

# The Self-Assessed Writer

## Harnessing Fiction-Writing Processes to Understand Ourselves as Legal Writers and Maximize Legal Writing Productivity

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### I. Introduction

Legal writing scholars have undertaken important and groundbreaking work in recent years regarding the use of fiction elements to enhance legal writing.<sup>1</sup> These scholars have demonstrated that borrowing such elements from the fiction writer's toolkit as plot, character, and setting may improve advocacy and persuasion, and help to develop briefs and memos that more wholly resonate with the reader.<sup>2</sup>

Beyond these tools, however, a number of processes used by fiction writers have yet to be brought into legal writing practice. For example, fiction writers employ various techniques to overcome writer's block and jumpstart the writing process, to incorporate feedback, and to maximize

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<sup>1</sup> See Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. Rich. L. Rev. 1213 (2010); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1 (2010); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative To Pleading Practice*, 15 Leg. Writing 3 (2009); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17 (2008); Kendall F. Haven, *Story Proof: The Science Behind the Startling Power of Story* (2007); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001); Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 Clin. L. Rev. 329 (2006).

<sup>2</sup> See e.g. Foley & Robbins, *supra* n. 1 (discussing how to use the various elements of storytelling, such as character, conflict, and resolution, to write a compelling fact section that has maximum persuasive effect).

productivity. By importing and adapting these methodologies, legal writers may greatly improve their own creativity, clarity, and efficiency.<sup>3</sup>

This article does not purport to cover the myriad ways in which fiction-writing processes may benefit legal writing. Rather, it highlights two examples of fiction-writing techniques that may be useful to legal writers. First, the article introduces exercises for maximizing writing productivity through self-assessment. Both fiction and legal writers are faced with the constraints of producing large-scale, top-quality written product, often under tight deadlines with competing demands. Fiction writers use a number of processes to meet these demands, including exercises that help them understand themselves better as writers. The exercises fiction writers use to know themselves and enhance their processes can, with some adaptation, be vastly helpful to the legal writer in gaining skills and confidence.

Second, building upon this initial self-assessment exercise, the article examines the issues fiction and legal writers share in beginning a writing project. This article offers suggestions as to how novelists grapple with such issues and, in particular, details an exercise intended to get the words flowing. It illustrates a technique through which fiction writers generate ideas and jumpstart the writing process, a free-writing exercise in which one must write for a predetermined amount of time without stopping to think or edit. Through both exercises, the writer gains confidence and develops a body of material with which to work.

By combining the self-assessment and creativity jumpstart, legal writers—like their fiction-writing counterparts—can maximize both their productivity as writers and the quality of the writing they produce. In order to understand the applicability of fiction-writing processes to legal writing, it is helpful to examine what the two disciplines have in common.

## II. Lawyers & Novelists: Kindred Spirits?

For me, novel writing and legal writing have always had to coexist. I decided to seriously pursue my lifelong dream of becoming a novelist following the events of 9/11—which took place exactly one week after I'd begun to practice law. As a result of those events, I realized that time was fleeting and I did not have forever to make my novelist dream a reality—I needed to get started immediately. I took a course at Temple University

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<sup>3</sup> I have long used these techniques in my own fiction writing and legal writing (both brief writing when in practice and scholarship presently). I have also begun to incorporate these techniques in my classroom as a teacher of first-year legal writing.

called, “Write Your Novel This Year” and began to write in earnest. But I was saddled with \$1,000 a month in law school debt and couldn’t just run off to sit in a garret and write. So I penned my first novel by writing from five to seven in the morning before going off to practice as a junior associate in a large law firm. Legal and fiction writing have in this sense always been contemporaneous for me.

Throughout my years of practicing law and writing novels, I had a nagging sense that the synergies between lawyers and novelists were not unique to me and were more than just coincidence. The image of the lawyer-who-would-be-novelist is so prevalent<sup>4</sup> as to border on cliché. Why, for example, are so many *New York Times* bestselling novelists also former lawyers?<sup>5</sup> And why, during my years at the firm, did I encounter so many lawyers—from junior associates uncertain of their career choices to the most senior and successful partners—who confided in me a deeper desire to write a novel? Is it just career dissatisfaction and a fascination with a foreign world that causes these two types of professionals to be drawn to one another? My observations through years of simultaneous legal- and fiction-writing practice suggest that it is something more, a commonality in the need to create narratives, that produces synergies for these two fields.

At first glance, legal writing and fiction writing appear to be wildly divergent fields, with more differences than similarities. Legal writing is based on real life and must be committed to accurate depiction of the facts and ethical adherence to the law.<sup>6</sup> In contrast, novel writing is largely imagined, and the writer is free to create anything she wants.

But there are important similarities between the two disciplines. First, both require a good deal of creativity. The novelist seeks to develop a compelling premise, characters about whom the reader will care, and a realistic setting in which the story can play out. The lawyer, while constrained by facts and law, must still tell her client’s story persuasively

4 The attorney–novelist is also a compound of longstanding crossbreed, dating back at least to eighteenth-century author Henry Fielding, who was also a magistrate. Richard Davies, *AbeBooks.com, Ten Lawyers Who Became Authors*, <http://www.abebooks.com/books/john-grisham-perry-mason/authors-literary-lawyers.shtml> (accessed Mar. 11, 2013).

5 See Patrick Anderson, *Lit or Miss: Lawyers-Turned-Authors Find Mix of Success, Setbacks*, 24 Wash. Law. (April 2010) (available at [http://www.dcbbar.org/for\\_lawyers/resources/publications/washington\\_lawyer/april\\_2010/lit\\_miss.cfm](http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/april_2010/lit_miss.cfm)). This article chronicles the journey of many lawyers who became novelists, including John Grisham (*A Time to Kill*), Scott Turow (*Presumed Innocent*), David Baldacci (*Absolute Power*), Meg Gardiner (*China Lake*), Richard North Patterson (*The Tangled*), Lisa Scottoline (*Final Appeal*), and others. See also Hillary Mantis, *The National Jurist, The Ultimate Alternative Legal Career: Lawyer Turned Novelist*, <http://www.nationaljurist.com/content/ultimate-alternative-legal-career-lawyer-turned-novelist> (June 22, 2012, 7:33 a.m.).

6 See e.g. Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experiences of Non-Fiction Writers about the Limits of Legal Storytelling*, 16 Leg. Writing 163 (2010); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

and create a narrative as compelling as that in any novel.<sup>7</sup> Lawyers develop a theory of the case, or theme, and then must decide how to use detail and other storytelling elements to evoke the client's case.<sup>8</sup>

Second, both fiction and legal writers operate within certain structural constraints. The lawyer has a duty to accurately convey the facts and the law.<sup>9</sup> A novelist, while seemingly unbound by these requirements, must in fact consider story arc<sup>10</sup> and the particular conventions of the genre in which she is writing,<sup>11</sup> not to mention more-practical concerns of chapter and overall length, etc.<sup>12</sup> Within the story, the novelist is obliged to be plausible and consistent and to engage in world-building—creating a place which in fact has rules and constraints of its own. Or, as J.R.R. Tolkien said, “[T]he story-maker [must] prove[] a successful ‘sub-creator.’ He [must] make[] a Secondary World which your mind can enter. Inside it, what he relates is ‘true’: it accords with the laws of that world.”<sup>13</sup>

Additionally, both legal writers and fiction writers are engaged in reader-centered communication.<sup>14</sup> Both are concerned with identifying the reader, evoking certain reactions, and affecting the reader in a

7 Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006). For example, Professor Robbins chronicles how the legal writer may borrow the metaphor of the hero's epic journey as a foundation for client-centered lawyering and a judicial audience.

8 *Id.* at 771-72.

9 Model R. Prof. Conduct 3.3 (ABA 2012), Candor Toward the Tribunal, provides, in relevant part, “(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false.”

10 Many modern novels follow a traditional, three-arc story structure: the first, in which the reader is introduced to the protagonist, and something happens to shake the protagonist out of her normal realm and introduce a quest which she undertakes; the second, in which the protagonist encounters challenges and tries and fails to achieve her goals, all the while building skills to face the ultimate challenge; and the third, in which the hero ultimately prevails. For a discussion of the story arc in various genres, see Carolyn Wheat, *How to Write Killer Fiction: The Funhouse of Mystery and the Rollercoaster of Suspense* (2003). See also Robbins, *supra* n. 7.

11 Novels will vary in length, structure, and style, depending on whether they are intended to be literary or commercial. Within the commercial realm, books may be classified as women's fiction, romance, historical, etc., and this classification can also affect the trajectory of the story.

12 Publishers often have preferred lengths for novels, which may be specified either in their submission guidelines or in contractual terms. In my case, the terms are specified in my contract and my novels typically clock in at around 100,000 words (about 300 pages), and they average about 20 chapters, or 15 pages per chapter.

13 J.R.R. Tolkien, *On Fairy-stories*, in *Tolkien On Fairy-stories* 27, 52 (2008). Writing historical fiction provides an interesting example of world-building, namely, the tension between historical accuracy and good storytelling. How much can accuracy be compromised for the sake of plot? For example, readers in the Wikipedia age seem very obsessed by the “gotcha!” of finding a purported inaccuracy in a novel, and gripe about such inaccuracies both in reviews posted to public forums such as Goodreads and Amazon and in direct e-mails to the author. But there are times when writers need to take liberty with history, such as collapsing an accurate historical timespan into a shorter period for the sake of narrative arc. Pam Jenoff, *Diary of an Eccentric, Putting the History in Historical Fiction*, <http://diaryofanecentric.wordpress.com/2010/03/11/guest-post-pam-jenoff-author-of-almost-home/> (Mar. 11, 2010).

14 Wayne Schiess, *Legal Writing Is Not What It Should Be*, 37 S.U. L. Rev. 1, 2 (2009).

particular way—essentially in causing the reader to “root for” the client or character. For example, the legal writer wants to persuade the judge to rule in favor of the client on a particular issue and so attempts to draft a narrative that portrays the client as sympathetic and entitled to relief under a particular law.<sup>15</sup> Similarly, the novelist will want to create a character with whom the reader identifies so the reader can empathize with the character’s struggles—also seeking to have the reader “root for” the protagonist.<sup>16</sup>

Finally, from a practical perspective, both fiction and legal writers seek to undertake large-scale writing projects that will require a great deal of work, often on a tight time schedule. Their projects will go through many iterations and revisions, and receive comments and feedback from others. So both types of writers need strategies for initiating projects, managing large amounts of material and information, and incorporating input.

Despite their differences, these two disciplines approach writing in importantly similar ways, and the tools of the one can be of use to the other.

### III. Two Examples from the Novelist’s Toolkit: The Tape Measure and the Hammer

This article highlights two of the various processes from novel writing that legal writers may wish to employ. The first of these is the writer’s self-assessment, which, continuing the toolkit analogy, may be likened to a ruler or tape measure. The second, which I have dubbed “the Hammer,” is an exercise to jumpstart creativity. These two exercises may be used in tandem at the outset of a writing project, or perhaps to rejuvenate a project that the writer has begun and that is now stalled.

#### A. The tape measure: the writer’s self-assessment

Novel writers often engage in exercises to get to know their characters, such as “interviewing” a character to find out her motivations, desires, inner conflicts, etc.<sup>17</sup> But it is equally important for the writer to get to know herself as a writer. To that end, novelists spend a great deal of time engaged in self-assessment. They look for ways to understand their

<sup>15</sup> Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1994).

<sup>16</sup> Linda Seger, *Creating Unforgettable Characters* (1990).

<sup>17</sup> For example, novelists often create extensive character profiles, including a character’s likes and dislikes and personal history. Some even “interview” characters in a question and answer format to learn more about them. Such materials may either be incorporated into the novel or serve merely as inspiration and background for the writing.

work styles and preferences as a means to increasing both the quality and quantity of their writing. For example, in *The Plot Whisperer*, the author recommends not only getting to know one's characters with interviews but also interviewing oneself to find answers.<sup>18</sup>

Borrowing modules of self-assessment from the creative-writing realm can be beneficial to legal writers in at least two ways.<sup>19</sup> First, by looking inward, legal writers may begin to understand themselves, the settings and mediums that yield their greatest writing productivity, the things that inspire them and the areas on which they need to focus. Thus, by using a “measuring” tool, legal writers can improve their writing both quantitatively and qualitatively. Additionally, by thinking of themselves as writers with a distinct writer's identity and style, legal writers gain confidence.

One useful way to begin self-assessment is with a questionnaire that asks writers about their past writing experiences, their perceived writing strengths and weaknesses, and their preferred writing environment (setting, time of day, medium, etc.). Though most writers know their environmental preferences intuitively. (E.g., “I am a morning person.” “I do my best work late at night.”), many have not consciously reflected upon those preferences in order to set that time aside and use it to maximize productivity.

Questions included in the self-audit may vary, but I offer the following sample as a starting point:

## SELF-ASSESSMENT QUESTIONNAIRE

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### I. Part One—Environmental/ Atmospheric Preferences

- What is your preferred time of day to write? Why?
- What is your preferred writing environment? (Location? Activity or quiet?)
- What is your preferred writing medium? (Desktop computer, notebook computer, longhand?)
- Are there particular foods or beverages that enhance your writing experience?

### II. Part Two—Substantive Assessment

- What are your greatest writing strengths?
- What are your writing weaknesses?
- Describe some of your prior favorite writing experiences. Least favorite?
- Describe your writing style.
- How do you like to begin a writing project?

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<sup>18</sup> Martha Alderson, *The Plot Whisperer: Secrets of Story Structure Any Writer Can Master* 1–18 (2011).

<sup>19</sup> Scholars have done important work on self-awareness in legal writing (i.e., metacognition). See M.H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ALWD 27, 29 (2004) (“The process of metacognition involves inventorying your learning preferences and the results you achieve from different learning processes, and it involves self-regulation of cognitive activities by monitoring them and making appropriate adjustments.”). Incorporating self-assessment techniques from the fiction writer's toolkit expands the breadth and depth of possible assessment.

Another question is whether the writer is a short-burst or longer time writer. For example, a writer who discovers that she is a sprinter or short-burst worker (i.e., one, like me, who prefers to work in brief periods of time, rather than in marathons) can schedule numerous, brief blocks in which to work. Conversely, the writer who takes awhile to get started needs to find large blocks of time. Answers should be probed to understand how to maximize these blocks. For example, if it takes a writer a long time to get started, is there something she can do in advance like note-taking or a writing warm-up in the car or the night before to hit the ground running?<sup>20</sup> Can the short-burst writer be encouraged to stretch his or her endurance like a runner by writing for five or ten minutes longer each week?

Additionally, through self-assessment questions, a writer should be encouraged to understand her preferred environment: Do I prefer to write in a private setting or somewhere more public, like a coffee shop? Do I like music or silence? Similarly, a writer should consider whether she likes a desktop or a laptop or writing longhand.<sup>21</sup> Finally, although it may seem superfluous, writers may consider whether there are particular foods or beverages that help them write. Coffee might be an obvious answer, but for others there may be particular foods that they have found to enhance concentration.

Out of this first half of the writer's self-assessment, a portrait begins to emerge of oneself as a writer. Mine, for example, shows that I do my best writing in the morning, as early as five a.m., but that by noon I've lost my creative spark. Thus, it is imperative that I (a) reserve as much of that time as possible for writing and (b) find other types of writing-related work I can do in the afternoons and evening (brainstorming, taking notes, etc.). I do the actual writing on a computer (laptop is fine for actual writing, though I need a big screen for editing and revision), but I problem-solve and plot longhand in a notebook. I like quiet, lots of coffee, perhaps peppermints or other hard candy to spur concentration. Silly? Maybe, but it works for me, and it has helped me to write and publish six novels in ten years, while practicing and teaching law. It also helps me with equal force when approaching legal writing projects, from briefs to law-review articles.

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**20** Gaining self-awareness has enabled me to develop processes that have helped me progress as a writer. For example, recognizing that I like to work in short time increments, I've developed a process by where I read materials in the evening (either related to writing craft or something substantive that relates to my novel) and take notes. The next morning, I can then jump into writing from those notes, without worrying about writer's block.

**21** Answers to this question may vary depending upon the project. For example, while a laptop computer may suffice at an early writing stage, a desktop computer with a bigger screen may work better for the editing and revision stages.

The second half of the questionnaire focuses on more-substantive concerns, i.e., understanding one's own writing predispositions. The most straightforward place to begin is with an assessment of strengths and weakness. Of course, in the context of the questionnaire, writer strengths and weaknesses are a matter of self-perception and may be inaccurate. But working through the answers and showing how they may or may not reflect reality can also be helpful. Similarly, questions regarding favorite writing experiences may help to tease out writer predispositions by identifying both negative and positive and negative experiences in past writing, in order to approach future writing projects in the most optimal manner.

The questionnaire also raises the issue of writing style in the self-assessment (with a prompt that is purposefully vague and can be answered in a variety of ways). This question can provide fertile ground for discussion with other writers, either before or after the questionnaire is completed. For example, does one tend to be wordy or too terse? Is the language employed formal in tone or more casual? Is the writer prone to excessive description, or is more needed?

The assessment then concludes with a more specific question about the writer's preferred means of beginning a writing project—seeking information, for example, about whether the writer is more “creative” and needing structure or more structured and needing a jump start. This final question sets the stage for the creativity exercises described in the next section.

From the second part of the assessment, the writer comes away with a measure of her skill set, a self-awareness that can be beneficial in improving writing quality. In my case, I have learned that I write strong narratives, but struggle with description. I tend to be brief and so I have to allow time to flesh out my early drafts. I'm also prone to overuse certain words, such as “suddenly,” so I have to go back and look for excessive repetition. The focus of the substantive self-assessment may vary somewhat when approaching fiction- and legal writing projects. But they result in helpful points as I embark on either.

A number of “best practices” should be implemented when using a writer self-audit such as that described above. First, while the self-assessment is by its very nature an individual activity, it can also be useful to have a number of writers engage in self-assessment in a group setting, such as a legal writing class or writer's workshop. Each writer can complete the questionnaire and bring it to a group session to discuss in pairs, essentially interviewing one another to learn the answers. Then, the group can discuss the various questions and answers as a whole. Writers may gain confidence from empathizing with peers about challenges or fears. Or perhaps through sharing, the writers may gain insight regarding

their strengths about which they were previously unaware. It is also useful to repeat this assessment exercise multiple times at intervals several months apart to recognize progress and development.

In using this self-assessment tool, I employ several key themes. First, the self-assessment is a means for the writer to learn about her own existing predispositions and also to recognize that these things may change as one gains writing proficiency. Second, it is important for writers to learn from peers' writing styles to discover things that might benefit their own work.

Finally, it is important that writers understand these as enabling questions and not limitations. For example, it is beneficial for a writer to discover that she prefers to write in the morning because she can attempt to block out writing time in the mornings. However, she should be discouraged from saying, "I can write only in the morning." Rather, the writer should consider if there are ways to expand the boundaries of her best writing time. (E.g., perhaps the issue is that she writes best when well rested and could take a brief nap before afternoon writing. Or perhaps there are other writing-related tasks that can be done at less optimal times of the day: "My best writing time is morning but I can brainstorm at night.")

One Ann Lamott quote explains wittily how writers can stretch their writing capabilities if they remain flexible: "I used to not be able to work if there were dishes in the sink. Then I had a child and now I can work if there is a corpse in the sink."<sup>22</sup> Writers should thus be encouraged to understand that the answers are not meant to develop hard and fast rules or confines but rather serve as starting points from which to build; they should recognize the need to be flexible in light of circumstances and competing demands.

Using the results of the audit, the writer can design a plan, including tasks and timelines, that enables her to most efficiently complete the project.

## **B. The hammer: jumpstarting creativity**

Armed with the results of the self-audit, writers can approach the vexing issue of how to begin a project. I am often asked about my writing process: Do I start with an image or a fully formed story? Do I work from an outline or just write? The real question, I suspect, is that of creativity, a shared problem for both fiction and legal writers: How does one find the

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<sup>22</sup> *Bird by Bird with Annie*, DVD (New Video Group 2009).

inspiration for a particular writing project and nurture that ember of inspiration to full-blown flame?

All writers share the commonality of the blank page. In the case of the novelist, she may have an image of a character or scene that jumpstarts the work. For the legal writer, a theme or theory of the case may evolve through discovery and be ready to take flight. Whether inspiration is plentiful or nonexistent, the page is still blank. Writer's block is endemic to all forms of writing. It may be particularly problematic either for novice writers such as new law students and attorneys (even those who have done substantial writing before may be stymied by the new and unfamiliar writing format)<sup>23</sup> or for those beginning a particularly cumbersome project such as a large brief.

One of the problems in addressing creativity is that people approach it in such widely different ways. In any given group will be some number of writers who simply cannot get words out onto paper, some who can write plenty but cannot organize their thoughts, and still others who are somewhere in between or unsure of their own proclivities in this regard.

A parallel dichotomy exists in novel writing. When it comes to starting a project, fiction writers lump themselves, broadly speaking, into two camps: plodders and pantsers.<sup>24</sup> First, plotters or "plodders" must have an outline or well-established story structure in place before putting pen to paper.<sup>25</sup> The second group, the "pantsers" (named for those who literally go by the seat of the pants), find it necessary to write first and organize later.<sup>26</sup> These categories aptly reflect the divide I have seen between those who cannot get a word onto the page and those who write and write but cannot find structure in their work.

Yet the distinctions are perhaps less clear than these terms suggest. Every writer has a bit of plodder and pantsner in her, and which one predominates depends on a variety of factors, including the nature of the project (size, subject, matter, etc.), whether one is coauthoring, or whether one is required to submit an outline in advance, etc. When I am asked how I begin writing, the answer is, "It depends." My own process, for example, carries elements of both the plodder and pantsner. Most of my projects begin with free-form writing. In the beginning, I am strictly pantsner—I

<sup>23</sup> Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 *Leg. Writing* 223 (2010).

<sup>24</sup> See e.g. Jon Thysell, *National Novel Writing Month, Plotting vs. Pantsing: A Plea to End the War*, <http://www.nanowrimo.org/en/forums/all-ages-coffee-house/threads/70298> (Oct. 16, 2012) (describing these two categories, plodders (who begin with an outline) and pantsers (who just jump right in and write)).

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

<sup>26</sup> *Id.*

write freely anything that comes to mind—dialogue, plot, narrative, internal monologue—without stopping or organizing. When the manuscript is somewhere around 150 pages, I begin to organize it into chapters, using a separate outline document to keep track of it all (a very “plodder” thing to do). But for some books I’ve written under contract, I’ve been required to submit a detailed proposal and have needed to modify my approach.

I would say that most legal writers fit into the plodder category. This is not to suggest that they are particularly good at outlining or otherwise organizing their thoughts, but rather that they have difficulty getting started on the actual writing.<sup>27</sup> Even those who would in other circumstances tend to write readily seem stymied by a fear of legal writing.<sup>28</sup> In fiction writing, this might be analogized to the novice writer who cannot find the right voice for her work. So for legal writers, especially newer attorneys, the early focus may be on helping the plodders get words onto paper (i.e., jumpstarting creativity).

Fiction writers use a variety of exercises and techniques to jumpstart creativity.<sup>29</sup> For me, the technique that translates most effectively into the legal writing realm is an exercise from Natalie Goldberg’s *Writing Down The Bones* and *Wild Mind*.<sup>30</sup> Goldberg, a practicing Zen Buddhist who brings this approach to her writing, is a proponent of the timed writing exercise.<sup>31</sup> In this exercise, one writes continuously for a predetermined period of time without stopping to self-edit, which can be a particularly helpful way to begin committing ideas to paper.<sup>32</sup> Her guidelines are the following:<sup>33</sup>

- *Keep your hand moving.* Frequently, a writer pens a sentence, then stops to consider it and edit, losing the flow of the idea. This exercise requires the writer to commit to writing without stopping for a specific period of time.

<sup>27</sup> See Felsenburg & Graham, *supra* n. 23 (chronicling many of the hurdles that beginning legal writers encounter, including lack of familiarity with the requirements of legal writing, resistance to the critical thinking that is integral to legal writing, and decreased confidence when faced with the difficulty of legal writing).

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

<sup>29</sup> For example, a writer might imagine a scene as something out of a play or movie and use this visual to generate scenic detail in their writing. A novelist’s “interviewing” characters to derive their backstory, motivations, etc., works similarly. Attorneys may consider doing similar activities to develop a client’s narrative or before a deposition to help evince the theory of the case.

<sup>30</sup> Natalie Goldberg, *Writing Down the Bones* (2005) [hereinafter Goldberg, *Bones*]; Natalie Goldberg, *Wild Mind: Living the Writer’s Life* (1990) [hereinafter Goldberg, *Wild Mind*].

<sup>31</sup> Goldberg, *Bones*, *supra* n. 30, at 10–13.

<sup>32</sup> *Id.*

<sup>33</sup> Goldberg, *Wild Mind*, *supra* n. 30, at 1–5. See also Mary Bast, *Out of the Box Coaching, Excerpts from Natalie Goldberg, Writing Down the Bones and Wild Mind: Living the Writer’s Life*, <http://www.breakoutofthebox.com/NatalieGoldberg.pdf> (accessed Mar. 15, 2013).

- *Lose control.* Write without fear that the work is not good enough—a common problem that can stop writers mid-project. This underscores the idea, which many of us already teach in both legal and fiction writing, to “get it out there” and then fix it up later.
- *Be specific.* Even on the first draft, look for language that gets to the heart of what you are trying to say and that captures the essence of the idea.<sup>34</sup>
- *Don’t think—get below discursive thought to the place where your mind is original, fresh.* Just write and let your hand flow without stopping to edit or worry about the quality of the work at the initial stage.
- *Don’t worry about punctuation, spelling, or grammar.* These can come in at a later draft stage and should not hinder free-association writing.
- *You are free to write the worst junk in America.* Write without fear in starting a new writing project.<sup>35</sup>
- *Go for the jugular.* Go deep, something that may be difficult at first draft stage.

In short, for a predetermined amount of time, the chief rule is that the hand must keep moving—no editing or stopping to think.<sup>36</sup>

The particular strength of the exercise, which I’ve used for over two decades, is its ability to get one writing, without letting the “inner editor” interfere. Additionally, because the exercise can be varied in length, it allows the novice writer to approach the difficult task of uninterrupted writing in small increments initially and to build up to longer pieces (much like a new runner who runs in short increments, then increases them, building stamina). Indeed, my current process of beginning a book, which involves free-writing for the first 150 pages or so, is a direct outgrowth of the Goldberg exercise, as it is just a series of free-writing exercises, undertaken over the course of several weeks or months.

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**34** This is the part of the exercise with which I most struggle. By nature, I am not good at description; it is something that I have to incorporate in later drafts. If I were to stop and think about whether I was being specific enough, I would lose the flow of the writing exercise. For this reason, I am inclined to forego this guideline, especially when coaching novice writers, in order to get them into the flow of the exercise.

**35** In teaching legal writing, student fear is one of the biggest obstacles I encounter. Whenever a student expresses hesitation at showing her work to me or her peers, I encourage that student to go on Amazon and look at all of the awful things that people say about my books. This may not be a tool available to all instructors, but the point is, if you want to enter a profession that involves writing, you have to be willing to put your work out there and take feedback and criticism.

**36** Goldberg, *Bones*, *supra* n. 30, at 10–13; Goldberg, *Wild Mind*, *supra* n. 30, at 1–5.

When I use Goldberg's exercise with writing groups, I read a passage that explains the importance of such exercises in silencing our inner editors:

Our "monkey mind" says we can't write, we're no good, we're failures, fools for even picking up a pen; we listen to it. We drift. We listen and get tossed away. Meanwhile, wild mind surrounds us—sink into the big sky and write from there, let everything run through us and grab as much as we can of it with a pen and paper. This is all about a loss of control.<sup>37</sup>

I then have the writers attempt a timed writing exercise. They may be instructed to write with a particular focus or to answer a certain question, or they may just write generally. I tend to make the exercise relevant to the memorandum or brief on which the writers are working, but its less technical aspects, such as writing the fact section. I instruct them to write for ten minutes without lifting up the pencil or ceasing typing<sup>38</sup> or stopping themselves to edit or doubt.

This straightforward exercise is not as simple as it may sound. Many writers find themselves uncomfortable with the concept of writing freely and nonstop.<sup>39</sup> In order to break into this exercise, it is best to do it several times in different sessions, first for just a few minutes then gradually working up to ten or fifteen minute bursts. Goldberg analogizes it to running: "This is the practice school of writing. Like running, the more you do it, the better you get at it. Some days you don't want to run and you resist every step of the three miles, but you do it anyway. . . . You just do it. . . . That's how writing is too. . . . Through practice you actually do get better."<sup>40</sup>

Following the exercise, we discuss the challenges and benefits of writing for a predetermined time without editing. For example, students often struggle with keeping their hands moving without stopping to edit or to doubt the quality of what they are writing. But they find that once they have persevered through the exercise and repeated it more than once,

37 Bast, *supra* n. 33. Indeed, the need for writing exercises and other forms of prewriting for novice legal writers to gain confidence has been documented in legal-writing scholarship. Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 Regent U. L. Rev. 83 (2011–2012).

38 Goldberg's exercises are generally conceived with pen and paper. However, I sometimes permit writers to use their laptops because of their comfort level and the fact that this is how they will ultimately write. There may be value in having them use pen and paper, but I prefer not to stymie them with an unfamiliar medium for purposes of this exercise when they need things to flow.

39 Indeed, allowing writers to use laptops can be particularly problematic in this regard because the temptation to stop writing and click over to the Internet may be distracting.

40 Goldberg, *Bones*, *supra* n. 30, at 11.

they have a body of written material with which they can work. Writers are generally pleased to have overcome their initial resistance. They gain confidence and walk away from the workshop with a body of written material to use as a starting point.<sup>41</sup>

#### IV. Conclusion

This article does not purport to exhaustively cover the fiction-writing processes that may be applied into legal writing, but rather to highlight two potential exercises that may help legal writers as much as it can writers of fiction. Books on fiction writing can provide numerous other suggestions, including additional exercises for jumpstarting creativity, as well as techniques for developing story structure and revision.<sup>42</sup> Conversations between fiction and legal writers may also generate ideas as to exercises that legal writers may borrow from the fiction-writing realm. Experimenting with and adapting fiction-writing processes can be helpful to the legal writer in stretching herself as a writer and in producing higher quality writing in a more efficient manner.

It wasn't until I began teaching legal writing that I understood that the parallels between legal and fiction writing are numerous, multifaceted, and deep.<sup>43</sup> The benefits of borrowing novel-writing techniques are many and can help legal writers not only develop writing strengths and eliminate its weaknesses, but view their work through new lenses. In these ways, legal writers can build not only additional skill, but confidence.

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<sup>41</sup> Closely following the issue of jumpstarting creativity is the question of structure. This problem may be particularly acute for the pantsers, who can often produce a large quantity of words but then have trouble organizing it. For the writer who readily puts pen to paper, the challenge is facing down an unwieldy mass of words and figuring out what to do with them. In a future article, I plan to address processes novelists use to organize and structure their work, including charts, cards, and storyboards, which legal writers may wish to adopt, depending upon their learning and writing styles.

<sup>42</sup> See Goldberg, *Bones*, *supra* n. 30; Goldberg, *Wild Mind*, *supra* n. 30; Alderson, *supra* n. 18; *The Complete Handbook of Novel Writing* (Writers Digest eds., 2d ed., 2010); Noah Lukeman, *The First Five Pages: A Writer's Guide to Staying Out of the Rejection Pile* (2005); Donald Maass, *Writing the Breakout Novel* (2002).

<sup>43</sup> Myriad other novel-writing techniques may also benefit legal writers. For example, novel writers develop systems for receiving feedback from other writers in the workshop setting. They also develop systems for incorporating the feedback received from multiple sources into revisions while maintaining the authenticity of the writer's own work. (I've developed a system in my own work that involves cataloging suggested revisions in a multi-tiered system: I make small revisions first, then approach the larger revisions and engage in brainstorming where the feedback presents issues to be resolved, and table for discussion with the editors those suggestions which I believe are inconsistent with what I am trying to say.) In a future work, I plan to explore these additional tools and their adoption into legal writing.