

# TOWARD A PEDAGOGY FOR TEACHING LEGAL WRITING IN LAW SCHOOL CLINICS

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## ABSTRACT

One of the major legal skills students use in almost every law school clinic is advanced legal writing. Clinicians spend many hours every week triaging student writing and coaching their students to produce practice-worthy documents. Yet advanced legal writing is not routinely addressed in clinic seminars and there is no clear methodology for teaching advanced legal writing through clinical supervision. This Article is the first to propose a comprehensive pedagogy for teaching and supervising legal writing in clinic.

Moreover, clinicians commonly experience the frustration that students seem to come to the clinic deficient in many legal writing skills. This Article identifies one of the causes as the “transfer of learning” phenomenon, in which the mind does not recognize applications for previous learning in new situations due to the change in context. One major premise of this transfer theory is that students need to be taught how to connect their clinical legal writing experiences to their previous legal writing instruction. Accordingly, this Article is also the first not only to introduce “transfer-friendly” teaching methods in the proposed pedagogy,

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<sup>1</sup> Associate Professor of Law, Washburn University School of Law; J.D., Duke University School of Law, 1995. I am particular debt to all of the clinicians who took the time to respond to the Clinical Legal Writing Survey from 2008 to 2010. I am also grateful for encouragement from Professor Ariana Levinson, Chair of the Legal Writing Institute Committee on Cooperation Among Clinical/Externship and Legal Writing Faculty, as well as for very thorough and thoughtful research assistance from Kimberly Lynch (J.D., Washburn University School of Law, 2009). Last but not least, I could not have undertaken this or my other work without the first opportunities I was given to study and practice both clinical and legal writing teaching methods with my past and present colleagues in the clinical, legal writing, and Indian legal programs at the Sandra Day O'Connor College of Law at Arizona State University.

but is also the first to detail a comprehensive, step-by-step model for collaboration between the clinic and legal writing programs.

By discussing and practicing the methods described here, clinical programs can craft approaches that work for the unique needs of their clinics, students, and individual teaching philosophies, resulting in an educational experience that leaves students better-prepared for clinical and professional law practice.

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## I. INTRODUCTION

*"But I don't want to go among mad people," Alice remarked.  
"Oh, you can't help that," said the Cat: "we're all mad here. I'm  
mad. You're mad."  
"How do you know I'm mad?" said Alice.  
"You must be," said the Cat, "or you wouldn't have come here."  
—Lewis Carroll, Alice's Adventures in Wonderland*

It is sometimes said that most lawyers spend more time engaged in legal writing than in almost any other lawyering skill. Because law clinics are designed to train their students in the realities of law practice, it should be no surprise that students and their supervising attorneys spend a great deal of time planning to write, writing, talking about writing, and then writing some more. What is surprising, however, is how few course materials and teaching methods have been developed to teach advanced legal writing in law school clinics. Clinicians excel at turning all sorts of unpredictable, disparate events that occur during the life of a case into teachable moments. Yet they are also pressed for time, and often confront the problem that many of their students need remedial instruction in analysis, research, and writing. A more methodological, yet flexible approach to supervising clinical legal writing can be of great benefit to the entire learning community.

At the same time, some barriers do exist, in the sense that legal writing methods are often perceived as being very formalistic, and clinics are characterized by their dynamism.<sup>2</sup> Thus for busy clinicians, descending down the rabbit hole of legal writing instruction may feel like going among mad people. But it needn't be so. A growing body of literature has begun to discuss how legal writing and clinical educators can collaborate to share teaching methods and support each other's professional status.<sup>3</sup> So

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<sup>2</sup> See generally Sarah O'Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301 (2007) (comparing legal writing and clinical pedagogies).

<sup>3</sup> The Journal of the Association of Legal Writing Directors recently devoted an entire volume to this topic. See generally Tracy Bach, *Cooperation, Not Collision: A Response to When Worlds Collide*, 4 J. ASS'N LEGAL WRITING DIRECTORS 62 (2007), Darby Dickerson, *Building Bridges: A Call for Greater Collaboration Between Legal Writing and Clinical Professors*, 4 J. ASS'N LEGAL WRITING DIRECTORS 45 (2007), Phyllis Goldfarb, *So Near and Yet So Far: Dreams of Collaboration Between Clinical and Legal Writing Programs*, 4

far, these authorities have covered much ground in discussing the incentives and barriers to collaboration,<sup>4</sup> how to implement clinical methods in legal writing courses,<sup>5</sup> and how to implement legal writing methods in specialized legal writing clinics.<sup>6</sup> In addition, the Legal Writing Institute's Committee on Cooperation Among Clinical/Externship and Legal Writing Faculty<sup>7</sup> has begun to explore how clinicians can benefit from legal writing pedagogy, and has even begun to establish a database of resources, including annual surveys of legal writing faculty regarding their

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J. ASS'N LEGAL WRITING DIRECTORS 35 (2007), Philip N. Meyer, *When Worlds Collide: Exploring Intersections Between Legal Writing and Clinical Pedagogy, Scholarship, and Practice*, 4 J. ASS'N LEGAL WRITING DIRECTORS 1 (2007), Michael A. Millemann, *Using Actual Legal Work to Teach Legal Research and Writing*, 4 J. ASS'N LEGAL WRITING DIRECTORS 9 (2007), Kate O'Neill, *But Who Will Teach Legal Reasoning and Synthesis?*, 4 J. ASS'N LEGAL WRITING DIRECTORS 21 (2007), Sarah E. Ricks & Susan C. Wawrose, *Comment: Survey of Cooperation Among Clinical, Pro Bono, Externship, and Legal Writing Faculty*, 4 J. ASS'N LEGAL WRITING DIRECTORS 56 (2007).

<sup>4</sup> See generally Schrup, *supra* note 2 (explaining the different pedagogical bases and circumstances of clinic and legal writing programs and how those differences must be understood in order to overcome the "clinical divide").

<sup>5</sup> See generally e.g., Millemann, *supra* note 3; Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441 (2006) (recounting the authors' experiences in building an experimental third-semester legal writing course at the University of Maryland School of Law based on indigent defense work for a client represented by outside counsel, and proposing addition models for such collaborations), Steven Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 207 (2007) (proposing that traditional first-year legal writing courses should incorporate additional lawyering skills in order to provide a better foundation for upper-division coursework). See also generally Margaret M. Russell, *Beginner's Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLINICAL L. REV. 135 (1994) (arguing to include more clinical approaches to teaching across the first-year core curriculum).

<sup>6</sup> See generally Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653 (1993) (describing the author's experiences in creating a writing-focused clinic at Georgetown University Law Center, and also offering general advice on how to adapt legal writing teaching methods in such a clinic), Cheri Wyron Levin, *The Doctor is in: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157 (2008) (describing the author's approach to teaching and supervising writing in the Advanced Clinical Writing Program at the University of Baltimore School of Law).

<sup>7</sup> See Legal Writing Institute, *Committees & Reports*, [http://www.lwionline.org/committees\\_and\\_reports.html#cooperation](http://www.lwionline.org/committees_and_reports.html#cooperation) (last accessed March 4, 2010).

collaborations with other programs and samples of student work critiqued by both clinicians and legal writing faculty.<sup>8</sup>

Despite these advances, scant resources address in any detail how the explosion of educational methods and scholarship in legal writing can be not just borrowed, but actually transformed and adapted for use in the vast majority of the more traditional, live-client clinics focused on transactional or litigation practice. Existing resources also do not address how clinicians perceive the problem of legal writing from their side of the “divide.”<sup>9</sup>

Clinicians do teach and supervise legal writing and often do it quite well, but also tend to report concerns that they are not always teaching writing efficiently, that better tools might save them time, that it is often difficult to communicate with students about abstract principles of written legal analysis and structure, that students often seem to arrive in clinic unable to demonstrate proficiency in many core legal methods, and that they would like to learn how to supervise student writing with a more conscious, planned, and time-tested approach.

Accordingly, this Article begins to address the need for models and methods that can be used in the more traditional, live-client clinics that are not specifically designed to focus on writing, but instead contain a great deal of writing as a natural byproduct of the transactional or litigation process. It also endeavors to draw upon the existing theory and practice in legal writing programs, but also to discuss how those approaches can be tailored for a much more fast-paced, unpredictable environment with a great variety in cases and writing assignments. Finally, the plan also includes a collaboration model in which clinical and legal writing faculty members at unique institutions can consider working together to trade and train in each other’s methods. At the core of most of these proposed teaching methods is the idea that rather than teaching writing skills anew, clinical and legal writing programs can collaborate to foster the transfer of first-year, novice-level skills into the clinic for further growth and development.

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<sup>8</sup> See Legal Writing Institute, *Student Sample Edited by Clinical and Legal Writing Professors*, <http://www.lwionline.org/uploads/FileUpload/FirstPersonNarrativeredacted.pdf>

<sup>9</sup> The idea of the clinical/legal writing “divide” comes from Professor Schrup’s article. See generally Schrup, *supra* note 2.

## II. THE TRANSFER OF LEARNING PROBLEM

### A. A Case of Collective Amnesia?

A perplexing phenomenon tends to occur each semester when a new group of students enters the clinic. Even those with top grades in their previous courses seem to lack even novice-level proficiency in research, writing, and analysis.<sup>10</sup> For example, even when the entire first-year class learns how to write a detailed client advice letter in legal writing, just one or two short semesters later, new clinic students will often turn in a draft letter that contains no date or “re:” line, misspells the client’s name, and contains only one or two short paragraphs with little analysis,<sup>11</sup> and an inappropriate assessment of the recipient’s legal sophistication or emotional state.<sup>12</sup> Similarly, a clinic professor might frequently receive first drafts of motion memoranda that have no questions presented or brief answer or are missing the facts, or which contain analysis that misses major components, such as proving which rule applies in the jurisdiction or supporting the application of law to facts through analogy to authority. Even more often, students who were coached in their first year to rewrite a project to include nuances like narrative reasoning will tend to revert to more formulaic, perfunctory analysis in their early projects for the clinic, seemingly forgetting their professors’ exhortations to argue

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<sup>10</sup> Cf. Laurel Currie Oates, *I Know That I Taught Them How to Do That*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 1, 5 (2001) (identifying a similar problem of skills attrition resulting from students’ failure to transfer skills within legal writing courses).

<sup>11</sup> These observations are based on my personal experiences in the Indian Legal Clinic at Sandra Day O’Connor School of Law at Arizona State University, and comports with what my clinician colleagues at Washburn Law Clinic have observed. Furthermore, in the Clinical Legal Writing Survey, over half of respondents observed that their students’ letters tended to misapprehend the audience and appropriate tone. *Infra*, Appendix C, Question 11. This transfer of learning problem appears to be a pervasive and even ordinary phenomenon. I base that conclusion on my research into transfer of learning, and on my personal discussions with personal colleagues at Arizona State and Washburn; other clinicians at various conferences, including the 2008 AALS Clinical Conference in Tucson and the 2009 Midwest Regional Clinical Conference in Bloomington; and the results of the Clinical Legal Writing survey I conducted from 2008 to 2010 and which is summarized and reported later in this article.

<sup>12</sup> *Id.* See also *infra* at section IV(A) and Appendix C (survey summary and results).

through the theory of the case. To educators and employers, this problem may seem a little like some kind of collective amnesia.

In my former incarnation as a clinician, my colleagues and I routinely experienced all of these things, and I am now embarrassed to admit that my first, impulsive thought was, “why aren’t they learning this material in first-year legal writing?” After transitioning into teaching legal writing at a different law school, I was intrigued to observe that the “what have they been teaching them?” problem is not limited to clinic. In legal writing, when our students struggle to organize material in discrete paragraphs, and to keep legal principles logically separate, or even sometimes to use proper grammar, we often wonder, “what have they been teaching these people from Kindergarten through college?”<sup>13</sup>

Not only do students often overlook applications for knowledge obtained in previous situations, they also sometimes appear to regress when asked to change contexts.<sup>14</sup> For example, each spring semester when legal writing professors shift from writing objective office memoranda to a persuasive appellate brief, we see students who excelled at skills like formal analytical structure or citation during the fall term suddenly lose the ability to produce work at their previous performance levels in the new assignment. When we consult in our one-on-one, post-grading conferences, these diligent students often express surprise and disbelief that they turned in briefs for their midterm examination that contained these basic errors, as well as mistakes in even more fundamental skills learned long ago, such as sentence structure or

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<sup>13</sup> These observations are again based on personal observations and discussions with colleagues in the field.

<sup>14</sup> See Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 1, 6 (“To be sure, most developmentalists build into their schemes a period when children/students may seem to show some decline in their cognitive skills as a result of conflicts between what they have assimilated and what they are experiencing, but that regression is only a prelude to further growth. Thus, if we lay a solid foundation and then reinforce growth, the students will both maintain what they have learned and steadily build on it toward greater cognitive maturity.”); Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DETROIT MERCY L. REV. 207, 236 (2009) (“Student writing regresses when students transition from high school to college, from freshman composition to an academic concentration, from college to graduate or professional school, and from professional school to a profession.”).

grammar.<sup>15</sup> However, when they attack the same assignment once again by rewriting their briefs for the final exam, they tend not only to regain, but also to surpass their fall-semester performance levels. Similarly, clinic students are often able to reach a much higher level of performance by the end of the semester, after a great deal of individual attention and trial and error.

Just as legal writing professors lack the resources to “re-teach” mechanics like grammar to graduate students,<sup>16</sup> I suspect that one of the main reasons why the clinical scholarship has not deeply addressed the problem of legal writing is because it presumes that all of the fundamentals are covered during the first year and should not have to be addressed again with upper-division students.<sup>17</sup> What I found in my investigations is that surprisingly, this apparent amnesia is not truly a problem with our students or even with our ordinary teaching methods. The problem is the change in context,<sup>18</sup> whether to a different course or even to a different type of written work product or client file. Once I began to research this problem, I eventually understood that the right question to ask was, “how can we help students to *transfer* their learning to casebook courses, clinic, and the workplace?” One purpose of this Article is to begin to address the transfer problem between legal writing and clinic.

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<sup>15</sup> See Williams, *supra* note 14 at 21-22 (observing the phenomenon that when students must apply their writing skills to a new type of writing, they tend to perform at a lower level than one might expect given their performance in previous types of writing contexts), cited in Aida M. Alaka, *The Phenomenology of Error in Legal Writing*, 28 QUINNIPIAC L. REV. 1, 37 n. 186 (2009).

Professor Alaka’s study also contains a vivid example from a highly-trained, published scholar in anthropology who became a law student. When she attempted legal writing for the first time, she felt that her writing was so poor and incomprehensible that she must be suffering from a “degenerative brain disease.” Of course, her writing improved with practice. *Id.* at 37 & n. 188, citing WAYNE C. BOOTH ET AL., *THE CRAFT OF RESEARCH* 126 (2d ed. 2003).

<sup>16</sup> See Aida M. Alaka, *The Grammar Wars Come to Law School*, 59 J. LEGAL EDUC. 343, 351-52 (2010).

<sup>17</sup> I also suspect that another reason may be that legal writing instruction continues to be stigmatized by many law school administrations, despite the many advances brought about by the skills training movement.

<sup>18</sup> SARAH LEBERMAN, LEX MACDONALD & STEPHANIE DOYLE, *THE TRANSFER OF LEARNING: PARTICIPANTS’ PERSPECTIVES OF ADULT EDUCATION AND TRAINING* 1-8 (Gower Publishing Co. 2006).

## B. Transfer Theory, Schema Theory, and Contextual Shifts

The idea that students should be able to transfer their skills and knowledge to new situations sounds deceptively simple. But our experience shows that it is not so easy, particularly in these early years of training.<sup>19</sup> While most educators are effective in helping students to obtain and store knowledge and skills, very few are able to address the reality that as soon as their students leave the classroom setting and enter the workforce, little of that training will immediately come into use.<sup>20</sup> In fact, some educational scholars consider the idea of teaching for transfer as somewhat of a lost cause, arguing that students typically will have to connect learning through a process of trial-and-error that takes place once they have finally reached the workplace.<sup>21</sup> For similar reasons, the transfer of learning has been referred to as a sort of “holy grail” of education, with all the unreachable, mythical qualities that metaphor conjures.<sup>22</sup> Other scholars disagree, reporting success with teaching strategies that help learners to more mindfully connect their studies to both past and future experiences.<sup>23</sup> Their strategies hold out significant promise for legal educators.

“Transfer of Learning” is a small and often overlooked discipline within both educational theory and cognitive psychology. Simply stated, transfer theory addresses how to help learners connect prior learning to new contexts.<sup>24</sup> Part of the connection involves recognizing that existing skills apply in a new situation, recalling those skills, and then judging how to use them appropriately for the change in circumstances.<sup>25</sup> The key to understanding the transfer problem is the idea of contextual

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<sup>19</sup> See e.g. Oates, *I Know That I Taught Them*, *supra* note 10 at 4 (identifying one’s level of expertise as a key factor in transfer).

<sup>20</sup> See ROBERT E. HASKELL, *TRANSFER OF LEARNING: COGNITION, INSTRUCTION AND REASONING* xiii (Academic Press 2001) (“Despite the importance of transfer of learning, research findings over the pasts nine decades clearly show that as individuals, and as educational institutions, we have failed to achieve transfer of learning on any significant level”).

<sup>21</sup> See HASKELL, *supra* note 20 at 3 (noting the paradox that although transfer is the most important goal of education, it “seldom occurs.”).

<sup>22</sup> See HASKELL, *supra* note 20 at 3-4, quoting JAMES DESSE, *TRANSFER OF TRAINING: THE PSYCHOLOGY OF LEARNING* 213 (McGraw Hill 1958).

<sup>23</sup> See generally, e.g., LEBERMAN, MACDONALD & DOYLE, *supra* note 18.

<sup>24</sup> See *id.* at 1-8.

<sup>25</sup> See *id.* at 14-15; DAVID A. SOUSA, *HOW THE BRAIN LEARNS* 142-143 (3d ed., Corwin Press 2006).

change. When the context changes, the brain often is not able to immediately recognize that the skill sets it stored for a different context apply to the new situation, as well.<sup>26</sup> Some cue is needed to trigger the brain to recognize that the new conditions are sufficiently similar that the previous skills should apply.<sup>27</sup>

According to subcategory of cognitive psychology and transfer of learning called schema theory, this seeming inability to cue previous knowledge for use in a new situation occurs because when human beings learn, they encode their knowledge according to the context in which they obtained it.<sup>28</sup> Thus when a law student learns how to write a good question presented for an office memo, she is likely to tie that learning to the particular assignment she was working on, her classroom environment and professor, and even her emotional state at the time she learned that skill.<sup>29</sup> Two or three semesters later, when a clinic professor assigns that student to write a memo, she may entirely omit the question presented as irrelevant to this entirely “new” type of assignment, unless she is cued to recognize the similarity to her first-year experience and then to recall the information learned there.<sup>30</sup> The same is true for subtler skills, like using secondary sources as a valuable research tool, or comparing the fact patterns of carefully-chosen cases to achieve a nuanced analysis.

Although the art of the mindful transfer of learning is not a panacea, it is possible to help students to avoid some of these grosser transfer problems as they shift from one course to another, or from law school to practice. In one very basic example, the professor and course materials can achieve a surprising amount of continuity by simply *reminding* the student to remember and apply her previous training. In this vein, at a handful of law schools, clinicians and legal writing faculty collaborate to present a refresher module that reminds students about the memo-writing and briefing skills they acquired in first year, but also discusses how to generalize and then adapt those analytical skills for the

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<sup>26</sup> LEBERMAN, MACDONALD & DOYLE, *supra* note 18 at 14-15.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See HASKELL, *supra* note 20 at 75-94 (describing how learning is encoded according to various environmental factors).

<sup>30</sup> One of the more obvious errors that can be observed as students transition into clinical writing is that they sometimes forget one or more of the customary sections typical of memos and briefs, producing a cursory—or at least truncated—work product. See *infra*, Appendix C, Question 11.

many other kinds of work product encountered in practice, such as status memos, demand letters, trial motions, and so on. Transfer strategies can also take much more subtle and abstract forms, such as teaching students the art of generalization during their skills training experiences, so that they understand how to draw upon skills in negotiation when writing a good demand letter.

Curricular design and teaching methods can help students connect their first year legal writing training to their advanced legal writing experiences in law school clinics.<sup>31</sup> During the first

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<sup>31</sup> On a curriculum-wide level, I have argued elsewhere that schema theory and other transfer tools should be adopted across the curriculum to help students to create schema designed to encode information for a broader array of future applications. Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, available at <http://ssrn.com/abstract=1478997> (work in progress). Michael Hunter Schwartz has devoted a great deal of scholarship and teaching materials to the problem of transfer within legal education. He has examined transfer as one of the three core concepts underlying learning theory, of which the other two are learning and instruction. *See generally* MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS* (Carolina Academic Press 2005), MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS WORKBOOK* (Carolina Academic Press 2005), MICHAEL HUNTER SCHWARTZ, *TEACHING LAW BY DESIGN* (Carolina Academic Press 2009), Michael Hunter Schwartz, *Teaching Law by Design: How Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 366 (2001).

A few legal writing scholars have also discussed how to effect transfer of learning with the legal writing classroom. *See generally* Oates, *I Know That I Taught Them*, *supra* note 10 (discussing how educational and cognitive psychological theory can aid legal writing professors in designing courses and problems to effect transfer), Alaka, *The Phenomenology of Error*, *supra* note 15 (studying how students' study habits and use of professor feedback affected their ability to transfer skills and learning from their undergraduate writing experiences to law school and from previous work in the same legal writing course to new assignments), Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: a Positive Approach to Analytical Errors in 1L Writing*, 39 LOY. U. CHI. L.J. 123 (2007) (proposing that legal writing educators can promote the transfer of learning by exposing students to common analytical errors in advance of the first major graded assignment, teaching them to identify those errors, and then connecting written feedback on the assignment to those previous discussions).

And still other scholars have addressed how transfer theory can be applied to specific situations within the clinical setting, apart from legal writing. Several articles address transfer within specific sub-disciplines: *see generally* David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2003); *see* David A. Binder, Albert J. Moore, & Paul Bergman, *A Depositions Course: Tackling the Challenge of Teaching for*

year of law school, those cues can come from anticipating future applications during the required writing courses. In the clinic, they can come from supervisory dialogue, from a somewhat more structured approach to student drafting at the beginning of the clinic semester, from one or more seminar modules, and from various self-teaching tools provided to the students by the clinic.<sup>32</sup> Many of these strategies and tools can best be developed through collaboration between the clinical and legal writing programs at each unique institution.

### III. THE CURRENT STATE OF AFFAIRS: RESULTS OF THE CLINICAL LEGAL WRITING SURVEY AND OTHERS

So far, two attempts have been made to assess what kinds of collaborations are taking place between clinical and legal writing programs, one from the perspective of clinical professors, and the other from the perspective of legal writing professors. In both cases, participation was voluntary, and it is entirely possible that those educators with an interest in collaboration or with experience in the other field were more inclined to participate than others. If so, the results may somewhat inflate the amount of collaboration, as well as the interest in collaborating or learning about each other's techniques.

In any event, one of the major conclusions that emerges is that collaboration is happening, but still at a minority of institutions. Moreover, except for those schools that integrate clinical skills into the mandatory skills curriculum, most collaborations result very much from the efforts of individual educators reaching out to each other on an ad hoc basis. As mentioned earlier, this Article proposes that even greater benefits can be had at those schools where collaboration takes places between entire programs.

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*Professional Skills Transfer*, 13 CLINICAL L. REV. 871, 872, 882-888, 896-898 (2007).

<sup>32</sup> In the long run, the wider law school curriculum can also enhance transfer by providing more skills training: once the student in this example has the experience of including the question presented in more than one memo across spatial, temporal, personal, doctrinal, procedural, and professional contexts, her "schema" will broaden to the point where she is much more likely to remember to include the question presented in any future office memorandum. *Cf.* LEBERMAN, MACDONALD & DOYLE, *supra* note 18 at 14-15, SOUSA, *supra* note 25 at 142-143.

### A. The Clinical Legal Writing Survey

In a recent survey conducted by the author, 93% of clinicians from 24 law schools nationwide reported that their programs have no planned or uniform approach to supervising legal writing, although many reported feelings of efficacy with their individual approaches to this type of teaching. Of the 30 individual clinicians who responded, 60% indicated that they would like to learn about additional tools for teaching legal writing in some form or another.<sup>33</sup> Yet despite the desire for new tools and concerns about students' analytical, research, and writing skills, 60% also reported no pending discussions or plan for collaborating with their counterparts in the legal writing program.<sup>34</sup>

The Clinical Legal Writing Survey began informally at the 2008 AALS Clinical Legal Education Conference in Tucson, Arizona. To date, 31 clinicians have responded, representing approximately 24 law schools.<sup>35</sup> The survey was not designed to be empirical, but rather to (1) gather a set of unique observations about how individual clinicians address legal writing with their student attorneys, (2) gauge the level of collaboration occurring between clinics and legal writing programs at the responding institutions, and also (3) gauge the respondents' interest in developing future collaborations, as well as in learning about new methods for supervising clinical legal writing.

The great majority of respondents had between 5 and 20 years of teaching experience, with nearly all of those years as clinicians, but with a great deal of other teaching experience as well. Eight of the 32 clinicians surveyed had also taught first year or advanced legal writing, and many had taught a full range of skills and doctrinal offerings. Over half of the respondents are either tenure track, parallel tenure track, already tenured, or have long term contracts. Six had short term contracts or appointments.

By far, most of the respondents identified their clinics as having individual, live-client representation as a primary feature. As with many of the questions on the survey, those responding had the freedom to identify more than one response and to rank or not rank their choices. Three emphasized criminal work, while eleven

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<sup>33</sup> *Infra*, Appendix C, Questions 8 and 17.

<sup>34</sup> *Infra*, Appendix C, Question 6.

<sup>35</sup> The number of law schools represented may be either 23 or 24 because one respondent declined to include his or her name and institution.

emphasized civil, which could also include domestic relations practice. Three were transactional, and the rest included multi-faceted practice areas like tribal court practice, human rights, alternative dispute resolution, various regulatory areas, and so on. Some selections overlapped, such as one clinic that involved live-client representation in both civil and criminal law in a tribal court setting.<sup>36</sup> As for the legal writing programs at those schools, the great majority reported a one-year “standard” curriculum, with some variations as to upper-level electives. A smaller number reported an integrated program combining clinical simulations with writing, and only two schools reported that they require three or more semesters of legal writing.

One of the survey questions was designed to identify any strong, common-sense correlations between the status enjoyed by so-called skills faculty and the amount of collaboration occurring at that school. Anecdotally speaking, the positive correlation between higher status for skills faculty and the strength of inter-program collaboration appears to be quite high. Of the schools that responded that they have some type of regular collaboration with their legal writing program (at least “meet[ing] occasionally”), all but one provided longer-term job security to their legal writing faculty members, whether in the form of a long-term contract or some variety of tenure track. Only one of those institutions used short-term contracts, and none used an adjunct-director model.<sup>37</sup>

Significantly, the two responding schools whose clinicians actually receive some training from legal writing faculty both employ tenure-track legal writing professors. Of the institutions already engaging in some kind of collaboration, two also have a formal clinic component, such as a seminar session, taught by their colleagues in legal writing, or by an in-house clinical legal writing professor. Finally, of the two schools planning some form of future collaboration, one has long-term contract legal writing faculty, and the other respondent was unsure of those faculty members’ status. The remaining institutions had no plans to collaborate so far, but a few expressed interest in the idea.

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<sup>36</sup> E.g., Professor 18.

<sup>37</sup> To provide some context for this trend, eight of the 24 schools responding to the survey overall used short term contract faculty and/or adjuncts, and one still used upper-level students to teach legal writing. Of those using short-term faculty, respondents often noted that the program director was tenured or tenure-track even if the remaining instructors were not.

Thus, except possibly for the respondent who was uncertain of the status offered to legal writing colleagues, every institution with some form of present or planned collaboration offers at least some kind of long-term contract as job security to its legal writing faculty, if not parallel or equal tenure track. Although these findings are not necessarily statistically valid, they are not entirely surprising: while some adjunct and short-term faculty are personally driven to go out of their way to contribute greatly to the health of the institution, there is little other than such an internal drive to motivate most to dedicate extra time and effort to inter-program collaboration.<sup>38</sup>

In another survey question, clinicians were asked to subjectively assess their own skills in supervising students' clinical legal writing. About ten of the professors reported that they had actually taken the time to learn legal writing teaching methods. Of them, four already had identified themselves as having previously taught legal writing. Another handful did not answer that they had learned legal writing methods, but identified themselves earlier in the survey as having taught legal writing at some point in the past. A slightly larger number of clinicians reported that although they do not have precise training in legal writing instruction, they have developed their own methods and feel comfortable with them. A good percentage of them crossed out the qualifier, "I do not have time to learn," suggesting that they were willing to improve their skills despite feeling confident overall in their individual methods.

Finally, the survey also asked generally what kinds of legal writing tools clinicians might find helpful in their teaching.<sup>39</sup> The responses to this question were fairly evenly dispersed among the

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<sup>38</sup> Furthermore, in a survey of legal writing terminology undertaken by Professors Terrill Pollman and Judith Stinson, those scholars found a statistically high correlation between those educators' familiarity with popular legal writing terms and their years of experience and involvement in the field, such as participation in conferences and online discussions. That finding suggests that low employment status may inhibit legal writing professionals' ability to collaborate and train others effectively. Cf. Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 *MAINE L. REV.* 239, 245 n. 16 (2004) (observing that "the turnover rate for legal writing positions has been extraordinary"—as high as 76% according to a study conducted between 1980 and 1987, but which is probably less now due to the increased prevalence of full-time faculty, long-term contracts, tenure track, and parallel tenure track).

<sup>39</sup> The survey also addressed a number of more specific issues about how clinicians approach legal writing. They are addressed elsewhere below.

various options provided. Nine indicated an interest in learning more about how to communicate with students about their writing. The most by far (18) were interested in learning more about feedback methods, including possible checklists or other rubrics. Seven of those clinicians were those who also indicated an interest in learning about better communication. Nine were interested in a module for teaching a legal writing seminar session in the clinic curriculum, although time and curricular overload seemed to be a concern for others:

In one semester, most students do not get sufficient exposure to different types of writing in a clinical setting. Also, with other substantive issues we need to cover in the seminar, it's difficult to devote more time to writing classes than I already do, but students really need more instruction.<sup>40</sup>

A handful was also interested in greater tools for self-instruction, such as a clinic manual.<sup>41</sup>

### B. Legal Writing Institute Surveys

From 2005 to 2007, the Legal Writing Institute's Committee on Cooperation Among Clinical/Externship and Legal Writing Faculty informally surveyed its members via e-mail to assess the types and levels of collaboration taking place between their programs and the clinical, externship, and pro bono programs at their respective institutions.<sup>42</sup> The respondents, who consisted of full-time legal writing professors and others who teach across disciplines, identified a number of applications for individual and programmatic collaboration.<sup>43</sup> In most places, the questions were not designed to distinguish among collaborations with clinic, pro

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<sup>40</sup> *Infra*, Appendix C, Question 18.

<sup>41</sup> Because so many earlier indicated an interest in rubrics, checklists and other tools for students, it may be that the idea of using the clinic manual as an instructional tool was not contextualized well enough by the survey.

<sup>42</sup> Legal Writing Institute, *Results of 2007 Survey by LWI Committee on Cooperation Among Clinical, Pro Bono, and Legal Writing Faculty*, <http://www.lwionline.org/uploads/FileUpload/CollaborationSurveyResults2007.pdf> (last accessed March 4, 2010).

<sup>43</sup> See generally *id.* (reporting the results of the 2007 survey).

bono, or externship programs, and so it is somewhat difficult to assess efforts that solely involve the clinic.

In 2007, 67 LWI members responded to the survey.<sup>44</sup> Some of the more prominent results showed that while about 30% invited clinicians to speak to their legal writing classes, only about 13% similarly appeared in clinic, externship, or bono classrooms.<sup>45</sup> Discussions about legal writing pedagogy seemed to take place more often, with 46% reporting some kind of consultation, ranging from informal, water-cooler type conversations, to formal training, to highly integrated curriculums.<sup>46</sup> One quarter of the respondents identified themselves as cross-over faculty teaching in a clinic, externship, or pro bono program in addition to (or perhaps instead of<sup>47</sup>) legal writing.<sup>48</sup> Very few (9%) collaborated on curriculum or course materials.

Another interesting trend was that 2007 saw a flourish of new crossover courses that integrate formal clinical instruction with formal writing instruction. Some are required skills programs, others are writing clinics, and others are legal writing courses that borrow problems from pending cases, often in collaboration with a clinic or public interest organization.

Furthermore, another of the most revealing focuses of the 2007 survey was the series of questions devoted to legal writing vocabulary. A full 86% of the 67 LWI members who responded to the survey agreed that “it would be useful for LRW teachers, clinicians, and externship and pro bono supervisors to share the same vocabulary for legal writing concepts.” They identified many impediments and solutions for doing so,<sup>49</sup> which are discussed in more detail elsewhere below.

Finally, although the survey solicited only positive reports of collaborative efforts and not negative, the sheer volume of

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<sup>44</sup> See generally *id.* (noting at the beginning of each question how many respondents out of 67 answered the question).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 3-4.

<sup>47</sup> LWI has a very open membership policy and does not require annual dues, and so it is welcoming to many who do not teach legal writing full time or even at all, as well as to members outside of academia. See Legal Writing Institute, *Welcome to the Legal Writing Institute!*, <http://www.lwionline.org/join.html> (last accessed March 4, 2010).

<sup>48</sup> See Legal Writing Institute, *Results of 2007 Survey*, *supra* note 42 at 11-12.

<sup>49</sup> See *id.* at 23-27.

positive reports indicated a wide belief in the ultimate value of such efforts.<sup>50</sup>

#### IV. EXISTING PEDAGOGICAL FOUNDATIONS AND THE NEED FOR ADAPTABILITY

For legal writing instruction to become a more planned, mindful process of learning in the clinic, some collaboration between each school's clinic and legal writing programs is highly desirable.<sup>51</sup> One of the beginning points for meaningful collaboration is to understand the similarities and differences in each other's approaches by understanding the respective pedagogies. Both clinical and legal writing pedagogy are well-documented in the literature. Accordingly, the goal of this section is not to provide an exhaustive overview. Instead, its objective is to help collaborating faculty members to understand the rationales behind each other's approaches.

##### A. Foundations of Clinical Pedagogy

When professors who teach legal writing collaborate on methods and materials for the clinical program, it is important for them to see that teaching clinic is a very delicate balancing act indeed. Those who teach legal writing know well the feeling of playing many roles—educator, collaborator, counselor, scholar, mentor, and coach. It is important to set boundaries and to prioritize. Clinicians wear even more hats, and the consequences for failing to balance them appropriately are even more serious. Mentoring legal writing is extraordinarily time-consuming and, if unchecked, can detract from other important clinical teaching goals.

Under the rules of professional responsibility, the clinician's utmost duty ostensibly is to the client, and many—but not all—clinical models emphasize the client first and the educational and social justice missions as a very close second or

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<sup>50</sup> See *id.* at 18-20.

<sup>51</sup> See generally, e.g. Dickerson, *supra* note 3 (describing the many ways in which collaboration between the clinical and legal writing faculty can benefit their programs, students, and the faculty members themselves).

even third.<sup>52</sup> Of course, what is best for the client is not always best for the student or the social justice mission,<sup>53</sup> and vice-versa. Naturally, clinicians excel at finding the teaching opportunities that flow from those tensions, and a good portion of the literature flows from those lessons learned.

1. *Clinical Models: Client-Centered, Learning-Centered, and Community-Centered*

Although there are a number of competing schools of thought on the best pedagogical basis for various kinds of clinics, the most common is probably the *client-centered approach*. In that approach, clinicians avoid a paternalistic approach to counseling and advocacy.<sup>54</sup> Instead, they teach their students how to empower differently advantaged clients to participate actively in setting the goals of the representation.<sup>55</sup> In one well-known work of narrative scholarship, Professor Lucie White describes the challenges of representing clients in the context of great socio-economic, cultural, and racial difference.<sup>56</sup> In that case, “Mrs. G” received a letter from the public assistance office telling her that she received an overpayment.<sup>57</sup> Mrs. G had received a very small settlement for a car accident and spent it to buy her and her daughters some necessities, including some decent “Sunday shoes” for church.<sup>58</sup> When she disclosed the payment to the authorities, the public assistance office incorrectly advised her that she could spend it freely.<sup>59</sup> A traditional, top-down approach to case

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<sup>52</sup> See Robert J. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 & n. 15, excerpted in HURDER ET AL., CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS at 153-54 (Lexis-Nexis 1997) (explaining that the large number of law schools using a client-centered model are often influenced by their adoption of the textbook D. Binder & S. Price, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (adopted by 94 schools at the time of the article’s writing)).

<sup>53</sup> E.g. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 S.M.U. L. REV. 1461 (1998).

<sup>54</sup> See Dinerstein, *supra* note 52 at 504-505.

<sup>55</sup> See *id.*

<sup>56</sup> See generally Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990), excerpted in HURDER ET AL., *supra* note 52 at 215-225.

<sup>57</sup> White, *supra* note 56 at 22-23.

<sup>58</sup> *Id.* at 24.

<sup>59</sup> *Id.*

development unraveled on the witness stand when the client resisted the lawyer's theory of the case, which cast her as a victim, "on her knees, asking for pity."<sup>60</sup> Instead, she chose to tell her story from a stance of greater dignity, in which purchases such as good shoes for church quite fairly qualified as "necessities of life" even when living in poverty.<sup>61</sup> One important object lesson flowing from this tale is that it is often ill-advised to assume that the lawyer is always in a better position to develop the narrative aspects of case theory and strategy, although they are sometimes constrained to do so by social and legal realities.<sup>62</sup>

In that vein, clinics typically strive to teach their students to respect the client's voice and to become better cross-cultural listeners and communicators.<sup>63</sup> This increased attention on the influence of culture has ramifications for educators from legal writing programs who assist in designing criteria sheets or other teaching tools for clinical writers. While some professors in first-year programs do include such nuanced considerations as client voice and cross-cultural understanding,<sup>64</sup> 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. Yet cross-cultural training is crucial for clinics, who work with diverse clients, students, and faculty.<sup>65</sup>

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<sup>60</sup> *Id.* at 27.

<sup>61</sup> *Id.* at 46-51.

<sup>62</sup> *See id.* at 46-48, 52-58.

<sup>63</sup> *See generally*, Aliza G. Organick, *Tribal Law and Best Practices in Legal Education: Creating a New Path for the Study of Tribal Law*, 19 KAN. J.L. & PUB. POL'Y 63 (2009) (relating the challenges of fostering cross-cultural understanding between non-Native law students and clients from tribal communities), Jean Koh Peters & Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (offering an approach to cross-cultural training in law school clinics), Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37 (2008) (exploring a variety of teaching goals and supervisory situations involving cross-cultural client representation).

<sup>64</sup> *See generally* Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281 (2000) (describing the benefits of including cross-cultural context in legal methods courses, particularly through writing assignments).

<sup>65</sup> *E.g.* Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 401 (2005).

Rivals to the client-centered approach are now emerging, including models focused more acutely on learning and on social justice. First, a *learning-centered* model posits that the educational mission of the university requires pedagogical imperatives to come first.<sup>66</sup> The model has a strong basis in the skills training revolution brought about in part by the *MacCrate Report*,<sup>67</sup> *Educating Lawyers*,<sup>68</sup> and *Best Practices for Legal Education*,<sup>69</sup> but existed even before that time.<sup>70</sup> Under that approach, the supervising attorney's ethical responsibilities to the client are met by simultaneously dispensing competent legal services,<sup>71</sup> while sometimes elevating the educational experience over non-essential client needs.<sup>72</sup> Much of the balancing seems to occur at the client and case-selection stage,<sup>73</sup> and live-client work may be coupled with simulated work in order to offer more complete and consistent training.<sup>74</sup> It is fairly safe to assume that in most clinics, either the representation or the pedagogical objectives take top priority.<sup>75</sup> Some of the dissent in whether the pedagogical approach should take precedence results from the concern that a case-driven model

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<sup>66</sup> See Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 371 (2009) (critiquing the pedagogically-centered approach ostensibly advocated by David Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 256 (2003).)

<sup>67</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (commonly known as The MacCrate Report), *excerpted in* HURDER ET AL., *supra* note 52 at 12-20.

<sup>68</sup> See generally WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>69</sup> See generally ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

<sup>70</sup> See generally Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982), *excerpted in* HURDER ET AL., *supra* note 52 at 50-59.

<sup>71</sup> Ashar, *supra* note 66 at 371.

<sup>72</sup> See *id.* at 370-371 & n. 58, *citing and critiquing* David Chavkin, *supra* note 66 at 258, 260-261.

<sup>73</sup> Binder & Bergman, *Taking Lawyering Skills Training Seriously*, *supra* note 31 at 207-218.

<sup>74</sup> See *id.* at 215-218 (proposing, *inter alia*, that clinics can borrow from portions of cases being litigated by public interest partners, or choose cases according to the skills training they are likely to impart, such as cases nearing trial versus those that are still in the initial client counseling stage).

<sup>75</sup> See *id.* at 193-97.

often results in very dissimilar experiences for students and carries no guarantee that a certain set of core lawyering skills will be learned in any depth.<sup>76</sup>

A third major competing model springs from the *community lawyering* movement.<sup>77</sup> Traditionally, the institutional and individual responsibility to the social justice mission of legal education comes in roughly third place to clients and students.<sup>78</sup> Today, there is a small but growing movement of clinical professors advocating for an approach to clinical design and teaching that emphasizes the social justice mission of the clinic somewhat ahead of its objectives to educate individual students and serve individual clients.<sup>79</sup> Building upon the historical social justice mission of clinical legal education,<sup>80</sup> the community lawyering movement stresses the responsibility of law schools not just to provide good representation to disparate clients while educating students, but truly to make lasting contributions to the communities around them.<sup>81</sup> In this vein, Professor Sameer Ashar

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<sup>76</sup> *Id.* at 203 (“The primary reason that the case-centered approach is likely to frustrate transfer of lawyering skills is imply that programs devote too little time to too many lawyering tasks.”).

<sup>77</sup> See generally Karen Tokarz et al., *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL’Y 359 (2008) (exploring the dimensions of this movement).

<sup>78</sup> Cf. Ashar, *supra* note 66 at 368 (describing the social justice mission as secondary to pedagogical goals, and identifying the client-centered approach as the matter of first concern in the “canonical approach” to clinical pedagogy).

<sup>79</sup> Of course, those secondary concerns are still paramount, and the rules of professional responsibility ensure that the client will receive quality representation.

<sup>80</sup> Scholars have attributed the genesis of the social justice mission of legal education to a range of sources. According to Professors Baillie and Bernstein-Baker, those sources range from long-standing values innate to the legal profession to the much later events, such as the inclusion of public service in the Model Rules of Professional Conduct. James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education*, 13 LAW & INEQ. 51, 64-66 (1994). The social justice mission evolved considerably with the birth of the clinical legal education movement, which correlated generally with the Civil Rights Era. See Jon C. Dubin, *supra* note 53 at 1465; see also SULLIVAN ET AL., *supra* note 68 at 92. Nevertheless, the idea of lawyering for social change as a primary focus of legal education remains “counter-cultural” in the legal academy. See William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 9-11 (2007).

<sup>81</sup> See generally Ashar, *supra* note 66 (arguing that social justice should be the primary—not secondary or tertiary—mission of law school clinics, and that it

has questioned the usefulness of the single-client case to achieve social justice.<sup>82</sup> He advocates instead to transform certain clinics into focal points of “collective mobilization,” working in concert with activist organizations, students, educators, and carefully selected clients to effect social change.<sup>83</sup>

From another standpoint, the emphasis on social justice comes from the educational mission itself, and it should be axiomatic that attorneys should be trained to engage in law reform.<sup>84</sup> At the same time, Professor Antoinette Sedillo López distinguishes between the social justice mission itself—the decision to impact our students and communities in a certain way—and educational goals, which are the methods for creating that impact.<sup>85</sup>

Under the community-centered approaches, educational and case-focused goals are not devalued, but rather are carefully selected to meet the larger goal of community impact, law reform, and collective empowerment.<sup>86</sup> As part of any collaborative effort between clinical and legal writing faculty, time should be set aside to discuss which philosophies drive individual clinics and professors within the clinical program so that shared teaching materials reflect those values. At the same time, clinicians should also listen to legal writing professors’ reactions to these values. Many legal writing professors come from considerable law practice backgrounds themselves, and tend to reflect educational values that prize innovation.<sup>87</sup> Many of them also share the

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should be undertaken with an emphasis on collective, community-oriented bases rather than via a series of disconnected, fragmented representations or through impact litigation that is focused more on the legal goals of the attorneys).

<sup>82</sup> See *id.* at 358-359.

<sup>83</sup> *Id.* at 358-359.

<sup>84</sup> See Antoinette Sedillo López, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 314 nn. 50-51 (2001).

<sup>85</sup> *Id.* at 310 n.15.

<sup>86</sup> See Ashar, *supra* note 66 at 389-414 (describing a model for community-oriented clinics that nevertheless meet both student and client needs).

<sup>87</sup> See 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, 30-38 (2004) (observing that legal writing professors have a significant role in curricular innovation, among other things, because (1) they are working in a relatively new scholarly field within the academy, (2) their courses are naturally outcome-oriented, (3) their teaching methods are so directly related to student performance, and (4) they enjoy a

clinical movement's concern for social justice.<sup>88</sup> There is much common ground to be found.

## 2. *Teaching Methods: Nondirective Supervision, Collaborative Learning, and the Staged Approach*

From an educational standpoint, the larger goal of clinical education is to train students to become socially-minded, ethical and professional attorneys with a core set of lawyering skills in a number of defined areas.<sup>89</sup> Which skills receive emphasis usually depends on the clinic, instructor, and caseload.<sup>90</sup> Understanding that students will soon be graduating and representing clients, clinics rightly focus on encouraging students to become independent learners,<sup>91</sup> a role they will play for the rest of their professional lives.

In order to foster that professional independence, clinicians balance express instructions with a great deal of nondirective supervision.<sup>92</sup> In its pure form, nondirective supervision encourages and catalyzes, but does not command or resolve:

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great deal of professional growth-oriented motivation from their innovations and their students' resulting successes).

<sup>88</sup> See generally Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 63 (2001) (describing how social justice values can be reflected through legal writing problem design, including the choice of substantive legal area, as well as across the first year curriculum).

<sup>89</sup> See Binder & Bergman, *Taking Lawyering Skills Seriously*, *supra* note 31 at 193-194 (describing dual and sometimes conflicting goals for clinical education as identified by William Pincus at the genesis of clinical education: teaching basic skills and instilling a motivation toward "legal and social reform"), *citing and quoting* William Pincus, *Educational Values in Clinical Experience for Law Students*, CLEPR Newsletter Vol. II, No. 1, Sept. 1969, *reprinted in* Clinical Education for Law Students 78 (Council on Legal Education for Professional Responsibility 1980).

<sup>90</sup> *Cf.* Binder & Bergman, *Taking Lawyering Skills Seriously*, *supra* note 31 at 194-202 (critiquing the case or client-centered model as resulting in an unpredictable, fragmented, and inconsistent approach to skills training).

<sup>91</sup> *Cf. generally* Peter Toll Hoffmann, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L. J. 301 (1986), *excerpted in* HURDER ET AL., *supra* note 52 at 72-77 (proposing a graduated approach from directive to non-directive supervision in order to foster increasing independence in student attorneys).

<sup>92</sup> Supervision has been defined as "ongoing dialogue between student and teacher about [a client's] representation." Anne Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC.

In this model of clinical instruction, student assumption of the primary lawyer role is coupled with participation in reflective critique on practice decisions, but without direct instruction on how to make decisions or perform tasks, or unambiguous information about the supervising attorney's views on those matters. Supervisors not only permit, but insist on, the students' relatively independent decisionmaking authority in handling legal cases for their clients. As a result of this autonomy in role assumption, students are able to confront personal and professional issues of lawyering.<sup>93</sup>

Nevertheless, an unyielding adherence to nondirective methods can undermine learning by ignoring the need for a graduated approach to independence,<sup>94</sup> and can also rob students of the opportunity to learn from observing expert attorneys at work.<sup>95</sup> Moreover, because many situations do call for direction, a dogmatic nondirective approach sometimes leads to a certain amount of undesirable, passive direction.<sup>96</sup> In other words, the supervisor will be forced to direct the student's actions through a loosely Socratic process<sup>97</sup> that may become very frustrating and inefficient for teacher, student, and client.<sup>98</sup>

Used judiciously, this hands-off teaching style is designed to encourage independent judgment, self-reliance, intellectual curiosity, and creative problem-solving.<sup>99</sup> In that sense, nondirective supervision harmonizes well with contemporary Socratic method for casebook classrooms, as well as with the

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CHANGE 109, 110 (1994), *excerpted in* HURDER ET AL., *supra* note 52 at 29-39, *as quoted in* Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485, 516 (1998).

<sup>93</sup> Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 319-320 (2006).

<sup>94</sup> *Id.* at 321, *citing* Hoffmann, *supra* note 91, *as excerpted in* HURDER ET AL., *supra* note 52 at 72-77, *and* Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 186 (1989).

<sup>95</sup> Katz, *supra* note 93 at 321.

<sup>96</sup> *Id.* at 321.

<sup>97</sup> *Id.* at 321, *citing* Shalleck, *supra* note 92 at 179-80.

<sup>98</sup> *See* Katz, *supra* note 93 at 321.

<sup>99</sup> *See id.* at 319-20.

Socratic and nondirective feedback often employed in legal writing critique.<sup>100</sup>

As in other courses, nondirective teaching is not always as easy to practice as it is to preach. In her seminal work, Professor Ann Shalleck reflects upon the ups and downs in the life of her supervisory and collaborative relationship with one student on a memorably difficult case.<sup>101</sup> Particularly instructive are those stinging moments that we have all experienced where our fatigue or other external pressures have led us to undermine—or enable—a struggling student by providing the quick solution.<sup>102</sup>

Another popular, and sometimes competing,<sup>103</sup> philosophy of clinical teaching is that law students learn best by working together like lawyers do in practice.<sup>104</sup> In other words, they must learn how to work collaboratively:

Collaboration is a work process in which participants share ideas and feedback concerning a task, often large and unstructured tasks such as strategic planning, but also more finite tasks such as the arguments to be used in motions. The working participants feel responsible for the work and are genuinely interested in each others' ideas and respectful of different points of view—which they anticipate will improve the work product.<sup>105</sup>

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<sup>100</sup> See generally Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267 (2007), Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991) (both discussing how to use nondirective-style feedback in legal writing courses).

<sup>101</sup> See generally Shalleck, *supra* note 92 (exploring the boundaries of nondirective supervision by examining it within the microcosm of one student and case).

<sup>102</sup> Cf. Bloch, *supra* note 70, at 349-50 (“[T]he possibility always exists that mutual inquiry will be forsaken and that the teacher will take control of the representation by lecturing to the student and directing him or her to do what the teacher knows—or has determined—must be done. . . . Instead, . . . students should be encouraged to decide when to ask questions and when to explore for answers on their own.”)

<sup>103</sup> See Katz, *supra* note 93 at 317 (arguing that an exclusive focus on nondirective supervision robs students of the benefits that can be had from observing expert attorneys through collaborative work and modeling).

<sup>104</sup> O’Grady, *supra* note 62 at 495-96.

<sup>105</sup> Katz, *supra* note 93 at 340.

In a collaborative learning environment, students benefit from increased opportunities to observe their expert supervisors actually engaging in the practice of law.<sup>106</sup>

Clinics are well-poised to adopt collaborative learning models. Many clinics differ from legal writing programs in that there is less of a hierarchical division between professor and student.<sup>107</sup> The nature of live-client work and small student-teacher ratios means that much of the learning environment occurs in small groups or one-on-one.<sup>108</sup> In fact, the relationship tends to be much less hierarchical than the typical law firm associate experience in practice, which has caused Professor Catherine Gage O'Grady to question how law schools and their clinics might best prepare students for the realities of collaboration in the practice environment.<sup>109</sup>

In addition to training in lawyering skills, the collaborative approach fosters the development of professional identity.<sup>110</sup> Because early legal employment experiences tend to be so hierarchical,<sup>111</sup> clinic may very well be the first time a student has had the experience of being treated like a lawyer. And in fact, her lawyer status starts to become very real in that students in litigation clinics usually are admitted to temporary practice under the court rules and often work alone, even when dealing with clients, witnesses, court staff, and opposing counsel.<sup>112</sup>

Like any philosophy, these differing views of clinical pedagogy are susceptible to extremes.<sup>113</sup> Accordingly, in recent years, some scholars have advocated for a graduated approach

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<sup>106</sup> *See id.* at 317.

<sup>107</sup> *See* O'Grady, *supra* note 62 at 515.

<sup>108</sup> *See id.* at 513-21.

<sup>109</sup> *See generally id.* (exploring the intersections and digressions between collaboration in law school and in practice, and observing that top-down hierarchy and lack of autonomy can easily lead to a failure of professional identity for new associates).

<sup>110</sup> *See id.* at 487.

<sup>111</sup> *See id.* at 506 ("The hierarchical structure and power differentials in the early collaborative working relationships reinforce new lawyers' tendency to view themselves as "employees" with little autonomy.")

<sup>112</sup> *See id.* at 515.

<sup>113</sup> *Cf.* Katz, *supra* note 93 at 319-26 (arguing that rigid adherence to nondirective supervision can stifle learning); *cf.* Hoffmann, *supra* note 91, *cited in* HURDER ET AL., *supra* note 52 at 73 (noting that supervisory styles vary greatly in according to the type of encounter, mode of teaching, and development of the student).

from collaborative to nondirective supervision, tailored to the learning needs of the particular student, as well as to the exigencies of the case.<sup>114</sup> Professor Peter Toll Hoffman identifies three graduated stages: beginning, middle, and final.<sup>115</sup> In the beginning of the supervisory relationship, the instructor offers much more explicit explanations and instructions.<sup>116</sup> Once students gain some knowledge and experience, the middle stage allows for a more collaborative approach that includes joint decision making and problem solving, as well as significant independent inquiry.<sup>117</sup> Finally, in the last stage, the teacher takes a more nondirective approach, allowing the student to control the process when her decisions represent legitimate approaches to the representation.<sup>118</sup> As in other “scaffolded”<sup>119</sup> approaches, the teacher “fades”<sup>120</sup> to the role of “confirmer and guider.”<sup>121</sup>

In conclusion, as with the various types of clinical models, collaborators should also discuss their teaching philosophies in order to foster mutual understanding and to discover their compatibilities and differences. When working together to develop teaching materials, educators may wish to discuss which aspects of the writing process can be explained and directed for the students. The most obvious candidates are the more formal aspects of writing, such as the parts of a memo, the requirement to use the clinic’s pleading paper, the schedule for drafting, and so on. Those aspects involving professional judgment are more suited to Socratic-style catalyzing questions. For clinics that adopt the graduated approach, the need for students to reveal their planning, early drafts, and thought process during the writing process can be eliminated as individuals develop the judgment and experience needed to operate independently on certain types of projects.

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<sup>114</sup> See Hoffmann, *supra* note 91, cited in HURDER ET AL., *supra* note 52 at 72-73, and cited by Katz, *supra* note 93 at n. 45.

<sup>115</sup> Hoffmann, *supra* note 91, cited in HURDER ET AL., *supra* note 52 at 73-76.

<sup>116</sup> *Id.* at 73-74.

<sup>117</sup> *Id.* at 74-75.

<sup>118</sup> *Id.* at 75-76.

<sup>119</sup> Cf. generally JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (Cambridge University Press 1991) (proposing the concept of “scaffolding” a pedagogy designed to empower students to increasing proficiency and independence).

<sup>120</sup> Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 45, citing Allan Collins, John Seely Brown, & Ann Holum, *Cognitive Apprenticeship: Making Thinking Visible*, 15 AMER. EDUCATOR 3, 5 (1991).

<sup>121</sup> Hoffmann, *supra* note 91, cited in HURDER ET AL., *supra* note 52 at 75.

## B. Foundations of Legal Writing Pedagogy

Like clinical education, as legal writing has grown into its own discipline, it has exploded with pedagogical innovations.<sup>122</sup> As clinicians begin to explore legal writing pedagogy for application in the clinic, it is important to recall that while legal writing programs must focus a good deal more on the formal components of analysis, they provide the bridge to the more nuanced analysis required in the clinic.

### 1. *A Spectrum of Program Models*

For many decades, a dearth of legal skills training opportunities<sup>123</sup> meant that even if students did receive any training in legal analysis, it was probably limited to IRAC-style, law school essay examination writing. As the movement toward more skills training gained speed, law schools gradually included practice-oriented legal analysis and writing in their curriculums.<sup>124</sup> The staffing models varied widely then, and still do.<sup>125</sup> Structural options range from the relatively few fully-integrated, co-directed, full-time, primarily tenure-track models like the one at Washburn University School of Law<sup>126</sup> to classes mentored mostly by upper-division students.<sup>127</sup> The latter type is now considered grossly insufficient, and most schools have moved to a point somewhere in

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<sup>122</sup> Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 30-38.

<sup>123</sup> See generally e.g. BEST PRACTICES, *supra* note 69 (one of the number of pivotal reports on legal education since the early 1990s calling for increased skills training in legal education).

<sup>124</sup> As an aside, the name “legal writing” itself is a misnomer and probably reflects some of the reductionist thinking that relegates this subject to proofreading and editing. A more appropriate title for courses focused primarily on written legal analysis with some oral argument is legal analysis, legal analysis and communication, or perhaps legal methods if more clinical skills are included. For a general overview of the content of legal writing programs, see RALPH L. BRILL ET AL., ABA SOURCEBOOK ON LEGAL WRITING PROGRAMS (2d ed., American Bar Ass’n 2006).

<sup>125</sup> See BRILL ET AL., *supra* note 124 at 81-127.

<sup>126</sup> Washburn University School of Law, *Legal Analysis, Research, and Writing Program*, <http://washburnlaw.edu/curriculum/larw/index.php> (last accessed January 18, 2010). See also BRILL ET AL., *supra* note 124 at 87-93.

<sup>127</sup> See BRILL ET AL., *supra* note 124 at 115 (noting that at a “handful” of schools, legal writing courses are taught by upper-division students).

the middle.<sup>128</sup> Some are staffed by full-time faculty short-term contracts and relatively low pay;<sup>129</sup> others are taught by full-time faculty on a parallel tenure track, often with lower pay and varying ability to vote in faculty meetings.<sup>130</sup> Still others are taught by adjuncts from the surrounding legal community, often coordinated by a program director.<sup>131</sup>

In terms of curricular models, legal writing programs vary anywhere from six-semester mandatory programs with specialized “tracks”<sup>132</sup> to the more typical two-semester, first-year curriculum, which covers basic skills in legal analysis, research, and writing, and requires students to produce an objective memorandum and a persuasive brief.<sup>133</sup> Although the “next wave” seems to be a three-semester or more mandatory program, often with two or more “tracks” (litigation and transactional),<sup>134</sup> the gold standard program design continues to be the one-year model with objective analysis in the first half and persuasive analysis in the second, and is reflected in the structure of virtually every textbook for first-year analysis and writing courses.<sup>135</sup> In the fall, students typically learn formal analysis and generate one or more objective memoranda in for a simulated client and legal problem.<sup>136</sup> In the second semester, the class usually explores how to adapt formal analysis for advocacy, and will often generate a trial memorandum, a memorandum in support of a dispositive motion, or an appellate brief.<sup>137</sup> Some instructors also include an introduction to letter writing for law practice, often asking the students to generate a demand letter or client advice letter.<sup>138</sup> The capstone experience at the end of the year-long curriculum typically consists of moot

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<sup>128</sup> See *id.* at 115-16 (observing the many deficiencies of experience, priorities, and so on, and noting that only a “handful” of schools still use this model).

<sup>129</sup> See *id.* at 98-104.

<sup>130</sup> See *id.* at 93-98.

<sup>131</sup> See *id.* at 108-114.

<sup>132</sup> See *id.* at 174-193.

<sup>133</sup> See *id.* at 44-46.

<sup>134</sup> See generally Randall Abate, *The Third Time is the Charm: The Structure and Benefits of a Three-Semester Legal Writing Program*, 16 SECOND DRAFT: BULL. LEG. WRITING INST. 7 (May 2002).

<sup>135</sup> See Kristin B. Gerdy, *Continuing Development: A Snapshot of Legal Research and Writing Programs Through the Lens of the 2002 LWI and ALWD Survey*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 227, 237 (2003).

<sup>136</sup> See *id.* at 240.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

court-style oral arguments based on the final trial motion or appellate brief assignment.<sup>139</sup>

While the curriculum continues to focus on formal analysis in the second semester, the students' novice proficiency in those skills tends to permit the class to explore more nuanced skills in case theory (legal and narrative), persuasive argumentation, ethics, and professionalism.<sup>140</sup> Here, it is important to note that although incoming clinic students sometimes are able to demonstrate only the most minimal proficiency in these basic lawyering skills, they were able to show novice-level proficiency in order to pass their first-year writing courses. In fact, those that performed at above-average grade levels often demonstrated proficiency approaching the average quality of work seen in run-of-the-mill law practice. Our students' atrophy in legal skills<sup>141</sup> 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. One more obvious example of this problem is that the skills gap between the first year and clinic is exacerbated in most law schools by the lack of a required third semester of legal writing. Even for students that do not take clinic, the third semester would help them to integrate skills experienced in their first summer clerkships.

## 2. *Theoretical Bases: Composition Theory and the New Rhetoric*

The state of the art in legal writing pedagogy is solidly rooted in the New Rhetoric, a school of undergraduate composition theory developed in the 1970s and 1980s.<sup>142</sup> The New Rhetoric

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<sup>139</sup> See *id.*

<sup>140</sup> See generally, e.g., RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (5th ed. 2005) (covering many such advanced skills in the second half of the book).

<sup>141</sup> See Schrup, *supra* note 2 at 302 (“LRW faculty members generally believe that students’ newly-acquired skills atrophy without practice and consistent reinforcement in different contexts throughout the remainder of law school.”).

<sup>142</sup> See generally Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999), cited in Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 40-52 & nn. 81, 86, 87.

departed from the traditional, formalist approach to writing<sup>143</sup>—just as client-centered clinical pedagogy developed as a reaction to the traditional, top-down, dispensation of legal services found to be so disempowering to marginalized clients.<sup>144</sup> Under the formalist approach, writing was treated as mere recordation of previous thinking.<sup>145</sup> Instructors focused their energy not on the thinking itself, but on how properly it was recited on paper in terms of grammar, style, structure, and tone.<sup>146</sup> The New Rhetoricians perceived that writing is not separate from thinking: it *is* thinking.<sup>147</sup> It should be axiomatic that the reason why the vast majority of legal analysis is presented on paper and not by the spoken word is that written analysis exacts such precise testing, revisiting, and resolution of one’s thinking. It is the very process of writing that exposes weaknesses in reasoning and authority and forces the lawyer to delve ever deeper into the problem to find the root causes and their solutions.<sup>148</sup> No wonder, then, that good writing always demands the challenging—and even painful—process of recursive research and revision.<sup>149</sup> Based on this perception that writing is really just a way of thinking and reasoning through a problem, New Rhetoricians focused their attention on the thinking/writing process. For this reason, contemporary pedagogical models are sometimes called the *process-oriented* approach.<sup>150</sup>

In the field of composition theory, the process-oriented approach developed to include multiple drafts with professor “intervention” at various points along the way, including the planning, drafting, and polishing stages.<sup>151</sup> Before students begin

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<sup>143</sup> See Terrill Pollmann, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQUETTE L. REV. 887, 896-99. (2002).

<sup>144</sup> See Dinerstein, *supra* note 52 at 504-505.

<sup>145</sup> See Pollmann, *Building a Tower of Babel*, *supra* note 143 at 896-899.

<sup>146</sup> See *id.* at 896-899.

<sup>147</sup> Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 42-44; Pollmann, *Building a Tower of Babel*, *supra* note 143 at 902.

<sup>148</sup> See Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 896-899.

<sup>149</sup> See Berger, *supra* note 142 at 160-62.

<sup>150</sup> See Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 47-49 (“Most Legal Writing courses are now structured around some form of the ‘process’ method.”).

<sup>151</sup> See *id.* at 48-49 (contrasting the outmoded “product method,” in which teachers are involved directly in student writing only when grading the final product, versus the “process method,” in which professors “intervene in their students’ writing before the final draft, so they can give students feedback on

writing, educators also break down the various analytical and writing processes into ever-smaller units, reducing them to steps, principles, components, and techniques.<sup>152</sup> Students study and practice these units, and then reassemble and finesse them into a whole.<sup>153</sup> This examination is almost scientific, like dissecting a tissue sample under a microscope and exploring it at increasingly essential levels such as the cell, nuclei, mitochondria, and so on. In this methodology, formal, written analysis is best taught to novices by exposing it and breaking it down into its components, replete with subparts and sub-subparts.<sup>154</sup>

Naturally, an understanding of the parts does not necessarily lead to an understanding of the whole in a simplistic, building-blocks fashion. But it does give the novice analyst a beginner's, step-by-step approach which will understandably take years of practice, experience, and mentoring to develop into fully nuanced, sophisticated skill set. Moreover, to those of us who learned in the traditional "sink or swim" approach to legal writing,<sup>155</sup> it might feel like "cheating" or "spoon feeding"<sup>156</sup> to teach in this fashion. But learning theory supports the notion that exposing the process enables students to learn more quickly and accurately.<sup>157</sup> After all, it is the *practice* of these skills, not their

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their research, writing, and thinking and question premises upon which their analysis is based," allowing "both student and teacher to think more deeply and critically, both about the subject matter that is the focus of the writing and about the writing process itself.").

<sup>152</sup> See *id.* at 46, 54-55 (describing the use of "heuristics," such as "criteria sheets" to reveal the "formal, structural, and analytical expectations that the reader has for the document").

<sup>153</sup> See *id.* at 40 ("In the legal writing course . . . the students work from the bottom up instead of from the top down.").

<sup>154</sup> See *id.* at 46, 54-55 (describing the use of "heuristics," such as "criteria sheets" to reveal the "formal, structural, and analytical expectations that the reader has for the document").

<sup>155</sup> See Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 273 (2009).

<sup>156</sup> Cf. Dionne L. Koller, *Legal Writing and Academic Support: Timing Is Everything*, 53 CLEV. ST. L. REV. 51, 64 (2006) ("Teaching legal writing . . . often requires a one-on-one approach and a level of 'spoon feeding' that would be objectionable if done in an academic support setting. Such 'spoon feeding' can be helpful to students who are performing adequately, because a more directive approach to teaching legal writing can often enable a student to develop a context for writing future papers.")

<sup>157</sup> Cf. Schwartz, *Teaching Law by Design*, *supra* note 31 at 351-52 (critiquing the approach in doctrinal legal courses where professors do not reveal their

mere introduction, that creates effective lawyers.<sup>158</sup> When instructors “hide the ball” by obscuring essential components of the task, even the most rudimentary exercises become quite bewildering and overwhelming.<sup>159</sup> In fact, it is this very concern that novices need more express instructions and modeling that led clinician-scholars to recommend more collaborative work and a staged approach to clinical legal education.<sup>160</sup>

Just like legal readers, who expect writers to disclose their conclusions before setting forth their proof,<sup>161</sup> students benefit from receiving information first in big picture form, and then broken down into increasingly small components, then reassembled into the larger picture again.<sup>162</sup> And like any other adult learner students, law students need those skills to be modeled by the teacher, then practiced, and then improved through critique.<sup>163</sup> Many legal writing professors use a variety of paradigms and checklists to help students break down and then

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expectations to students until after grading the final exam, do not instruct students in how to learn, and provide no trial and feedback opportunities before the exam).

<sup>158</sup> Cf. generally, e.g., BEST PRACTICES, *supra* note 69 (criticizing the lack of sufficient skills training opportunities in legal education).

<sup>159</sup> Cf. Schwartz, *Teaching Law by Design*, *supra* note 31 at 350-51 (describing how traditional casebook teaching methods create an environment in which students are unrealistically expected to “vicariously” absorb learning by watching the professor question other students).

<sup>160</sup> See generally Hoffmann, *supra* note 91 (proposing a staged progression from directive to non-directive supervision), O’Grady, *supra* note 62 (arguing, inter alia, that collaborative approaches to clinical supervision allow greater opportunities for novices to learn by watching experts in practice).

<sup>161</sup> See e.g. RICHARD K. NEUMANN, JR. & SHEILA SIMON, *LEGAL WRITING* 109 (Aspen Publishers 2008) (instructing students that legal readers expect one’s conclusions to be revealed at the outset of a segment of analysis, and not hidden until the end).

<sup>162</sup> Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems”* 61 RUTGERS L. REV. 867 (2009) (reporting student characterizations of the concept “thinking like a lawyer”: “A common metaphor emphasized the need to ‘break down’ problems in sequential order. Said one student, ‘it’s ‘step thinking’ in anything you approach; breaking things down.’ Another said ‘you have to aim at ‘kernels’ of ideas.’”); cf. Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 46, 54-55 (discussing the use of heuristics to teach legal writing).

<sup>163</sup> See generally Schwartz, *Teaching Law by Design*, *supra* note 31 (encouraging legal educators to reveal their expectations in advance, model appropriate solutions to sample problems, providing opportunities for practice and feedback, and assessing classroom learning before the students are asked to undertake a major graded exam or assignment).

reassemble the whole in meaningful form. These types of tools can be quite useful for clinicians in encouraging more experienced students to build on their previous formal training in order to self-teach the more formal aspects of legal writing, such as the parts of a motion for summary judgment, the function of a demand letter, the structure of a complaint, and so on.

Legal writing pedagogy for first-year law students recognizes that novices must learn to play scales before they can play a sonata. Once students have learned their scales in legal writing, clinicians can bring them further along the path, bridging beginner's skills into more dynamic, unpredictable world of live-client law practice. Accordingly, legal writing and clinical programs should operate as a symbiotic—not oppositional—model. The tools that follow can help achieve that goal.

### 3. *Specialized Terminology for a Growing Academic Discipline*

As a result of these insights, legal writing educators have developed considerable terminology to label the parts, functions, and principles of legal analysis.<sup>164</sup> Those components and strategies—as well as the terminology developed to name and describe them—have started to become a key component of the pedagogy.<sup>165</sup> All of the popular textbooks use variants of these terms, and also provide a number of points, annotated exemplars, and checklists for students to use in self-critique.<sup>166</sup> Such tools for self-teaching will work best if they connect the first year writing context to the clinical writing context by using terms familiar to

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<sup>164</sup> See Terrill Pollman, *Building a Tower of Babel*, *supra* note 143 at 888, 898, 906-907, 909-910, 923-924; *see generally* Pollman & Stinson, *IRLAFARC!*, *supra* note 38 (discussing the insights gained from their survey of professional jargon developed by legal writing professors).

<sup>165</sup> *Cf.* Pollman & Stinson, *supra* note 38 at 243-45 (studying the rise of a complex and disparate jargon within the field, and positing that “the new terminology may be necessary to adequately communicate the new concepts, or new combinations of old concepts, that legal writing professors teach. Interpreting law, writing law, and practicing law require unambiguous precision.”).

<sup>166</sup> *See generally e.g.* NEUMANN, *supra* note 140 (providing checklists at the end of many chapters or topics).

students from their legal writing courses.<sup>167</sup> Those terms could be thought of as the lexicon of legal writing.<sup>168</sup>

It would not be surprising to most legal writing professors if, over the last several years, clinicians, employers, and judges have increasingly had the bewildering experience of having a student or law clerk discuss her analysis in a strange foreign language:<sup>169</sup> “Professor, do you feel that the *case illustrations* in the *rule explanation* of my *umbrella CREAC* are the best ones to demonstrate the *rule spectrum* represented by the key arguments and counterarguments?” This kind of discussion takes place every day in legal writing classrooms and teacher conferences around the nation. Students might even expect that all experienced lawyers use these terms of the trade, but they may be foreign to those of us who graduated before the dawn of the modern legal writing program.<sup>170</sup> A number of these terms, which are used to describe components of legal analysis, only came into more widespread use with the advent of formal legal writing courses and textbooks.<sup>171</sup> Perhaps even more vexingly, the terminology varies from textbook to textbook, from law school to law school, and even from professor to professor.<sup>172</sup> One person’s *IRAC* is another’s *TREAT*<sup>173</sup>;

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<sup>167</sup> See Schrup, *supra* note 2 at 305-306.

<sup>168</sup> See Pollmann & Stinson, *supra* note 38 at 245, 246, 254 (referring to the language of legal writing in terms of a lexicon).

<sup>169</sup> *Cf. id.* at 242 (noting in their study of legal writing terminology that the jargon is still so varied that “[even] legal writing professors are not consistently confident that they understand many of the terms used in the legal writing literature and in conversation among colleagues”).

<sup>170</sup> *Cf. id.* at 243 (“... as the new vocabulary grows, communication difficulties threaten its continuing vitality. Legal writing professors, students, and others in the legal community may not understand the new terms of be confident that they share a common language”).

<sup>171</sup> Professors Pollmann and Stinson noted a strong correlation between the terminology legal writing professors use in their classes and the textbooks they assign to their students, or those that they review in-depth when considering which books to assign. *Id.* at 265-266.

<sup>172</sup> See *id.* at 254 (remarking that over one quarter of their survey respondents had actively created their own legal writing terminology).

<sup>173</sup> See generally MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL WRITING AND ANALYSIS* (Foundation Press 2009) (adopting *TREAT* as their variation on the *IRAC* paradigm).

one professor's *legal term of art*<sup>174</sup> is another's *phrase-that-pays*.<sup>175</sup>

Although this great variety in legal writing jargon can be confusing and even frustrating, scholars in the field have observed that for the time being, it is probably too soon to call upon members of the discipline to unify their terms.<sup>176</sup> To do so might stifle advancement within this still relatively young doctrine. At the same time, those scholars have begun to call for a gradual effort to avoid the proliferation of new terminology for the sake of itself, for example out of an over-abundance of caution in borrowing terms used in the scholarship of others,<sup>177</sup> or due to an emotional attachment to favorite terms.<sup>178</sup>

#### 4. *Teaching Methods: Planned Intervention and Constructive Critique*

Because writing *is* thinking, the New Rhetoric uses planned, staged intervention in the planning and drafting stages, rather than critiquing work after the writing project is already complete. In contemporary legal writing programs, this intervention usually takes place on a draft memo or brief that the student has polished to the best of his ability. The instructor provides written feedback and then meets with the student in a conference. Afterward, the student re-writes the project and deepens his analysis. It is during the re-writing process that most students develop the ability to move from formalism to nuance, at least on that specific project.

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<sup>174</sup> NEUMANN & SIMON, *supra* note 161 at 156 (instructing students to use “terms of art” in written analysis when those terms convey an idea that carries a specific legal connotation).

<sup>175</sup> See Pollman & Stinson, *supra* note 38 at 289 (“Phrase that pays” is a term that Mary Beth Beazley has used to refer to the key words or key terms of a rule that the student writer will address in a document.”); see also Beazley, *The Self-Graded Draft*, *supra* note 271 at 182-183 (using the term in context).

<sup>176</sup> Pollman, *supra* note 145 at 890-91 (“[This] Article . . . rejects the potential solution of regulating legal writing jargon or language by committee, because that approach will stifle creativity and vitality in a new area. Instead, it suggests as a possible solution studying the emerging professional language, using care to expand the language only when the neologism enriches, and finally, creating situations within and without the academy for sharing the rich and varied vocabulary of the emerging discipline.”)

<sup>177</sup> Pollman & Stinson, *supra* note 38 at 244.

<sup>178</sup> Legal Writing Institute, *Results of 2007 Survey*, *supra* note 42 at 22.

The form of feedback usually consists of detailed margin comments and some interlineations, followed shortly thereafter by a one-on-one conference<sup>179</sup> to discuss strengths, weaknesses, and plans for re-writing the project. The written feedback should contain a reasonable amount of explanation so that the student understands not only what went wrong, but why it went wrong, and how to improve it.<sup>180</sup> For example, an inadequate comment might simply observe, “there is not enough background explanation on the binding rule.” A better critique would elaborate, perhaps giving non-directive tips for enhancement,<sup>181</sup> such as, “Because the prosecutor is arguing that the statutory language is ambiguous, it may be important to research the legislative history to see what the Legislature intended when it included this phrase.”<sup>182</sup>

The instructor performs triage<sup>183</sup> on the student’s thinking/writing process in a broad-to-narrow fashion.<sup>184</sup> For example, if the student’s work shows a great deal of confusion in structure, which obscures his ability to perform meaningful analysis, the instructor will address the larger structural and organizational problems first, leaving nuanced concerns for later

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<sup>179</sup> See generally Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards A Transformative Learning Experience*, 45 SOUTH TEXAS L. REV. 255 (2004) (offering advice for effective professor-student conferences on legal writing).

<sup>180</sup> Daniel L. Barnett, *Triage In The Trenches Of The Legal Writing Course: The Theory And Methodology Of Analytical Critique*, 38 U. TOL. L. REV. 651, 664-666 (2007); see also Anne Enquist, *Critiquing And Evaluating Law Students' Writing: Advice From Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1149-50 (1999).

<sup>181</sup> Barnett, *Triage in the Trenches*, *supra* note 180 at 665.

<sup>182</sup> The Legal Writing Institute’s Committee on Cooperation Among Clinical/Externship and Legal Writing Faculty has begun a comparative database of clinical and legal writing professors’ feedback on student drafts. It promises to serve as a useful tool for both clinicians and legal writing educators to improve their feedback technique. See Legal Writing Institute, *Committees and Reports*, *supra* note 7. In addition to the collection of commented drafts compiled by the LWI committee, the Institute also recently compiled a monograph on legal writing feedback techniques. The monograph is a collection of the most time-honored and instructive articles. Legal Writing Institute, *The Monograph Series of the Legal Writing Institute, Volume One: The Art of Critiquing Written Work*, available at [http://www.lwionline.org/monograph\\_volume\\_one.html](http://www.lwionline.org/monograph_volume_one.html) (last accessed February 21, 2010).

<sup>183</sup> See Barnett, *Triage in the Trenches*, *supra* note 180 at 654-55.

<sup>184</sup> See Enquist, *supra* note 180 at 1333.

discussion, or for a smaller percentage of the feedback given.<sup>185</sup> Assuming a one-year curriculum, professor and student can slowly graduate from focusing more on overall structure and formal analytical components to concentrating on nuances like depth of research, subtlety of counteranalysis, persuasive use of facts, and so on.

Grammar and writing style become tertiary concerns during this staged approach, even though ultimately they are crucial to one's credibility in law practice.<sup>186</sup> Professors do not always ignore smaller-order concerns like grammar and citation when there are still larger concerns, but they do not edit or comment on them pervasively, even when errors run rampant throughout the draft. A common approach is to comment upon and correct only one or two examples of each category of problem within the document, and instruct the student to find and fix the rest during the *polishing stage* of the final draft<sup>187</sup> (not in the early rewriting stages, when such corrections might be wasted by successive revisions).<sup>188</sup>

### C. Shared Goals and Differing Emphasis

There has been much discussion of the institutional, curricular, and pedagogical barriers to clinical-legal writing collaboration. There seems to be some consensus that while there are a number of barriers, the incentives to collaboration are worth

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<sup>185</sup> See Barnett, *Triage in the Trenches*, *supra* note 180 at 656 (noting that larger-order concerns like structure and analysis should be addressed first).

<sup>186</sup> See *id.* at 657-58.

<sup>187</sup> Enquist, *supra* note 180 at 1139 (“For sentence structure, grammar, punctuation, and citation problems, the experts employ a few different methods. Some line-edit to show how syntax, word order, and verbosity can be improved. Others merely circle the problem, particularly if it is a grammar, punctuation, or citation error, and then write the rule's page number in the margin. When the same error appears numerous times in the same paper, some make the correction the first time the error appears and then write a margin comment that tells the student that the error appears repeatedly. The paper's author is then responsible for finding and correcting the other instances.”)

<sup>188</sup> The lack of resources to address some students' need for remediation in writing mechanics is a frequent source of concern for clinicians and legal writing professionals alike, and the best solution appears to be for the two programs to collaborate in persuading the law school to hire a writing specialist. See Alaka, *Grammar Wars*, *supra* note 16 at 355-56.

overcoming these difficulties.<sup>189</sup> Based on the transfer of learning material presented earlier, it may be useful to think of these barriers coming not so much from the instructors, students, or the pedagogy, but rather from the lack of “connective tissue” to foster transfer across the curriculum. Other than the lack of transfer-friendly curriculum design, another major obstacle probably lies in the status and equality issues that continue to challenge many clinical and legal writing faculties.<sup>190</sup> Despite the great strides brought about by *MacCrate* and *Best Practices*, these challenges are likely to continue to cycle with the national economy.

While legal writing and clinical faculty can hopefully increase their collaboration on these status issues, they can also foster better collaboration on their teaching by focusing more on their shared goals than on their pedagogical differences, and by viewing the relationship between the two courses as symbiotic rather than oppositional. In that vein, it is useful to examine the two programs’ shared goals and differing emphasis, and to look for those points where they can help shepherd students from one type of experience to the other. While the differences are real, the two programs can have the potential to create a holistic blend when properly bridged.<sup>191</sup>

In her thorough examination of the incentives and barriers to programmatic collaboration, Professor Sarah O’Rourke Schrup notes that clinical and legal writing programs are stylistically at odds in some important ways.<sup>192</sup> Their styles differ in that legal writing instruction tends to emphasize students’ ability to perform the formal aspects of legal analysis, while clinical pedagogy emphasizes creative problem-solving and social justice.<sup>193</sup> As described earlier, legal writing programs break down the formal components of analysis into formulas and systems, just like music

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<sup>189</sup> See generally 4 J. ASS’N LEGAL WRITING DIRECTORS, *supra* note 3 (collecting essays and articles on the incentives and barriers to collaboration between legal writing programs and other programs in the law school, particularly clinics).

<sup>190</sup> See Schrup, *supra* note 2 at 320.

<sup>191</sup> Cf. *id.* at 306 (“The strengths that define each discipline, such as LRW’s focus on composition theory and cognitive psychology and the clinics’ overriding social-justice commitments, ultimately could be furthered as a result of improved bonds.”)

<sup>192</sup> See *id.* at 301-324.

<sup>193</sup> See *id.* at 306-18. Professor Schrup describes these two approaches as regnant (reigning/dominant) and rebellious (creative/revolutionary). *Id.* at 303.

composition courses break down music theory into notes and scales. Only once those foundations are laid can law students or musicians make the creative leaps needed to become great at what they do. Due to the different experience levels of their students, points of diverging emphasis include:

<i>Clinic</i>	<i>Legal Writing</i>
Advanced case theory	Core analytical tasks
Integrating knowledge and skills through experience and immersion; some staged progression to independence	Highly structured, sequential scaffolding
Objective-driven and case-driven analysis	Analysis as an end in itself, or to earn a good grade or job
Analysis and writing driven by client and social justice mission	Reader/audience-centered focus
Assignments driven by the case, client, and social justice mission	Assignments driven by pedagogical needs
Largely collaborative	Largely hierarchical due to teacher-student ratio and classroom setting

In terms of logistical and environmental obstacles to collaboration, the following differences between programs make it difficult to use a universal approach to legal writing pedagogy:

<i>Clinic</i>	<i>Legal Writing</i>
Docket- and client-driven schedule	Predictable and paced
Students have previously demonstrated proficiency in core legal analysis skills	Students are complete novices

Tension between client needs, social justice mission, and educational priorities	Completely student-centered
High stakes for instructors, students, and clients	Student grade performance is the only real risk factor in poor individual performance
Lack of a shared lexicon or common parlance for legal analysis among faculty and students	Shared lexicon for legal analysis among students with the same professor
Unpredictable, varied, and unique individual or team assignments	Vetted, paced, tailored, universal assignments

By contrast, the many shared points of emphasis include a balance of directive and non-directive supervision; regular feedback and opportunities for reflection; modeling; faculty interest in law reform and social justice; and faculty interest in curricular reform and learner-centered teaching methods. For example, a number of legal writing courses stress professionalism and even social justice through their classes on client counseling and case theory, and in their creation of writing assignments with socially and culturally charged issues. Clinicians must also stress formalism at times. For example, no matter how cutting-edge an argument seems to be, it will be rejected by the court if it is not presented and filed in the proper manner.

With this in mind, it should be fair to say that clinical and legal writing programs have more big-picture goals in common than not, even though they often differ in what they must emphasize. As for instructional goals, both aim to empower students to achieve the basic proficiency and competence in legal skills needed to enter the field;<sup>194</sup> to become increasingly

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<sup>194</sup> See BEST PRACTICES, *supra* note 69 at 170-72 (identifying as a common goal of experiential programs to “help students develop interpersonal and professional skills.”).

independent professionals;<sup>195</sup> foster and preserve their professional identity and voice (even in the face of vast formal requirements);<sup>196</sup> and to use critical reasoning, such as incorporating narrative, policy, and non-legal reasoning in addition to pure legal reasoning.<sup>197</sup>

#### D. Seeking the Middle Path

The explosion of legal writing scholarship in recent decades guarantees a rich supply of teaching tools for any clinician who seeks them.<sup>198</sup> That scholarship yields a rich and varied lexicon for every conceivable analytical and organizational principle in both written and spoken legal analysis.<sup>199</sup> A small, yet promising new area of research has also begun to explore how practitioners can mentor others' writing in a pure law practice setting.<sup>200</sup> That research recognizes that practitioners are less likely to study pedagogy and learn a special lingo for discussing analytical and organizational problems in their mentees' writing.<sup>201</sup> Of course, law school clinics are neither a pure classroom environment nor a pure practice environment. They combine the goals and contexts of both settings, including a fast-paced, client-driven environment and an equally demanding, pedagogically-driven environment.

Accordingly, using legal writing teaching tools for the classroom or for law practice presents a problem that demands

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<sup>195</sup> See *id.* at 172-73 (identifying as a common goal of experiential programs to “help students learn how to learn from experience”).

<sup>196</sup> See *id.* at 170 (identifying as a common goal of experiential programs to “help students learn to adjust to their roles as professionals”).

<sup>197</sup> See *id.* (identifying as a common goal of experiential programs to “help students become better legal problem-solvers”).

<sup>198</sup> See e.g. Legal Writing Institute, *The Monograph Series: The Art of Critiquing Written Work*, *supra* note 182.

<sup>199</sup> See generally Pollman, *Building a Tower of Babel*, *supra* note 143, (identifying the growing and diverse body of terminology applied to legal analysis and writing), Pollman & Stinson, *supra* note 38 (surveying that terminology).

<sup>200</sup> See generally Jane Kent Gionfriddo, Daniel L. Barnett & E. Joan Blum, A *Methodology for Mentoring Writing in Law Practice: Using Textual Clues to Provide Effective and Efficient Feedback*, 27 QUINNIPIAC L. REV. 171 (2009) (developing a step-by-step approach for law practice mentors to troubleshoot and discuss analytical issues in less experienced colleagues' writing).

<sup>201</sup> Cf. generally *id.* (providing a system for practitioner-mentors to critique associate writing, but avoiding the use of legal writing jargon).

application of the “Goldilocks Principle”<sup>202</sup>—a middle approach is needed<sup>203</sup> that is “just right.”

Based on these similarities and differences, a pedagogy for clinical legal writing should consider a graduated approach to independence from directive to collaborative to nondirective depending on the student’s growth stage and the urgency of the task at hand; a feedback prioritization plan that increases the emphasis on creative analysis in addition to formal structures; a legal writing lexicon for clinic that may consist of an “Esperanto” that is also introduced at some point in that law school’s legal writing program;<sup>204</sup> a method for bridging legal analysis tools from the first-year experience to the present; a modular, deadline-driven approach to early faculty intervention in the planning and drafting stages; and, when time permits, built-in opportunities for critical reflection before, during, and after a major writing experience. The sections to follow detail these strategies with practical applications, beginning first with broad transfer strategies, and then narrowing to specific applications for legal writing methods.

## V. TRANSFER-FRIENDLY CURRICULUM AND TEACHING TOOLS FOR CLINICAL LEGAL WRITING

In their groundbreaking work on transfer theory, Dr. David Perkins and his colleagues developed a number of strategies for “teaching for transfer.”<sup>205</sup> The strategies to be employed depend on how far removed the new context is from the previous learning

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<sup>202</sup> The Goldilocks Principle, derived from the timeless children’s tale, posits that extremes are to be avoided and a middle path that balances extremes is usually preferable. See e.g. Hazel Muir, *Goldilocks’ Planet May Be Just Right For Life*, NEW SCIENTIST, April 25, 2007, <http://www.newscientist.com/article/dn11710> (last accessed February 21, 2010).

<sup>203</sup> See Campbell, *supra* note 6 at 654 (“[legal writing pedagogical] concepts cannot be applied [to clinics] without modification”).

<sup>204</sup> See Schrup, *supra* note 2 at 306-306 (“students are better able to direct their efforts in the clinics when . . . professors use similar terminology and approaches.”) As a caveat, collaborators should be cautious not to put legal writing professors’ status at further risk by eroding academic freedom. The idea here is to introduce an Esperanto, but not to mandate that each professor must use that language to the exclusion of other, preferred terminology.

<sup>205</sup> See generally ROBIN FOGARTY, DAVID N. PERKINS & JOHN BARELL, HOW TO TEACH FOR TRANSFER (THE MINDFUL SCHOOL) (IRI/Skylight Training & Publishing, June 1991) (explaining twelve strategies for the transfer of learning to be engaged in by both teachers and students).

environment.<sup>206</sup> When the contexts are far apart, it is harder for the brain to recognize that learning stored in an earlier schema is appropriate for recall and application in the new situation.<sup>207</sup> For example, a person who has basic skills in painting household interiors can learn how to apply different kinds of paint finishes with a small amount of additional modeling and instruction. But the same person would not be able to learn how to professionally paint cars or airplanes without significant education in the fundamental principles and new materials. Thus Professor Perkins and Salomon categorize their strategies according to whether they help to foster transfer between contexts that are “near” each other or “far” apart.<sup>208</sup>

There are many lawyering skills that constitute near transfer for more experienced practitioners.<sup>209</sup> They might include applying the formal components of a motion, using the West digests to research case law for a new problem, applying cross-examination techniques to multiple witnesses, and so on. The five teaching strategies for near transfer identified by Dr. Perkins and his colleagues are to (1) *set expectations*<sup>210</sup> for the students, (2) *match*<sup>211</sup> the lesson design to the desired outcome, (3) simulate the real-world application,<sup>212</sup> (4) *model*<sup>213</sup> good solutions to problems, and (5) provide *problem-based learning*<sup>214</sup> opportunities.

In the suggested approaches that follow, clinicians can first help students to approach near transfer for previous training in document formatting and analytical structure by more explicitly discussing *expectations* for the writing project before and during the writing process. Second, both faculties can *match* previous formal training in analysis by using relatively consistent terminology, or at least by introducing synonyms or a variety of terms to students before learning becomes too deeply set in one

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<sup>206</sup> See David N. Perkins and Gavriel Salomon, *Teaching for Transfer*, 46 EDUCATIONAL LEADERSHIP 22, 25 (1988).

<sup>207</sup> LEBERMAN, MCDONALD, & DOYLE, *supra* note 18 at 14-15.

<sup>208</sup> Perkins & Salomon, *supra* note 206 at 25-26 (also using the terms “high road” and “low road” transfer synonymously for “far” and “near” transfer, respectively).

<sup>209</sup> See Binder & Bergman, *supra* note 31 at 198.

<sup>210</sup> FOGARTY, PERKINS & BARELL, *supra* note 205 at 33.

<sup>211</sup> *Id.* at 39.

<sup>212</sup> *Id.* at 45.

<sup>213</sup> *Id.* at 51.

<sup>214</sup> *Id.* at 57.

particular lexicon. Third, both faculties can *model* appropriate solutions to real-world writing problems, and this method becomes particularly useful when time runs out and the student is unable to meet all expectations by the time a filing deadline arrives.<sup>215</sup>

When it comes to more abstract tasks like producing a nuanced theory of the case or using case law effectively, the lack of significant, repetitive work experience makes virtually *every* new assignment so novel and complex that it qualifies as a “far” transfer even if it would constitute a “near” transfer within any practicing attorney’s repertoire. Accordingly, the following transfer-friendly teaching methods for addressing legal writing skills in law clinics focus primarily on strategies for far transfer to distant contexts.

In Professors Perkins, Fogarty, and Barell’s system of teaching for transfer, five more strategies help students to “bridge” their learning to distant contexts. First, educators should help students to *anticipate future applications* for the learning so that it can be encoded by the mind in a schema that encompasses that future context.<sup>216</sup> The idea is that a broader schema makes it more likely that the brain will recognize and recall that information when the future application is encountered.<sup>217</sup> Second, instructors are encouraged to help students learn to *generalize* their learning so that skills and knowledge can be abstracted from situation-specific contexts and freed for use in new problems.<sup>218</sup> Third, professors should help their students to become skilled in the art of *analogy*.<sup>219</sup> The more skilled the student becomes in recognizing abstract and creative connections between rules and fact patterns, the more likely that her mind will search related schema for knowledge that can be used to solve the problem at hand.<sup>220</sup>

Fourth, students should be provided with ample opportunities for *parallel problem solving*.<sup>221</sup> This means that practicing each skill only once or twice is usually not enough to achieve a level of encoding and understanding that makes the skill

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<sup>215</sup> The remaining two near transfer strategies are not discussed further here because by definition, clinics already educate their students within a real-world, applied setting and a problem-based approach to learning.

<sup>216</sup> FOGARTY, PERKINS & BARELL, *supra* note 205 at 67.

<sup>217</sup> *Id.* at 67.

<sup>218</sup> *Id.* at 73.

<sup>219</sup> *Id.* at 79.

<sup>220</sup> *Id.* at 79.

<sup>221</sup> *Id.* at 85.

easily transferrable to later experiences.<sup>222</sup> Because clinical education is so unpredictable and case-driven, the opportunity for parallel problem solving in legal writing may very well have to come from other areas in the institution, such as writing across the curriculum, an upper-level writing requirement, and so on. Fifth, learning is better encoded and understood for transfer when students are provided with the opportunity to more consciously connect their learning to experience in a process often referred to as *metacognitive reflection*.<sup>223</sup> On a final note, one powerful additional factor that is not expressly included in Dr. Perkins et al.'s *Mindful School* model, but is overwhelmingly supported in the scientific literature, is the student's need for *motivation* driven by professional development rather than by punitive factors like grade performance.<sup>224</sup>

To facilitate far transfer, both faculties can *anticipate applications* by promoting the clinic within the legal writing program through classroom visits, sanitized examples written by clinic students, and so on. Both programs can also teach the art of *generalization* in many ways, one of which is to identify lawyering skills common to a cluster of tasks, such as persuasive writing, examining witnesses, advising clients in person and in writing, and so on. Next, the two programs can *analogize* between first-year writing tasks and new writing projects in order to match the various formal components and persuasive strategies. Finally, they can encourage various forms of metacognitive reflection through general and tailored exercises designed to carry students from task to task.

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<sup>222</sup> *Id.* at 85, see also HASKELL, *supra* note 20 at 171-86 (stressing the importance of repetition or drill in order to foster transfer).

<sup>223</sup> FOGARTY, PERKINS & BARELL, *supra* note 205 at 91.

<sup>224</sup> See generally Lawrence Krieger & Kennon M. Sheldon, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERS. SOC. PSYCH. BULL. 883 (2007) (discussing the detriments of negative motivators and how to remedy them with motivators geared toward professional development); Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 LAW & PSYCHOL. REV. 57 (2009) (same).

A. Anticipating, Analogizing, and Parallel Problem-Solving  
Among Shifting Legal Writing Contexts

The essence of the transfer problem is that due to the way the human brain encodes new learning according to the precise context in which it was obtained, students often do not recognize when their previous training was designed to prepare them for a new assignment.<sup>225</sup> The shift in context is disorienting unless the brain can recognize enough similar features between the old context and the new context to signal a match. As a result of collaborating with clinicians, legal writing faculty can help students to create a schema for anticipating future contexts, sometimes referred to as *forward-reaching transfer*.<sup>226</sup> At the same time, clinicians can help students by helping them to cue their learning from the past into the present through review, repetition, analogizing, matching, and *backward-reaching transfer*.<sup>227</sup> Such approaches might range from cross-program visits from faculty and former students, to cross-program collaboration on writing assignments, to the more difficult ideal of exposing students to a broader variety of work product with repeated opportunities to address the same types of work product.

In terms of cross-program collaboration in the classroom, legal writing professors can invite clinicians, other local practitioners, or experienced third-year students into the classroom to discuss the many probable applications for memorandum writing in the “real world” of client representation. In this manner, the faculty can anticipate future applications in the clinic, externships, pro bono work, and formal employment by introducing work product types not explored previously in legal writing, and illustrating the similarities and differences to those the students have already encountered.

For example, after writing the first objective memorandum, an attorney or experienced intern can bring in sanitized examples of various kinds of memoranda, including formal analytical memos, shorter research memos, and briefs adapted from those memos. The class can explore them together, and then as an active learning exercise, reflect on how the analytical skills just learned can be found in each of these real-world examples. The students

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<sup>225</sup> See Section II, *infra*.

<sup>226</sup> Perkins & Salomon, *supra* note 206 at 26-27.

<sup>227</sup> *Id.*

should be asked not just to recognize the formal components of analysis in each work product, but also to make some generalizations about how these skills seem to appear across some varied contexts. The goal is to encourage students to encode their new learning, while it still fresh, into a schema that recognizes a wider variety of applications for future recall.

Once students are enrolled in the clinic, legal writing and clinic faculty members can help students to cue their previous training through a legal writing refresher in the clinic seminar. Because clinic students sometimes overlook the relevance of formal aspects of analysis and documents, a sample module might include a reminder about the importance of using the analytical formula, as well as a brief review of the purpose for common document sections in memos and briefs. Furthermore, because clinic is often the students' first opportunity to grasp the pervasive need for good letter writing in law practice, the instructors can move from review to new learning by expanding any letter writing component received in the first year to the various new types of letters one would encounter in practice, including letters that not only give advice, but also demand, negotiate, transmit documents, memorialize and confirm verbal agreements, and so on.

At Washburn, the clinic and legal writing programs collaborate every semester to help students avoid these early pitfalls. Although we have plans for more elaborate collaborations in the near future, we currently teach a legal writing module in the clinic seminar. Our 75-minute session is designed to help the student attorneys reach backward and forward in time to see how their previous, rigorous training in research, analysis, and writing can serve the ever-changing needs of their clinical practice. We have discovered so far that clinic students still need some review and a good deal of supervision in legal writing, but that some of these early pitfalls can be avoided even by this one simple method of teaching for transfer.

In another approach, some legal writing professors are experimenting with writing assignments based on real cases pending in the law school's clinic, through a local legal aid organization, or even in the local or federal courts.<sup>228</sup> When using

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<sup>228</sup> See generally Millemann, *supra* note 3 (advocating that legal writing professors borrow real client problems from partnering clinics or agencies in order to instill motivation and to expose them to various other pragmatic lawyering concerns).

real cases, assignment parameters must be limited by the student's experience levels, the number of pages the professor can be expected to grade per student, the course goals and curriculum, and client confidentiality. But one cannot underestimate the impact on students when they know with such certainty that their work is unquestionably relevant to their future law practice. Not only does real casework provide the holistic motivation of helping others and growing as a professional, it also creates a schema that foresees writing similar memos or briefs in the practice environment.

Finally, and perhaps less practically, a broad-based schema can also result from encountering a wider variety of work product on a repeated basis. In clinical pedagogy, the *learning-based* approaches have reacted to the need for consistent exposure and repeated practice in advocating for stronger commitment to comprehensive skills training in the clinic rather than episodic training that flows from the needs of the case rather than the student.<sup>229</sup> Probably the only way to achieve this goal with some chance of meaningful repetition is to adopt an institutional commitment to skills training across the curriculum, with a coordinated plan to methodically introduce students to different types of work product and lawyering skills and to repeat them in new doctrinal areas throughout their three years of education. It is for this reason that leaders in the academic support and humanizing legal education movements advocate for a greater skills component in doctrinal courses. In that vision, contracts students will draft clauses and agreements while learning about them, as will those learning about real estate transactions. Similarly, rather than just reading about cases, students will use them to write research memos in their tax courses, criminal law courses, and so on.<sup>230</sup>

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<sup>229</sup> See generally Binder & Bergman, *Taking Lawyering Skills Training Seriously*, *supra* note 31 (advocating for case selection and simulated skills training designed to better foster transfer from clinic to practice).

<sup>230</sup> See Beazley, *Better Writing, Better Thinking*, *supra* note 87 (proposing how to include more skills training in doctrinal courses without excessive grading).

## B. Simulating, Modeling, and Matching Through Exemplars and Terminology

### 1. *Teaching with Exemplars Through Annotated Sample Banks*

One important aspect of teaching for both near and far transfer is that the instructor provides exemplars of the expected work product and sometimes even models the approach to the assignment. How much clinicians model writing for students may depend in large part on whether the clinic has adopted a stricter form of either non-directive supervision or collaborative supervision. There will be more opportunities for modeling in the latter, but potentially less opportunity for the student to become immersed in creating a whole product.

Some educators have raised the potent pedagogical concern that students armed with a bank of completed work and comprehensive templates lose valuable learning opportunities. For example, on survey respondent commented that “sometimes I worry that we do our students a disservice with templates . . . .”<sup>231</sup> Another observed that, “I am happy with a non-directive approach in which students do not copy from models or samples.”<sup>232</sup> At the same time, quite a few respondents (nine overall) expressed a wish for more advance guidelines, rubrics, and checklists for their students to use, and some noted that it would be helpful to have them differentiated for various, commonly-encountered types of work product.

Some concerns about using forms and checklists arise from the common experience that students—and even novice attorneys—sometimes lack the judgment to use forms effectively, and in extreme cases, they may even abdicate their responsibilities as advocates, parroting the sample rather mindlessly in many places rather than critically evaluating the material to adapt and improve it for the client’s needs. Sometimes students’ inability to use samples and forms effectively results from stress management or motivational problems, but more often, they likely result from a lack of work experience and a lack of understanding about the teacher’s expectations. A frank discussion about the dangers of using forms and samples uncritically can help to inspire greater

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<sup>231</sup> *Infra*, Appendix C, Question 7.

<sup>232</sup> *Infra*, Appendix C, Question 8.

care.<sup>233</sup> Such discussions have value pedagogically, because the reality is that in law offices, attorneys must learn to recycle and adapt previous research and writing in order to increase efficiency and save client money.

In any event, because students must be able to work independently, a good bank of sample memos, motions, briefs, and other pleadings or contracts are key to avoiding wasting a great deal of client, student, and professor time on needless beginner's confusion. It is mostly fruitless for a student to waste a week of research and writing time trying to understand what content is required in a routine motion, when formal aspects of motion composition can be explained and modeled through a brief discussion and a few good, annotated samples, leaving the student to focus instead on developing unique content.

Because exemplars and templates have such value for helping students to adapt previous learning to new writing projects, the best approach may be to combine well-annotated samples, including advice, instructions, and caveats, with early planning and supervision about how to responsibly use them. Such annotating projects, tailored to the expectations of the clinic, supervisor, and jurisdiction, might be one fruitful outcome of occasional collaboration between the clinic, legal writing program, and the students who worked on those writing projects.

Most law clinics maintain sample document banks from past transactions or litigation. But understandably, few spend the time resources necessary to annotate those samples. Furthermore, the Clinical Legal Writing Survey demonstrated that many sample banks may not even be organized by document type.<sup>234</sup> Now that document scanners, PDF file conversion software, and word processors with commenting tools are inexpensive and found in

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<sup>233</sup> See Terry Jean Seligmann, *Why Is a Legal Memorandum Like an Onion?--A Student's Guide to Reviewing and Editing*, 56 MERCER L. REV. 729, 730-31 (2005) ("Published checklists can provide comprehensive guidance for you in creating and assessing your work. Legal writing teachers frequently use checklists or comment sheets, either standardized or custom tailored to the assignment. A danger of such lists, though, is that they may lead you to neglect the big picture in favor of spending an inordinate amount of time on a relatively unimportant decision, such as how to abbreviate the party's name in a citation. Any guideline or checklist should not be viewed as setting up rules applicable to all situations, or formulas that must be slavishly followed whether or not the legal analysis for the case fits the formula.")

<sup>234</sup> See Survey, *infra* at Appendix C, Question 7.

almost every university office, clinics can have students and staff supplement the bank not only with finished work product, but also with scans of their previous drafts, including the professor's interlineations and margin comments, as well as with reflective comments composed by the student attorney at the completion of the writing project. That process can be dovetailed with the student's opportunity for retrospective metacognitive reflection on the assignment.

## 2. *Matching Analytical Skills Through a Regular Legal Writing Vocabulary*

Transfer theorists would probably agree that performing written analysis in different situations calls for a "near" application of skills in a similar context. For example, regardless of the doctrinal area or type of written product, most often the student will apply some variant of IRAC structure, identify and explain the binding rule, apply it to facts through analogy and distinction, and so on. But this "near" transfer can seem very far indeed when students receive feedback using language and concepts that do not resemble those used in any of their previous training. Even more detrimental to the transfer of learning is the lack of a sufficient vocabulary to discuss analytical problems in writing:

From having many conversations about this with clinicians, I have noticed . . . it is difficult for [clinicians] to articulate what "is wrong" with student writing . . . . My experience is that clinicians (and other faculty and externship supervisors and lawyers in general) know good writing when they see it, and can identify writing as "ineffective" but have a difficult [time] diagnosing what is not working about the writing – large scale structure, small scale structure, depth of analysis, coherence, mechanics [, etc].<sup>235</sup>

Educational scholars who advocate teaching for transfer encourage teachers to show their students the similarities between near problems by "matching" them.<sup>236</sup> In the legal writing context, that

<sup>235</sup> Legal Writing Institute, *Results of 2007 Survey*, *supra* note 42 at 24-25.

<sup>236</sup> FOGARTY, PERKINS, & BARELL, *supra* note 205 at 39-43.

matching can take place through a better-coordinated vocabulary for describing the same skills. For many, that may require cross-training between the programs.

As observed earlier, nearly 90% of LWI members who responded to the 2007 Collaboration Committee survey felt that students would benefit from a more coordinated vocabulary for legal writing skills among the various skills programs in the law school. At the same time, a number offered cautionary observations. They included the need to protect academic freedom, resistance from other faculty to “move beyond” the basic IRAC paradigm, and, most commonly, lack of time and physical separation between the two faculties:<sup>237</sup>

We rarely see most of our clinicians, and exchange words only at faculty and committee meetings, and faculty lunches. They are in a different part of the building and often out of the building. It’s hard to build a common vocabulary when you don’t speak to each other much.<sup>238</sup>

The coordination problem is particularly troublesome when law schools use adjunct professors to teach legal writing, regardless of the many gifts those practitioners may bring to the school: “It is very difficult to coordinate all the different adjuncts’ schedules with full-time clinical faculty. We simply do not have the ability to teach cooperatively in ways that all-full time faculty do.”<sup>239</sup>

One of the more impenetrable problems may be the strong feelings some have regarding the use of paradigms like IRAC as a teaching tool: “there is some resistance to using LRW concepts like ‘IRAC’ because clinical professors (like some other doctrinal professors) don’t appreciate that it’s a tool that can be used flexibly, not mechanically.”<sup>240</sup> These prejudices exist on both sides of the fence:

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<sup>237</sup> Legal Writing Institute, *Results of 2007 Survey*, *supra* note 42 at 23-24.

<sup>238</sup> *Id.* at 23.

<sup>239</sup> *Id.* at 23. That problem may be somewhat ameliorated in adjunct-based programs that mandate a uniform textbook, although of course, academic freedom suffers as a result.

<sup>240</sup> *Id.* at 23.

[There are m]isconceptions about writing from both sides. Clinicians have been heard to say that the writing done in the required first semester programs “has nothing to do with practice” and that clinic students should start over and forget everything they learned about legal writing in those courses. Writing professors have been heard to say that clinic writing is not effective and doesn’t conform to readers’ expectations.<sup>241</sup>

When it comes to resistance to core legal writing methods like IRAC and its progeny, legal writing faculty have a role to play: “When writing teachers require students to use a strict ‘formula’ such as IRAC, it inhibits them from hearing the alternative structures that may be more effective. This builds barriers.”<sup>242</sup> Just as potent are individuals’ attachments to their idiosyncratic methods:

Ego and fear [are also a problem]. Clinicians and writing teachers are deeply committed to student learning. They have developed language and pedagogy that is sophisticated. In light of all that investment of time and energy, it is difficult to step back and say, “Maybe I was wrong. Maybe I need to rethink how I teach. Maybe someone else has a better idea and is teaching important material better than I am.”<sup>243</sup>

Working through these barriers will require time and dialogue between the two faculties as they seek to understand each other’s methods. Some ideas put forth by the LWI members were recognizing common goals and learning about each other’s methods through dialogue, such as meetings, workshops, and brown bag lunches; and working together to develop common materials for students, such as annotated exemplars, rubrics.<sup>244</sup> To aid these discussions, a short legal writing vocabulary primer is provided in Appendix B.

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<sup>241</sup> *Id.* at 25.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Legal Writing Institute, *Results of 2007 Survey*, *supra* note 42 at 26-27.

### C. Metacognitive Reflection and Exercises

Connecting clinical experiences to past and future applications requires some time for reflection. In simple terms, metacognition means “thinking about thinking.”<sup>245</sup> Mindfulness of one’s own thinking and learning process can bring an almost meditative quality to education that allows the mind to forge the connections necessary to foster transfer. Like any other learning strategy, educators can help students to train in metacognitive awareness by encouraging them to discuss their learning and even to work on exercises that prompt them to connect their experiences to their learning.<sup>246</sup> In fact, journaling about one’s experiences, particularly stressful experiences, has been shown to have profound positive impacts on physiological health and cognition alike.<sup>247</sup>

Some ideas for written metacognitive reflection relevant to the clinical setting are the transfer exercise, the private memo, and the journal, which roughly fall along a spectrum from most structured (the tailored exercise) to least structured (the reflective journal). Journaling is already popular in some clinic and externship programs. Private memos have been recommended to clinical programs before, but I suspect that they remain underused. Perhaps the most novel and underexplored form in the clinic is the tailored exercise, and it may be the tool most amenable to inter-program collaboration.

#### 1. *Transfer Exercises*

Guided and structured metacognitive reflection is no longer new to legal education, but it does not appear to be in wide use yet. For law schools that have academic support programs and have adopted models like Michael Hunter Schwartz’s *Expert Learning for Law Students* (Ex-L) program, students engage in a series of

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<sup>245</sup> Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DETROIT MERCY L. REV. 1, 14 (2003)

<sup>246</sup> See Alaka, *Phenomenology of Error*, *supra* note 15 at 16 & n. 343.

<sup>247</sup> See generally James W. Pennebaker and Cindy K. Chung, *Expressive Writing, Emotional Upheavals, and Health*, printed in HANDBOOK OF HEALTH PSYCHOLOGY 263-284 (H. Friedman & R. Silver, eds., Oxford University Press (2007) (discussing the results of their studies of journaling in trauma patients).

such exercises specifically for the purpose of transfer, i.e., to help them to connect their new learning to past and future applications.<sup>248</sup> Based on her research into transfer of learning within the legal writing classroom,<sup>249</sup> Professor Aida Alaka has developed a tailored reflective exercise designed to encourage students to integrate professor feedback on the previous legal writing project with the skills to be applied to the next project.<sup>250</sup> She based this exercise on her extensive study of how ten first-year students with varied performance in their legal writing courses used the extensive, individualized written feedback they received from their professors on their memo and brief assignments.<sup>251</sup> She interviewed students who significantly improved over the course of the year, declined, or remained at the same level of performance.<sup>252</sup> As she sometimes puts it, what she found changed the way she teaches:

For example, I have created quizzes and exercises tied to current and past reading assignments. At the beginning of the second semester, I require students to review my first semester comments, and submit a memorandum analyzing their own strengths and weaknesses, and assessing their approach to writing. I have also developed peer-grading exercises that require students to reflect on their own work after they have assessed another's. Using guided reflection, these exercises promote the transfer of skills and knowledge between writing projects and semesters, encourage the students to think about their experiences, and enhance their metacognitive reflection.<sup>253</sup>

The work of Professors Schwartz and Alaka demonstrates the great potential for constructive metacognitive exercises to facilitate student writing in the clinic. Structured exercises prompt students to assess their current strengths and weaknesses based on feedback from first year professors, legal employers, and clinic supervisors.

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<sup>248</sup> See generally Schwartz, *supra* note 31.

<sup>249</sup> Alaka, *Phenomenology of Error*, *supra* note 15 at 36-38.

<sup>250</sup> See Alaka, *Phenomenology of Error*, *supra* note 15 at 16 & n. 343.

<sup>251</sup> See Alaka, *Phenomenology of Error*, *supra* note 15 at 3-5.

<sup>252</sup> See *id.* at 8.

<sup>253</sup> *Id.* at 62 n. 314.

They also stimulate students to recall specific skills, knowledge, and resources acquired in previous contexts and to bring them into the present experience. Exercises can be generic or tailored to a specific type of work product or even an individual assignment. Whether generic or tailored, these exercises or questionnaires create the opportunity to foster recall and to create associations with previous contexts before the project gets underway, and thus before substantial student and professor resources are invested in creating a document. They also allow student and professor to spend more time *building* upon previous skills, rather than re-learning them.

## 2. *Private Memos*

Other authors have already extolled the virtues of the reflective memorandum in helping to illuminate a student's thought process to the professor.<sup>254</sup> This tool has been coined the "private memo,"<sup>255</sup> and was originally designed to help legal writing professors understand their students' strategic thinking during the writing process.<sup>256</sup> In a private memo, the student describes her struggles and decisions with myriad tasks in legal analysis, including litigation strategies like issue framing or how to tell a good story in a fact statement; critical reading problems like understanding the holding and reasoning in a complex but binding case; organizational challenges such as where to include the standard of review in an appellate brief, and even logistical concerns that often feel like mountains to law students, such as how to align a signature block along the right-hand margin.

The private memo helps to shortcut the triage process for the professor and helps her to target her feedback to the issues that most troubled the student, in addition to finding new points that the student may not have considered.<sup>257</sup> It also has a promising side-effect, which is to encourage the student to engage in metacognition before submitting her final draft. The memo assignment can be open-ended and directed entirely by the student, which brings it closer to the free-form, journaling end of the spectrum, or can combine open-ended reflection with some

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<sup>254</sup> See Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 59-60.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

guiding questions keyed to the assignment, more akin to the tailored reflective exercise. Such tailored questions might center around trouble spots anticipated by the professor, such as a tendency to conflate different elements within the cause of action, to overlook certain affirmative defenses, and so on. Which approach to adopt really depends on the strengths of the individual student, the complexity of the assignment, and whether the professor has specific concerns in advance that she knows she would like the student to consider before submitting the draft.

### 3. *Journaling*

Even more than the private memo, journaling has been lauded as a key learning tool across many disciplines. In fact, journaling has such a powerful effect on the psyche that it is used in many psychiatric therapies and has been associated with stress reduction and better immunity.<sup>258</sup> For these and many other reasons,<sup>259</sup> journaling is already in widespread use within clinical programs.<sup>260</sup>

Due to their unstructured form, journals are better suited to situations where the student is expected to foster her own learning, and not to situations where the professor has very specific expectations for the assignment, such as asking for very particular information about a drafted piece of work product. In the clinic, journal entries about legal analysis and writing might be best suited to a weekly or other periodic format and may or may not be specifically discussed with the professor during individual supervision or case rounds. One possible application for journals about clinical writing is to assign a short weekly journal entry to accompany presentation of a student's clinical writing portfolio at the end of the semester. As discussed elsewhere in the literature, the act of assembling one's written work into a portfolio and reviewing one's growth during the process can help to form a profound sense of professional growth and accomplishment during

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<sup>258</sup> See generally Pennebaker & Chung, *supra* note 247.

<sup>259</sup> See generally J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996) (describing the many purposes and benefits of journaling in law school clinics).

<sup>260</sup> See Nancy Levit, *The Theory and the Practice--Reflective Writing Across the Curriculum*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 253, 231 (2009).

a formative educational experience like law clinic—or at least to identify areas for continued improvement.<sup>261</sup>

## VI. NEW RHETORIC-BASED APPROACHES TO SUPERVISING CLINICAL LEGAL WRITING

As discussed earlier, legal writing pedagogy is solidly founded in the New Rhetoric, which views writing as a manifold, recursive process of thinking, researching, writing, and revising. In both college and law school classrooms, educators who teach written analysis “intervene” in the student’s process, scaffolding their learning during the planning, writing, and editing/revising stages. They do this through tools like written critique and selective interlineations, one-on-one verbal conferences, modeling, exemplars, and so on. Clinicians can use earlier and more frequent intervention to encourage better initial drafts and significantly evolved subsequent drafts. Tools that are well-suited to the busy, unpredictable clinical environment are those that put the most emphasis on well-planned independent preparation by the student. By learning how better to plan their research and writing and prepare for conferences, students can make much better use of precious one-on-one supervision time. To achieve this end, clinical professors can intervene early by using tools like research plans, annotated outlines, and modular drafts. During the revision process, professors can also use even more tools that empower students to become better self-directed in their use of equally precious written feedback. They can include self-critique, peer critique, prioritized written and verbal feedback, and the metacognitive exercises discussed in the previous section. Finally, during the final drafting process, professors can make judicious use of intervention through modeling, collaboration, and journaling.

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<sup>261</sup> Cf. Steven J. Johansen, “*What Were You Thinking?*”: *Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123, 140-42 (1998) (discussing how the act of compiling and annotating a portfolio encourages a student to reflect upon his or her choices as a writer and to identify areas for improvement).

### A. Early Intervention: The Planning and Research Stage

One prominent result found in the Clinical Legal Writing Survey was that about two thirds of the professors rely heavily on oral instructions when assigning a writing project to students. That most popular method is followed closely by instructions provided in class and then by exemplars found in the clinic's bank of sample work product. Only one assigns a textbook, *Writing for Law Practice*, but presumably others carry some materials in their clinic law library. The survey did not address the latter practice, although one respondent did note a wish to identify better writing handbooks for the clinic library. Clinics can enhance their teaching by providing more advance instruction for assignments, perhaps with more general rules and points provided in writing at the beginning of the semester, and by intervening in the planning stages of writing as well as in later drafts.

#### 1. *Research Plans*

Students often feel overwhelmed when beginning a new research project, and even more importantly, often overlook major sources of law, particularly when the institution's first-year curriculum fails to emphasize statutes as primary, binding sources second only to the federal, state, and tribal constitutions. The programs can collaborate to create a flexible model research template or templates for use in both programs. In my first year writing course, I have found that students can benefit from a methodical and comprehensive "three-branches" approach, which cues them to consider all major sources, including statutes, treaties, regulations, constitutions, cases, and so on.<sup>262</sup> This approach also cues students to think of both primary and secondary sources in a methodical manner:

1. Identify the issue
2. Identify which sovereign government's law controls: tribal, state, or federal
3. Secondary sources
4. Primary sources by branch of government

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<sup>262</sup> For sample research plans and flowcharts, see AMY SLOAN, BASIC LEGAL RESEARCH 320-32 (4th ed., Aspen Publishers, 2009).

- a. Legislative (examples: statutes, bills, legislative history, court rules)
  - i. Binding
  - ii. Persuasive
- b. Judicial (judicial opinions, court rules)
  - i. Binding
  - ii. Persuasive
- c. Executive (examples: regulations, treaties, executive orders, proposed regulations, agency decisions)
  - i. Binding
  - ii. Persuasive

Students should first identify the issue being researched, and the supervisor may wish to verify it before the student spends considerable time in the library. Next, the student should also determine which sovereign's law governs, federal, state, or tribal, and then examine sources of law from each of its branches. Students are then asked briefly to research and list major, reputable secondary sources, such as popular practitioner treatises, that might lead them to other pertinent sources and educate them in the background of the matter. Finally, students are asked to brainstorm and briefly identify both binding and persuasive primary sources of law from each of the three branches of government: executive, legislative, and judicial. Particularly with the executive branch, students are often quite surprised to learn how many matters are governed in part by agencies at the state or federal level, not to mention such little-discussed primary sources as executive orders, treaties, signing statements, and so on.

## 2. *Annotated Outlines*

An annotated outline is a linear outline that is organized by recognizable legal components from broad to narrow, such as causes of action, then elements or factors, then parts of the analytical paradigm, such as IRAC or CREAC. To annotate an outline generally means to include full case citations, including complete with pinpoint page references, for each assertion about a rule, case, or the application of law to facts. Annotation can also mean to label the structural components of analysis and even to include some of the writer's internal decision-making processes. Because

students are trained to think of legal analysis in analytical layers, they should easily be able to structure their outlines in the customary order and even to label the different layers for the professor, in order to expose the student's structural thinking.<sup>263</sup>

Annotated outlines allow the professor to triage organization and reasoning before the student makes a tremendous investment in time and energy, and before too much of the period before the filing deadline has passed, leaving more time for meaningful revision and critique. Ideally, the outline should at least reflect the structure and planned content of the discussion or argument section, but can also include earlier sections like the facts. Annotated outlines are not limited to memos and briefs, but can also be used for letters, complaints, contracts, and so on.

Such outlines also teach the student the value of planning a project before beginning, and can give the student a sense of grounding and accomplishment before facing the dreaded "blank page" of a major writing assignment. In fact, if the outline is sufficiently detailed, it has the power to greatly reduce writer's anxiety for most students, as does the supervisor's feedback gained through the triage of the outline draft. I have had students turn in a six-page annotated outline for a five-page assignment. By the time the students were finished outlining, they had almost written the entire memo, and just needed to convert it to prose form and work on fleshing out the concepts and the connections between ideas (or even cutting out weaker concepts). Others turned in cursory outlines suggesting that they were struggling early with the concepts involved and needed greater intervention.

Many students may struggle to create a good linear outline from the beginning. The clinic faculty can encourage them to experiment with pre-planning through non-linear outlines, such as spokes-and-wheels,<sup>264</sup> flowcharts, index cards, and the like. Those

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<sup>263</sup> Cf. generally Beazley, *The Self-Graded Draft*, *supra* note 271 (describing her self-critiquing exercise). This type of structural annotation can even replace the need for a private memo at the earlier drafting stages. A private memo, which, as described below, is a more narrative-style explanation of the structure and reasoning, which might be better suited for a later draft, after the first draft is produced based on the critiqued, detailed outline.

<sup>264</sup> A good example of a spokes-and-wheels outline can be found in BRYAN GARNER, *THE WINNING BRIEF* 26-29 (2d ed., Oxford University Press 2004) (describing this form as a "whirlybird" outline). See also Colleen Rae, *Before the Outline: The Writing Wheel*, *COLLEGE TEACHING*, Vol. 34, No. 3, pp. 99-102 (Summer 1986).

forms encourage brainstorming and continual reorganization of interconnected ideas without the distraction of the need to enforce rigid hierarchy.<sup>265</sup> Nevertheless, because written legal analytical structure is linear, students who prefer non-linear outlining should learn to convert that structure to linear, top-down, broad-to-narrow hierarchical outline structure before tackling the draft itself.

### 3. *A Note on the Role of the Clinic Handbook or Manual*

Many clinics already provide a detailed manual to their student attorneys to serve as a reference for clinic policies and as a teaching tool for core skills that a student may have to exercise before there is an opportunity to address them in the simulated clinic seminar. Based on my personal experience in helping to compile a clinic manual and in reviewing exemplars from other universities, the main skill usually addressed in such manuals are usually client interviewing and file maintenance, because the students are expected to review their case files and meet their clients shortly after the semester begins, while the seminar is only just getting underway.

Because this article proposes more advance instruction and professor intervention in the planning, drafting, and final stages of research and writing, some basic exemplars, checklists, and exercises for research plans, different types of memos, and common varieties of work product can be good additions to the manual because they are much more likely to be used than those that must be located by searching binders or computer banks full of sample memos, briefs, and forms. In addition to exemplars and exercises and general exhortations about rules for handling correspondence, the manual can also include guidelines for consulting with supervising attorneys about expectations, drafting cycles, and other deadlines for all kinds of written product.

By incorporating more information about clinical legal writing, the “learning-centered” course manual<sup>266</sup> thus enables students to become more self-sufficient early in the semester, and to understand the relative emphasis on legal research and writing tools as vital to their success in clinic and law practice.

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<sup>265</sup> See GARNER, *supra* note 264 at 26-29.

<sup>266</sup> See generally Craig T. Smith, *Teaching Students How to Learn in Your Course: The “Learning-Centered” Course Manual*, 12 PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING (2003).

## B. Mid-Point Intervention: The Recursive Drafting Stages

### 1. *Modular Approach to Document Production with Calendared Deadlines*

Due to stress and transfer problems, students sometimes flounder when faced with the “cognitive overload”<sup>267</sup> of a new writing assignment, particularly if it involves an unfamiliar doctrinal legal area or type of work product. In addition to the transfer-friendly teaching techniques discussed in this article,<sup>268</sup> students and professors often benefit from approaching the writing project in a modular fashion, one small segment at a time,<sup>269</sup> and to having the opportunity to rewrite multiple times. For example, with an internal memo, it is often a good idea to critique the statement of issues, brief answers, and facts before the student spends too much time on the discussion, sometimes even one section at a time. In this tighter, but more paced manner, both professor and student can ensure an adequate understanding of the question presented and avoid excessive “red herring” issues and wasted research trails.<sup>270</sup> In another example, the discussion or argument section of a memo or brief can also be reduced to segmented assignments. For example, one might ask the student to explain and prove the rule of law and submit it for feedback before attempting to apply it to the facts. In that example, such a piecemeal approach might be warranted where the rule of law is rather unsettled or novel in the jurisdiction and there is a great likelihood that the student will need guidance in predicting and proving the rule before spending a great deal of time validating its application to the client’s facts.

Of course, in the clinic, multiple and/or modular drafts are practical only when the filing deadline permits the luxury of time for a series of revisions and supervisory meetings. Moreover,

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<sup>267</sup> See Rodriguez, *supra* note 14 at 236.

<sup>268</sup> Section VI, *infra*.

<sup>269</sup> See Beazley, *Better Writing, Better Thinking*, *supra* note 87 at 54-55 (describing the use of heuristics in legal writing instruction).

<sup>270</sup> Of course, it is also understood that valuable learning experiences also inhere in these red herrings and dead-end research trails. The goal here is to weed out those that result from mere confusion about the expectations for the assignment, and learn instead from the narrower “mistakes” that result from the need to discern among confusingly similar causes of action, legal doctrines, and so forth.

individual professors' busy caseloads and schedules may create impediments to using a more frequent and routine system of drafting. In the survey, clinicians were asked to assess their overall supervisory styles when it comes to providing feedback and revision opportunities to students in their clinical legal writing. Fortunately, one positive sign that emerged was that the vast majority reported making the time for multiple drafts with feedback, particularly for major assignments. Only three clinicians reported problems finding time to allow for multiple drafts in such situations. One of those three qualified the answer, indicating that although re-writing may not take place frequently, when it does happen, the problem is lack of time: "When I've re-written, this is why." A few also reported that they rely more on oral feedback due to insufficient time to give considerable written feedback.

In fact, a significant percentage of the survey participants reported that one of the biggest obstacles to effective collaboration with students on their writing projects was actually the *students'* struggles with time management. The modular approach lends itself well to a series of smaller, calendared assignments that build toward a whole document, and teaches students to schedule ample time for the planning, outlining, and recursive research and writing phases of the drafting process. Today's law students are well-suited to a segmented drafting cycle due to the very pedagogy employed in first year legal writing, where classes learn their "scales" through deconstructing and re-assembling legal analysis through analytical formulas, methodical organizational hierarchies, checklists, and a section-by-section approach to document assembly. A modular approach can also help to identify early those students who struggle with motivation or time management—even their early product will tend to be late and/or underdeveloped.

To put this segmented approach into practice when time allows, the professor can ask the student to take responsibility for proposing a drafting schedule that works back from the filing deadline, leaving at least three to five business days for proofreading, filing and service, depending upon the court rules. Even with a tighter writing schedule, such as a 14-day deadline to file the response to a motion, a student and professor who are able to have shorter but more frequent meetings can agree to review a segment every couple of days during the first week, resulting in a

completed rough draft, and to use the second week for revision and finalizing.

If the particular clinic's supervisory style, caseload, and student-teacher ratio permits this piecemeal approach, it can be quite beneficial to students in developing a realistic understanding of how long it takes a novice attorney to produce even the most rudimentary work product. It is not realistic to expect students to have strong time management skills when it comes to producing new types of work product because they simply do not yet have the experience to fully comprehend what is expected or entailed. Professors can scaffold students into this understanding by requiring modular drafts and deadlines at first, and then increasingly leaving it up to the more self-directed students to set their own drafting schedules as the semester goes on.

## 2. *Self-Critique and Peer Critique*

In their supervision, clinicians can help students learn to become more effective evaluators of their own writing by encouraging them to use exercises for self- and peer-critique. Several years ago, Professor Mary Beth Beazley devised a self-grading tool that students can use to triage their own analytical structure. Her method, which is called the Self-Graded Draft,<sup>271</sup> is easily adaptable for different tasks and environments and holds great potential for helping clinic students to become more independent. Many legal writing professors across the country use this highly-regarded and time-tested technique, and so there is a reasonably good chance either that new clinic students have already learned a variant, or that some legal writing faculty members would be willing to teach it during the first year as a collaborative effort with the clinic.

In the self-graded draft, students learn to mark up and color-code different parts of their analysis.<sup>272</sup> This approach may sound rudimentary, but its simplicity belies its power to teach good structure, and even good technique.<sup>273</sup> Generally speaking, students begin by labeling the analytical layers in each separate

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<sup>271</sup> See generally Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175 (1997).

<sup>272</sup> *Id.* at 188.

<sup>273</sup> *Id.* at 182-85.

analytical unit.<sup>274</sup> Thus if a cause of action contains four disputed elements, the student would label the parts for the introductory, “umbrella” paragraphs that describe, define, and explain the cause of action, and then for the separate analyses of each of the four elements. Further steps require students to identify the focal point of each issue’s analysis,<sup>275</sup> to locate defining terms from the governing test,<sup>276</sup> to mark citation placement and frequency,<sup>277</sup> to illustrate the appropriate and sufficient use of facts from the client’s matter, and so on.<sup>278</sup>

In the clinic, it could be useful to revisit the self-graded draft technique in a refresher session on legal writing and to have students practice it on a very short memo of four to five pages during the class. After the refresher, the instructions for the self-grading method should be accessible by handout, TWEN posting, or clinic handbook. Professors who like this tool can then elect to ask students to submit their draft work products with self-graded markup for memos and briefs, illuminating the structure in advance for both professor and student.<sup>279</sup> It is often a good idea to require markup to be turned in a day or two before the draft is due. Doing so can help to avoid last-minute writing and can also signal structural danger to the student while he still has time to make meaningful changes before the professor must invest time in critique.

It is not difficult to envision further applications for these same color codes in any document that requires a certain recipe of “ingredients.” For example, in a jurisdiction that requires notice

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<sup>274</sup> *Id.* at 178-79 & n. 5.

<sup>275</sup> *Id.* at 190.

<sup>276</sup> *Id.* at 190-91.

<sup>277</sup> *Id.* at 195-96.

<sup>278</sup> *Id.* at 199. The original model calls for yellow to mark the appearance of the CREAC focus in the end-conclusion in order to bring the analysis back to the big picture. *Id.* I still ask my students to do so with pen, but in an adaptation, I have conscripted the color yellow to represent facts from case law. The reason is that students often tend to emphasize either almost all client facts or almost all case facts when applying the law to the client’s problem. The green/yellow combination helps them to test whether they are using a reasonable balance of facts from both types of sources, in the hopes that this will encourage meaningful comparison and contrasts between fact patterns.

<sup>279</sup> For example, if the application of rules to facts is all green and very little yellow in the method described above, it is immediately clear even before reading that the student probably has not used the case law sufficiently for analogy and distinction from the client’s facts.

pleading, a professor might ask the student drafting a complaint to mark the terms of art from key elements in one color and the client's facts in another in order to ensure that each element is separately addressed and supported by concrete allegations. Even though the draft complaint may very well need more facts and more elements added, the professor will get the document at a higher stage of development in both structure and content, as opposed to receiving a bare-bones document with few allegations included.

As for peer critique, that tool has a love-hate reputation among the faculty and students who have used it, but the benefits promise to tip the scale even more in clinic than they do in legal writing. Proponents find peer critique tremendously enlightening as a teaching tool for both the critiquing student and the writing student, and thus a nearly indispensable aspect of legal writing pedagogy.<sup>280</sup> According to Professor Kirsten Davis, its advantages include exposure to collaborative learning,<sup>281</sup> the benefit of a greater diversity of critique,<sup>282</sup> and a rare opportunity to evaluate a work-in-progress from the perspective of the legal audience.<sup>283</sup> On the other hand, peer critique exercises can be challenging to administer because they require precise instructions and feedback exemplars<sup>284</sup> and a reasonable amount of novice legal writing experience among the students.<sup>285</sup> Another very potent obstacle is students' common fear that others will "steal" their work and gain an advantage, not to mention fears about exposing one's writing ability to competitive classmates.<sup>286</sup> Finally, Professor Jo Ann Durako reports that "outlier" students at the high and low ends of the curve sometimes feel that they gain little from the experience.<sup>287</sup>

Fortunately, in the clinic, many of the obstacles faced by professors teaching first-year legal writing are not present.

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<sup>280</sup> See Kirsten K. Davis, *Designing And Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 1, 2 (2003).

<sup>281</sup> *Id.* at 2-3.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 4.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 4-5.

<sup>286</sup> *Id.*

<sup>287</sup> See Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 73,\*3 (1999), cited in Davis, *supra* note 280.

Students typically are not eligible for clinic until their third semester of law school, and by then have more experience with receiving critique in legal writing and possibly in a summer clerkship. Because clinic students often work in teams on collaborative writing projects, the fear of grade disadvantage is largely ameliorated, as is the “outlier” problem experienced in larger classroom settings. Moreover, the advantages of peer feedback dovetail nicely with clinical pedagogy, particularly as two of the greatest benefits are exposing students to collaborative work and providing them with tools for self-empowerment.

As for training, some synergy and efficiency can be achieved by combining the peer feedback training and methods provided by Professor Davis<sup>288</sup> with Professor Beazley’s self-graded draft technique described above. Because both approaches aim to help students teach analytical organization to themselves and each other, they combine very well. In fact, I often use various aspects of the self-graded draft markup system when critiquing students’ papers. Clinicians may be able to encourage or require peer critique for early drafts before engaging in significant professor critique.

Finally, moving from critiquing exercises to rubrics, many textbooks advocate a checklist approach to legal writing for more experienced students, and even to novices.<sup>289</sup> If the clinic faculty can gradually prepare checklists for different types of work product found in the clinic, perhaps even with some collaboration from legal writing colleagues, they can slowly build a bank of self-guiding worksheets for clinic students (and legal writing students<sup>290</sup>) to use in approaching new types of attorney work.

Remembering that shifts in context can often lead to skills attrition or a failure to cue previous learning, checklists have the power to help students recall knowledge previously stored for different applications. For example, a student assigned to write a

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<sup>288</sup> Davis, *supra* note 280 at Appendix A.

<sup>289</sup> See generally AUSTEN L. PARRISH & DENNIS T. YOKOYAMA, *EFFECTIVE LAWYERING: A CHECKLIST APPROACH TO LEGAL WRITING & ORAL ARGUMENT* (Carolina Academic Press 2007). See also LINDA H. EDWARDS, *LEGAL WRITING & ANALYSIS* 112-125 (2d ed. 2008), NEUMANN, *supra* note 140 at 116-137; CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 218-222 (5th ed. 2006).

<sup>290</sup> Collaborating to create checklists and rubrics benefits the legal writing faculty as well: tools produced with the clinic are even more likely to represent the priorities of practitioners in the jurisdiction.

motion for summary judgment may falter at the new form of motion and by the strange new focus on genuine issues of material fact, but can be cued by conversations and checklists to treat these procedural questions as just another issue to be analyzed using principles covered in the first year.

### 3. *Prioritized and Instructive Feedback*

In the survey results, clinicians revealed that they give a good deal of feedback on student writing both in writing and in person—and often in both forms. Keeping in mind that several responding clinicians also had formal legal writing teaching experience and may have been attracted to participate in the study for that reason, a fair percentage of clinicians are reporting some success, but still struggling with time constraints, professional expectations, and their students’ problems with time management, mechanics, and transfer of learning.

In terms of feedback types, the vast majority of clinicians responding indicated that they use a combination of margin comments and oral feedback.<sup>291</sup> Fewer perform interlineations and other forms of line editing, although at least two noted that they use all forms of feedback, depending on the assignment and the student: “I’ve used all these methods depending on student and deadlines”;<sup>292</sup> “The order [in which these methods are] used depends very heavily on the student.”<sup>293</sup> Margin comments and oral feedback are staples of legal writing feedback. Given that most of these clinicians are creating time for multiple revisions and using both written and oral feedback, they are using methods that are consistent with the New Rhetoric’s approach to professor intervention during the student’s writing process.

A different survey question aimed to gauge trends in directive versus nondirective feedback on different types of writing problems. Options ranged from open-ended, Socratic-style questions to highly directive, pervasive line editing throughout the document.<sup>294</sup> One strong trend that seemed to emerge was that the professors are drawing from the range of options in a thoughtful manner, employing more Socratic-style, non-directive supervision

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<sup>291</sup> *Infra*, Appendix C, Question 15.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

on larger questions of legal analysis, but using more directive redlining for mechanical skills like grammar.<sup>295</sup> Another notable approach is to become more directive as the number of drafts increases and time runs short. A few respondents indicated that they use a gradient approach when the schedule allows for multiple drafts, starting with more open-ended questions and progressing toward more directive feedback. For example: “I start broadly and then narrow as drafts progress—second draft: if student doesn’t get it, I write a sample. Third draft: redline, unless first draft is so good, only minor corrections are necessary.”<sup>296</sup>

This broad-to-narrow approach to feedback suggests an understanding of the “state of the art” in feedback priorities in legal writing courses. Of course, in legal writing courses, the redlining stage is unnecessary because the work will not be submitted to the court or a client, and due to curricular restraints and student-teacher ratios, there is rarely an opportunity for students to rewrite work more than once.

While some clinicians use the more desirable broad-to-narrow system, 11 respondents still ranked pervasive line editing as either the first or second mode of feedback, with another six ranking it as a less frequently used form.<sup>297</sup> The contemporary approach among legal writing professors is to line edit only single sentences or paragraphs that exhibit a pervasive grammatical or style problem, and then to instruct the student to find and revise similar examples throughout the rest of the paper.<sup>298</sup> Moreover, it is considered inadvisable to line-edit for larger-scale concerns like analytical structure or even paragraph organization. Of course, time may not always allow this process in clinic when the students’ writing obstacles are particularly stubborn. When a student exhibits such obstacles, it may be worth pairing him or her with a more proficient teammate who can perform peer feedback and modeling, or more tightly structuring the drafting cycle to allow for a greater number of revised drafts.

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<sup>295</sup> *Id.*

<sup>296</sup> *Infra*, Appendix C, Question 16.

<sup>297</sup> *Id.* This rate must be qualified by the fact that two respondents ranked all methods equally and expressly noted that which mode is used depends on factors like the assignment and the student; this same thinking may have influenced others’ choices as well.

<sup>298</sup> *See* Enquist, *supra* note 180 at 1139.

Another interesting pattern noted in the survey results is that even those clinicians who felt generally comfortable with providing feedback still encountered some trouble when it came to discussing grammatical-type errors with students, as opposed to discussing the substance.<sup>299</sup> This is not surprising, given that it is difficult even for legal writing professors to craft Socratic, guiding questions for concrete, rule-based tasks like grammar. The need for remedial grammar instruction is frustrating for clinicians and legal writing professionals alike. As one clinician put it, “I see a great deal more basic writing issues like grammar and punctuation than I expected at this stage of education.”<sup>300</sup> One useful insight that can come from inter-program collaboration is that it is unrealistic to expect either legal writing or clinical law professors to devote significant effort to teaching mechanics,<sup>301</sup> and schools are slowly recognizing that they need to employ specialists trained in English grammar instructions to teach some students remedial mechanics.<sup>302</sup>

Fortunately, legal writing scholars have produced prolific scholarship about efficient critiquing methods. While the survey reveals that many clinicians have already developed feedback methods that they consider to be effective, some basic principles warrant summarizing here. Basic feedback methodology may be unfamiliar to newer clinicians, to those without experience in teaching legal writing, and for those who have developed a good instinctive approach, but who are interested in improving their methods or correlating them to the styles students experience in legal writing. Three of those basic feedback techniques could be categorized as prioritization, specificity, and tone.

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<sup>299</sup> Perhaps as a shortcoming, the survey did not differentiate further between the perceived abilities to supervise the substance of legal analysis versus the underlying analytical structure.

<sup>300</sup> *Infra*, Appendix C, Question 18.

<sup>301</sup> The idea that legal writing professors do not teach writing mechanics as a core aspect of their curriculum is sometimes surprising to students and to the rest of the law faculty, and may result in part from the unfortunate misnomer for the discipline. Particularly in the first year, legal writing professors and their courses are much more occupied with teaching analytical technique than writing mechanics. In my understanding, the prevailing view within the legal writing discipline is that law schools should employ “writing specialists” trained in teaching mechanics—such as a graduate student in English—to mentor students who require remediation in this area.

<sup>302</sup> Lobbying for a writing specialist is another area in which collaborative force between the two programs can help to effect change within the law school.

First, because students can only effectively process a certain amount and variety of critique at one time, each professor should adopt selective feedback priorities based on whether the student's work represents a very early, middle, or late draft.<sup>303</sup> In early drafts, the emphasis usually is on overall organization and large-scale analysis,<sup>304</sup> for example, has the student stated a legal rule, and is it the correct rule for the jurisdiction? As the drafts progress and the analysis becomes more rigorous, professors can focus on finer points, such as strategy, nuanced argument, and smaller-scale organization such as paragraph order.<sup>305</sup> Only in the final drafting stages is it usually valuable to focus on grammar and style,<sup>306</sup> even though they can be very distracting—almost compulsively so—to the skeptical expert reader in early drafts. Heavy emphasis on style and grammar in early drafts usually detracts from time needed for better analysis, and tends to be wasted because sentences, paragraphs, and even entire sections will be removed or substantially altered in successive drafts.<sup>307</sup>

Second, comments should be specific, not vague. If the student's analysis is difficult to follow, the generic "difficult to follow here" should be replaced with a diagnosis and remedy,<sup>308</sup> for example, "this section does a good job of setting forth what it means to be 'demoted' under the law of constructive discharge, but then makes a very conclusory assertion that the client was demoted without significant discussion of the facts or how they can be analogized or distinguished to the binding cases and those persuasive cases that are relatively square with our facts."

Similarly, otherwise cryptic comments on writing style, such as "awkward" should be followed with an explanation,<sup>309</sup> like "awkward sentence—the most important point is buried in the middle—consider splitting into two and reordering the information." Of course, the ability to provide feedback that actually teaches while it points out flaws requires the ability to engage in analytical triage.<sup>310</sup> Two recent articles by Professor

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<sup>303</sup> See Enquist, *supra* note 180 at 1133.

<sup>304</sup> See *id.*

<sup>305</sup> Barnett, *Triage in the Trenches*, *supra* note 180 at 654-659.

<sup>306</sup> *Id.* at 654, 657-659.

<sup>307</sup> *Id.* at 658.

<sup>308</sup> *Id.* at 664.

<sup>309</sup> See *id.*, Enquist, *supra* note 180 at 1149-1150.

<sup>310</sup> Barnett, *Triage in the Trenches*, *supra* note 180 at 654-659.

Dan Barnett and his colleagues<sup>311</sup> provide excellent primers on legal writing triage, explaining how to identify problems in organization, rule selection, analogical reasoning, and so on. In addition to triage and instruction, comments can also point students to references in the clinic library or in previous class materials, facilitating the transfer of learning and empowering the student to become more independent.

Third, because motivation is so crucial to performance and to successful transfer of learning, professors may want to consider the emotional effect of feedback on some students' motivation as important to their professional growth and success.<sup>312</sup> This is not to say that student attorneys should be coddled, but rather that the professor should aim to present some positive feedback when possible,<sup>313</sup> and to frame critical feedback in terms of an opportunity to improve, rather than as a personal fault. Two simple and quick methods can go a long way in this regard, and they might be called framing, sandwiching, and training.

Some legal writing instructors take the time to *frame* individual comments in terms of a positive outcome,<sup>314</sup> such as “to improve this section, . . .” or “to take your fact section to the next level, . . .” Others also structure their general comments to begin and end with a positive observation or encouragement, and to “*sandwich*” critique in the middle. While some scholars rightly point out that the precise wording of a discrete comment can help to cultivate positive motivations and associations, I have found that when time is short, I am not always able to structure comments to meet this concern, and I suspect that many clinicians will often feel the same way. Instead, I use my syllabus and a few reminders during the year to *train* students in how to perceive feedback, for example, to view it like the tough love one receives from a favorite coach rather than as pointed criticism directed at the student's innate qualities of mind. I have found this method to be just as effective, if not more so, to the point that in recent years, students increasingly are the ones to reassure me that I should not worry: they want the feedback and understand its necessary role in the learning process.

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<sup>311</sup> See generally *id.*, Gionfriddo, Barnett & Blum, *supra* note 200.

<sup>312</sup> Rodriguez, *supra* note 14 at 215-18.

<sup>313</sup> See *id.* at 221-22.

<sup>314</sup> See *id.* at 222 (“[A]t this point, comments should focus on helping the student to deepen her reflection on the writing.”)

Although feedback methodology is a large topic, employing these three principles can help to make clinical legal writing more efficient and effective for both teacher and student. It also makes sense to disclose the priorities to students in the beginning so that, for example, they understand that style and grammar remain crucial, but will be explored in more depth at a later time. Nevertheless, students should also be trained to understand that legal employers expect professional-looking work even during the drafting stage, and that a distracting level of gross errors, such as incomplete sentences or a lack of citations, is unacceptable in a professional environment.

### C. Late Intervention: The Final Draft and Post-Writing Stages

In the Clinical Legal Writing Survey, one question was designed to discern whether responding clinicians frequently faced the Hobson's choice of rewriting student work or submitting substandard work to the court or client, as well as how they approached the problem.<sup>315</sup> Three trends seemed to stand out from the smattering of responses. First, six clinicians either skipped the question or expressly indicated that it did not apply to their experiences.<sup>316</sup> Because this pool of respondents rarely skipped questions, I interpreted the skipped questions as "does not apply."

For eight clinicians, the need to rewrite is most often caused by poor time management on the part of the student attorney, typically leading to missed internal deadlines.<sup>317</sup> Ten clinicians, including three of those who rewrote due to students' time management issues, also most frequently rewrote when the student was unable to tackle a particularly nuanced argument.<sup>318</sup> In an earlier question, two professors reported having faced the frustrating dilemma of having to correct and rewrite some student work due to the lack of sufficient skills and terminology to discuss the shortcomings with students.<sup>319</sup>

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<sup>315</sup> *Infra*, Appendix C, Question 14.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> This question also posited that the clinician would "model an appropriate solution" for the student. Only one respondent qualified that part of that assumption, crossing out the word "appropriately," perhaps to indicate a lack of confidence that the modeling was having the desired educational impact upon the student. *Infra*, Appendix C, Question 14.

<sup>319</sup> *Infra*, Appendix C, Question 12.

Overall, I concluded that although some clinicians were steadfast in their refusal to rewrite student work, most in this group encountered understandable obstacles in the form of time (whether due to the case itself, the student, or both) and the student's ability to tackle the project either in whole or in places where greater sophistication and nuance is required.

While some late interventions can be avoided through better planning, time management, and early intervention in the recursive thinking/writing process, there will be times when clinical supervisors simply must step in and intervene to protect the client when a student is unable to acquit a particular task,<sup>320</sup> for example, finishing a brief in time to meet the filing deadline. This "failure" can of course be transformed into a learning experience by shifting mindfully and transparently to more directive pedagogical techniques, including modeling, and collaborative learning, and by concluding the project with post-writing metacognitive reflection. Choices should take into account various factors like the student's relationship with the client, the client's understanding of the risks involved, the teacher's relationship with the student, the teacher's ability to competently assume the task within the current parameters, and the burdens placed on the client and the system.<sup>321</sup>

In one scenario, there may be time left during business hours to revise a document to submittable form, but not enough to permit the novice student attorney to attempt another draft. In this situation, the supervisor can include the student in the decision to use a more collaborative to completing the project, perhaps dividing the work and giving more directive instructions to the student about how to fix a particular problem. In the least desirable scenario, where a failed final attempt to make the draft submittable has failed and no time remains for collaborative work, the instructor may have to rewrite sections, but can include the student in the product by instead asking the student for feedback or, at minimum, some proofreading assistance. After the document is filed or submitted to the client, the professor can engage the student in some guided self-reflection about time management, depth of analysis, writing style or whatever seems to be the

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<sup>320</sup> See generally George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991), excerpted in HURDER ET AL., *supra* note 52.

<sup>321</sup> *Id.* at 430, excerpted in HURDER ET AL., *supra* note 52 at 124.

weakness that led to the student attorney's failure to meet the rigorous demands of the assignment. In this way, the professor and student can turn an imperfect situation into a growth experience.

## VII. CONCLUSION

Teaching formal legal writing in any setting—classroom, clinic, or law office—is an arduous but rewarding task. Although long sessions of writing and triage can be tedious, the rewards come from helping a new professional to become more proficient and independent in one of the lawyer's most important skill sets, alongside such formidable qualities as critical thinking, advocacy, and professionalism. Through inter-program collaboration and individual innovation, both the clinic and legal writing faculties both faculties can become increasingly effective at helping to transfer and build upon students' existing analytical skills.

While no one technique will work in every situation, a host of legal writing teaching methods can be adapted to the fast-paced, dynamic clinical environment along spectrums of assignment type, time frame, and the individual student's stage of growth. In particular, clinics can consider using a staged approach to clinical legal writing pedagogy that borrows as needed from directive, collaborative, and non-directive supervisory styles. They can also design their assignment and feedback methods to make use of transfer-friendly teaching tools so that they can spend more effort on higher-order learning, rather than on review. Among these methods, earlier and more frequent intervention, a realistic drafting and feedback schedule, and the opportunity for student reflection at all three major stages are probably the most key.

Overall, the need for more skills training across the curriculum is well-illustrated by the juxtaposition of these two comments from clinicians at different institutions: "Having taught at three schools, I can say that the students here are better prepared and ready to take on individual client representation. I firmly believe that [the required, four-semester integrated skills program] is the reason for this. This has also changed my syllabus dramatically since now I do not have to spend the start of a semester teaching interviewing and counseling"; and "My school has very little skills training prior to clinic. We can't do it all. Any and all would be helpful." The two respondents who seemed to

report the greatest feelings of efficacy were those who benefitted from the two-year skills curriculum and from having an in-house legal writing professor to take primary responsibility for supervising writing in the clinic.

Finally, in addition to the pedagogical benefits covered in this article, stronger collaborative ties with the legal writing program can increase professional well-being for faculty members in both programs, through new friendships, feelings of efficacy, and stronger mutual support in status issues facing all skills faculty. These collaborative efforts can spread out to other skills program faculty as well, including pro bono, academic support, and externship programs, and to the sometimes surprising number of cooperative doctrinal faculty members as well. As legal educators connect their methods, they will gradually benefit their own professional growth, integrate the curriculum, and increase their students' ability to connect their learning across contexts, especially the ultimate contexts: law practice, public service, and their infinite other destinations.

#### APPENDIX A: A MODEL FOR COLLABORATION AMONG CLINICAL AND LEGAL WRITING FACULTY MEMBERS

##### A. Introduction

This collaboration program was originally developed as part of an article-in-progress and was presented at the 23rd Annual Midwest Clinical Law Conference, Building Bridges: Creating Clinical Opportunities through Collaboration, Indiana University School of Law, Bloomington, Indiana, November 14, 2008. The updated model that follows is designed to further that work but also to serve the mission of the Legal Writing Institute's Committee on Cooperation among Clinical/Externship and Legal Writing Faculty.

*Premises.* Although the plan is adaptable, this version presumes a standard, one-year, legal writing curriculum administered during the first year, with eligibility for clinic in semesters 3-6.

*Structure.* Undertaking a collaborative model will require some initial planning and goal-setting between the two programs. This model is divided into two parts: planning and implementation.

*Terminology.* In this plan, *clinic* refers to law students working in a live-client setting supervised by law faculty. It encompasses transactional, litigation, alternative dispute resolution, and other types of clinics. Although legal analysis would be a more appropriate term, *legal writing* and the acronym LRW<sup>322</sup> refers to simulated legal methods courses, including legal analysis, research, and writing, particularly at the first-year level.

## B. Inter-Program Planning for Collaboration

### 1. *Step One: Setting Goals for the Collaboration*

Goals for collaboration may be as small as meeting to share information and methods, or as big as team teaching certain segments of each other's courses. Each program will have to decide what model works best for its curriculum, faculty, and students. How many of the additional steps outlined below are needed will depend on these goals. Some possible talking points for setting goals include:

- Whether clinicians would like legal writing professors to share state-of-the-art techniques for written and verbal feedback on writing projects.
- Whether legal writing professors would like to learn more from clinicians about their current feedback and supervision methods and how it might help them to innovate within their own courses, perhaps to provide a more realistic simulation.
- Does the skills curriculum encourage team teaching across programs?
- Are faculty members willing to guest-teach in each other's classrooms?
- Are faculty members willing to commit to long-term collaboration, such as meeting on a semester basis or even monthly basis, or perhaps keeping an "open-door" policy for solving educational challenges as they arise, such as problems with a particular student's brief?
- Collaboration may be limited by ethical restrictions protecting client confidentiality. Does the clinic's

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<sup>322</sup> See BRILL ET AL., *supra* note 124 at 5, n. 5.

organizational model permit collaboration with non-clinical faculty on client matters, or even between clinic practice groups? The models vary widely among schools and depend in part on malpractice coverage. If a clinic model is obstructing desired collaboration, can it be modified?

- Are the collaborators more interested in working together on a regular basis, or perhaps in a frontloaded approach to create a bank of skills and tools to be used without significant ongoing collaboration?
- Are most or all members of the programs, including any directors, interested in program-wide collaboration, or should collaboration take place on an ad hoc basis, between interested individuals?

## 2. *Step Two: Verify Core Skills Covered in 1L Curriculum*

Very often, clinical and legal writing faculty members know little about what is going on in each other's courses. An important first step is to help each other understand what skills are needed in clinic and what skills are taught in legal writing.

### a. *Analysis*

- Case/Rule Synthesis
- Narrative Reasoning
- Policy Reasoning
- Objective vs. Persuasive Analysis
- Case Theory
- Working with Facts

### b. *Research*

- Using print and electronic resources
- Knowing when to stop (law of diminishing returns)
- Citation: ALWD or Bluebook?
- Primary Sources
  - Digests
  - Citators for validation and for further research (Shepard's; KeyCite)
  - Statutes (state and federal; annotated)
  - Using Shepard's in print (becoming less relevant)
  - Alternative vendors (LoisLaw, VersusLaw, HeinOnline)

- Court Rules (often omitted or underemphasized)
- Secondary Sources
  - Topical, web-based research portals
  - Treatises
  - ALR
  - Encyclopedias (AmJur; CJS)
  - Practice Aids (AmJur Trials, Causes of Action, Proof of Facts, state-focused practitioner deskbooks/guides—all rarely covered)
- c. *Writing: Organization, Process, and Style*
  - Organization
    - Meta-organization: Standard document sections, causes of action, disputed elements, issues, etc.
    - IRAC-level structure (often using different acronyms, including CREAC, TREAT, C-RAC, IRREAC, and so on, but all consisting of the same five layers: thesis, main rule, rule explanation/proof/illustrations, application to facts, conclusion)
    - Rule-level organization: Broad-to-narrow “funnel” development; organization by key principles and terms of art
    - Paragraph-level organization, devoted to separate sub-issues, and including topic sentences
    - Sentence-level organization, including subject-verb-object placement
  - Process
    - Recursive writing, research, re-writing as analytical process
    - Annotated outlining (detailed outline including citations)
    - Non-linear outlining
  - Style and Grammar
    - Sentence-level editing
    - Style manual
    - Availability of review exercises and other self-study materials for remediation
    - Tone for objective and persuasive writing

### 3. *Step Three: Assess Student Familiarity with Varied Work Product*

Most legal writing programs cover office memos, trial and/or appellate briefs, and letters (typically, advice or demand letters). However, programs do vary, and students may be exposed to other forms in their upper-division courses even before they reach clinic. The following checklist may help in discerning what experience the *average* clinic student is likely to have.

- Formal, full-length office memos (most common in first semester) (note that students will probably be unfamiliar with informal research memos, status memos, contact memos, transfer memos and other memos to file)
- Letters in order of likely coverage: client advice, demand, settlement/negotiation, confirmation, routine client contact/update, notice, transmittal (fairly likely)
- Motions and memoranda in support (somewhat likely)
- Appellate briefs (most common in second semester)
- Administrative documents in order of likelihood: time sheets, fee agreements, (dis)engagement letters (unlikely)
- Transactional documents (less likely)
- Scholarly papers (less likely)

### 4. *Step Four: Establish a Common Lexicon*

For those of us who attended law school before the late 1990s, we received very little specialized terminology to help us understand the various components of a formal, written, legal analysis. That has changed. Textbooks and individual instructors are constantly contributing new thought to a developing lexicon.

This beneficial development can also be one of the greatest hindrances in ensuring a smooth transition from the legal writing program to clinic. As a field of study, the legal writing community has not yet settled on a consistent lexicon. Scholars in the field caution that while this may be frustrating at times, we should remember that legal writing is a relatively new field of scholarship experiencing an explosive state of growth, and innovation remains the higher priority. *See generally* Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 Me. L. Rev. 239 (2004).

That said, successful collaboration requires some semblance of a common parlance, and individual educators can help students to make the transition without jeopardizing others' academic freedom. The following talking points will help to establish whether legal writing educators at a given institution are already using a common lexicon, and if not, how they might work together to create an "Esperanto" for their transitioning students.

- Identify whether the legal writing program uses a common textbook or allows the academic freedom to vary. Different books tend to use wildly varied terminology, but the freedom to choose is probably paramount.
- It may be necessary to schedule a meeting to explain how modern legal writing courses tend to break down analytical components and to name them with specialized language. Those of us who were trained before the advent of the modern LRW program probably are not familiar with anything other than very basic IRAC terminology.
- Identify the most common terms used for various analytical components shown on the lexicon handout, below.
- Consider developing an "Esperanto" lexicon that can be introduced to all professors' students and used somewhat interchangeably. For example, legal writing professors who use varied acronyms for the legal analysis paradigm, such as IRAC, IRREAC, TREAT, or CREAC, can perhaps choose one additional, common form that they all agree to introduce to their students as an alternative, alerting them that it may be used in clinic or other skills courses. This approach is advocated by the Pollman/Stinson literature.
- Adopt the same language for the clinic handbook and for student supervision.
- Consider how often clinicians need to discuss even smaller analytical components with their students, such as "umbrella" sections, "rule explanations" and so on, and discuss how to develop a shared terminology for those skills as well.

5. *Step Five: Understand Each Other's Pedagogical Methods*

In order to create some new, common ground for innovation, it may be worthwhile for each program to educate the other about its supervision and feedback methods and to identify points of similarity and difference.

d. *Foundations of legal writing pedagogy*

- The paradigm for legal analysis, typically more elaborate variations on IRAC.
- Emphasis on traditional form, particularly in the first semester.
- Emphasis on learning the “scales” of core analytical, research, and writing skills, rather than litigation or counseling strategy. Strategy is included, but at a very introductory level.
- Writing style and mechanics are an important, but much *lesser* emphasis than non-LRW colleagues may understand. The legal writing course should really be called “legal analysis.”
- A predicable academic schedule permits educators to use consistent pedagogical methods and to aim for a roughly equal experience for each student, according to his or her abilities.
- One of the largest areas of focus is how to provide extensive written feedback on analysis, strategy, and writing style.
- Another important area of focus is teaching students how to plan and strategize their research and writing process.
- Contrary to some stereotypes, LRW faculty often do prize values emphasized in many progressive clinical pedagogies, such as lawyering for social justice and community lawyering, and some do attempt to work them into writing assignments and lectures on case theory. But because there is so little time even to teach the fundamentals, these skills often end up on the cutting-room floor. There may be ways for legal writing faculty to touch briefly upon these concerns and to encourage students to explore them further in clinics and externships.

e. *Foundations of clinical supervision*

- As an advanced course, clinicians should not have to teach the foundations of legal analysis and reasoning; students should be able to build upon strong foundations.
- Many programs emphasize the social justice movement or other progressive clinical pedagogies in their approach to clients, case selection, and strategy.
- There is some tension between various pedagogical approaches, including the collaborative approach, community lawyering movement, student-centered approach, client-centered approach, and so on.
- The realities of clinical teaching are that the client's needs and the exigencies of the case must sometimes come before the student's educational goals. On the other hand, this reality can also help students to understand how lawyers must prioritize these matters in practice.
- Written communication is only one part of what clinicians teach; all sorts of client counseling and courtroom skills demand equal or even greater time.
- Unpredictable schedules, urgent client matters, and disparate case assignments make uniform supervision practices and student experiences unrealistic and even undesirable.

6. *Step Six: Training in Feedback Methodology*

- Fortunately, good feedback methodology is very well covered in the literature. In fact, the Legal Writing Institute recently published a monograph of the seminal works on critiquing student work product.
- In addition, the LWI Committee on Cooperation among Clinical/Externship and Legal Writing Faculty is creating a bank of feedback samples based on real student work in clinics. The samples include feedback from both clinical and legal writing professors.
- When legal writing and clinical educators collaborate on feedback technique, they should take into account the need for time-saving methods like peer grading and self-grading, using guided exercises with detailed instructions.

- ❑ Typically, comments should address analysis and organization before writing mechanics and style, particularly on the first draft.
- ❑ Time permitting, the clinician should not line-edit the student's work. Instead, the professor can line-edit one or two paragraphs that contain common problems and challenge the student to identify and address the rest.

### 7. *Step Seven: Preparing Students to Transfer their Skills*

The relevant scientific literature shows that even when students have gained a good deal of proficiency in certain skills, they tend to overlook or misapply those skills when first asked to apply them in a new context. The change of context can be environmental, such as working with a new professor in a different course, or the task itself, such as working on a different client matter, on a different type of work product, or in a new field of law. Faculty should try to recognize that a student's poor performance early in the clinic experience may be more of a transfer problem than a personal problem.

- ❑ The literature further shows that students are better able to transfer skills when educators can help them to encode their knowledge according to schema, to use metacognitive reflection, and so on.
- ❑ A large schema introduced during the 1L year can help students to contextualize their core lawyering skills across the law curriculum. Developing a broad schema early in law school will help students to generalize skills and to see their potential applications in new contexts, such as clinic. For more specific explanations and examples, see Tonya Kowalski, *Toward a Pedagogy for Legal Writing in Law School Clinics*. Some options include:
  - Inter-program classroom visits
  - Shared exemplars of student work
  - Writing problems borrowed from clinic cases
  - Shared rubrics and checklists
  - Shared terminology (see the points on lexicon above)
- ❑ Metacognitive reflection exercises are another useful tool supported by the literature on cognitive psychology and

transfer of learning. Detailed samples appear in two locations: Michael Hunter Schwartz's *Expert Learning for Law Students* text and workbook, and in Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*.

- ❑ Once these instructional tools are developed to fit the program's needs, the clinic can potentially use its student handbook to present a transfer-friendly system for tackling cases and particular assignments.
- ❑ In addition to various transfer tools like rubrics and metacognitive exercises, research shows that fostering growth-based motivations greatly aids students' ability to transfer their skills. Guest speakers, including former students and clients, may help students to find a motivation that extends beyond mere grades.
- ❑ Transfer models also show that educators can help students to make connections between similar assignments just as much as between greatly differing assignments. For example, students may not always realize at first that a memorandum for one kind of motion is the same type of document as the memorandum for another kind of motion. Good annotated sample banks can help students to see the similarities among different types of attorney work product.
- ❑ The clinic probably will not require an advanced legal writing textbook; clinical pedagogy militates against significant assigned readings in favor of one-on-one supervision. But faculty can refer students to those books in the clinic library when self-study is required. Clinic professors should not feel that they have to teach each form of written work product anew; students should use self-directed study to discover basic forms and guidelines, and tailor supervision to the finer questions.
- ❑ Students' ability to see that their previous experience provides the needed foundation for new assignments may depend upon the use of good schema and training in metacognition (above).
- ❑ Collaborating faculty members may wish to consider developing feedback forms that can save time, including guided self- and peer-feedback exercises.

## 8. *Step Eight: Working with Students*

Students typically produce a higher-quality work product when taught how to develop good planning strategies. Goal-setting, outlining, and reflection promote a thorough and well-presented document. What follows is one proposed method for improving student performance on initial drafts and rewrites:

- ❑ Meet with the student to set goals for the project. In terms of outward forms, consider developing a checklist tool that includes the required format, typographical settings, document sections, audience, and tone, among others. In terms of legal substance, recall that students are often confused by similar causes of action and terms of art, and that they often overlook major issues that fall outside the elements of a claim, such as constitutionality, damages, attorney fees, costs, defenses, and so on. In order to get the most out of the initial conference, the professor might first assign the student to do some limited, secondary-source reading.
- ❑ Set deadlines not just for the final product, but for the planning and drafting stages in-between. Consider requiring those dates to be calendared and entered into the tickler system, just like formal litigation deadlines. When setting deadlines, consider including time for multiple rewrites, depending on the ultimate deadline and the project's complexity. Another reality is that the supervising professor may also need time to work on the end product if the student is not able to bring it up to standards, and that several days may be needed for final word processing, filing, and service.
- ❑ Students typically are able to work more independently and efficiently when provided with a good sample for each step of the writing process, including sample outlines and sample reflective exercises.
- ❑ After assigning a new project, consider asking students to complete a metacognitive reflection exercise designed to help them recall their planning, research, and analysis skills from legal writing, in addition to other lawyering skills they are learning at the time. An exercise can prompt the students with questions about how to identify issues, find

relevant sources in the library, complete an annotated outline, and so on.

- ❑ Requiring a good research plan to be submitted with the exercise will help the supervising attorney to see whether the student is on the right track *before* he or she spends many hours in the library.
- ❑ When the student is ready to submit her first draft, the supervisor may wish to require a peer and/or self-assessment exercise. This might take a checklist form, or perhaps even a narrative of the student's reasoning process and struggles, which is sometimes called a "private memo."
- ❑ Because clinicians do not always have time to provide extensive written comments (and too many can be counter-productive for the student), they again may wish to use a checklist approach. For example, legal writing colleagues may be able to help develop a list of master comments tied to each aspect of a good objective or persuasive work product, coded by numbers. The supervising attorney can use the comment number in place of extensive written explanations.
- ❑ This cycle works for the re-outlining and re-writing process as well. Typically, the first cycle will focus on major analytical problems, and the next cycle(s) on honing the analysis and then improving format and writing style. Legal writing pedagogy discourages undue focus on format and style in the early stages of writing.
- ❑ Ideally, the student should be given an opportunity to engage in reflection after the project is finished. This idea comports with both pedagogies. Here again, an exercise can help the student to prepare for the feedback and reflection process with his supervising attorney.

### C. Developing a Shared Lexicon for Legal Writing in Clinic

Discussing legal writing on deep level requires a certain shared vocabulary or jargon. According to Pollman and Stinson, *infra*, legal writing terminology is in a state of explosive proliferation, just like the discipline itself, and it will take time to agree on a smaller number of variants in terms. Students may learn different terms for different parts of written legal analysis from their

doctrinal professors, skills professors, employers, and academic support programs.

Because skills instruction is relatively recent, non-LARW faculty who graduated before the mid-to-late 1990s probably did not have an LARW class with a specialist in the field, and probably were never exposed to terms like *umbrella*, *CREAC*, *rule explanation*, and so on. Even if they did during that time period, their vocabulary will vary according to where they went to law school and even which professor they had. You might be able to find common ground by discussing IRAC instead, because that has been around for a long time in the context of writing law school exams. But the differences are still important. Below is a short list of synonyms and terms for the structural vocabulary used in our course so far. This list is tailored to objective analysis, typically covered during the first semester of law school. The collaborating faculty should work together to adapt the terminology for persuasive analysis.

<i>Analytical Component</i>	<i>Synonyms</i>	<i>Function</i>
Thesis	Conclusion, Thesis-Conclusion, Issue (I in IRAC)	Predicts the outcome for the ultimate issue for a discrete sub-issue, ideally with a concrete preview of the reasoning behind that prediction.
Rule	main rule, rule statement, umbrella rule (when appearing in umbrella section)	States or synthesizes the governing rule, usually a test or definition consisting of operative terms of art, elements, and/or factors.
Rule Explanation	Rule proof, Explanation, Rule Illustration, Rule Development, Rule (When used as a subset of R in IRAC).  Subsets: Subsidiary rules (sub-rules),	Sequential, broad-to-narrow analysis development and proof of the rule, including subsidiary rules and exceptions, policy statements, and relevant canons or principles to be applied. The narrower, more targeted, focused rule for the issue (sometimes

	exceptions, policy background, legislative history, contextual history, illustration cases, example cases.	synthesized by the writer from a variety of sources) is usually accompanied by a sufficient spectrum of case illustrations (facts, holding, rationale) to place the rule in context.
Rule Application	Application, Analysis (A in IRAC).	Topical application of the rules to the facts and circumstances of the client's case.
Conclusion	End-Conclusion, Sub-Conclusion, Connection-Conclusion	Restatement of the thesis and primary reasons.
Umbrella	Mother/Parent CREAC (my terms), ultimate issue, introduction. There are other names for it that I have seen but can no longer recall.	The introduction to two or more sub-issues, consisting of the overarching thesis, rule, and any rule explanation and background information. It may also consist of a roadmap to the rest of the memo or brief.
CREAC	IRAC, CRuPAC, CREXAC, CRAC, IRREAC, and many more.	One popular acronym for the legal analysis paradigm.
Housekeeping	As far as I can tell, this is my term. I still haven't found anyone else having come up with a name for this process of disposing of undisputed rules or elements and identifying reasonably disputed elements. The closest	The process of explaining to the reader which parts, elements, or factors of a multi-part rule are not reasonably disputed, accompanied by a convincing reason and citation to authority.

	corollary is “roadmapping,” which I view as a subcategory of housekeeping because it tells you what will be discussed, but does not always tell you what will <i>not</i> be analyzed or why.	
Roadmap		A succinct statement of which issues will be analyzed in which order below.
Questions Presented	Issues, Issues Presented, Deep Issues (Bryan Garner’s method).	Preliminary memo or brief section stating and previewing the primary issues.
Brief Answers	Short Answers	See above.
Facts	Statement of Facts, Fact Statement	Objective recitation of the relevant contextual and determinative/operative facts.
Discussion	Analysis, Argument	The body of the objective or persuasive analysis after the preliminary sections of a memo or brief. Argument is reserved for persuasive briefs and memoranda.

#### APPENDIX B: THE LANGUAGE OF LEGAL WRITING: A PRIMER FOR CLINICIANS

Because IRAC is the one term that is probably familiar to most law graduates across generations as the paradigm for formal legal analysis,<sup>323</sup> it is probably a good place to start understanding

<sup>323</sup> See Pollmann & Stinson, *supra* note 38 at 261 (finding that survey participants are “highly confident that they understand the IRAC acronym, [although] they express low confidence in the IRAC variations—CREAC, CRuPAC, and FORAC.”)

the evolution of legal analysis terminology. (Whether such formulas are the best way to teach legal analysis is a topic for another day.)<sup>324</sup> I suspect that many full-time legal writing professors<sup>325</sup> no longer use IRAC, but rather a more complex acronym that adapts IRAC for litigation-style analysis.<sup>326</sup> If they do use IRAC, they are very likely to provide students with quite a few subparts and adjustments for each part of IRAC so that it can be adapted from law school essay exam writing to the simulated practice environment of memoranda and briefs.<sup>327</sup> At the same time, all of the more complicated acronyms used today for the major parts of analytical structure are based on IRAC,<sup>328</sup> and it is likely that in most cases, they represent the same concepts with different names attached.<sup>329</sup>

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<sup>324</sup> See Christine M. Venter, *Analyze This: Using Taxonomies To “Scaffold” Students’ Legal Thinking And Writing Skills*, 57 MERCER L. REV. 621, 624 (2006) (challenging the use of such paradigms as too rigid or limiting: “Formulas like CREAC, while useful, often ultimately prove to be too reductionist to be entirely useful in teaching students the skill or art of analysis. CREAC tends to encourage formalism, rather than creative thinking. This tendency is evidenced by the fact that many students who struggle to cultivate their legal writing skills bemoan the fact that legal writing does not allow for creativity. These students fail to see that CREAC is merely a tool for writing up their analysis and response to problems, and that they can be creative in their responses to those problems and in the arguments they make.”) My philosophy is that paradigms are very reassuring and instructive to students who are trying to learn their “scales,” such as logical structure and reader expectations, and that law schools that provide their legal writing faculty members with appropriate pay, status, and job security will allow their educators the resources necessary to add depth and nuance to such introductory lessons.

<sup>325</sup> Professors Pollmann and Stinson noted a correlation between familiarity with varied legal writing terminology and the experience of the professor. Pollmann & Stinson, *supra* note 38 at 242.

<sup>326</sup> Cf. NEUMANN & SIMON, *supra* note 161 at 108 (warning students to use IRAC instead of CREAC for law school exams).

<sup>327</sup> Cf. *id.* at 108 (warning students to use IRAC instead of CREAC for law school exams)

<sup>328</sup> For non-legal readers, IRAC is the time-honored acronym for legal analytical structure within the context of law school exams. The acronym stands for the words issue, rule, analysis/application, and conclusion. Most legal writing educators seem to avoid using the word “analysis” for the “A” in IRAC, and instead frequently use “application.” This substitution is probably popular because all of IRAC constitutes part of a larger “analysis.”

<sup>329</sup> See Pollmann & Stinson, *supra* note 38 at 261-62 (adding the caveat that “It remains for further study whether this indicates a difference in the organizational paradigms they are teaching, or whether they are teaching the same concepts with different names for the same parts of the document.”).

Although most educators who do not teach formal legal analysis are probably not aware of the more advanced variations on CREAC for practitioner documents, those that practiced law themselves probably instinctively used those forms in their own client work. Upon reflection, most would probably agree that in practice, lawyers tend to provide a conclusion or prediction rather than an open-ended issue, and that the rule needs to be explained and proved and not merely stated as black letter law.<sup>330</sup> For those reasons, the more popular acronyms change *I* to *C* for conclusion, and add an *E* to remind students to sufficiently explain, develop, prove, and illustrate the rule. The result is sometimes CREAC.<sup>331</sup> Variants include TREAT,<sup>332</sup> where conclusion is replaced with thesis, IRREAC, CREXAC,<sup>333</sup> CRuPAC,<sup>334</sup> where explanation is replaced by proof, and so on. There are many others, many of which can be unique to even just one professor or one legal writing program,<sup>335</sup> but all purportedly stand for the roughly the same paradigm.<sup>336</sup> Most common variations on the paradigm can be decoded using this simple chart, and moving among the columns:

Analytical Part	v1	v2	v3	v4
<i>Issue</i> framed as a Thesis/Conclusion	C	T	I	
<i>Rule</i> statement or synthesis	R	Ru		
<i>Rule explanation</i> , proof, illustration	E	RE	Ex	P
<i>Application</i> of rule to	A	A		

<sup>330</sup> See NEUMANN & SIMON, *supra* note 161 at 108-11 (explaining the rationale for the CREAC paradigm to students).

<sup>331</sup> See *id.* at 105-111.

<sup>332</sup> See MURRAY & DESANCTIS, *supra* note 173 at 95-112.

<sup>333</sup> See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 61-76 (2d ed., Aspen Publishers 2006).

<sup>334</sup> See NEUMANN, *supra* note 140 at 94 & n. 1 (crediting the term to Professor Stinson).

<sup>335</sup> See Pollman & Stinson, *supra* note 38 at 261-62 (noting that according to their survey results, 19% of respondents used CREAC, 4% used CRuPAC, and 2% use FORAC (which replaces conclusion with facts), suggesting that the rest use highly idiosyncratic versions like IRLAFARC and BARAC).

<sup>336</sup> See *id.* at 261-62 (adding the caveat that “It remains for further study whether this indicates a difference in the organizational paradigms they are teaching, or whether they are teaching the same concepts with different names for the same parts of the document.”).

facts through analogy/distinction				
<i>Conclusion</i> /Thesis restated, summarized	C	T		

Within each part of CREAC are more analytical parts. First, the opening *conclusion* (C) (also known as an *issue* or *thesis*) should contain more than a just a conclusory statement; it should also contain a reason that essentializes in a nutshell how key *terms of art* from the governing rule apply to pivotal facts. Students may have been trained to think of the key term of art from the rule as the *phrase-that-pays*, based on their training in Professor Beazley's self-graded draft.<sup>337</sup> Or they may have been trained to think of it under another name entirely, in a manner skillfully devised by a unique professor, legal writing program, or textbook author.<sup>338</sup>

Second, if not well-settled, a *rule statement* (R) or main rule must sometimes be *synthesized*<sup>339</sup> (compiled and integrated) from disparate authorities into a harmonized whole, and often with *subsidiary rules*<sup>340</sup> (subrules) and exceptions.

Third, the *rule explanation* (E) is perhaps the most versatile and complex. Sometimes it requires a great deal of *rule proof*<sup>341</sup> when the rule is unsettled or disputed. This proof might consist of anything from legislative history to extensive case discussion, or all of the above, entirely depending on the circumstances. Rule explanations also provide the various subrules, principles, and exceptions that help the reader to understand how the rule operates.<sup>342</sup> They also supply a reasonable spectrum<sup>343</sup> of *case*

<sup>337</sup> See Beazley, *The Self-Graded Draft*, *supra* note 271 at 182.

<sup>338</sup> See Pollman & Stinson, *supra* note 38 at n. 72.

<sup>339</sup> Jane Kent Gionfriddo, *Thinking Like A Lawyer: The Heuristics Of Case Synthesis*, 40 TEX. TECH L. REV. 1, 4 (2007) ("In the law, this idea of synthesis comes into play as lawyers, in their many roles, analyze groups of legal authority to determine reasonable interpretations of law.")

<sup>340</sup> See NEUMANN & SIMON, *supra* note 161 at 110 ("A subsidiary rule is one that operates with the primary rule to resolve the issue.")

<sup>341</sup> See *id.* at 109 (advising students to increase reader confidence in the quality and applicability of the rule by "proving" its adoption, accuracy, and so on).

<sup>342</sup> NEUMANN & SIMON, *supra* note 161 at 107.

<sup>343</sup> The use of the label "rule spectrum" for a range of applications within a given legal rule appears only once in the literature, in passing. See Lisa T. McElroy, *From Grimm To Glory: Simulated Oral Argument As A Component Of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 626 (2009). It may be one of those terms identified by Professors Pollmann and Stinson as passing to a

*illustration*.<sup>344</sup> Ideally, rule explanation paragraphs have paragraph *topic sentences*<sup>345</sup> that introduce the subrule or other principle to be explained in that paragraph, followed by discussion and examples.

Fourth, the *rule application* (A) contains the classic comparison and distinction of the client's facts to those from the authorities,<sup>346</sup> ideally from a sufficient spectrum or range of authorities.<sup>347</sup> The spectrum usually should consist of one or more cases that explore applications that support the client's position, contrasted with one or more cases that support the stronger counterarguments opposing the client's position.<sup>348</sup> This latter process is sometimes referred to as *counteranalysis*,<sup>349</sup> and it can occur in the rule explanation, too, when the rule is hotly contested.

Fifth, the end-*conclusion* should "wrap things up"<sup>350</sup> in terms of the "big picture." Some professors favor a more

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small group of people by word of mouth from a conference presentation or the like. See Pollmann & Stinson, *supra* note 38 at 259.

<sup>344</sup> The term "case illustration" occurs much more frequently in the literature, although it is not always expressly defined. *Cf., e.g.,* Barnett, *Triage In The Trenches*, *supra* note 180 at 683 (using the term when discussing good feedback techniques). A case illustration provides an example of how the rule has been applied to a particular fact pattern in the past. Ideally, if the issue being illustrated is an important one, the writer will supply a reasonable spectrum of illustrations for later analogy and distinction. A good case illustration is generally said to require facts, holding, and reasoning. See e.g. LAUREL CURRIE OATES & ANNE ENQUIST, *JUST MEMOS* 197-200 (2d ed., Aspen Publishers 2007).

<sup>345</sup> Gionfriddo, Barnett & Blum, *supra* note 200 at 189 (describing the need for supervisors to identify whether students use topic sentences to focus their paragraphs and to connect paragraphs to each other).

<sup>346</sup> See generally Stephanie Roberts Hartung & Shailini Jandial George, *Promoting In-Depth Analysis: A Three-Part Approach To Teaching Analogical Reasoning To Novice Legal Writers*, 39 CUMB. L. REV. 685 (2009) (describing a step-by-step approach to introducing students to analogical reasoning using legal authorities).

<sup>347</sup> See Lisa T. McElroy & Christine N. Coughlin, "The Other Side of the Story: Using Graphic Organizers as Cognitive Learning Tools to Teach Students to Construct Effective Counter-Analysis," \_\_ U. BALT. L. REV. \_\_ (2010) (describing the use of "graphic organizers" to set out a range of possible applications for a given rule in order to encourage students to engage in counteranalysis). The idea of a range or spectrum of possible applications appears throughout rule explanation and application.

<sup>348</sup> See McElroy & Coughlin, *supra* note 347 at \_\_ (describing the process of supporting analysis through comparison to favorable cases and distinction from unfavorable cases).

<sup>349</sup> See generally *id.* (describing the process of counteranalysis).

<sup>350</sup> See NEUMANN & SIMON, *supra* note 161 at 109.

conclusory style of conclusion statement; others prefer more detail. Perhaps the best approach depends upon where the issue's difficulty falls along the range of hotly disputed to relatively straightforward application.

Finally, when a legal writing class discusses the larger analytical framework that begins a brief argument section or a memo discussion section, they often refer to it as the *umbrella*<sup>351</sup> analysis. In structural terminology, the umbrella is the larger IRAC / CREAC structure that houses all of the others within the discussion or argument. For example, in an appellate brief analyzing a cause of action like a federal civil rights claim, the umbrella IRAC / CREAC structure would introduce a global thesis/conclusion encompassing the entire cause of action, then state the applicable rule consisting of the elements of the cause of action from the relevant federal statute, then provide rule explanation with some of the statutory background, then preview the forthcoming structure with a *roadmap*<sup>352</sup> stating which disputed elements will be discussed in what order. The writer will then provide section headers and separate CREAC-style analyses for each of the disputed elements in the cause of action. In that light, the conclusion section that typically ends any brief or memo could be thought of as the end of the umbrella CREAC.

While it is actually possible to explore the lexicon of legal writing in infinitely greater variety and detail, these kinds of common-sense terms should be sufficient for clinicians to be able to more accurately and pointedly discuss the outer, formal components and functions of legal analysis with their students. Collaboration with one's legal writing program can help to identify terms in common use at that school, enabling clinicians to better tailor their lexicons to the students' recent experiences. They can also provide the *lingua franca* needed to help orient within the analysis when moving beyond formalism and into more in-depth discussions about technique and strategy.

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<sup>351</sup> See e.g. *id.* at 125-30.

<sup>352</sup> See *id.* at 127 ("The umbrella passage also sets out a roadmap for what follows. It tells the reader what issues you will consider, their relative importance or unimportance, and sometimes the order in which you will consider them.").

## APPENDIX C: CLINICAL LEGAL WRITING SURVEY DATA

## A. Background Information

*Question 1: Biographical Information**Years Teaching*

0-1	2	3	4	5-9	10-14	15-19	20-24	25-29	30+
13	6		3	7,8,14, 17,22,24, 27,30	2,4,10, 11,12, 18,20, 23	1,9,15, 16, 21,25, 26	19,28		5

*Years as Clinician*

1	2	3	4	5-9	10-14	15-19	20-24	25-29	30+
	6,8	30	3	7,10,14, 17, 22, 23, 24, 27	2,4,9, 11,12, 18,19, 20	1,15,16, 21, 25, 26	28		5

*Other Courses Taught*

1	Professional Responsibility, Environmental Law
2	Elder Clinic, Women/AIDS Clinic, Externship Seminar
3	Employment Law
4	Professional Responsibility
5	Evidence, Administrative Law, Torts, Professional Responsibility, Criminal Law
6	Trial Advocacy
8	LRW
9	LRW, Interviewing & Counseling, Trial Advocacy, Criminal Law, Criminal Procedure
10	LRW, Advanced LRW
11	Juvenile Law, Disability Law
12	Evidence, Administrative Law, Poverty Law
14	Family Law, LRW, Public Interest Lawyering
16	Pretrial Advocacy-Civil; Pretrial Advocacy-Criminal;

	Criminal Law, Comparative Criminal Law and Procedure
17	Mediation, Legal Externship
18	Indian Law; Ethics; Tribal Courts; International Advocacy for Indigenous Peoples; Law of Indigenous Peoples; Native American Rights; Advocacy; LRW
19	Elder Law; Interviewing, Counseling & Negotiation
21	Housing Law; Asian Pacific Americans and the Law; Roles and Ethics in Practice (Skills and Professional Responsibility course)
22	Human Rights Advocacy Seminar
23	Race and the Law, LRW, Property, Small Business and Transactional Clinic, Entrepreneurial Law
24	Writing for Law Practice (upper level); Torts seminar
25	Introduction to Criminal Law; Criminal Procedure
26	International Law; Professional Responsibility; Negotiation
30	LRW, Immigration

*Employment status*

Already tenured	1,4,5,9,12,14,16,18, 23
Tenure track/full scholarship	28
Parallel/clinical track/reduced scholarship	3, 26
Long term contract	11,15,17,20, 21, 22, 25, 27
Short term contract or visitor	6,8,13, 19, 24, 30
Other	2: Regular TT with reduced scholarship 7: Tenure track with modified scholarship expectations; (clinical writing, even including some briefs, may count). 10: Clinical TT with full scholarship expectations 19: Administrative Appointment

*Question 2: Clinic Type*

Individual, live client representation	2,3,4,5,6,9,10,11,12,14,15,16,17, 18,19, 20, 21, 24, 25, 26, 28, 30
Impact litigation with heavy writing	13
Transactional	1, 19, 23
Civil/domestic pretrial and trial litigation	4,6,7,11,12,13,15,18, 19, 24, 27

Criminal pretrial and trial litigation	9,16,18
Tribal court practice	18
Appellate litigation	8,13, 20, 25
ADR	17
Administrative practice	4,5,7,13,17, 19
Immigration/human rights	3,5,15, 22
Intellectual Property/Technology	None
Other	4: Elder law – nursing home/long-term care rights; Medicaid; financial exploitation; guardianship; conservatorship 5: Community education 18: Project/Tribal/Live Client/State/Tribal/Federal Court 20: Death Penalty Appellate / Post-Conviction (Prisoner Representation) 24: Prisoners; Postconviction

## B. Legal Writing Program and Faculty

### *Question 3: LRW Program Status*

Traditional TT/Full scholarship	2,4,5,7,11,14,15,16, 23, 24
Parallel TT/Clinical TT	5,10, 19,
Long-term, multi-year contracts	1,7,9,17,18, 22, 25, 26, 27, 28
Full time short term contracts (1-2 years)	8,18,30
Adjuncts	6,7,11, 21, 25
Students/work study	6
Do not know	3,13,20
Other	None
Comments	1: Three-year multi contract 5: [Traditional or parallel tenure tracks are] available, but must elect. 7: [Traditional tenure track] for <i>directors</i> , [long-term contracts] for others (and mostly there are adjuncts teaching). 8: Director is tenured 18: [Indicated that full time model begins in 2008]

*Question 4: LRW Curriculum*

Standard first-year program	1,3,7,8,9,10,11,15,16,18, 20,22, 23, 24, 25, 28
Two or more semesters of integrated skills	4,14,17, 26, 27
One semester of basic LRW	2, 21
Separate courses for research/writing	None
Three or more semesters of required legal writing / integrated courses	4, 30
Upper division electives	4,9,10, 23, 24
Do not know	13
Other/ comments	2: Advanced writing required 5: Integrated with required first year criminal law course. 6: One semester of research/writing plus one upper-level elective 7: But may eliminate persuasive writing from the first-year curriculum. 10: One “intensive” writing course plus 2 other writing courses. 12: Integrated legal research and writing and substantive first year course. 14: Also: legal writing integrated with doctrine. 19: two semesters of research and writing integrated into criminal law in the first year 21: Advanced Legal Research required for struggling students

C. General Clinic Policies and Procedures for Legal Writing

*Question 5: Programmatic Approach to Writing in Clinic*

No unified approach/up to the individual	1,2,3,4,5,6,7,9,10,11,12,13,14,15,17, 18, 19, 20, 21, 22, 23, 23, 24, 25, 26, 27, 28, 30
Set of general rules and policies for students to follow	8
Unified checklists and writing samples	7,8

Other	<p>4: We have a class in writing letters that includes 2-3 practice groups</p> <p>7: We teach 2-3 classes on writing as part of the clinic curriculum.</p> <p>16: Our approach is a combination of the first two. We have some standardized guidelines, but each professor essentially develops and monitors evaluation of student work.</p> <p>27: [T]here is no grading.</p>
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*Question 6: Clinic/LRW Collaboration*

LRW professors train clinicians	10,14
Clinicians train LRW professors	
Meet occasionally	8,10,14, 23, 26
LRW teaches a segment in clinic	10,15,16, 23, 24
No collaboration yet but planned	7,13
No plans so far	2,4,5,6,8,9,11,17,18, 19, 20, 21,22, 25, 27, 28, 30
Other/ comments	<p>1: We meet monthly or so to discuss “teaching skills” but don’t generally discuss students or how to coordinate programs.</p> <p>3: No planned collaboration but I regularly consult legal writing professors on . . . [unfinished thought].</p> <p>4: <i>Wish</i> for collaboration on both sides; no actual <i>plan</i>.</p> <p>10: LRW sometimes covers sabbaticals/leaves in clinic and vice versa. Clinic issues sometimes [provide] the basis for certain 1L assignments.</p> <p>7: I have asked to be included in some of their [LRW] meetings dealing with teaching methods.</p> <p>12: Clinic has its own legal writing instructor . . . .</p> <p>13: I have been in contact with other professors to integrate the curriculum and make sure students are getting contradictory messages.</p> <p>14: We have an in-house clinical writing instructor.</p> <p>28: Good idea!</p>

*Question 7: Advance Instructions to Students*

	R1	R2	R3	R4	R5	R6
Checklists, rubrics, guidelines for each type of work	3,4,7,8,18, 23			2	17	
General LRW guidelines, undifferentiated	5,8, 26	20	1	17		
Bank of sample work product for types	1,3,4,5, 7,8,10, 19, 20, 24, 30	2,6,9, 13,18	11,17	23		
One or more classroom sessions	3,4,5,7, 8,10,12, 15,16, 19, 21, 24	1,11,17, 21	2, 23			
One-on-one, individual supervision	3,4,5,6, 7,8,*9, 10,11,13, 14,15,16, 17, 19, 24, 25, 26, 27, 28	23,	18, 20			
Other	2: Fill-in templates 10: Non-directive feedback after draft provided 19: Text— <i>Writing For Law Practice</i>					
Comments	<p><i>Comments:</i></p> <p>2: Sometimes I think we are doing our students a disservice with templates but it works with our estate planning documents</p> <p>4: [Checklists and samples exist] for some types, not all.</p> <p>9: [Circled the word orally for emphasis]</p> <p>22: I either don't know how to answer this or the answer is <i>none</i>.</p> <p>27: [Circled "orally"]</p>					

*Question 8: Desire for Additional Tools*

3	Rubrics and written guidelines
4	I would like to know how to better give individual feedback to help students develop their legal writing skills
5	First year [legal writing program] faculty responding more to student deficiencies in research and writing
6	Written guidelines in particular types of work product; most helpful would be guidelines/ideas for talking with students about specific work product types and challenges
8	Written guidelines and rubrics would be helpful.
10	More clinicians rotating through a legal writing course (and vice versa)
11	Classroom tools—writing tutorial center for poor writers
12	I am happy with a non-directive approach in which students do not copy from models or samples.
15	The checklists and bank would be helpful. We have a bank – but not for each type of writing product.
16	I'd like to see increased collaboration between legal writing professors and clinicians to more effectively reach students in the clinic and to better lay a foundation for writing skills early in law student's career.
17	Writing guidelines for each type of work
19	Written guidelines for each type of writing
20	General legal writing guidelines
21	I don't know. I'd like to figure out (or get help figuring out) which tools would be most useful for students.
22	Advance-type guidance for writing
23	I'm pleased with the written guidelines used in the transactional clinic. I provide students with outlines of certain documents, such as corporate bylaws, and the outlines include the corresponding [state] corporations code section so that the students understand the reasoning behind particular language.
24	More coordination with writing professors
28	Checklists, etc.

D. Impressions of Student Experience and Skills

*Question 9: Course Pre- and Co-requisites*

None	1,2,5,8,19,22, 25, 26, 30
Evidence	3,5,7,10,11,12,14,15,16,17, 21
Advanced legal writing	None
Civil or criminal procedure	9,11, 21
Trial advocacy	9
Pretrial advocacy	None
Topical subject area related to clinic	3,18,20,29
Other	4,10,12,14,15,16,23,24,28: Professional Responsibility 17: Case Arc program is 4 semesters of skills which incorporates legal research & writing, interviewing & counseling, negotiations, contract/transactional drafting, <i>and</i> focused problem solving. 21: Negotiation for Mediation Clinic 23: Business Associations. I also strongly encourage tax courses, but they are not currently required.
Comments	4: They must take [Civil Procedure] in the first year – not a formal pre-requisite. 5: Recommended; Interviewing [and] Counseling is [also] recommended 6: Contemporaneous enrollment in clinic workshop 22: 2L or 3L status – or if LLM, 2 <sup>nd</sup> semester; but International Human Rights and/or Public Interest Law strongly recommended

*Question 10: Work product in mandatory LRW curriculum*

Office memo	1,2,3,5,7,9,10,11,14,15,16,17,18, 19, 21, 23, 24, 25, 26, 28, 29, 30
Client letter	15,16, 17,18, 23, 24, 25, 26, 28, 29, 30
Demand letter	15, 24, 25, 28, 29
Motion	6,18, 23, 24, 25, 26, 28, 29, 30
Trial brief	7,10, 23, 28, 29, 30
Appellate brief	1,2,5,6,7,8,9,10,11,14,15,16, 17, 19,

	21, 23, 24, 25, 29
Contract	2, 17, 26
Legislative provision	18
Scholarly article	5, 17, 19
Other	22
I do not know	4,12, 27
Comments	<p>2: Possibly others</p> <p>5: [Scholarly paper]</p> <p>10: Either [trial brief] or [appellate brief]</p> <p>17: I'm sure there are other things but not sure of the continuum.</p> <p>21: These are informed guesses</p> <p>22: Amicus briefs, reports, research memos (persuasive and objective)</p> <p>23: Other work product may be required</p> <p>24: I do not know [what others are required, if any]</p>

*Question 11: Average student's ability to translate previous legal writing to clinic*

Seem to understand basic components of memo/brief and can perform nuanced analysis with good authority	1,4,8,12,17, 21, 22, 24, 28, 29, 30
Often provide only a cursory analysis with missing document sections	3,7,8,10,15,16, 20, 25, 29
Have trouble with differences between objective/persuasive analysis	3,7,8,9,15,16, 17, 19, 25, 26
Underestimate statutes/regulations	1, 2,4,6,9,10,15,16,18, 25, 29
Underestimate secondary sources	1,2,4,5,7,9,11,12,14,16,18, 19, 22, 23, 24, 26
Letters lack right tone/language level	1,4,5,6,7,11,14,16, 17, 19, 21, 23, 24, 25, 26, 27
Other/ comments	<p>3: Students seem to understand basic case law research but are unable to effectively analyze or distinguish the case.</p> <p>4: These are issues at the beginning. By end of clinic, nearly all students can use statutes/regulations</p>

	<p>appropriately and write a good letter.</p> <p>5: No recognition of their individual problems with grammar, spelling, punctuation, syntax; no sense of self-diagnosis of writing quality (and no experience in [such self-diagnosis]).</p> <p>6: Analysis is solid and reasonably well supported but writing style is amateurish and not persuasive; organization poor.</p> <p>10: [The problem of cursory analysis and missing document sections] happens in advanced legal writing courses too! Organization and persuasion are ongoing topics of teaching (to be expected).</p> <p>11: Letters lack basic business format; students have little idea what to put in a petition or motion.</p> <p>14: Students don't underestimate statutes but have trouble interpreting them.</p> <p>19: Many students have not mastered the fundamentals. Citation form is usually woefully inadequate. Many still have problems with spelling or grammar. Many do not even know the format for a standard business letter.</p> <p>22: Sloppy writing and superficial analysis (at times) and advocacy.</p> <p>28: Pretty good as we have a <i>very</i> excellent legal writing program in first year.</p> <p>29: I've had students in both categories [referring to items 1 and 2].</p>
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E. Individual Practices and Preferences

*Question 12: Your skills in teaching clinical LRW*

Comfortable discussing substance but harder time with analytical methodology	1,6,16,17, 30
Can identify grammar errors but correct them myself	2,3,11,14,16,18, 20, 22, 26, 29
Accept incomplete analysis and rewrite even if there is	1,20

time for another draft; hard to explain what is wrong	
I have educated myself re legal writing terminology and concepts for use in clinic	3,7,8,9,10,21,23,25,28,29
Do not have time to learn but have developed own methods and feel comfortable discussing with students; can encourage a better product	2,4,5,11,14,15,18,19,20,22,24, 27
Other/ comments	<p>2: [Crossed out “because I do not know how to discuss or explain many of them” and replaced with “as I read along.”]</p> <p>2,4: [Crossed out “I do not have time to learn . . . .”]</p> <p>4: I can explain steps for proper written analysis; I can and do explain rules behind subtle grammar and style problems; I do not know the terminology and concepts used in legal writing, but I am open to learning about them.</p> <p>10: Because I teach 1L and advanced writing courses I have a pretty good comfort level with legal writing concepts, terminology, etc.</p> <p>12: Students work on major writing projects with our clinic writing instructor.</p> <p>14: [It is not that I can’t explain them; I] do not have time to.</p> <p>22: Maybe somewhere between them</p> <p>24: I need (and have time) to coordinate terminology/concepts from LARW into clinic instruction; [also crossed out the segment beginning with “I do not have time . . . .”]</p> <p>28: We all taught legal writing [for] one year, so I am comfortable. I also write a lot.</p>

*Question 13: Types of Supervision*

Multiple drafts on major assignments with written and oral feedback	1,2,3,4,5,6,7,8,9,10,12,14,15,16, 17,18,19,20,21,22,23,25,26,27,28
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Often have time to meet more than once and provide written feedback	1,2,4,5,6,7,10,16,19,23,24,25,27
Seldom have time for written; rely more on oral	20,26,30
Students seldom can re-write more than once	9
Often need to take over for student to save time	19,29
Other/ comments	9: [Used interlineations to clarify that there are multiple drafts for major assignments but seldom for “shorter projects.”] 19: I often do not have time to give individual feedback on class assignments. 22: I also do red-lining and re-writing 29: When I’ve re-written, this is why [perhaps qualifying the “often” in the question]

*Question 14: What Causes Need to Re-Write Student’s Work?*

	R1	R2	R3	R4	R5	R6
Student bewilderment causes missed internal deadlines	2,11	8, 20, 21, 24				
Student’s poor time management causes frequent extensions and missed deadlines	1,8,11, 16, 19, 21, 22, 24		9			
Student cannot produce proficient analysis despite sufficient time and feedback	19			24		
Product requires nuanced argument; after a chance to rewrite, supervisor models solution	1,7,9, 16, 20, 22, 23, 25, 26, 27		2,8, 21, 24			
Time constraints make it difficult to meet and give adequate feedback for	5,7,11, 30	2,9		21		

more rewriting						
Other	10					
Comments:	<p>2: [Changed “frequently” in the main question to “on occasion.”]</p> <p>3,4,6,12,14,15: [Skipped or expressly indicated that the question does not apply]</p> <p>10: I won’t let them get to the place where I do a lot of rewriting myself. If I do have to it’s only because of time but I would explain my decisions to the student.</p> <p>22: All to varying degrees; [also crossed out “properly” before “models an advanced solution”]</p> <p>28: Sometimes time constrains me but generally I have students redo after editorial comments from me, student director, and teammate.</p>					

*Question 15: Feedback Types and Preferences*

	R1	R2	R3	R4	R5
Oral	4,7,12,15, 17, 20, 23, 26, 27, 28	2,3,9,10, 11,14,18, 21, 22, 24, 25, 29	1,6,8,16		
Margin with some interlineations	1,2,3,4,6, 7,8,10,11, 12,14,16, 18, 19, 24, 25, 26, 28, 30	5,15,17, 21, 27	29		
Pervasive line editing	5,*9,12, 22, 23, 26, 29	1,6,8,16	2,17, 21, 24, 27		4
Written memo to student	4,7,12	25	22		
Other	3,12				
Comments	<p>2: [For verbal follow-up] I write “see me” on the draft.</p> <p>3: Explanation [of “other”]: I use track changes in Word for edits and parenthetical notes/questions.</p> <p>4: I use them all—it’s hard to rank, although</p>				

	<p>pervasive line-editing is my last choice. All are useful and efficient in some contexts.</p> <p>7: Margin comments accompanied by memorandum and meeting with student.</p> <p>9: Almost always in combination with a conference/conversation.</p> <p>12: I've used all these methods depending on student and deadlines.</p> <p>16: The order [in which these methods are] used depends very heavily on the student.</p> <p>18: [It] depends on what I am editing—letter, memo, motion—and time.</p> <p>19: [This is] the method that I am most comfortable with and seems most efficient</p> <p>21: [I also] meet with student to discuss written feedback</p>
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*Question 16: Directive vs. Non-Directive Supervision*

	R1	R2	R3	R4	R5	R6
Mostly Socratic without rewriting	3,4,11,18, 19, 23, 29		17			
Probing on substance, directive on structure, rarely rewrite	2,3,4,5, 6,7,10, 14,16,17, 18, 23, 25, 26					
Edit sample passages only for style/grammar	2,3,4, 10, 18, 24, 25, 29	5,16, 17				
Redline/correct most grammar and style	1,4,7,9, 11,15, 18, 20, 21, 22, 24, 26		5,16			
Tend to rewrite for both style and substance when student cannot produce satisfactory second draft	1,6,15, 18, 19, 20, 22, 24	9, 21		16		4
Other	8,18, 22					

Comments	<p>3: [crossed out “and prompt the student to re-write the rest.”]</p> <p>4: It depends on the student and the case.</p> <p>8: We do 6-8 drafts—early drafts provide mostly margin comments and sample edits; end drafts incorporate more of my own edits.</p> <p>10: [When I edit sample passages, they are] generally thesis sentences or headings.</p> <p>22: I offer comments that aim to get students to consider ambiguities, problems, or to probe for more nuanced analysis.</p> <p>27: A progression through all [of these] starting with mostly non-directive and moving to directive, all [of] which varies given the complexity of the project.</p> <p>28: It depends on the student. I am most interested in clarity, tone, persuasiveness, and clear statement of the theory of the case in briefs.</p> <p>29: I start broadly and then narrow as drafts progress—second draft: if student doesn’t get it, I write a sample. Third draft: redline, unless first draft is so good, only minor corrections are necessary.</p>
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*Question 17: Interest in Legal Writing Teaching Methods*

Do not have time to re-teach 1L LRW, but would like to learn how to better discuss with them	1,4,11,14, 18, 19, 20, 22, 26
Would like to learn methods but am afraid of creating status problems	25
Do not have time for significant LRW in curriculum but would like tools for feedback and checklists	1,2,4,5,11,12,15, 16,17, 18, 20, 21, 22, 23, 26, 27, 28, 29
I could spend some more time in the classroom and would like model for special LRW component	1,3,4,5,6,7,10, 19, 24
Do not have time to provide extensive feedback or rewriting schedules; would like self-instruction tools like a manual	1,5,11, 18, 26
Other/ comments	<p>7: [Crossed out “I could spend more time . . . .”]</p> <p>8: My whole clinic is about advanced legal writing.</p>

	<p>9: None of these choices seem right to me. I feel well equipped having taught legal writing for three years. Time is a major constraint.</p> <p>10: If you have ideas let me know!</p> <p>12: Our [in-house clinic] legal writing professor teaches writing in one seminar; I would appreciate [tools for feedback and checklists.]</p>
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*Question 18: Additional Comments*

3	I see a great deal more basic writing issues like grammar and punctuation than I expected at this stage of education. I would love a basic grammar resource that is not too expensive for our clinical library.
4	I would like the chance to compare legal writing concepts and methods to those I use, to improve my own teaching and promote consistency for the students.
7	In one semester, most students do not get sufficient exposure to different types of writing in a clinical setting. Also, with other substantive issues we need to cover in the seminar, it's difficult to devote more time to writing classes than I already do, but students really need more instruction.
10	Keep up the good work!
11	My school has very little skills training prior to clinic. We can't do it all. Any and all would be helpful.
14	At . . . , we have an in-house director of clinical writing who is available to work with each student in each clinic in an intensive way. She often provides the kinds of feedback that I can't, because of time constraints. Her article on her position is available in the Clinical Law Review.
16	A "tutorial" from a legal writing professor would help me better supervise clinical student writing. A good, practice focused, writing text or guide would be helpful.
17	Having taught at 3 schools I can say that the students here are better prepared and ready to take on individual client representation. I firmly believe that CaseArc is the reason for this. This has also changed my syllabus dramatically since now I do not have to spend the start of a semester teaching interviewing and counseling.
21	What a great project!! I look forward to reading your article. Just going through the process of answering these

	questions has given me much food for thought. Thanks!!
22	Hard to say but I'm very open and interested.
28	Excellent survey. I am interested in the results.
30	You should have a box "I am not interested in teaching legal writing in the clinic."