquire basic and advanced writing techniques, including proper grammar, sentence structure, and word choice; avoiding repetition; and ensuring clarity, conciseness, and flow.

Students must then acquire legal writing skills. These skills include predictive and persuasive writing techniques, logical or syllogistic reasoning, argument style and structure, narrative storytelling, reconciling unfavorable facts and law, using persuasive legal authority, and proper citations. Students must also draft litigation and transactional documents, understand that writing techniques are document-specific, and learn the art of re-writing. To master these skills and integrate experiential learning exercises, students need time, continuity, and repetition.

Furthermore, learning how to draft persuasive legal arguments is the skill closest to law practice.¹⁰⁶ One scholar explains as follows:

[T]he principal problem with legal writing . . . is that we have not been taught how to create and construct arguments. It is not our writing that is undeveloped or unclear; it is our thinking. In order to develop “clearer” thinking, lawyers need to know something about the

¹⁰³ See *Twelve Data Points Detailing the Crisis of Poor Writing in America*, TEACH THOUGHT (Nov. 6, 2012), <http://www.teachthought.com/industry/12-data-points-detailing-the-crisis-of-poor-writing-in-america/>. See also *The Decline Of Student Writing and What Instructors Can Do About It*, ONLINE LEARNING INSIGHTS (Sept. 11, 2012), <http://onlinelearninginsights.wordpress.com/2012/09/11/the-decline-of-student-writing-and-what-instructors-can-do-about-it/>.

¹⁰⁴ See George Leef, *For \$100K, You Would At Least Think That College Grads Could Write*, FORBES (Dec. 11, 2013), <http://www.forbes.com/sites/georgeleef/2013/12/11/for-100k-you-would-at-least-think-that-college-grads-could-write/>.

¹⁰⁵ See *Twelve Data Points Detailing the Crisis of Poor Writing in America*, *supra* note 103.

¹⁰⁶ See Susan Hanley Kosse & David T. Butle Ritchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 80 (2003).

rhetorical tradition from which legal argument is derived. Law students, in particular, should be acquainted explicitly with the basics of classical rhetoric: the different modes of persuasion, how to invent and construct arguments, how to identify fallacies in argument . . . [L]aw professors “should be teaching the sequences of logical reasoning.”¹⁰⁷

Thus, “[n]othing could be more important for the development of crucial linguistic and ‘critical analysis’ skills than prolonged instruction in rhetorical reasoning and discourse.”¹⁰⁸ Professors Koss and Ritchie stated:

[T]he 57.3 percent of respondents [judges, practitioners, and legal writing professors] who did not think new graduates write well is not necessarily a reflection on students’ legal writing instruction in law school. It may just be that *recent graduates have not yet had time to develop their writing skills as professionals*. Another possibility is that legal writing instruction in law schools is adequate, but students have *insufficient opportunity in the second and third years to hone their writing skills*.¹⁰⁹

Indeed, if students stop writing, their skills atrophy.¹¹⁰ Some may forget basic skills or not even receive instruction in advanced writing techniques.¹¹¹ Those who performed well in their writing courses and are already strong writers do not have the opportunity to become outstanding writers.¹¹² These students are unable to refine the most fundamental skill for lawyers during their education.

¹⁰⁷ James Etienne Viator, *Legal Education’s Perfect Storm: Law Students’ Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 759 (2012) (quoting Kristen K., Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 489 (2003) and Anita Schnee, *Logical Reasoning “Obviously,”* 3 LEGAL WRITING: J. LEGAL WRITING INST. 105, 116 (1997)).

¹⁰⁸ *Id.*

¹⁰⁹ Koss & Butle Ritchie, *supra* note 106, at 86 (emphasis added).

¹¹⁰ See Kowalski, *supra* note 71, at 311 (citing Sarah O’Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301, 302 (2007)).

¹¹¹ *See id.*

¹¹² *See id.*

Legal writing instruction is analogous to marathon training. Clinic and the practice of law is the marathon. If a runner stops training after the eighth week of a sixteen-week training schedule,¹¹³ the runner's muscles will atrophy and their stamina will diminish. The runner will not finish the race. Similarly, if law students stop writing after the second or third semester, they will spend the next eighteen months of law school neither refining their skills nor drafting the documents they will encounter in practice. As a result, their writing skills will atrophy and they will graduate unprepared to enter the legal profession.¹¹⁴ Worse yet, if additional assignments are incorporated into an existing two or three-semester curriculum, legal writing may devolve into a survey course where students do not have sufficient opportunity to re-write and refine their skills.

Additionally, teaching legal writing primarily or exclusively in the first year hinders their development as writers because students are learning foundational legal knowledge, how to read and research case law, identify a holding, perform a legal analysis, reason by analogy, use IRAC, and accurately cite to authority hinders their development as writers. Asking law students to master basic and advanced writing techniques in predictive and persuasive contexts in these situations is akin to giving someone four weeks to train for a marathon. It is not realistic to expect success.

The process of becoming a great writer is evolutionary, not finite. Students *and* lawyers can always improve, no matter the level of proficiency. Why, then, would we stunt their growth as writers? Also, for those who do require upper-level writing courses, why are they satisfied by drafting a scholarly paper on the meaning of "consideration" in 18th Century parlance? This is not practical legal writing and *often, is not taught by legal writing professors*.¹¹⁵ It is, candidly, a wasted opportunity.

Adding upper-level writing courses is not an effective response unless one course is required for all students in each semester and these electives focus on real-world drafting. Requiring students to write scholarly papers does not teach them how to be legal writers. Allowing students to satisfy

¹¹³ See, e.g., *Marathon Intermediate 16 Week Program*, BOSTON ATHLETIC ASSOCIATION, <http://www.baa.org/programs/training-programs/marathon-training/intermediate-16-week-program.aspx> (last visited Oct. 6, 2014).

¹¹⁴ See Kowalski, *supra* note 71, at 311 ("Our students' atrophy in legal skills between first-year legal writing and upper-division courses like clinic usually has less to do with the quality of instruction or their ability to learn, and more to do with the failure of the curriculum to foster the transfer of learning from one program to the other.").

¹¹⁵ See *id.* at 309–10.

their upper-level writing requirement by writing a paper analyzing the origins of *dicta* in 17th Century Slovenia adds insult to injury.¹¹⁶ A persistent criticism of legal education is that “writing and research as taught in law school tends to focus on research papers and less on written advocacy.”¹¹⁷

Furthermore, students, particularly those needing additional writing instruction the most, will not enroll if the courses are electives.¹¹⁸ Perhaps those who did not excel in the first two or three required semesters of legal writing bristle at the thought of a poor grade or shudder at the thought of another re-write. The best writers, who received A’s in their core legal writing courses, might get lulled into a false sense of security believing that they have already reached the finish line.

2. *Re-writing and Repetition, Not Just Revision*

If students draft complaints or motions to dismiss without the opportunity to reflect on their drafts, incorporate feedback, re-write documents, and repeat those tasks in different contexts, they will not refine their writing skills.¹¹⁹ Indeed, great writers know the importance of re-writing and understand that “[i]f it sounds like writing, . . . rewrite it.”¹²⁰ An effective legal writer must also be a good editor at the macro and micro level and realize the first draft is only the first step. As a famous judge once said, “There are a few rare individuals who can get it right the first time. . . . I have to rely on my three indispensable rules of writing: (1) rewrite; (2) rewrite; and (3) rewrite.”¹²¹

Some law students, however, believe that their first draft is the final draft or that re-writing is nothing more than a spell check.¹²² They perform a spell-check and hand in a memorandum or brief expecting to receive a high grade only to look befuddled when the paper is returned

¹¹⁶ See Macfarlane & Manwaring, *supra* note 18, at 262.

¹¹⁷ *Id.*

¹¹⁸ See Viator, *supra* note 107, at 743.

¹¹⁹ See Montana, *supra* note 57, at 291 (explaining that “law students traditionally treat an assignment as completed as soon as they turn in their first draft for a grade. Rather than making substantive revisions during the rewrite phase, they concentrate on superficial edits to word choice, grammar, spelling, sentence structure, and citation.”).

¹²⁰ ELMORE LEONARD, ELMORE LEONARD’S 10 RULES OF WRITING 71 (William Morrow 2007).

¹²¹ Allen D. Black, *Judge Wisdom, the Great Teacher and Careful Writer*, 109 YALE L.J. 1267, 1271 (2000).

¹²² See Montana, *supra* note 57, at 291.

littered with red ink.¹²³ The confused student tries to decipher the professor's handwritten notes and loses confidence as each page is overrun with comments. That student did not realize that re-writing and revising are essential components of the writing process and involve different skills. Those skills require the student to think like a reader and review the text like an editor. Without the time or opportunities to perform this three-step process, law students are not developing their own writing processes and are not learning to be great legal writers.

3. *Persuasive Writing is One of the Most Difficult Skills in Law School—And Should Be Taught from Day One.*

In the real world, lawyers must learn how to make—and win—an argument. As we have discussed in earlier articles,¹²⁴ legal writing courses should begin with persuasive writing from the first day of law school. The sequential model we propose enables a persuasion-based pedagogy and allows for experiential learning to be incorporated into the first semester of law school.¹²⁵ Instructors can teach legal research and reasoning by involving students in an amicus brief¹²⁶ or by collaborating with a clinical professor. Alternatively, instructors can begin the course with a simulated client interview allowing students to gather facts and litigate a hypothetical lawsuit as it would unfold in the real world.¹²⁷

Furthermore, advanced persuasive legal writing courses teach important skills that are often neglected in first-year writing courses.¹²⁸ Thus, more required courses give “teachers and students the opportunity to

¹²³ See *id.* at 291–92. See also Susan McClellan, Constance Krontz, *Improving Legal Writing Courses: Perspectives from the Bar and Bench*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 201, 213 (2002) (“While the lack of experience with writing is a problem, perhaps the lack of experience with rewriting or redrafting is an even greater problem.”).

¹²⁴ See Charles E. MacLean & Adam Lamparello, *Amicus Briefs - Friends of Lawyering Skills Pedagogy*, 20 LAW TEACHER 13 (Spring 2014); Lamparello & MacLean, *supra* note 95; Megan E. Boyd & Adam Lamparello, *Legal Writing for the “Real World”: A Practical Guide to Success*, 46 J. MARSHALL L. REV. 487, 487–88 (2012); Adam Lamparello & Charles E. MacLean, *Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It*, 4 HOUSTON L. REV. OFF THE RECORD 95 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385744.

¹²⁵ See sources cited *supra* note 124.

¹²⁶ See *Amicus Briefs - Friends of Lawyering Skills Pedagogy*, *supra* note 124.

¹²⁷ See Lamparello & Boyd, *supra* note 55.

¹²⁸ See Smith, *supra* note 81, at 129.

work with various types of legal writing that were not covered in the first year and that may be important to the students' future practice as lawyers."¹²⁹ An integrative approach also "allows teachers to introduce students to a number of different genres of legal writing,"¹³⁰ and it facilitates a pedagogy that "integrate[s] the teaching of advanced writing skills with instruction on other lawyering skills such as client interviewing, client counseling, pretrial practice, trial practice, negotiation, and alternative dispute resolution."¹³¹

There is no reason to wait until the second semester to teach these skills. At most law schools, students spend their first semester drafting objective memorandums that analyze hypothetical legal issues.¹³² They do not start writing persuasively until the second semester, and often have only one or two semesters to learn this complex skill.¹³³ Some persuasive writing courses are worth only two credits,¹³⁴ and "some students, at least, are doubtless persuaded by these status issues to take their legal-writing studies less seriously than they otherwise might."¹³⁵ After all, some students might devalue the importance of writing in that context, particularly when faced with four-credit constitutional law and property courses in the same semester. This could possibly change if students knew the writing would continue for all six semesters.

Legal writing professors can spark their students' passion on the first day by involving them in an amicus or habeas project. The traditional skills—research, citation, and predictive writing—will still be taught, but students will know that their work will have an impact upon real people.¹³⁶ A legal writing curriculum that is only two or three semesters sends a

¹²⁹ *Id.* at 131.

¹³⁰ *Id.* at 134.

¹³¹ *Id.* at 130.

¹³² *Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It*, *supra* note 124.

¹³³ *Id.*

¹³⁴ Linda H. Edwards, *Legal Writing: A Doctrinal Course*, UNIV. NEVADA, LAS VEGAS, WILLIAM S. BOYD SCH. OF LAW 10 (2013), <http://scholars.law.unlv.edu/facpub/898>.

¹³⁵ Ian Gallacher, "When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals, 46 SUFFOLK U. L. REV. 451, 494–95 (2013).

¹³⁶ See Adam Lamparello & Charles MacLean, *Legal Writing—What's Next? Real-World, Persuasion Pedagogy from Day One*, 48 NEW ENG. L. REV. ON REMAND 85, 88 (2014) [hereinafter *Legal Writing-What's Next?*].

message to students that writing is not as important or as difficult as other lawyering skills. The opposite is true in the real world.

4. *Law Schools are not focusing enough on Transactional Drafting*

Many law students do not want to be litigators, and those who become litigators often perform transactional work at some point in their career.¹³⁷ Graduates that join smaller firms or open their own practice often practice in a number of different areas, including real estate, landlord–tenant law, and tax. These lawyers draft contracts for the purchase of real estate, wills, and leases. Graduates at larger firms may be required to draft stock purchase and merger agreements. One scholar explains as follows:

The point here is that, despite the survey results showing a significant interest in transactional drafting instruction—a collective interest actually greater than or equal to the collective interest in litigation—schools’ curricular choices show an unawareness of this preference. This unawareness is most starkly demonstrated in the first-year writing course, which is virtually devoid of any transactional writing instruction.¹³⁸

As our proposal suggests, law schools should require students to take at least two transactional courses, one of which focuses predominantly on drafting real-world documents.

5. *More Required Courses Produces Better Lawyers*

More required courses will provide *all* law students with practical skills training throughout the curriculum.¹³⁹ In our sample curriculum students will still have the opportunity to choose electives that relate to their areas of interest. Students should not, however, be able to choose their entire second and third-year curriculums. That may result in a practical-skills gap for students who avoid additional writing and

¹³⁷ Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 69 (2007).

¹³⁸ *Id.* at 72.

¹³⁹ See Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 1, 12 (1996) (stating that “[A]dvanced writing courses and required semesters will benefit students by giving them more practice under the direction of experts. It will benefit law schools when legal writing professors can help design three-year curricula that intentionally build writing expertise.”).

simulation-based courses or choose courses based on the likelihood of receiving a high grade. Furthermore, if law schools are committed to training graduates with core competencies, then essential courses include corporations, wills and estates, negotiation, accounting for lawyers, administrative law, transactional drafting, and clinic.

V. AN INTEGRATED THREE-YEAR REQUIREMENT THAT MERGES THE ANALYTICAL, SKILLS, AND EXPERIENTIAL LEARNING COMPONENTS

In an effort to attract students and maintain relevance, law schools devote substantial resources to increasing experiential learning opportunities, such as expanding the number and types of clinics, externships, and mentoring opportunities, and incorporating simulations throughout the curriculum.¹⁴⁰ Legal writing courses, however, have not enjoyed a similar expansion.¹⁴¹

Although many law schools expanded the number of writing courses in their upper-level curriculums, they do not require additional courses.¹⁴² At most law schools, students will graduate having drafted a legal memorandum, an appellate brief, and a scholarly paper.¹⁴³ Students might draft a second appellate brief as a member of a moot court team, draft a complaint in civil procedure, and draft a contract in torts. Students may also draft a brief and meet with clients in one of the law school's various clinics or represent a client in landlord tenant court. Are these experiences valuable? Of course. Are they preparing students for the practice of law? Without more legal writing instruction, the answer is no.

The continuing criticism of graduates' writing abilities and the lack of familiarity with many of the documents that lawyers draft in practice¹⁴⁴ is a testament to the need for more required legal writing courses. As one

¹⁴⁰ See Martin J. Katz, *Facilitating Better Law Teaching—Now*, 62 EMORY L.J. 823, 835 (2013) (describing expansions in clinics, externships, and simulations at the University of Denver Sturm College of Law).

¹⁴¹ *Legal Writing-What's Next?*, *supra* note 136, at 86.

¹⁴² Schulze, *supra* note 137, at 85.

¹⁴³ *Legal Writing-What's Next?*, *supra* note 136, at 87.

¹⁴⁴ See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0.

recent graduate laments, “The big problem for many people is that law school and the practice of law are so different.”¹⁴⁵

A. Experiential Legal Writing in Law School—a Sample Curriculum

Based on the realities of law practice, the expectations of graduates, and the need for law schools to connect more closely with the bench, bar, and community, the following three-year curriculum was designed to serve as a starting point for discussion about the transformative changes that can take place at laws schools across the country.

**FIRST-YEAR
FIRST-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
CONTRACTS (3)	PROBLEM SETS; DRAFT A CONTRACT (FOR THOSE WRITING ACROSS THE CURRICULUM)
CIVIL PROCEDURE (4)	PROBLEM SETS; DRAFT A COMPLAINT
TORTS (3)	
CRIMINAL LAW (3)	PROBLEM SETS; DRAFT A CRIMINAL STATUTE, GRAND JURY INDICTMENT, NEGOTIATE A PLEA BARGAIN ON BEHALF OF HYPOTHETICAL CLIENTS
LEGAL RESEARCH, ANALYSIS, AND WRITING (3)	RESEARCH FOR AN AMICUS OR HABEAS BRIEF (OR COLLABORATE WITH A CLINIC); CLIENT INTERVIEW (FACT GATHERING); OBJECTIVE LEGAL MEMORANDUMS; CLIENT LETTER, PRESENTATION TO PARTNER

Credits: 16

¹⁴⁵ *Id.* See also Sherry Karabin, *Law firms prepare their new associates*, CHI. LAW MAG. (Sept. 2012), <http://www.chicagolawyer magazine.com/Archives/2012/09/Working-With-Associates.aspx>.

**FIRST-YEAR
SECOND-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
PROPERTY (4)	PROBLEM SETS; DRAFT A LEASE OR COVENANT (FOR THOSE WRITING ACROSS THE CURRICULUM)
CONSTITUTIONAL LAW (4)	PROBLEM SETS; DRAFT A STATUTE THAT SURVIVES A CONSTITUTIONAL CHALLENGE
STATUTORY INTERPRETATION (3)	PROBLEM SETS; DRAFT A STATUTE THAT SURVIVES A CONSTITUTIONAL CHALLENGE
LEGAL WRITING (3)	DRAFT A COMPLAINT, MOTION TO DISMISS, SIMULATED ORAL ARGUMENT
ELECTIVE (2)	

Credits: 16

**SECOND-YEAR
FIRST-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
EVIDENCE (4) (REQUIRED)	PROBLEM SETS; DRAFT A MOTION IN LIMINE (FOR THOSE WRITING ACROSS THE CURRICULUM)
CORPORATIONS (4) (REQUIRED)	PROBLEM SETS; DRAFT PARTNERSHIP AGREEMENT
CRIMINAL PROCEDURE (3)	PROBLEM SETS
LEGAL WRITING (2)	DRAFT ANSWER, DISCOVERY, AND

	PARTICIPATE IN MEDIATION OR SETTLEMENT NEGOTIATIONS
PROFESSIONALISM (2)	
ELECTIVE (2) (INCLUDING MOOT COURT OR LAW REVIEW)	

Credits: 17

**SECOND-YEAR
SECOND-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
WILLS, TRUSTS, AND ESTATES (REQUIRED) (3)	PROBLEM SETS; DRAFT A WILL
ACCOUNTING FOR LAWYERS (REQUIRED) (2)	PROBLEM SETS
LEGAL WRITING (2)	DRAFTING AND ARGUE MOTION FOR SUMMARY JUDGMENT
CONFLICT OF LAWS (3)	PROBLEM
ELECTIVES (5) (INCLUDING MOOT COURT AND LAW REVIEW)	

Credits: 15

**THIRD-YEAR
FIRST-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
NEGOTIATION AND MEDIATION (2) (REQUIRED)	PROBLEM SETS; SIMULATED MEDIATION, SETTLEMENT DISCUSSION, OR ARBITRATION
LEGAL WRITING (2)	DRAFT TRIAL BRIEF AND MOTION IN LIMINE
CLINIC REQUIREMENT I (2)	

CLINIC REQUIREMENT II (2)	
TRIAL ADVOCACY OR TRANSACTIONAL DRAFTING (3)	VOIR DIRE, OPENING STATEMENT, WITNESS EXAMINATION, CLOSING ARGUMENT, DRAFT JURY INSTRUCTIONS; OR DRAFT MERGER AGREEMENT, STOCK PURCHASE, LEASE, CONTRACT FOR THE SALE OF REAL ESTATE
ELECTIVE (4) (INCLUDING MOOT COURT AND LAW REVIEW)	

CREDITS: 15

**THIRD-YEAR
SECOND-SEMESTER**

SUBSTANTIVE LAW	EXPERIENTIAL LEARNING
ADMINISTRATIVE LAW (4) (REQUIRED)	PROBLEM SETS
CLINIC REQUIREMENT III (2)	
CLINIC REQUIREMENT IV (2)	
LEGAL WRITING (2)	APPELLATE BRIEF AND ARGUMENT
ELECTIVES (2)	

Credits: 12

Total Credits: 91

(ABA Minimum—83)¹⁴⁶

¹⁴⁶ See ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, interpretation 304-4 (2007–2008), http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf.

The acquired skills in each course:

Semester One

COURSE	WRITING AND REASONING SKILLS	EXPERIENTIAL LEARNING
<i>PERSUASION I</i> : LEGAL RESEARCH, REASONING AND WRITING IN THE AMICUS OR SIMULATED LITIGATION CONTEXT	STRUCTURE OF STATE AND FEDERAL COURT SYSTEM	CLIENT INTERVIEW
	THE LOCAL COURT RULES	
	READING CASES; IDENTIFYING ISSUES, HOLDING, RULE OF LAW, REASONING	CLIENT LETTER
	LEGAL REASONING AND FORMS OF ARGUMENTATION	PRESENTATION TO PARTNER
	STARE DECISIS	BILLING THE CLIENT
	CASE SYNTHESIS	
	PRIMARY AND SECONDARY AUTHORITIES	
	IRAC/CRAC	
	DRAFTING THE QUESTION PRESENTED	
	CITATION	
	WRITING CLEARLY AND CONCISELY	
	AVOIDING LATIN, LEGALESE	
	SENTENCE, PARAGRAPH LENGTH, AND WORD CHOICE	
	AVOIDING REPETITION	

	EFFECTIVELY USING HEADINGS AND SUBHEADINGS	
	WRITING, RE-WRITING, AND REVISING	
	EDITING FOR SPELLING AND GRAMMAR	
	DEFINING TERMS	
	PRONOUN USE	
	EXCESSIVE USE OF ADJECTIVES AND ADVERBS	
	PASSIVE VERSUS ACTIVE VOICE	
	APPROPRIATE USE OF FOOTNOTES	

Semester Two

COURSE	WRITING AND REASONING SKILLS	EXPERIENTIAL LEARNING
<i>PERSUASION II: THE COMPLAINT AND MOTION TO DISMISS</i>	PERSUASIVE WRITING TECHNIQUES	LITIGATION STRATEGY SESSIONS
	CHOOSING A THEME	ORAL ARGUMENT
	ALTERNATIVE ARGUMENTS	SETTLEMENT CONFERENCE
	RESPECTING YOUR ADVERSARY—AND THE COURT	
	DRAFTING A CONCISE AND PLAN STATEMENT THAT SURVIVES A MOTION TO DISMISS;	

	ALLEGING JURISDICTION AND VENUE; ENSURING THAT YOU HAVE PROPERLY RESEARCHED THE ISSUE; ASSERTING CAUSES OF ACTION; HEIGHTENED PLEADING STANDARDS	
	WRITING FOR THE AUDIENCE—AND THE STANDARD OF REVIEW	
	DRAFTING A PERSUASIVE STATEMENT OF THE ISSUES	
	PERSUADING FROM THE BEGINNING: DRAFTING A POWERFUL INTRODUCTION	
	USING EVERY OPPORTUNITY TO PERSUADE—THE TABLE OF CONTENTS, AUTHORITIES, AND PROCEDURAL HISTORY	
	DRAFTING THE STATEMENT OF FACTS: NARRATIVE STORYTELLING; USING HEADINGS AND SUBHEADINGS TO GUIDE THE READER; PRESENTING THE FACTS ACCURATELY;	

	MAKING STRATEGIC CONCESSIONS	
	PRESENTING THE LEGAL ARGUMENT— USING THE MOST FAVORABLE AUTHORITY.	
	RECONCILING UNFAVORABLE FACTS AND LEGAL AUTHORITY	
	WRITING THE ANALYSIS SECTION	
	ADDRESSING COUNTERARGUMENTS	
	WHEN—AND HOW— TO DRAFT A REPLY	

Semester Three

COURSES	WRITING AND REASONING SKILLS	EXPERIENTIAL LEARNING
<i>PERSUASION III: THE ANSWER, DISCOVERY, AND THE MOTION FOR SUMMARY JUDGMENT</i>	PERSUASIVE WRITING TECHNIQUES (CONTINUED)	MEDIATION
	PERSUASIVE WRITING TECHNIQUES CONTINUED	ORAL ARGUMENT
	RESPONDING TO THE ALLEGATIONS; PLEADING COUNTERCLAIMS AND AFFIRMATIVE DEFENSES	CLIENT CONSULTATION
	DRAFTING INTERROGATORIES AND DOCUMENT REQUESTS THAT AVOID OBJECTIONS	

	AND PROBE RELEVANT INFORMATION; KNOWING THE LAW GOVERNING CONFIDENTIALITY AND PRIVILEGE; KNOWING THE FEDERAL, STATE, AND LOCAL COURT RULES	
	RESPONDING TO THE ADVERSARY'S DISCOVERY— AVOIDING OBJECTIONS WITHOUT REVEALING TOO MUCH	
	WHEN TO FILE A MOTION TO COMPEL	
	SUMMARY JUDGMENT—WHEN TO FILE; DRAFTING ARGUMENTS BASED ON THE STANDARD OF REVIEW—IS THERE REALLY NO UNDISPUTED ISSUE OF FACT?	
	AVOIDING OVERLY BROAD ARGUMENTS	
	SUPPORTING EACH FACTUAL STATEMENT WITH CITATIONS TO THE RECORD	

Semester Four

COURSES

WRITING AND

EXPERIENTIAL

	REASONING SKILLS	LEARNING
<i>PERSUASION IV: THE MOTION IN LIMINE AND TRIAL BRIEF</i>	PERSUASIVE WRITING TECHNIQUES (CONTINUED)	ORAL ARGUMENT
	THE PURPOSE OF AND REASONS TO FILE A MOTION IN LIMINE	JURY SELECTION AND VOIR DIRE
	INCLUDING ONLY THOSE FACTS AND LAW THAT ARE RELEVANT TO THE NARROW ISSUE UPON WHICH YOU ARE MOVING WEIGHING PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT	MAKING A PERSUASIVE OPENING STATEMENT
	WEIGHING PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT	DIRECT AND CROSS EXAMINATION
	PRESERVING OBJECTIONS	CLOSING ARGUMENTS
	THE TRIAL BRIEF—PRESENTING THE EVIDENCE ACCURATELY AND PERSUASIVELY	

Semester Five

COURSES	WRITING AND REASONING SKILLS	EXPERIENTIAL LEARNING
<i>PERSUASION V: THE APPELLATE BRIEF</i>	DRAFTING A STRONG QUESTION PRESENTED;	CLIENT CONSULTATION

	THE FACTS ARE EVERYTHING: TELLING A COMPELLING NARRATIVE IN THE STATEMENT OF FACTS	ORAL ARGUMENT
	HAVING A POWERFUL INTRODUCTION THAT IS CONSISTENT WITH THE LEGAL ARGUMENT HEADINGS APPEALING ON NARROW—AND WINNABLE— GROUNDS	
	KNOWING AND APPLYING THE STANDARD OF REVIEW EFFECTIVELY	
	APPEALING TO BROADER POLICY ISSUES	
	BEING HONEST WITH THE APPELLATE COURT, PARTICULARLY IF THE ISSUE WAS NOT PRESERVED ON APPEAL	

Semester Six

COURSES	WRITING AND REASONING SKILLS	EXPERIENTIAL LEARNING
<i>PERSUASION VI: RE-WRITING</i>	IDENTIFYING STRUCTURAL AND STYLISTIC PROBLEMS IN YOUR DOCUMENT	MEETING WITH PARTNER; RECEIVING AN IMPLEMENTING FEEDBACK

	PERFORMING A MACRO/LINE EDIT	
	THE MICRO, OR COPY EDIT	

VI. A FEW ADDITIONAL CONSIDERATIONS FOR THE LEGAL ACADEMY

As law schools educate more lawyers and the job market shrinks, law schools must confront realities that transcend the curriculum by choosing quality over quantity in legal education.¹⁴⁷

A. *Grade Inflation Is a Bad and an Unethical Practice*

Grade inflation occurs at law schools, just as it does at other institutions of higher learning.¹⁴⁸ Inflating grades, however, is unfair to law students and inherently unethical.¹⁴⁹ Moreover, grading curves do not necessarily guard against undeservedly high (or low) grades.¹⁵⁰ Basing grades on student competition, however, is far less problematic than giving students grades that are not reflective of their performance or ability.

Grade inflation also gives students false hope.¹⁵¹ In the real world, they will not be graded on a curve or given undeserved accolades. Assessments are based on the quality of a lawyer's work, the efficiency within which a lawyer completes assignments, and the lawyer's ability to work under pressure.¹⁵² Law school assessments should hold students to the same standard because they deserve a candid and real-world assessment of their abilities. Similarly, those who do not demonstrate a minimal level of competence in their courses should not be allowed to pass

¹⁴⁷ *Legal Writing-What's Next?*, *supra* note 136, at 88.

¹⁴⁸ Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253, 316 (2012).

¹⁴⁹ *See id.* at 317–19 (discussing hypothetical examples to express the importance of awarding grades based on “reasons relating to merit, such as aptitude or work ethic”).

¹⁵⁰ *See* Leslie M. Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading is More Consistent with Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 123, 154 (2011) (“Criteria-referenced grading can . . . more effectively address the concern of grade inflation and rigor.”).

¹⁵¹ P-G Matusak, *Texas Bill to Fight Grade Inflation Now in House*, WATCHDOG WIRE (Mar. 25, 2013), <http://watchdogwire.com/texas/2013/03/25/texas-bill-to-fight-grade-inflation-now-in-house/>.

¹⁵² *See* Bernhard, *supra* note 76, at 831–51 (discussing the incorporation of standards-based training in clinical courses).

with marginal grades and steadily incur more student loan debt. The honest and ethical practice for students, the profession, and the legal academy is to ensure that every graduate is sufficiently competent to practice law and has an opportunity to secure stable employment.

B. Law School Must Be More Rigorous, Particularly at Lower-Ranked Law Schools

The Langdell Model (or Case Method) is a vital component of legal education. Likewise, the LSAT—a standardized test that measures analytical reasoning ability—is a useful, albeit imperfect, method of assessing analytical and logical reasoning skills. No one enjoys reading dull cases. Innovative textbooks that reduce case length and include more problems more effectively engage the reader. However, law students must develop their analytical skills under the structure of legal opinions and think critically about complex issues.

The American Bar Association's recent decision to allow up to 10% of applicants to be admitted without taking the LSAT sets a bad precedent.¹⁵³ At a minimum, the LSAT is valuable at the extremes—for those who score a 175 as opposed to a 135—and fairly accurately predicts first-year performance.¹⁵⁴ If the ABA chose to dispense with the LSAT, it should replace it with another standardized test that measures critical thinking skills. With grade inflation occurring at many undergraduate institutions,¹⁵⁵ law schools need a credible standard by which to assess the quality of applicants. The ABA's decision makes this more difficult.

The problem with this approach is that marginally-qualified applicants—LSAT under 140 and G.P.A. under 2.25—will incur substantial debt by attending law school, may have difficulty excelling in coursework, and may not have reasonable employment prospects upon graduation. Thus, it is problematic and may be unethical to accept applicants that, absent information explaining any red flags, are unlikely to

¹⁵³ See Paul Caron, *ABA: Law Schools Can Admit 10% of Students Without LSAT, Must Do Annual Audit of Placement Data, Can't Give Academic Credit for Paid Externships*, TAXPROFBLOG (June 10, 2014), http://taxprof.typepad.com/taxprof_blog/2014/06/aba-allows-law-schools-.html.

¹⁵⁴ See William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 986 (2004).

¹⁵⁵ Sita Slavov, *How to Fix College Grade Inflation*, U.S. NEWS & WORLD REPORT, (Dec. 26, 2013, 11:00 AM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/12/26/why-college-grade-inflation-is-a-real-problem-and-how-to-fix-it>.

succeed in law school or pass the bar exam.¹⁵⁶ Although applicants are more than an index, numbers do reveal something—particularly at the extremes.

Stated simply, law schools must maintain rigor throughout the curriculum, particularly for marginally qualified applicants, and provide students with the skills to compete for jobs. One scholar stated:

Unlike the traditional law school, in which student performance is widely distributed and mediocrity is accepted as inevitable, the new law school is premised on the conviction that nearly all students can perform at a high level if provided with the proper instructional environment. Given the law schools' informal but important position as gatekeeper for the legal profession, no lower standard is tolerable.¹⁵⁷

A six-semester experiential legal writing program is one way to ensure rigor and relevance.¹⁵⁸

C. *Most Law Students Want Security Before They Serve the Public Interest*

The American Bar Association and many law schools placed a renewed emphasis on public interest law and on meeting unmet legal needs throughout the country, particularly for individuals who do not have the resources or access to legal representation.¹⁵⁹ Public interest work is a noble calling and an invaluable way to impart upon students the value of serving the community and giving a voice to underrepresented populations.

¹⁵⁶ See Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PROF. 67, 84 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914224 (showing the relationship between LSAT scores and bar passage rates).

¹⁵⁷ Feldman & Feinman, *supra* note 27, at 930.

¹⁵⁸ See generally Benjamin H. Barton, *Economists on DeRegulation of the American Legal Profession: Praise and Critique*, 2012 MICH. ST. L. REV. 493 (2012) (discussing opposing views on the degradation of law schools).

¹⁵⁹ See Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 368 (2013) (challenging "legal educators to think more broadly about our possible roles in simultaneously expanding opportunities for our graduates and improving access to justice for people who are currently underserved").

Law schools must, however, be realistic. The average law school debt is \$100,000 and is non-dischargeable in bankruptcy.¹⁶⁰ Law students, particularly those who have spouses and children, view their degree as a means to provide long-term financial security.¹⁶¹ Public interest law's notoriously low salaries will do the opposite and may deter even the most passionate students from pursuing this career path.¹⁶²

VII. CONCLUSION

For the first time in the legal academy's history, legal writing professors have an opportunity to fundamentally change the face of legal education. They have to chance to earn the respect that is long overdue and develop a curriculum that benefits law students, the profession, and the clients who depend on excellent and ethical legal representation.

The Clinical Legal Association proposed a fifteen-credit mandatory experiential learning requirement to the ABA.¹⁶³ Only six were approved.¹⁶⁴ The time has arrived for the Legal Writing Institute to propose its own changes to legal education: a six-semester, three-year experiential legal writing curriculum that trains students in the craft of writing and the art of advocacy. We hope this article is a first step in that direction.

¹⁶⁰ See Brian Z. Tamanaha, *The Mismatched Economics of Legal Education*, 85 N.Y. St. B.A. J. 14, 14 (2013).

¹⁶¹ Jennifer Jolly-Ryan, *Bridging the Law School Learning Gap Through Universal Design*, 28 TOURO L. REV. 1393, 1405 (2012).

¹⁶² Jill Lynch Cruz, Melinda S. Molina, & Jenny Rivera, *Hispanic National Bar Association Commission on the Status of Latinas in the Legal Profession: Study on Latina Attorneys in the Public Interest Sector La Voz De La Abogada Latina: Challenges and Rewards in Serving the Public Interest*, 14 CUNY L. REV. 147, 159 (2010) ("While much still remains to be learned about public interest attorneys, there appears to be one well-documented and widely-shared characteristic within the public interest bar. Public interest attorneys are paid markedly low salaries, and over the past few years their salaries have not kept comparable pace with salary increases in the private sector.").

¹⁶³ *Clinical Legal Education Association (CLEA) Comment on Draft Standard 303(a) (3) & Proposal for Amendment to Existing Standard 302(a) (4) to Require 15 Credits in Experiential Courses*, CLINICAL LEGAL EDUC. ASS'N, (July 1, 2013), <http://www.cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf>.

¹⁶⁴ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 88, at 16.

