

Alternative Substantive Approaches to Advanced Legal Writing Courses

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Recent surveys indicate that more and more law schools are beginning to offer legal writing courses beyond those required in the first year. In 2002, 87 percent of the schools responding to a survey of legal writing programs offered upper-level legal writing electives.¹ The increase in such courses has been a growing trend for a few years now. Louis Sirico commented on the “proliferation” of advanced legal writing courses in 1997, attributing it to two things:

First, with the increasing sophistication of legal writing as a professional discipline, legal academics have realized that there is far more to teach than can be taught in the standard first-year legal writing course. Second, with the growing emphasis on teaching professional skills, legal academics have realized that learning to write well is an integral part of any professional training.²

A third reason can be added. Unlike schools of times past, many (if not most) law schools now use full-time teachers with indefinitely renewable contracts in their legal writing programs. Undoubtedly, some schools are developing advanced courses to take advantage of the expertise of these professionals who are making their careers in legal writing.

One byproduct of the boom in advanced legal writing has been the publication of numerous books and articles devoted to it. In the last few years several textbooks designed to be used in upper-level courses have appeared, and several teachers have written comprehensive articles on advanced legal writ-

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1. Association of Legal Writing Directors & Legal Writing Institute, 2002 Survey Results 13 [hereinafter 2002 Survey]. The complete results of the 1999, 2000, 2001, and 2002 surveys are available online at <<http://www.alwd.org/alwdResources/surveys/surveyNDX.htm>> (last visited Aug. 7, 2003).
2. Louis J. Sirico Jr., *Advanced Legal Writing Courses: Comparing Approaches*, 5 *Perspectives: Teaching Legal Research & Writing* 63, 63 (1997).

ing.³ Most of these articles describe in detail the specific advanced writing courses designed and offered at the author's law school.

As these books and articles make clear, there is no consensus among legal writing professionals as to what substance an advanced course should cover. For some teachers, advanced legal writing means instruction on legal drafting—of legislation, or of contracts, wills, and other transactional documents, or of litigation documents such as pleadings and interrogatories. For others, advanced legal writing is an opportunity to teach aspects of brief writing more sophisticated than those taught in introductory courses. Still others see advanced legal writing as an opportunity to integrate writing instruction with a specific doctrinal area or with other lawyering skills, such as interviewing, counseling, and negotiating. And still others take different substantive approaches. Indeed, advanced legal writing today is not so much a course as it is a grouping of diverse courses.

In this article I attempt to summarize and categorize the various approaches of advanced legal writing courses. My intent is to provide a classification scheme—a taxonomy, if you will. I begin by organizing the courses into four broad categories; I discuss the types of courses that fall within each category and the textbooks that are currently available. Then I discuss briefly the advantages and disadvantages of the various approaches to advanced legal writing, from both the teacher's and the students' standpoint.

It should be emphasized that my aim is breadth rather than depth. Unlike most of the existing articles on advanced legal writing, which provide detailed suggestions for designing and teaching a specific course, this article briefly summarizes the various substantive approaches and their primary advantages and disadvantages. I hope it will serve as a starting point for legal writing professionals who are thinking of designing a new advanced course, and for all faculty who are contemplating additions to their school's curriculum and would like an overview of the different courses being offered at other schools around the country.

3. See, e.g., Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 *John Marshall L. Rev.* 303 (2000); Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 *Seton Hall L. Rev.* 653 (1993); Barbara J. Cox & Mary Barnard Ray, *Getting Dorothy Out of Kansas: The Importance of an Advanced Component to Legal Writing Programs*, 40 *J. Legal Educ.* 351 (1990); Susan L. DeJarnatt, *In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 *J. Legal Educ.* 50 (2000); Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 *Legal Writing* 95 (2000); Linda H. Edwards, *Certificate Program in Advanced Legal Writing: Mercer's Advanced Writing Curriculum*, 9 *Perspectives: Teaching Legal Research & Writing* 116 (2001); Lissa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask*, 34 *Gonz. L. Rev.* 45 (1999); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 *Gonz. L. Rev.* 1 (1998); Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 *Duq. L. Rev.* 203 (1995); Sirico, *supra* note 2.

An Overview of the Various Substantive Approaches

A careful examination of the available scholarship and syllabi,⁴ along with a review of recent surveys of legal writing programs,⁵ reveals that there are four basic substantive approaches to advanced legal writing instruction. In this section I examine each of them and note the specific types of courses that fall within each category.

Two caveats are necessary at the outset. First, although the four categories are broadly defined, there are probably some courses that do not effectively fit into any of them. Second, some courses may fit into more than one category. No doubt some legal writing teachers have designed hybrid courses that combine different approaches. But neither of these exceptions should pose a problem for us: the vast majority of advanced legal writing courses can be categorized. My goal is to establish a general system of classification so that faculty can approach the designing of advanced courses more systematically. This goal can be achieved even if a few courses refuse to fall neatly into one of the slots.

The Horizontal Advancement Approach

Under what I call the horizontal advancement approach, advanced legal writing is seen as an opportunity to introduce students to new “genres” of legal writing, genres that are different from the types of documents introduced in a

4. In 1997 Mary Beth Beazley, director of legal writing at the Ohio State University College of Law, compiled a syllabus bank for advanced legal writing courses. See *Legal Writing Syllabus Bank, Packet #10 (1997)* (on file with author). Susan DeJarnatt has summarized its contents:

The syllabus bank . . . includes 33 syllabi for upper-level writing or legal research courses from law schools around the country. The packet was compiled in 1997 through submissions solicited through the Legal Writing Institute. [It] includes nine syllabi for legal drafting of varied documents, one for drafting of commercial documents, one for litigation drafting, and three for legislative drafting; one syllabus for a major scholarly paper with exercises, two for advanced writing techniques, two for memo- and brief-writing, seven for appellate advocacy, one for rhetorical oral technique, and three for advanced legal research. . . . [T]wo syllabi have a specific substantive focus: the first an advanced appellate advocacy clinic in criminal law and procedure (a live-client clinic in which students write appellate briefs); the second a practicum skills course that uses a simulated employment dispute for the entire semester.

DeJarnatt, *supra* note 3, at 53 n.15.

5. The latest survey of legal writing programs lists the following categories of upper-level elective legal writing courses:
 - advanced legal writing—general writing skills
 - advanced legal writing—survey course
 - drafting, general
 - drafting, litigation
 - drafting, legislation
 - drafting, transactional
 - advanced advocacy
 - scholarly writing
 - judicial opinion writing

2002 Survey, *supra* note 1, at 13.

first-year course. That is, rather than revisiting the same sorts of documents and covering their more sophisticated aspects, advanced writing courses taking the horizontal advancement approach leave behind the introductory genres of legal writing and begin anew with entirely different types of legal documents.⁶

This approach is reflected in Lucia Ann Silecchia's article, "Designing and Teaching Advanced Legal Research and Writing Courses." Explaining why "advanced writing training" is important, Silecchia says:

Depending on the format of the first-year course, an advanced research and writing course can expose students to writing projects within different genres. While the typical first-year writing projects are often office memoranda and appellate briefs, an advanced course can accomplish much more by exposing students to the writing of many other types of documents.⁷

As she points out, most introductory legal writing courses cover two specific genres: the office memorandum and the appellate brief. Under the horizontal advancement approach, an advanced legal writing course may introduce students to other types of documents such as "case notes, . . . short articles, judicial opinions, . . . statutes, pleadings, contracts, opinion letters, and a host of other products."⁸

Perhaps the best way to understand the horizontal approach is to examine more carefully the different genres of legal writing. There are three basic genres, each with subgenres. The genres differ in their purpose, their audience, their paradigmatic structure, and the skills required for their effective production. After analyzing the genres and their subgenres, we will see how the horizontal approach to advanced legal writing involves a progression from genre to genre.

The Different Genres of Legal Writing

Application analysis writing. This is writing that communicates the analysis of a specific legal problem (such as a client's predicament or a party's position)

6. The metaphoric concept "horizontal advancement" is used to describe these courses because the students proceed "horizontally" from one "introductory" course to another. This approach is markedly different from "vertical advancement," whereby upper-level courses augment the introductory legal writing instruction by going "deeper" into a known subject, covering more sophisticated aspects of legal documents already familiar to the students.
7. Silecchia, *supra* note 3, at 215, 217.
8. *Id.* at 235 (the ellipses replace references to advanced "research" projects, as opposed to advanced "writing" projects). Silecchia also sets out a "model" of an advanced legal research and writing course based on a course she taught at Catholic University's Columbus School of Law in the summers of 1992 and 1993. *Id.* at 238-47. Her explanation of the substantive focus of the course also reflects the philosophy behind the horizontal advancement approach:

After considering the options for assignments, a case note on a pending Supreme Court case was selected as the major project that students would create in the course. The case note seemed a good choice for such an assignment because it was a lengthy and intense writing experience that most students had never undergone. It also was unlike anything they had written in the first-year Lawyering Skills Program and it was not a litigation oriented project.

Id. at 240.

in terms of applicable legal authority. The writer explains how existing legal authorities (and perhaps nonlegal authorities) *apply* to a specific fact situation. Such writing follows the traditional IRAC paradigm or one of its modern variations:⁹ the writer, in the context of a real and extant legal matter, explains the law on an issue or subissue and then explains how the law applies to the particular facts relevant to that issue.

Many of the most common forms of legal writing can be classified as application analysis writing. The typical office memorandum, for example, falls into this category: it predicts through objective analysis how a court may *apply* existing legal authorities to the facts of a client's case. All of the modern texts on memo writing set out similar paradigms for communicating legal analysis. Boiled down to the essentials, the paradigm consists of two basic steps: (1) explain the law on the issue, and (2) apply the law to the facts at hand.

Court briefs—both trial briefs and appellate briefs—also fall within this genre of legal writing. A court brief differs from an office memorandum in that the former is a persuasive document and the latter is an objective document. A court brief is also different in terms of format, component parts, audience, and tone. Nevertheless, the meat of a court brief—the argument section—follows the same basic paradigmatic structure as the discussion section of a memo: it explains how existing legal authorities *apply* to the facts of the case at hand.

Application analysis writing also includes the judicial opinion. As with memos and briefs, the writer (i.e., the judge) shows how existing legal authorities compel a certain result under the facts of the case. In analyzing a typical judicial opinion, one can readily see the familiar paradigmatic structure: the law is explained and then applied to the particular facts.

Although they are not as formal, two other types of legal documents can also be classified as application analysis writing. The first is the client advice letter: typically the writer explains how the law applies to the client's factual situation so that the client can conduct his affairs accordingly. To be sure, the level of specificity in explaining the analysis depends on the client's sophistication. Nevertheless, client advice letters, in a general sense, apply the traditional paradigm for communicating legal analysis and thus fall into the category of application analysis writing.

The second is the typical law school exam answer. Traditional exam questions present a hypothetical fact pattern and ask the student to write the analysis of that fact pattern (either objectively or persuasively) in terms of the law covered in the class during the semester. Books on exam taking advise the

9. As most readers are well aware, IRAC = Issue, Rule, Application, and Conclusion. For more on the modern paradigms, see Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 *Stetson L. Rev.* 1193, 1206 n.59 (2000); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 *Neb. L. Rev.* 561, 573 n.44 (1997). Both Rowe and Parker direct the reader to other useful articles and books.

law student to answer such questions by following the IRAC paradigm: explain the relevant law and then apply the law to the hypothetical facts.¹⁰

Legal drafting. Legal drafting, as one textbook explains, “reduces to writing clients’ desires regarding legally significant transactions or events, for example, wills, contracts, pleadings, and statutes.”¹¹ It is unlike application analysis writing—and unlike the third genre we will discuss, critical analysis writing—because it does not involve the communication of legal analysis.¹² In fact, it rarely includes citations to legal authorities at all. Instead, legal drafting is writing in which a lawyer communicates a client’s intentions with regard to legally significant events. The primary function of legal drafting is to produce a document that both reflects and yields a client’s desired results in connection with some event that is meaningful under the law.

Legal drafting is generally broken down into three subcategories. The first is *transactional drafting*—the writing of documents that memorialize and effectuate a client’s intentions in connection with business and financial events and transactions. Examples include:

- general contracts to which a client is a party
- a client’s estate planning documents, such as wills, trust agreements, and powers of attorney
- documents created in connection with a client’s real estate transactions, such as purchase and sale agreements, deeds, leases, mortgages, promissory notes, construction contracts, easements, and restrictive covenants
- documents created in connection with a client’s personal property transactions, such as contracts of sale, bailment contracts, bills of sale, security agreements, promissory notes, and leases
- documents created in connection with business entities of which a client is a part, such as partnership agreements, joint venture agreements, franchise agreements, articles of incorporation, and corporate bylaws.

The second subcategory is *litigation drafting*—the drafting of pleadings and other procedural documents associated with lawsuits and administrative proceedings. Examples include complaints, petitions, counterclaims, cross-claims,

10. Because of the paradigmatic similarity between the discussion section of office memos and traditional law school exam answers, many legal writing professionals advise their students that instruction on memo writing has the added benefit of assisting them on their final exams in their doctrinal courses.

11. Susan L. Brody et al., *Legal Drafting 5* (Boston, 1994).

12. The same textbook explains:

[D]rafted documents use the substantive law differently than do memoranda or briefs. Both objective and persuasive memoranda or briefs analyze the law. . . . In contrast, drafted documents are not analytical at all. In fact, the law itself is infrequently mentioned in most forms of legal drafting. Although legal drafting requires a thorough understanding of the relevant substantive law, it does not present the law.

third-party complaints, answers, replies, interrogatories, requests for admission, requests for production, motions, and jury instructions.

Finally, the third subcategory is *legislative drafting*—the writing of constitutional provisions, statutes, ordinances, regulations, and “anything else of a command nature that emanates from an agency of government.”¹³ Legislative drafting requires the skills of a precise wordsmith so that the language accurately reflects and effectuates the intentions of the body enacting the legislation in question.

While the intended audiences of transactional drafting, litigation drafting, and legislative drafting may differ, the three forms of legal drafting are similar in that their primary function is to memorialize and effectuate a client’s specific desires. The writer expects that her language will be dissected in the future by lawyers, judges, and other audiences, with the aim of determining its precise meaning. Thus the key to legal drafting is precision in word choice so that the resulting document both reflects and yields the results the client wants, even under adverse scrutiny.

Critical analysis writing. Critical analysis writing—also called scholarly writing—communicates the critical evaluation of a specific aspect or area of the law in terms of relevant legal principles, policy considerations, and/or jurisprudential concepts. It is like application analysis writing in that it involves (at least in part) the communication of legal analysis based on established legal authorities. Unlike application analysis writing, however, critical analysis writing is not undertaken in the context of a specific factual scenario. The analysis is conducted in the abstract. As a consequence, there is no application step of the type inherent in application analysis writing. And although critical analysis writing does involve the communication of legal analysis based on legal authorities, its structure does not follow the IRAC paradigm.¹⁴

Elizabeth Fajans and Mary R. Falk have identified four general subcategories of critical analysis writing:¹⁵

- A *law review comment* is a scholarly article, written for publication in a law review, which analyzes a specific area or aspect of the law.
- A *law review case note* is a scholarly article, written for publication in a law review, which analyzes the published judicial opinion or opinions in a single noteworthy case.
- A *law review competition paper* is written by a law student in connection with the student’s effort to gain membership on the school’s law review. Fajans and Falk explain: “The great majority of law

13. Thomas R. Haggard, *Legal Drafting in a Nutshell* 295 (St. Paul, 1996).

14. Fajans and Falk set out several alternative paradigms for structuring scholarly articles. See Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers*, 2d ed., 71–77 (St. Paul, 2000).

15. *Id.* at 1–14. Fajans and Falk actually list three categories of critical analysis writing: seminar papers, student law review articles, and law review competition papers, but in their discussion they break student law review articles into law review comments and law review case notes. *Id.* at 5–12.

journals now use a writing competition in the selection process. These competitions typically ask the candidate to write a short scholarly paper based on a ‘closed universe’ of supplied readings.”

- A *seminar paper* is a scholarly term paper, written for a grade in a law school course (typically in a student’s second or third year), which analyzes an aspect of the law relevant to the substantive focus of the course.

The Horizontal Advancement Approach and Available Textbooks

Whereas most first-year legal writing courses introduce students to legal memoranda and court briefs, upper-level electives taking the horizontal advancement approach introduce students to other types of legal writing. The progression is “horizontal” because each course is an introductory course covering a new and different type of legal document.

Horizontal advancement can best be understood through an analogy. Assume that a student interested in learning a foreign language takes Introductory French. After successfully completing that course, he could choose to take Intermediate French or Introductory Spanish. If he takes Intermediate French, he will progress “vertically” by going deeper into a subject that he has already studied. But if he takes Introductory Spanish, his progression will be “horizontal” because this is another introductory course in a completely different language.

In the legal writing context, horizontal advancement can occur within or between the different genres of legal writing discussed in the previous section. For example, after covering memos and briefs in the first year, a teacher could stay within the application analysis genre and cover judicial opinion writing in her upper-level course. While opinion writing is paradigmatically similar to memo and brief writing, it differs from those types of writing in many other ways. So a course on judicial opinion writing would progress horizontally by introducing students to a new subgenre within the more general genre of application analysis writing.

Or a teacher designing an advanced course could progress into a completely different genre of legal writing by covering legal drafting or critical analysis (scholarly) writing. Again, the progression would be horizontal, but this time into genres of legal writing that are completely (i.e., paradigmatically) different from memos and briefs.

The following table sets out a visual illustration of the horizontal advancement approach. The order of the genres and subgenres in the table is for illustration purposes only. Teachers following this approach have vast discretion in choosing what genre to focus on in an upper-level legal writing course.

<i>Application analysis writing</i> ^a office → court → judicial → client → memos briefs opinions letters	<i>Legal drafting</i> transactional → litigation → legislative → drafting drafting drafting	<i>Critical analysis writing</i> scholarly writing projects • comments • case notes • seminar papers
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^aAlthough exam writing is another subgenre of application analysis writing, it is not included in this table. If exam writing is taught, it is generally taught in the first year. It is rarely a topic for an advanced legal writing course.

Because horizontal advancement is the most popular approach for designing advanced legal writing curricula,¹⁶ many textbooks are available to teachers who may wish to use it. Below is a list of some of the currently available texts that provide instruction on advanced genres of legal writing.¹⁷

JUDICIAL OPINION WRITING

American Bar Association, *Judicial Opinion Writing Manual: A Product of the Appellate Judges Conference*, Judicial Administration Division (St. Paul, 1991).

Ruggero J. Aldisert, *Opinion Writing* (St. Paul, 1990).

Joyce J. George, *Judicial Opinion Writing Handbook*, 4th ed. (Buffalo, 2000).

LEGAL DRAFTING

Susan L. Brody et al., *Legal Drafting* (Boston, 1994).

Scott J. Burnham, *Drafting Contracts: A Guide to the Practical Application of the Principles of Contract Law*, 2d ed. (Charlottesville, 1993).

Barbara Child, *Drafting Legal Documents: Principles and Practices*, 2d ed. (St. Paul, 1992).

Reed Dickerson, *The Fundamentals of Legal Drafting*, 2d ed. (Boston, 1986).

Thomas R. Haggard, *Legal Drafting in a Nutshell* (St. Paul, 1996).

George W. Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* (St. Paul, 2003).

Robert J. Martineau, *Drafting Legislation and Rules in Plain English* (St. Paul, 1991).

William P. Statsky et al., *Legislative Analysis and Drafting*, 2d ed. (St. Paul, 1984).

CRITICAL ANALYSIS (SCHOLARLY) WRITING

Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers*, 2d ed. (St. Paul, 2000).

Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes and Seminar Papers* (New York, 2003).

16. See 2002 Survey, *supra* note 1, at 13.

17. The list in the text does not include sources on client letter writing because there are no textbooks dedicated exclusively to the writing of client advice letters. But many of the general introductory legal writing texts have chapters covering client letter writing. See, e.g., Helene S. Shapo et al., *Writing and Analysis in the Law*, 4th ed., ch. 15 (New York, 1999); Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing*, ch. 14 (New York, 1999); Nancy L. Schultz & Louis J. Sirico Jr., *Legal Writing and Other Lawyering Skills*, 3d ed., ch. 11 (New York, 1998); Laurel Currie Oates et al., *The Legal Writing Handbook: Analysis, Research, and Writing*, 3d ed., ch. 7 (New York, 2002); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style*, 4th ed., ch. 18 (New York, 2001); Charles R. Calleros, *Legal Method and Writing*, 4th ed., ch. 24 (New York, 2002); Lynn B. Squires et al., *Legal Writing in a Nutshell*, 2d ed., ch. 11 (St. Paul, 1996); Robin S. Wellford, *Legal Reasoning, Writing, and Persuasive Argument*, ch. 18 (Newark, N.J., 2002). One advanced legal writing text also provides instruction on client letter writing. See Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing*, chs. 14 & 15 (St. Paul, 1991).

The Vertical Advancement Approach

Under the vertical advancement approach, an upper-level legal writing course presents more sophisticated aspects of a genre to which the students have already been exposed. Instead of introducing students to new and different types of legal documents, vertical advancement goes deeper into a previously covered subject.

As explained earlier, most first-year legal writing courses cover two specific kinds of writing: objective writing, typically taught in the context of an office memorandum, and persuasive writing, typically taught in the context of a court brief. An upper-level course following the vertical advancement approach builds directly on one or both of these by presenting more advanced dimensions of the skills covered in the first year. I will discuss two subcategories of the vertical advancement approach.

Advanced Brief Writing / Advanced Appellate Advocacy

The most popular¹⁸ course that can be classified as vertical advancement goes by many names: Advanced Brief Writing, Advanced Appellate Advocacy, and Advanced Moot Court, to name a few. But whatever the name, courses in this subcategory focus on advanced instruction in the writing of appellate briefs. They build on the first year's introductory brief-writing instruction by covering more sophisticated aspects of appellate procedure, appellate brief writing, and appellate oral argument. In short, these courses provide detailed instruction on a very specialized area of legal practice—appellate work—and detailed instruction on a very specialized type of legal document—the appellate brief.

Because of the popularity of such courses, numerous textbooks on appellate brief writing have been published in recent years. Below are some of them.

Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, 1st rev. ed. (Notre Dame, 1996).

Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (New York, 2002).

Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice*, 3d ed. (Cincinnati, 1998).

Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, 2d ed. (St. Paul, 1999).

Bradley G. Clary et al., *Advocacy on Appeal* (St. Paul, 2001).

Michael R. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (New York, 2002).

John T. Gaubatz & Taylor Mattis, *The Moot Court Book: A Student Guide to Appellate Advocacy*, 3d ed. (Charlottesville, 1994).

Alan D. Hornstein, *Appellate Advocacy in a Nutshell*, 2d ed. (St. Paul, 1998).

Robert J. Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, N.Y., 1985).

18. See 2002 Survey, *supra* note 1, at 13–15.

Myron Moskowitz, *Winning an Appeal*, 3d ed. (Charlottesville, 1995).

UCLA Moot Court Honors Program, *Handbook of Appellate Advocacy*, 3d ed. (St. Paul, 1993).

Advanced Persuasive Writing / Rhetoric Theory

The other subcategory of the vertical advancement approach comprises upper-level courses on persuasive writing theory and strategies. Like advanced brief-writing courses, courses in this group build on the introductory instruction in persuasive writing of the first year. But they differ in two important ways. First, they are not tied to a specific type of legal practice or a specific type of legal document. As explained above, advanced brief-writing courses teach advanced aspects of persuasion in the context of appellate practice and appellate brief writing. The writing instruction in these courses is intermixed with detailed instruction on appellate procedure (such as standards of review, the doctrine of finality, interlocutory appeals, appeals as a matter of right versus discretionary appeals, rules for perfecting an appeal, and issue preservation)¹⁹ and detailed instruction on the parts and format of an appellate brief (such as the cover page, the table of contents, the table of authorities, the statement of jurisdiction, the statement of the case, the questions presented, and the summary of the argument, in addition to the argument section).²⁰ In contrast, advanced persuasive writing courses teach general techniques and strategies designed to be applicable to the many types of persuasive documents that lawyers produce, not just appellate briefs. Their focus is persuasive writing in a general sense, not merely in the context of appellate practice.

The second difference is that advanced persuasive writing courses often incorporate more theory than is typical in courses on advanced brief writing. The persuasive writing instruction in advanced brief-writing courses is often anecdotal or only loosely based on theoretical principles. Advanced persuasive writing courses, on the other hand, often explore the theory behind persuasive writing strategies based on principles from other disciplines such as classical rhetoric, psychology, and literary theory.

Because courses on advanced persuasive writing are relatively new in the legal writing academy, few suitable textbooks have been published. What follows is the complete list.

Louis J. Sirico Jr. & Nancy L. Schultz, *Persuasive Writing for Lawyers and the Legal Profession*, 2d ed. (Newark, N.J., 2001).

Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (New York, 2002).

James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, 1973).

19. See, e.g., Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice*, 3d ed., chs. 2–7 (Cincinnati, 1998); Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, 1st rev. ed., chs. 4–5 (Notre Dame, 1996); Mary Beth Beazley, *A Practical Guide to Appellate Advocacy*, ch. 2 (New York, 2002); Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, 2d ed., chs. 1–2 (St. Paul, 1999).

20. See, e.g., Bentele & Cary, *supra* note 19, at ch. 8; Aldisert, *supra* note 19, at chs. 8–14; Beazley, *supra* note 19, at chs. 8–9; Berry, *supra* note 19, at ch. 5.

The Survey Course Approach

Courses in this category cover a myriad of legal writing topics, often combining some remedial instruction with aspects of both horizontal advancement and vertical advancement. More specifically, they generally supplement the first-year instruction in objective and persuasive writing by reviewing some of the skills covered in those introductory courses (remedial instruction), by covering an array of advanced aspects of those skills (vertical advancement), and by introducing students to various new genres of legal writing (horizontal advancement).

The survey approach is reflected in Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* (St. Paul, 1991).²¹ It covers a wide variety of horizontal and vertical legal writing topics: instruction on the “process” of writing (chapter 2); introductory instruction on legal drafting, including legislative drafting, litigation drafting, and transactional drafting (chapters 3–5, 11–13, 16); advanced instruction on the writing of objective and persuasive questions presented (chapter 6); advanced instruction on the writing of objective and persuasive statements of fact (chapters 7–8); advanced instruction on the writing of the discussion section of an office memorandum and the argument section of a court brief (chapters 9–10); introductory instruction on writing general correspondence and client advice letters (chapters 14–15); introductory instruction on critical analysis (scholarly) writing (chapter 17). Although advanced legal writing courses following the survey course approach are fairly popular,²² Ray & Cox is the only formal textbook available for such courses.

The Integrative Approach

As the name suggests, the integrative approach augments introductory legal writing instruction by integrating advanced writing instruction with instruction on another topic. It has two subcategories.

Advanced Legal Writing in the Context of Other Lawyering Skills

The first subcategory encompasses courses that integrate the teaching of advanced writing skills with instruction on other lawyering skills such as client interviewing, client counseling, pretrial practice, trial practice, negotiation, and alternative dispute resolution. This approach is reflected in two recent articles: Angela J. Campbell, “Teaching Advanced Legal Writing in a Law School Clinic,”²³ and Maureen E. Laflin, “Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report.”²⁴ While no textbooks for the integrative approach have been published, these articles provide comprehensive suggestions for designing such courses.²⁵

21. Ray & Cox, *supra* note 17.

22. See 2002 Survey, *supra* note 1, at 13–15.

23. Campbell, *supra* note 3.

24. Laflin, *supra* note 3.

25. See also Ralph L. Brill et al., ABA, Section of Legal Education and Admissions to the Bar, *Sourcebook on Legal Writing Programs* 131–33 (Chicago, 1997).

Advanced Legal Writing in the Context of an Upper-Level Doctrinal Subject

Courses in the second subcategory integrate the teaching of advanced writing skills with the instruction of a specific upper-level doctrinal subject. This approach is also reflected in recent articles: Susan L. DeJarnatt, “In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing,”²⁶ and Barbara J. Busharis and Suzanne E. Rowe, “The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses.”²⁷ Both articles set out numerous suggestions for legal writing teachers who may be interested in this approach. Again, no textbooks are currently available.

Advantages and Disadvantages of the Various Approaches

The Horizontal Advancement Approach

The popularity of the horizontal advancement approach to advanced legal writing instruction serves as a testament to its many advantages. First and most important, it gives teachers and students the opportunity to work with various types of legal writing that were not covered in the first year and that may be important to the students’ future practice as lawyers. This is particularly true of client letters and legal drafting. Although less directly related to the practice of law, scholarly writing and judicial opinion writing can also help prepare law students for practice in real and concrete ways. Instruction in scholarly writing, for example, gives students an opportunity to critically analyze a legal topic in ways vastly different from those of other writing courses. Such an experience not only improves students’ general analytical skills, but exposes them to new techniques and strategies of critical analysis that are relevant to many of the documents practicing lawyers routinely prepare. Similarly, instruction in opinion writing can be beneficial to all students—not just those who will take judicial clerkships. Understanding judicial opinions is fundamental to law practice. A course on opinion writing can give students new and important insights into this pervasive form of primary law.²⁸

Another big advantage to horizontal advancement is that a number of textbooks and sample syllabi are available for such a course. The abundance of such materials no doubt reduces the substantive and administrative hassles associated with designing a new upper-level writing course.

26. DeJarnatt, *supra* note 3.

27. Busharis & Rowe, *supra* note 3.

28. A lengthy discussion of the potential pedagogical benefits of a general course on judicial opinion writing is beyond the scope of this article. It is interesting to note, however, that the three main books on judicial opinion writing are not targeted to the general law student—even though all law students might arguably benefit from a course devoted to that topic—but are expressly written for judges and their clerks only. See Ruggero J. Aldisert, *Opinion Writing* 121–26 (St. Paul, 1990); Joyce J. George, *Judicial Opinion Writing Handbook*, 4th ed., 219 (Buffalo, 2000); ABA, *Judicial Opinion Writing Manual: A Product of the Appellate Judges Conference, Judicial Administration Division*, 8–11 (St. Paul, West 1991). In fact, West Group, the publisher of Aldisert’s *Opinion Writing*, does not list the book anywhere in its 2002 catalog of law school publications.

Despite these advantages, there is one major disadvantage for teachers considering the horizontal advancement approach. Because these courses introduce students to new genres of legal writing rather than build on prior instruction, they are basic and fundamental—and introductory. They cover rudimentary concepts in genres of legal writing that are completely new and challenging to the students but not particularly challenging to the teacher. Thus, while such a course may be challenging and interesting to the students, a teacher who has looked forward to teaching an advanced writing subject and discussing advanced concepts with a sophisticated group of students may find it less than fulfilling.

The Vertical Advancement Approach

Advanced Appellate Advocacy

A course on advanced appellate advocacy also has many advantages. First, it offers legal writing teachers the very thing that is lacking in a horizontal approach: it allows the teacher to build directly on the brief-writing experience of the first year and to explore more sophisticated aspects of appellate practice and appellate briefs with students who are no longer beginners.

A second (and related) advantage is that both teacher and student have the opportunity to cover important topics on appellate practice and brief writing for which there was no time in the introductory class. Effective appellate brief writing is a complicated skill, and certainly students can benefit from a second semester to practice it.

Another advantage to an advanced appellate advocacy course is that the teacher can choose from a number of textbooks and sample syllabi. Again, the availability of such materials reduces the labor associated with designing a new writing course.

Finally, advanced appellate advocacy courses have direct relevance to moot court, a cocurricular activity important at many law schools. Most schools have moot court teams that represent the school in regional and national competitions. The standard format requires the participants to write an appellate brief in a hypothetical case on appeal and to present an oral argument in support of the brief. Not surprisingly, courses on advanced appellate advocacy can serve as helpful training grounds for students participating in moot court competitions.

But there are two main disadvantages to advanced appellate advocacy courses. First, they provide detailed instruction in a highly specialized area of practice. Because most students will not become appellate attorneys, much of the substance of the course will have limited relevance to their future practice. Second, in addition to covering the skills associated with writing an effective appellate brief, these courses give a significant amount of time to appellate procedure. Many writing teachers would rather devote that time to writing instruction.

Advanced Persuasive Writing / Rhetoric Theory

Courses on advanced persuasive writing build on the introductory instruction of the first year by covering advanced strategies of persuasive writing.

Moreover, they often go beyond anecdotal advice and base their instruction on theoretical principles from other disciplines. As a consequence, these courses can be a welcome and rewarding change for the teacher. Rarely do teachers of practical legal skills have an opportunity to explore theoretical and philosophical concepts with their students. Courses on advanced persuasive writing provide such an opportunity.

The inclusion of theory also reflects another advantage of advanced persuasive writing courses. Rather than staying strictly within the legal profession, these courses often look to theoretical principles of other disciplines that are relevant to persuasion generally. Thus, their approach is consistent with the increasing recognition that borrowing and learning from other disciplines can enrich the study of law and lawyering skills.²⁹

A third advantage of these courses is that the instruction has general applicability to the practice of law. Unlike advanced appellate advocacy courses, which deal with a very specialized area of legal practice and may have only limited applicability to many students' future careers, advanced persuasive writing courses operate in a general context, and the instruction can be more relevant to the future practices of a greater number of students.

There are two main disadvantages to courses on advanced persuasive Writing. First, some teachers may fear that interdisciplinary theory is beyond the capabilities of most of their students.³⁰ Second, to date there are few textbooks available.

The Survey Course Approach

The primary advantage of courses following this approach is the breadth of their coverage. They allow teachers to touch briefly on an array of advanced legal writing topics. That can be rewarding and interesting for both the students and the teacher.

There are, however, two primary disadvantages. First, there is only one textbook available. Teachers following this approach must either use the Ray and Cox text, *Beyond the Basics*, or undertake the burdensome task of developing their own materials. Second, these courses generally can only scratch the

29. For many years I have argued that the legal writing field should adopt an interdisciplinary approach and base skills instruction on theoretical principles from other disciplines. In fact, I made two presentations on this topic. See Michael R. Smith, "Skills" Scholarship in Legal Writing: Toward an Interdisciplinary Future, Program Brochure, 1997 Atlantic Region Legal Research and Writing Conference (copy on file with author); Michael R. Smith, Legal Writing "Skills" Scholarship: Proposals for the Future, 1998 Legal Writing Institute Conference, Program Brochure (copy on file with author).
30. This concern was expressed about my textbook, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (New York, 2002). One anonymous reviewer commissioned by the publisher to review my proposal said: "We would not . . . adopt this text here at _____. . . . [O]ur student body is relatively unsophisticated, and I believe this text would go over their heads." Letter to Ellen Greenblatt, Senior Acquisitions Editor, Aspen Law & Business, Proposed *Advanced Legal Writing Text I* (Oct. 1998) (copy on file with author, sender's name deleted). I personally have not found this to be a problem, however. I have taught courses based on the material in my book several times. I have found that students of all levels of ability can learn and benefit from a course that explores legal writing from a theoretical, as well as anecdotal perspective.

surface of genres of legal writing that are new to the students. As we discussed previously, these courses often cover horizontal advancement topics such as legal drafting and/or scholarly writing, in addition to vertical advancement topics that build directly on the first-year instruction. Learning a completely new genre of legal writing can take an entire semester by itself, but survey-approach courses often touch on a number of new types of legal documents in a single semester. Obviously, what the teacher gains in breadth she loses in depth.

The Integrative Approach

Much has been written in recent years on the advantages of integrating legal writing instruction with instruction on other lawyering skills³¹ and/or instruction on a specific doctrinal subject.³² It is said that integrating legal writing with other topics allows students to see how legal writing fits into the broader context of effective lawyering and allows them to appreciate the interrelationship between practical lawyering skills and the skills associated with mastering the substance of a particular doctrinal area. Advanced legal writing courses taking the integrative approach are designed with these advantages in mind.

They also have another, more practical advantage: they give the teacher an opportunity to explore topics other than legal writing that may be of interest to him. This aspect alone makes the integrative approach attractive, particularly to a teacher looking for a change of pace.

A third advantage is that the integrative approach allows teachers to introduce students to a number of different genres of legal writing. Because writing is taught in a broader context of lawyering skills or in the context of a doctrinal subject, students are often required to draft many different types of legal documents, such as litigation documents, transactional documents, and correspondence.

But the integrative approach also has its disadvantages. First, teachers who integrate writing instruction with other topics must spend significant class time on subjects other than writing. Many teachers prefer to have more time for pure writing instruction.

31. See generally, e.g., Campbell, *supra* note 3; Laflin, *supra* note 3; Kate O'Neill, Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course, 50 Fla. L. Rev. 709 (1998). O'Neill discusses the difference between a "traditional legal writing course" that focuses primarily on three categories of skills—legal research, basic legal method, and legal writing—and the "lawyering" or "law office" model, "which may add any or all of the following to the traditional legal writing agenda: increased attention to fact investigation and analysis, interviewing, counseling, negotiation, transactional planning and drafting, trial advocacy skills, and ethical issues." O'Neill, *supra*, at 710.

32. See generally, e.g., DeJarnatt, *supra* note 3; Busharis & Rowe, *supra* note 3; Parker, *supra* note 9; Leigh Hunt Greenshaw, "To Say What the Law Is": Learning the Practice of Legal Rhetoric, 29 Val. U. L. Rev. 861 (1995); Michelle S. Simon, Teaching Writing Through Substance: The Integration of Legal Writing with All Deliberate Speed, 42 DePaul L. Rev. 619 (1992); Douglas E. Abrams, Integrating Legal Writing into Civil Procedure, 24 Conn. L. Rev. 813 (1992); James D. Gordon III, An Integrated First-Year Legal Writing Program, 39 J. Legal Educ. 609 (1989).

Second, because the pedagogical goals of an integrated course are broader than those of a pure legal writing course, the teacher of an integrated course may have more difficulty designing problems and exercises. Most teachers of writing courses design their courses and their hypothetical problems to teach specific, identifiable writing skills. When a teacher has multiple pedagogical agendas to go along with the multiple topics he is trying to teach, he is less able to design problems that will satisfy specific writing goals.

Finally, no textbooks are available at present for the integrative approach. While there are some helpful articles, many teachers may feel the need for a truly comprehensive textbook.

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Although more and more law schools are offering upper-level legal writing electives, what constitutes advanced legal writing can differ dramatically from school to school, and even from teacher to teacher. This article has summarized and categorized the various substantive approaches to advanced legal writing taken by law schools around the country. The creation of such a taxonomy serves two functions. First, this article has provided a wide-angle snapshot that should allow legal educators to more effectively assess the state of legal writing instruction in American law schools. Second, the material presented here should help other teachers to design their own advanced writing courses. With an understanding of the various approaches to advanced legal writing and their attendant advantages and disadvantages, and a knowledge of the materials currently available, legal writing professionals will be able to learn from and build on the efforts of their predecessors and will have a solid foundation for designing new advanced courses.