

# BUILDING CREDIBILITY IN THE MARGINS: AN *ETHOS*-BASED PERSPECTIVE FOR COMMENTING ON STUDENT PAPERS

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In 2003, the National Commission on Writing in America's Schools and Colleges, sponsored by the College Board, issued a report discussing the state of writing instruction in American education.<sup>1</sup> The Commission concluded that the teaching of writing at all levels of education is the "most neglected" subject in the core curriculum.<sup>2</sup> In the effort to raise the priority of writing, the Commission recommended that educators ensure that writing assessment<sup>3</sup> is "fair and authentic."<sup>4</sup>

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<sup>1</sup> Natl. Commn. on Writing in Am.'s Schs. & Colleges, *The Neglected "R"—The Need for a Writing Revolution*, [http://www.writingcommission.org/prod\\_downloads/writingcom/neglectedr.pdf](http://www.writingcommission.org/prod_downloads/writingcom/neglectedr.pdf) (Apr. 2003). For a careful and thorough discussion about how this report and other studies of reading and writing should influence legal writing pedagogy, see Cathaleen A. Roach, *Is the Sky Falling?: Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent and Other Reports*, 11 Leg. Writing 295 (2005).

<sup>2</sup> Natl. Commn. on Writing in Am.'s Schs. & Colleges, *supra* n. 1, at 3.

<sup>3</sup> "Assessment" in composition circles takes on two distinct but related meanings. First, when discussing formal writing "assessments" such as statewide writing competency testing for high school students, "assessment" means the process of "deciding what to measure, selecting or constructing appropriate measurement instruments, administering the instruments, and collecting information." James D. Williams, *Preparing to Teach Writing: Research, Theory and Practice* 297 (3d ed., Lawrence Erlbaum 2003). Second, when discussing basic principles about how to teach writing, "assessment" often means the specific way in which a particular piece of writing is evaluated. Charles R. Cooper & Lee Odell, *Evaluating Writing: The Role of Teacher's Knowledge about Text, Learning, and Culture* 299 (Natl. Council of Teachers of English 1999). In this sense, evaluation does not mean "grading." Grading is "a final judgment about how well or poorly one has written a particular piece of writing," whereas "[e]valuation . . . can happen at any point in the writing process" and does the detailed responsive work grading does not. *Id.* at viii. This Article focuses on evaluation rather than grading.

<sup>4</sup> Natl. Commn. on Writing in Am.'s Schs. & Colleges, *supra* n. 1, at 4.

“Fairness” in the context of the writing course means that writing assignments “measure what was actually taught,” “produce valid inferences about knowledge and skill mastery,” are “administered appropriately,” and are “evaluated properly and accurately.”<sup>5</sup> When applied to writing assessment and evaluation, “authenticity” means that assignments designed to assess student writing “faithful[ly] replicat[e] . . . the circumstances of process-oriented writing instruction” and “‘honor’ elements of the writing process.”<sup>6</sup>

Determining fairness and authenticity in writing instruction is not limited to looking at the appropriateness of assignments in relation to course content or observing the teacher’s conduct in the classroom.<sup>7</sup> Rather, evaluating “fairness” and “authenticity” in the context of teaching writing also requires giving attention to the more individualized interactions between teacher and student, particularly when teacher and student are playing the roles of reader and writer. When legal writing professors read and evaluate student papers, for example, they make student-specific “judgments . . . about students and their progress”<sup>8</sup> in becoming competent members of the legal discourse community.

At the same time, however, students are making their own judgments—not only about the content of the writing course but also about the degree to which the evaluator possesses the traits to be fair and authentic in the evaluation. In other words, in their interactions with their legal writing professor, students judge whether their professor possesses the wisdom relevant to the area of writing being taught, whether she is trustworthy as a guide

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<sup>5</sup> Williams, *supra* n. 3, at 308.

<sup>6</sup> Maurice Scharton, *The Politics of Validity*, in *Assessment of Writing: Politics, Policies, Practices* 53, 59 (Edward M. White et al. eds., Modern Lang. Assn. of Am. 1996). The concept of “authenticity” comes from expressivist composition theory and focuses on the individual’s commitment to both the content of the writing and the writing process. *Id.* As to individual commitment, “authenticity” means that the writer has convinced the reader that “the writer believes in, has a personal stake in, or is otherwise intrinsically invested in the writing.” *Id.*

<sup>7</sup> For example, based on the instructions given and the standards described, an observer could sit in the writing classroom, review the class materials, and make judgments about whether the classroom teaching and writing assignments given to students are appropriate. An outside observer could determine whether a writing assignment was “fair” by looking at what learning outcomes it measured and how it was administered and evaluated. Another observer might question “authenticity” by asking whether students were guided through each step of the writing process—researching, prewriting, writing, revising, and editing—during the course. Classroom instruction and assignment design are outside the scope of this Article, however.

<sup>8</sup> Williams, *supra* n. 3, at 297.

through the writing process, and whether she exhibits goodwill toward her students. That is, students' judgments about the fairness and authenticity of the legal writing course relate not only to the content to which they are exposed, but also to their perceptions about the *ethos*—the intelligence, trustworthiness, and goodwill—of their teacher. So, fairness and authenticity in legal writing instruction are not merely a product of *what* is being taught and evaluated in the course but also are a product of how students construct *who* is doing the teaching and evaluating and in *what spirit* those activities are being done.

Constructing the legal writing professor's identity as an ethical (or unethical) actor is not a solitary process; rather, it is a collaborative process that happens through the interaction between teacher and student. One of the places where this interaction between student and teacher takes place is in the recursive writing process: the student completes a writing assignment, the teacher provides written comments on that assignment, and the student responds to those comments by making revisions.

Not surprisingly, the commenting process provides a robust, yet routine, context in which legal writing professor *ethos* is constructed. Commenting is a "richly complex" and "highly context dependent" discourse<sup>9</sup> that plays a significant role in the relationship between legal writing professors and their students. Legal writing professors give extensive, detailed feedback on student writing (perhaps more extensive than that given in other areas of writing instruction),<sup>10</sup> and through this detailed commenting, they interact with the text to help guide the student to make revisions and to improve his or her writing on future assignments.<sup>11</sup> "[P]roviding written individual feedback on law students' papers is one of the most important, if not the most important, teaching moment legal writing professors have."<sup>12</sup> In this important process, based primarily on the textual "conversation" between student and teacher, students make critical and enduring decisions about their

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<sup>9</sup> *Id.* at 316.

<sup>10</sup> General composition teaching resources suggest that a "reasonable goal" for commenting is five minutes per paper, *id.* at 317, whereas legal writing professors report an average of forty-five minutes to one hour of commenting per legal writing paper, Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-Five Experts*, 22 Seattle U. L. Rev. 1119, 1142 (1999).

<sup>11</sup> Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57, 59 (2002).

<sup>12</sup> Enquist, *supra* n. 10, at 1129.

professor's ability to be a fair and authentic guide into legal writing.

The legal writing professor's *ethos* is important in the first-year writing course. First, most first-year law students are novices in the legal discourse community;<sup>13</sup> thus, they are forced to rely on a purported expert—their legal writing professor—for much of the information they receive about the substance, organization, and style of legal writing. Moreover, because first-year students are required to write for an often imaginary future audience of judges, attorneys, and partners, students rely heavily on their professor as a “fair and authentic” stand-in for that unfamiliar audience. Finally, in many cases, feedback on a legal writing assignment is the first feedback and grade students get in law school, and numerous studies reflect the extreme stressors placed on law students as a result of grade competitiveness.<sup>14</sup> Thus, the perceived competence, trustworthiness, and goodwill of the legal writing professor are important both for helping students enter the discourse community and also for helping students deal with law school stress, continue to accept instruction, and remain motivated.<sup>15</sup>

Because of the dynamics of legal writing instruction, legal writing professors need to be concerned about how their comments on student papers enhance or detract from the professor's positive *ethos*, impact interactions with the students after giving written feedback, and affect the students' motivation to use the comments to improve the quality of their writing. Although articles have been written that give guidance to legal writing professors on the process of commenting,<sup>16</sup> understanding commenting on student

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<sup>13</sup> For more on how novices navigate entry into a “secondary” discourse community, see James P. Gee, *Literacy, Discourse, and Linguistics: Introduction and What Is Literacy?* in *Literacy: A Critical Sourcebook* 525, 527 (Ellen Cushman et al. eds., Bedford/St. Martin's 2001) (“Discourses are not mastered by overt instruction . . . but by enculturation (‘apprenticeship’) into social practices through scaffolded and supported interaction with people who have already mastered the Discourse . . .”).

<sup>14</sup> See e.g. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 *J. Leg. Educ.* 75, 75, 78 (2002) (“Legal education literature documents a number of disturbing effects of law school on law students. . . . A primary stressor is the grading and ranking system.”).

<sup>15</sup> Studies looking at the link between teacher *ethos* and student learning suggest that if students perceive their instructor's responses to their work as fair and authentic, based on wisdom and goodwill, then confidence can be built even if the students struggle with the writing. Conversely, the same studies imply that if the students perceive the evaluation as unfair, disingenuous, mean-spirited, or otherwise lacking in goodwill, the students will resist instruction. See *infra* nn. 42–50 and accompanying text.

<sup>16</sup> See generally e.g. Berger, *supra* n. 11; Enquist, *supra* n. 10; Anne Enquist, *Critiquing Law Students' Writing; What the Students Say Is Effective*, 2 *Leg. Writing* 145 (1996);

writing as a rhetorical process is a relatively unexplored area.<sup>17</sup> Thus, this Article explores the rhetorical process by which a legal writing professor's *ethos* is constructed and maintained in the commenting process and theorizes an "*ethos* of commenting," which can offer legal writing professors a relationship-based, student-centered, and skill-building orientation toward the commenting process.

Understanding how commenting works to create or undermine the teacher-student relationship lies at the juncture of *ethos*, writing evaluation theory, and theories about marginalia, so this Article explores each of these in turn. First, the Article reviews the general concept of *ethos* and explores how it is constructed. Second, the Article reviews the existing literature underlying the practice of commenting on writing, both in general and in the specific context of legal writing, and explores how *ethos* is explicitly and implicitly relevant to composition theory. Third, the Article addresses the concept of marginalia—the annotations made in the margins of a text—and examines how marginalia interacts with the printed text and affects the construction of the marginalist's *ethos*. The Article then draws upon these somewhat independent categories of exploration to develop eight theoretically driven principles that, if followed, can create a positive "*ethos* of commenting" in the legal writing instruction context and recommends related practical strategies for evaluators to construct a desirable commenting *ethos*. The conclusion suggests other research that might help further understanding of a constructive "*ethos* of commenting."

## I. COMMENTING, *ETHOS*, AND MARGINALIA

Commenting is a kind of discourse and is a rhetorical practice. "As writing teachers, we are unavoidably engaged in a rhetorical transaction with our students when we read and respond to student work."<sup>18</sup> In this discourse, the teacher uses the margins of the student text in the hopes of "speaking" to her student audience, attempting to persuade them to become involved with the text, to improve the writing, and to grow as a writer. Part of that persuasive appeal is the teacher's *ethos*.

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Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. Leg. Educ. 418, 422 (1999).

<sup>17</sup> Berger, *supra* n. 11, at 57.

<sup>18</sup> *Id.* at 60.

*Ethos* impacts the relationship that develops between legal writing professors and students through the commenting process in three important ways. First, *ethos* is not a static concept comprising only qualities intrinsic to the speaker or writer; rather, *ethos* is constructed through exchanges between reader and writer. Thus, in the commenting process, *ethos* is ever-changing, contingent, and contextual; is built upon group memberships; and directly affects students' learning. Second, writing evaluation literature has shown that elements related to *ethos*—expertise, authority, and tone, in particular—are relevant in composition and legal writing contexts. Finally, an examination of marginalia—the responsive, abbreviated commentary appearing in the margins of a document—reveals that the margins are a perfect location for a legal writing professor to interactively construct her “self” and the *ethos* accompanying that “commenting” self. In particular, this intersect of marginalia and *ethos* raises questions of ownership of the writing, authority, and voice in the text; the propriety of taking an oppositional tone in marginalia; and the necessity of role-playing in the commenting process.

#### *A. The Concept of Ethos and Its Connection to Legal Writing Instruction*

Often considered the most potent and important of Aristotle's three artistic modes of persuasion<sup>19</sup>—*ethos* (ethical appeal), *logos* (logical appeal) and *pathos* (emotional appeal)<sup>20</sup>—*ethos* is classically considered the “persuasive force of a person's character”<sup>21</sup> or “argument from [an individual's position of] authority.”<sup>22</sup> In modern theory, *ethos* is also a location where an “individual's . . . identity is constructed.”<sup>23</sup> As the product of a negotiation between speaker and audience, writer and reader, *ethos* is contingent upon the particular characteristics of the speaker and the audience, and, in the context of education, plays an important role in stu-

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<sup>19</sup> S. Michael Halloran, *Aristotle's Concept of “Ethos,” or If Not His, Somebody Else's*, 1 *Rhetoric Rev.* 58, 60 (1982); James C. McCroskey & Jason J. Teven, *Goodwill: A Reexamination of the Construct and its Measurement*, 66 *Commun. Monographs* 90, 90 (1999); Nancy Oft-Rose, *The Importance of Ethos*, 25 *Argumentation and Advocacy* 197, 197 (1989).

<sup>20</sup> McCroskey & Teven, *supra* n. 19, at 90.

<sup>21</sup> John S. Patterson, *Ethos and the Correction of Compositions*, 9 *Teaching English in the Two-Year College* 176, 176 (1983).

<sup>22</sup> Halloran, *supra* n. 19, at 60.

<sup>23</sup> Nedra Reynolds, “Ethos” as Location: *New Sites for Understanding Discursive Authority*, 11 *Rhetoric Rev.* 325, 325 (1993).

dents' perceptions of and willingness to engage in the learning process.

### 1. Ethos Generally

*Ethos* has three dimensions: intelligence, also known as “good sense,” “practical wisdom,” or competence; character, sometimes identified as trustworthiness; and goodwill, often identified as “caring”<sup>24</sup> or “intention toward the receiver.”<sup>25</sup> Generally, *ethos*, or “source credibility” as it is known in social scientific circles, is considered to be “a very important element in the communication process”<sup>26</sup> and is “especially important in securing assent.”<sup>27</sup> One way for speakers to secure assent is to “assess[ ] the characteristics of an audience and construct[ ] the discourse in such a way as to portray oneself as embodying those same characteristics.”<sup>28</sup> Creating a sense of identification between speaker and audience is paramount to the persuasive appeal.<sup>29</sup>

The goal of the speaker or writer in appealing to *ethos* is to create in the audience a strong and favorable impression of her own character, or, in other words, to create a “believable” and trustworthy identity.<sup>30</sup> The speaker or writer not only does this with the reputation she brings to the rhetorical situation<sup>31</sup> but also through her communication choices in the situation itself.

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<sup>24</sup> See e.g. McCroskey & Teven, *supra* n. 19, at 90 (“[G]enerally theorists have agreed that [*ethos* consists of] ‘competence,’ . . . ‘trustworthiness,’ . . . [and] ‘goodwill.’”).

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

<sup>26</sup> James C. McCroskey & Thomas J. Young, *Ethos and Credibility: The Construct and Its Measurement after Three Decades*, 32 C. States Speech J. 24, 24 (1981).

<sup>27</sup> Roger D. Cherry, *Ethos Versus Persona: Self-Representation in Written Discourse*, 15 Written Commun. 384, 386 (1998).

<sup>28</sup> *Id.* at 388.

<sup>29</sup> See Kenneth Burke, *A Rhetoric of Motives* 55 (U. Cal. Press 1969) (“You persuade a [person] only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his.”).

<sup>30</sup> Halloran, *supra* n. 19, at 60.

<sup>31</sup> The “rhetorical situation” is “a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance[;] . . . it needs and invites discourse capable of participating with the situation and thereby altering its reality.” Lloyd F. Bitzer, *The Rhetorical Situation*, in *Contemporary Rhetorical Theory: A Reader* 217, 219–220 (John L. Lucaites et al. eds., Guilford Press 1999).

## 2. *Ethos and Group Membership*

*Ethos* does not lie solely in the individual; rather, it is a “complex set of characteristics constructed [and sanctioned] by a group”<sup>32</sup> based on that group’s values and beliefs. At these “point[s] of intersection between speaker or writer and listener[s] or reader[s],” *ethos* is constructed.<sup>33</sup> Because *ethos* is a social act in a particular cultural context,<sup>34</sup> the nature of the community determines an individual’s character; the writer’s group membership as well as the audience’s group identity play significant roles in the development of the writer’s *ethos*. Accordingly, understanding a particular writer’s *ethos* requires examining the “discursive communities [she is] mediating within and between.”<sup>35</sup>

A writer’s membership in a particular group constructs her credibility, competence, and goodwill. Certain characteristics can be attributed to particular *kinds of* persons and groups,<sup>36</sup> and, where other group members demonstrate certain ethical characteristics, a member of that group can be deemed to have those same qualities, whether or not the individual actually possesses those qualities herself.<sup>37</sup> Through the acts of the writer’s group members, the *ethos* of both the group and each individual is expressed and shaped.<sup>38</sup>

A writer’s *ethos* is not only dependent on the characteristics of those in her group, it is also impacted by the particular characteristics of the audience. That is, audiences are not passive recipients of a speaker or writer’s predetermined *ethos*. The nature of the audience is key in determining how important an individual speaker’s or writer’s *ethos* will be to that audience. When the audience lacks knowledge of the particular content of a text or speech or does not perceive that the subject of discussion is relevant to the audience members or the real world, the “total personality” or *ethos* of the speaker or writer becomes the focus of the reader’s re-

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<sup>32</sup> Reynolds, *supra* n. 23, at 327.

<sup>33</sup> *Id.* at 333 (quoting Karen B. LeFevre, *Invention as a Social Act* 45–46 (S. Ill. U. Press 1987)); *see also* Terence McLaughlin, *The Educative Importance of Ethos*, 53 *British J. Educ. Stud.* 306, 311 (2005) (offering a spatially oriented notion of *ethos*: “the prevalent or characteristic tone, spirit or sentiment informing an identifiable entity involving human life and interaction (a ‘human environment’) in the broadest sense . . .”).

<sup>34</sup> Reynolds, *supra* n. 23, at 327.

<sup>35</sup> *Id.* at 333.

<sup>36</sup> Halloran, *supra* n. 19, at 62.

<sup>37</sup> *Id.* at 63.

<sup>38</sup> *Id.*



sponse.<sup>39</sup> This situation occurs when the audience “comes to the communication with little or no propensity to respond to the content of the message,” and thus the “personality of the [writer] emerges” as the only other reason the readers have for becoming involved in the substance.<sup>40</sup> Conversely, when the reader possesses sufficient knowledge to evaluate the message content and can understand the immediacy of the content to his or her own life, the writer’s personality is subordinated in the persuasive process, and the *ethos* of the writer becomes less important.<sup>41</sup>

Law students come to the legal writing classroom with a variety of preconceived notions about the law school and legal practice communities. Because legal writing professors simultaneously embody the role of law professor *and* lawyer (arguably more acutely than any other professor in the first-year curriculum because of legal writing’s strong emphasis on practice skills), students construct the professors’ personas based upon their memberships in these communities. Thus, legal writing professors take on the *ethos* of those communities, both local and global, and are impacted by what students believe about those groups.

Relatedly, the membership of first-year students in the “novice” community plays an equally significant role in constructing professor *ethos*. Arguably, because law students have little first-hand knowledge of law and legal practice, in those first months of law school, students rely heavily on the personality of their professors in engaging their intellectual curiosity and compelling them to become involved with the material. As students acquire more knowledge about the law and legal practice, however, they are more equipped to independently evaluate course content and information and understand its applicability to legal practice. As a result, *ethos* or personal persuasion becomes less important as students mature in the law, although arguably it always remains relevant to the professor-student interaction.

### **3. Ethos and Learning**

*Ethos* is pedagogically important because it is directly related to how students perceive their relationships to their teacher and to

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<sup>39</sup> Paul I. Rosenthal, *The Concept of Ethos and the Structure of Persuasion*, 33 *Speech Monographs* 114, 122 (1966).

<sup>40</sup> *Id.* at 122.

<sup>41</sup> *Id.* at 122–124.

the learning process. The more credible a teacher is perceived to be, the more persuasive the teacher is<sup>42</sup> and the more likely students are to learn from that teacher.<sup>43</sup> With respect to competence, the more competent a teacher is perceived to be, the more likely students are to make themselves available to receive additional information from that teacher.<sup>44</sup> Not surprisingly, “[c]ompetent teachers explain complex material well, have good classroom management skills, have the ability to answer student questions, and communicate effectively.”<sup>45</sup>

With respect to character or trustworthiness, Aristotle’s second category of *ethos*, if students perceive their teacher as less trustworthy, they are likely to perceive him as less credible.<sup>46</sup> “A teacher high in trustworthiness offers rational explanations for grading, treats students fairly, gives immediate feedback, and never embarrasses students or is verbally abusive towards students.”<sup>47</sup>

Finally, the students’ perception of the teacher’s caring or “goodwill,” as measured through the teacher’s “empathy, understanding, and responsiveness,” is positively related to student perceptions of learning.<sup>48</sup> Perceptions of caring are critical to success in the classroom:

Students will most certainly be more likely to attend class and listen more attentively to a teacher who is perceived to have their interests at heart [, and] it is more likely that the student will engage in more effort to learn what the teacher is attempting to teach.<sup>49</sup>

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<sup>42</sup> Jason J. Teven & Trudy L. Hanson, *The Impact of Teacher Immediacy and Perceived Caring on Teacher Competence and Trustworthiness*, 52 *Commun. Q.* 39, 40 (2004) (summarizing much of the quantitative research on source credibility).

<sup>43</sup> Katherine S. Thweatt & James C. McCroskey, *The Impact of Teacher Immediacy and Misbehaviors on Teacher Credibility*, 47 *Commun. Educ.* 348, 349 (1998).

<sup>44</sup> *Id.*

<sup>45</sup> Teven & Hanson, *supra* n. 42, at 40.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jason J. Teven & James C. McCroskey, *The Relationship of Perceived Teacher Caring with Student Learning and Teacher Evaluation*, 46 *Commun. Educ.* 1, 2 (1997); *see also* Teven & Hanson, *supra* n. 42, at 50 (“Teachers should attempt to . . . make more explicit caring statements to their students; . . . teachers will be perceived as more credible.”).

<sup>49</sup> Teven & McCroskey, *supra* n. 48, at 8.

Interestingly, caring is not “the opposite of malicious intent. . . . [I]ndifference [alone may] make the student more suspicious of the teacher[']s motives.”<sup>50</sup>

For legal writing professors, the links between *ethos* and learning discussed above should be particularly relevant. Certainly, if legal writing professors orient themselves toward student success and satisfaction, *ethos* is critical in that it plays an integral role in attendance, effort, and enthusiasm toward the course. And, in the first-year writing course where students are making valiant but often unsuccessful attempts to master legal discourse, shoring up students’ positive perceptions is crucial.

### *B. Commenting on Writing: Perspectives from Composition and Legal Writing Pedagogy*

Comments on student written work are seen generally as an “effective pedagogical tool,”<sup>51</sup> and commenting on student writing remains an integral part of the writing teacher’s duties. Evaluation through commenting is important because it

requires us to answer all the hard questions that students should ask but often do not know, or dare, to ask: What specifically, seems strong about my work? What is not so strong? What might I do to make some progress, either in revising this draft or in working on a comparable assignment in the future?<sup>52</sup>

Legal writing professors view the commenting process as critical to the student’s growth and development as a legal writer.<sup>53</sup> Legal writing professors see the written comments as a way of helping students to get to know “what’s expected in the legal culture”<sup>54</sup> and to get specific feedback on their work. Anne Enquist’s foundational article on commenting notes that the process of commenting is “the best way . . . of communicating with the student about [the] writing,” and is the “ultimate [means] for one-on-one . . . teaching.”<sup>55</sup>

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<sup>50</sup> McCroskey & Teven, *supra* n. 19, at 92 (quoting James C. McCroskey, *An Introduction to Communication in the Classroom* 110–111 (Burgess Intl. Group 1999)).

<sup>51</sup> Williams, *supra* n. 3, at 314.

<sup>52</sup> Cooper & Odell, *supra* n. 3, at viii.

<sup>53</sup> Enquist, *supra* n. 10, at 1125–1132.

<sup>54</sup> *Id.* at 1128 (quoting survey respondent Ruth Vance).

<sup>55</sup> *Id.* at 1128–1129 (quoting survey respondents Cathleen Wharton and Jill Ramsfield); see also Mary Kate Kearney & Mary Beth Beazley, *Teaching Students to “Think Like Lawyers”*: Integrating Socratic Method into the Writing Process, 64 Temp. L. Rev. 885, 897

Although composition studies literature consistently concludes that there is no one right way to respond to and comment upon writing so long as one knows how to “choose and apply [comments] constructively,”<sup>56</sup> certain techniques associated with good commenting have emerged. First, teachers should avoid the temptation to engage in stylistic and overly formalistic editing<sup>57</sup> and instead give feedback that deals with the classic rhetorical concerns of invention, audience, and purpose.<sup>58</sup> Second, others point out that purely objective evaluation of student writing is impossible because teachers cannot separate themselves from the contexts that surround the evaluation of a particular piece of writing; thus, evaluators need to “develop a higher level of consciousness, a kind of ‘thoughtfulness,’ often captured in the phrase ‘reflective practice.’”<sup>59</sup> Relatedly, Linda Berger offers that legal writing professors should “use reflection[ ]” to help students become better writers.<sup>60</sup>

A writing professor’s reflective practice should include considering the *ethos* necessary for successful commenting. Overall, research from the composition and legal writing fields suggests that the most effective *ethos* for commenting is one that displays expertise, objectivity, and a positive attitude, and empowers students in the writing process. By being sensitive to how students perceive (1) the professor’s authoritative position in the commenting process and (2) the tone of the professor’s comments, legal writing professors can develop these positive *ethos* characteristics in their commenting practice.

First, professors must display expertise while avoiding an overly authoritative persona. Students want, perhaps even demand, evaluator expertise—students want comments that are specific, detailed, and include examples.<sup>61</sup> In other words, students expect the professor to have enough knowledge to give them specific guidance. Anne Enquist’s 1996 study of how law students per-

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(1991) (“Responding to student writing is the most important task the legal writing teacher performs. If written effectively, these responses can be a major factor in teaching students how to research, write, and revise their writing independently.”).

<sup>56</sup> C. M. Anson, *Reflective Reading: Developing Thoughtful Ways to Respond to Students’ Writing*, in *Evaluating Writing: The Role of Teacher’s Knowledge about Text, Learning, and Culture* 302, 303 (Charles R. Cooper & Lee Odell eds., Natl. Council of Teachers of English 1999).

<sup>57</sup> Cooper & Odell, *supra* n. 3, at vii; Williams, *supra* n. 3, at 315.

<sup>58</sup> Cooper & Odell, *supra* n. 3, at xii.

<sup>59</sup> Anson, *supra* n. 56, at 303.

<sup>60</sup> Berger, *supra* n. 11, at 60.

<sup>61</sup> See generally Christine T. Everhart, *Response to Teacher Comments on Rough Drafts: What Students Find Most Helpful* (master’s thesis, Ariz. St. U. 1992).

ceived the written comments of their legal writing professors confirmed that law students want in-depth explanations and examples.<sup>62</sup>

An additional facet of expertise is accuracy: students want their professors to be accurate commentators and to remember from one draft to the next what has been said about the students' writing. In one study on the effectiveness of professor feedback in writing, a student noted that he had corrected the mistakes the professor had suggested and "still got marked off for them."<sup>63</sup> In the legal writing field specifically, veteran professors suggest that making mistakes in commenting, even on aspects of the writing as simple as grammar or citation form, can result in a loss of credibility with the student audience.<sup>64</sup>

Professors can create a negative *ethos* in the commenting process by adopting an "authoritarian stance" in their commenting practice.<sup>65</sup> To be better evaluators, professors should consider all of their "selves" they bring with them to the commenting process and subordinate the professor self that is "socially invested with power and authority."<sup>66</sup> One role to bring to the commenting process is the "student self" role. By engaging the role of the student self, the writing professor makes it her priority to recall the experience of not being in full control of her own writing and possessing incomplete knowledge about the writing process.<sup>67</sup> By remembering this positioning, the professor can create a persona or *ethos* that is supportive and constructive and that empowers students to take ownership of and responsibility for their own writing rather than an *ethos* that makes the student the object of coercive comments.<sup>68</sup>

Certainly, maintaining the balance between the authoritarian self and the student self in commenting is a careful process. As

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<sup>62</sup> Enquist, *supra* n. 16, at 188.

<sup>63</sup> Everhart, *supra* n. 61, at 38 (quoting student survey response).

<sup>64</sup> Enquist, *supra* n. 10, at 1138.

<sup>65</sup> Patrick McGann, "Well, Think Again!": *Remarking on Grading, Subject Positions, and Writing Pedagogy*, 25 *Composition Stud./Freshman English News* 19, 21 (1997).

<sup>66</sup> *Id.* at 23.

<sup>67</sup> *Id.* at 22 (asking, "[w]hat if we . . . placed ourselves in the role of student" when commenting on papers).

<sup>68</sup> *Id.* at 27. Kearney & Beazley also note that

the legal writing teacher must also strive to respond in ways that encourage the students' independence as legal writers. . . . It is all too tempting for the writing teacher simply to edit the students' writing and tell them what revisions to make. Students do not learn as much from editing because they do not have to think and revise independently—the teacher has done the revision for them.

Kearney & Beazley, *supra* n. 55, at 899–900.

noted, students want an expert to help them learn the legal writing genre, so professors must exhibit enough expertise to provide helpful guidance. On the other hand, students need to be in charge of their own progress towards attaining their professional voices. Simply mimicking teacher writing and following explicit directions, while important to the learning process, is not enough for students to mature as legal writers; rather, they must be able to mature into professionals who recognize their own power to transform their ideas into recognizable legal documents. So, professor comments must be directed toward helping students claim this power. Thus, the student-self role for the writing professor is not one that lacks knowledge and experience or that takes a passive role in the teaching process; rather, it is one that is careful to position itself “alongside”<sup>69</sup> instead of above the student and that is sensitive to the unique, interactive relationship the professor has with the student in the writing course.

Second, professor *ethos* is impacted, not surprisingly, by the way the students perceive the tone of the comments. Commenting on writing involves much more than the student understanding the comments; rather, the student is directly impacted by the tone of the comments.<sup>70</sup> Student perception of a writing professor’s goodwill, that is, the professor’s concern for the learning experience of the student and her attention to fairness in the evaluating process, plays a significant part in the student’s construction of the teacher’s *ethos*. To establish and maintain goodwill, professors should articulate objective standards, adopt a “coaching” persona rather than a “judgmental” one, use discretion in the kind of and number of comments they write, and generally adopt a positive approach to teaching writing.<sup>71</sup>

Balancing feedback between constructively critical comments and comments that point out the students’ writing strengths is important to maintaining a teacher-student relationship that keeps students open to receiving feedback. Students prefer positive comments to sarcasm and view positive comments as helping them improve their writing.<sup>72</sup> Even more important to the study of *ethos*, student perceptions of the helpfulness of the comments is more powerful than whether the comments do actually help the stu-

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<sup>69</sup> See Berger, *supra* n. 11, at 71 (noting the rhetorical position of reflective responding as “next to”).

<sup>70</sup> Patterson, *supra* n. 21, at 177–178.

<sup>71</sup> *Id.*

<sup>72</sup> Everhart, *supra* n. 61, at 22–23.

dents improve their writing.<sup>73</sup> Particularly relevant to teaching the first-year legal writing course, where confidence in both writing skills and overall academic capability can be at an all-time low for students,<sup>74</sup> student confidence in a stressful writing situation can be improved by positive reinforcement.<sup>75</sup> And, for many students, simply having the confidence that they can be successful in the writing course can spell the difference between a productive writing-revising process and a disastrous one.

With regard to tone, Anne Enquist's 1996 study showed that students characterized a negative tone as one that was impersonal, gave no encouragement, or was "distant."<sup>76</sup> Her subsequent survey of legal writing professors concluded that "positive feedback [is] an effective teaching technique" and warned against "sarcastic, angry, or overly negative comments."<sup>77</sup> "Over and over again [law students] said that they needed to know what they were doing right . . . partially because they needed the encouragement and partially because they needed help identifying their strengths so that they could build on them."<sup>78</sup> Terri LeClercq also concluded that law students respond best to positive comments and that, even though critical comments should be included in the commenting process, "feedback should be weighted toward the positive."<sup>79</sup>

In sum, both composition and legal writing literature point out that an evaluator creates an *ethos* for herself by her commenting choices. Because this commenting traditionally takes place in the margins of the student paper, the Article now turns to a discussion about the concept of marginalia, the new text that is created when a reader responds to an existing text by writing in its margins. An exploration of marginalia demonstrates that it is a unique discursive form that creates a dialogue between reader and writer and is a site for constructing *ethos*.

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

<sup>74</sup> See Hess, *supra* n. 14, at 77 ("Large percentages [of law students] believe they were more articulate and intelligent before beginning their legal education.").

<sup>75</sup> Everhart, *supra* n. 61, at 26.

<sup>76</sup> Enquist, *supra* n. 16, at 168–173.

<sup>77</sup> Enquist, *supra* n. 10, at 1132, 1148; see also Teven & Hanson, *supra* n. 42, at 41 ("[T]eachers who use verbally aggressive messages . . . are perceived as being less competent and caring.").

<sup>78</sup> Enquist, *supra* n. 16, at 168; see also Everhart, *supra* n. 61, at 25 (noting "[p]ositive paper markings heighten student[s'] awareness of their writing strengths").

<sup>79</sup> LeClercq, *supra* n. 16, at 422.

*C. Marginalia, New Rhetoric, and the  
Teacher's Roles as Reader and Writer*

Making annotations in the margins of texts is an age-old practice dating back two-thousand years<sup>80</sup> and is “among the most powerful weapons of textual supplement and mediation.”<sup>81</sup> Filtered through the lens of the New Rhetoric movement, the modern process of creating marginalia represents a “transactional relationship”<sup>82</sup> between reader and writer, annotation and text. Because marginalia is the reader’s response to the writer’s words that encroaches on the original writing’s physical space, it generally is seen as both oppositional and authoritative as well as transformative of the original.<sup>83</sup> Because of these characteristics, marginalia is a location for constructing and maintaining the identity of the teacher-as-annotator.<sup>84</sup>

H.L. Jackson, a contemporary scholar taking a comprehensive historical, theoretical, and critical view of marginalia, describes good marginalia as having the attributes of intelligibility, relevancy, and honesty<sup>85</sup> and also possessing four characteristics that make it a unique genre of discourse. First, marginalia is responsive; in making margin comments, the reader is engaged with the text and responsive to it.<sup>86</sup> Marginalia has no “independent significance” or autonomy; it is prompted by and exists only because of the original text.<sup>87</sup> Second, marginalia is personal, expressing the views of the annotator.<sup>88</sup> Third, comments in margins are evalua-

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<sup>80</sup> H.L. Jackson, *Marginalia* 44 (Yale U. Press 2001). For additional discussion about marginalia throughout history, see *Annotation and Its Texts* (Stephen A. Barney ed., Oxford U. Press 1991); *The Margins of the Text* (D.C. Greetham ed., U. Mich. Press 1997); William W.E. Slights, *Managing Readers: Printed Marginalia in English Renaissance Books* (U. Mich. Press 2001).

<sup>81</sup> Slights, *supra* n. 80, at 70.

<sup>82</sup> Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 *J. Leg. Educ.* 155, 166 (1999).

<sup>83</sup> See Jackson, *supra* n. 80, at 90; see also Slights, *supra* n. 80, at 8 (noting that marginalia can both locate and dislocate a text).

<sup>84</sup> See Jackson, *supra* n. 80, at 91 (“Marginalia can be used to construct and to monitor identity.”).

<sup>85</sup> *Id.* at 205–206.

<sup>86</sup> H.L. Jackson, *Writing in Books and Other Marginal Activities*, 62 *U. Toronto Q.* 217–220 (1992–1993).

<sup>87</sup> *Id.* at 219; see also Jacques Derrida, *This Is Not an Oral Footnote*, in *Annotations and Its Texts* 192, 195 (Stephen A. Barney ed., Oxford U. Press 1991); Slights, *supra* n. 80 at 63 (stating that the relationship between marginalia and “parent” text is “codependent”).

<sup>88</sup> Jackson, *supra* n. 86, at 219. In Jackson’s view of traditional marginalia, the annotator is often anonymous. *Id.* This is slightly different from a teacher commenting on stu-



tive of the original text.<sup>89</sup> Finally, the comments are economical because they are subject to the “physical constraints of the margins.”<sup>90</sup>

Marginalia generally occupies three physical spaces in a modern<sup>91</sup> text. First, comments can be placed in the side margins and generally represent the reader’s “running commentary” on the text.<sup>92</sup> These marks can include simple marks of attention, such as underlining; marks of approval or disapproval, such as a check; and words or phrases, which can vary in length and can indicate anything from resistance to engagement.<sup>93</sup> Second, comments can be placed at the beginning of the text, frequently “act[ing] as a mediator between the text and later readers.”<sup>94</sup> Finally, comments can be placed at the end of the text to assess the work in its entirety.<sup>95</sup> Regardless of its physical location, marginalia is both responsive and inextricably connected to the original text.<sup>96</sup>

New Rhetoric’s focus on transactional relationships makes marginalia—a discursive form that “records a transaction between two minds”<sup>97</sup>—fit neatly within the New Rhetoric framework. First, marginalia does more than convey the reader’s response to the original text; it manages the responses of subsequent readers.<sup>98</sup> “Even as [it] mediates between text and reader, [marginalia] produces fresh text that itself requires annotation.”<sup>99</sup> Because of its interpretive power, it impacts the way in which the author of the original text interprets his own work. Thus, marginalia satisfies New Rhetoric’s vision that writing is a process that creates knowledge, not just communicates it.<sup>100</sup>

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dent papers because the identity of the teacher is known to the student. However, whether anonymous or known, the marginalist still expresses a personal view.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The term “modern” is used here because until the middle of the nineteenth century, interleaves, or the blank leaves of paper bound between printed leaves, were provided in many texts for the purpose of accommodating reader annotations. Jackson, *supra* n. 80, at 33.

<sup>92</sup> *Id.* at 28.

<sup>93</sup> *Id.* at 29–31.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 36.

<sup>96</sup> *Id.* at 81.

<sup>97</sup> *Id.* at 210.

<sup>98</sup> Slights, *supra* n. 80, at 10.

<sup>99</sup> *Id.*

<sup>100</sup> Berger, *supra* n. 82, at 156.

Second, marginalia is the type of “reflective conversation”<sup>101</sup> that New Rhetoric views as critical to the writing process. “Put[ting] together” the meaning of a particular text requires interaction between “reader, writer, and text, all of which are embedded in context and language.”<sup>102</sup> Finally, New Rhetoric suggests that one type of reading is “rhetorical,” where readers comment on and evaluate the text, “imagining a full rhetorical context.”<sup>103</sup> Because margin comments are “in constant and complicated dialogue with the centered text and the world beyond” the paper,<sup>104</sup> they reflect that kind of rhetorical reading.

Looking at marginalia from the viewpoint of creating legal writing professor *ethos*, concerns about marginalia as a mechanism for creating a positive teaching *ethos* become apparent. First, marginalia, which includes “marking essays,” is generally oppositional.<sup>105</sup> It introduces “a new voice”<sup>106</sup> into the text that is often one of defiance and challenge; the annotator approaches the process of making margin comments as one of “raising objections” to the text.<sup>107</sup> Thus, the *ethos* of the annotator, almost by definition, starts as one of “rival,” which is not an *ethos* particularly conducive to teaching.

Second, this rival positioning in the margins can shift the position of power and authority in the document to the margins, creating an authoritarian *ethos* for the annotator.<sup>108</sup> Although the original text is literally and figuratively “centered” on the paper and is generally considered the “principal” text,<sup>109</sup> marginalia can decenter the original text, effectively “engag[ing] the reader in a lively debate with the centered text.”<sup>110</sup> This oppositional and defiant identity gives the annotator considerable power because every

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 171.

<sup>104</sup> Slights, *supra* n. 80, at 67.

<sup>105</sup> Jackson, *supra* n. 86, at 218.

<sup>106</sup> Jackson, *supra* n. 80, at 21.

<sup>107</sup> Jackson, *supra* n. 86, at 218; *see also* Ralph Hanna III, *Annotation as Social Practice in Annotation and Its Texts* 178, 183–183, 184 (Stephen A. Barney ed., Oxford U. Press 1991) (suggesting that annotation is an aggressive form of writing that “reconstitutes the [text’s] audience” as well as “delimit[s] [the author’s] possible meaning and relevance”).

<sup>108</sup> Hanna notes that “questions of annotation always come back to issues of communities and institutions, and consequently questions of power.” Hanna, *supra* n. 107, at 184.

<sup>109</sup> William W.E. Slights, *Marginalia*, [www.lights.com/~muri/pages2/contents/marginalia.html](http://www.lights.com/~muri/pages2/contents/marginalia.html) (accessed Oct. 24, 2004) (copy on file with Journal).

<sup>110</sup> Slights, *supra* n. 80, at 8.

comment is a means of self-assertion and alteration of the original text.<sup>111</sup>

In addition to opposing the text, marginalia exercises authority over the original text and can manage a subsequent reader's response to it.<sup>112</sup> If the annotator is already occupying a position of power, then the marginalia can take on even more significance and power in controlling the conversation. Not surprisingly, readers of annotated texts can sense the power differential; historically, the supplemental texts that arose from annotations have been "generally viewed with deep suspicion."<sup>113</sup>

Linda Berger's exploration of using a reflective rhetorical model for responding to student writing reveals that teacher commentary carries "considerable rhetorical weight"<sup>114</sup> and "'inevitably and automatically undermines the authority of the student.' Having lost authority as a writer, the student has lost control over the subject and the text."<sup>115</sup> This authoritative power of marginalia over a legal writing student's text has been recognized: "'margin/interlinear comments do 'fragment' the memo for the student . . . both physically and analytically. Writing in the margins may hinder the revision process by being a kind of physical or psychological barrier to the student's interaction with what he or she originally wrote."<sup>116</sup>

Conversely, taking a "reflective rhetorical" stance<sup>117</sup> can lessen the oppositional and authoritative *ethos* that might otherwise be developed in margin comments. That is, legal writing professors should respond to student writing in a way that places responsibility on (or gives power back to) the student for making both stylistic and substantive revisions.<sup>118</sup> The tone of this kind of evaluation

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<sup>111</sup> *Id.* at 90.

<sup>112</sup> See Jackson, *supra* n. 80, at 90 (noting that an annotator can "tak[e] over authorial functions").

<sup>113</sup> Slight, *supra* n. 80, at 68.

<sup>114</sup> Berger, *supra* n. 11, at 72. Teresa Phelps also points to the importance of developing one's own professional writing voice: "[L]egal writing is essentially an ongoing conversation and that re-visioning the act of writing as a lawyer in this way requires the development of a personal, professional 'voice.' One cannot converse without an authentic voice." Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 S.W. L.J. 1089, 1089–1090 (1986).

<sup>115</sup> Berger, *supra* n. 11, at 68 (quoting Jane Gebart Auten, *A Rhetoric of Teacher Commentary: The Complexity of Response to Student Writing*, 4 *Focuses* 3, 4–5 (1998)).

<sup>116</sup> Enquist, *supra* n. 10, at 1140 (quoting survey respondent Jane Kent Gionfriddo).

<sup>117</sup> Berger, *supra* n. 11, at 59.

<sup>118</sup> *Id.* at 71.

creates the perception that the teacher “rhetorically sit[s] next to the writer, collaborating, suggesting, guiding, [and] modeling.”<sup>119</sup>

A legal writing professor can cultivate this rhetorical persona by focusing not on her role as a legal writing professor but on “playing” the roles of various readers and evaluators with whom students will interact in their legal careers and adopting those personas. Linda Berger suggests that the legal writing professor can assume the identities of “credible and persuasive coach, more experienced fellow writer, average legal reader, or critical expert.”<sup>120</sup> Even in taking on the role of the critical expert, the legal writing professor can adopt an identity that is not harsh and demanding but rather one that encourages the student to meet the high expectations of the expert. In any of these roles, the teacher relegates her professor persona to the background and instead brings to the fore the “real” audience of legal writing—clients, judges, and other lawyers.

What is most important about the professor’s role-playing function, however, is her ability to establish her *ethos*, or in other words, her credibility, in the role she chooses to play.<sup>121</sup> Without credibility in the role, the professor will have a more difficult time persuading her student audience to adopt her viewpoint on the quality of the writing.<sup>122</sup> In particular, the legal writing professor can establish credibility in the evaluative process by (1) sharing her experiences in the role she chooses to play in the evaluative process, and (2) reflecting, in both the margin comments and in her face-to-face interactions with students, that she shares “important values” with them.<sup>123</sup> For example, if a writing professor wants to take on the role of “judge” in evaluating a student’s motion for summary judgment assignment, she might share in a classroom discussion her legal practice experiences as a judge reading and deciding summary judgment motions, as a litigator writing and responding to motions, or as a judicial clerk to a trial court judge reading and evaluating summary judgment motions.

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<sup>119</sup> *Id.* (quoting Chris M. Anson, *Response Styles and Ways of Knowing*, in *Writing and Response: Theory, Practice, and Research* 353–354 (Chris M. Anson ed., Natl. Council of Teachers of English 1989)).

<sup>120</sup> *Id.* at 80.

<sup>121</sup> Berger suggests that it is important for a legal writing teacher to “establish her authority” to speak in a particular role. *Id.*

<sup>122</sup> *See id.* at 81–82 (noting that a writing teacher can “establish common ground” with students by “gather[ing] information . . . about their reading and writing values” as well as sharing her own).

<sup>123</sup> *Id.* at 80.

Part of this same discussion could include asking students to step into the reader role and asking them what they would value in a “well done” motion. By emphasizing the ways in which the commenting role mirrors the professor’s “real life” experiences, the professor gains credibility as someone who can speak authentically in that role; by establishing a shared set of values around the writing assignment, the professor can create a sense of shared purpose.

Another way marginalia theory informs the construction of the legal writing professor’s *ethos* is through its recognition of “certified expertise.”<sup>124</sup> Certified expertise results when an annotator borrows evaluative standards from other sources and *identifies* the sources of those ideas as part of the annotating process.<sup>125</sup> The content of the legal writing course sets up the expectation that the professor will use certified expertise in the commenting process. First, professors offer students multiple texts that describe legal method, analysis, content, and citation. Additionally, when students learn legal analysis, they learn that legal writing draws heavily on certified expertise in the form of citation to authority to establish legal rules. Thus, by teaching students how to synthesize rules and cite to legal precedent, legal writing professors create an expectation in students that authority for particular points, propositions, or rules can be “found” in sources that are available for citation.

By looking to certified expertise as one way to respond to student texts, legal writing professors can take advantage of this expectation in their student audience. For example, drawing upon certified expertise in a margin comment may include giving the student a specific rule reference to a legal writing style manual for a suggested change to the student’s writing style. Because these types of changes often seem to be subjective changes that are a matter of personal preference rather than of discourse convention, the reference to an outside source can manage the way students respond to the comments by giving them an objective way to assess the evaluator’s authority and the marginalia’s validity.

H.L. Jackson warns, however, that certified expertise must be balanced with marginalia that has “an air of spontaneity,” which reinforces that the comments are honest and “passionate expres-

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<sup>124</sup> Jackson, *supra* n. 80, at 206.

<sup>125</sup> *Id.*

sion[s], [which demonstrate] proof of engagement.”<sup>126</sup> In the legal writing context, this suggests that comments that are overly formulaic, refer only to an outside source, and do not reflect an individualized response to the student’s specific text will be less effective and perceived as inauthentic.<sup>127</sup> Simply, if the legal writing professor does not appear engaged with the student’s writing, no amount of certified expertise will overcome the loss of goodwill that results from perceived disinterest or inattention.

## II. PRINCIPLES FOR A POSITIVE COMMENTING *ETHOS*

In the context of legal writing instruction, the professor’s *ethos* is developed significantly in the margins of the student paper and affects the student’s perceptions of the professor’s fairness and authenticity. Not surprisingly, this *ethos* is not necessarily dependent on the *ethos* the professor has developed with the student in the classroom; a new, commenting *ethos*—one where the legal writing professor can develop a new persona with new characteristics—emerges in the space between what the student has written in the original text, what the professor has written in the margins, and how the student responds to that marginalia. At this intersection, where the student receives direct and often critical feedback on the highly personal act of writing, the student develops her perception of the intelligence, character, and goodwill of the professor as an evaluator. Based on the professor’s choices along with the rhetorical context in which those choices are made, a positive or negative *ethos* can be created in the margins that can ultimately impact the legal writing professor’s ongoing relationship with the student and the student’s success in acquiring legal writing skills.

Eight principles and some associated practical strategies for developing a positive commenting *ethos* in the legal writing evaluation context are provided below.

1. *A commenting ethos is not static; it is the product of constant negotiation between reader and writer occurring in a broad context.*

The negotiation of the professor’s *ethos* takes place when the professor reads and responds to the student’s writing and the stu-

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<sup>126</sup> *Id.* at 210.

<sup>127</sup> See Scharton, *supra* n. 6, at 59.

dent then reads the comments and reacts to them. Moreover, this negotiation occurs in a context that includes not only the specific boundaries of the writing assignment, the interactions in the writing classroom, and the information—both intellectual and social—drawn from law school environment, but also encompasses the whole of the student's life experiences. As a result, the student's pre-existing beliefs about the *ethos* of the professor (and perhaps of a larger legal writing program as well) help to form the context in which the marginalia and the main text interact and in which the student constructs his or her perception of the legal writing professor's *ethos*.

Because of *ethos*'s negotiated status, legal writing professors taking an *ethos*-based approach to commenting should remember that they have significant power—within the larger contexts affecting the writing process—to shape a “virtual,” transactional relationship between teacher-as-reader and student-as-writer that is distinct from but interdependent with the classroom relationship. Yet, they should recognize that the student may or may not perceive this person as the same person who interacts with the student in the classroom because the professor's role has changed from teacher to reader and evaluator in the commenting process.

Legal writing professors can honor the principle that *ethos* is negotiated by first imagining the commenting process as a dialogue between teacher and student and considering what type of commenting persona would invite the student into that dialogue. For example, in advance of commenting on papers, legal writing professors should attempt to collect information about their students, such as through the traditional “personal essay,” to get to know the students and better understand the individual contexts in which the comments will be received. Then, to the extent possible, comments can be tailored to those individual needs. Moreover, legal writing professors should assess the dynamics of the classroom and be aware that the margins of student papers may help to rehabilitate a negative classroom perception or, conversely, work to destroy a positive one. An awareness of the negotiated status of *ethos* and the students' role in that negotiation can make the teacher more effective in offering margin comments.

2. *A positive commenting ethos develops from employing rhetorical strategies that highlight the teacher's membership in the professional legal writing community.*

An *ethos* that appeals to students arguably leaves the professorial, authoritative persona out of the mix; the professor's membership in the "legal writing professor community" is subordinated to other, more effective "selves" such as the "fellow legal reader" self. Arguably, developing an *ethos* that emphasizes the power imbalance between professor and student will do little to persuade the students that a legal writing professor's comments are worth considering. Rather, it is that professor's membership—or perceived membership—in the larger legal writing community that, in large part, makes her a credible source for legal writing instruction.<sup>128</sup> Because students want to envision themselves as members of the legal community, marginalia that overtly reflects the expectations of that community creates a sense of authenticity in the professor's comments. Thus, using margin comments to emphasize that community membership—the "fellow legal reader" role—develops a successful commenting *ethos*.<sup>129</sup> Specifically, comments focusing on (1) the substantive content of the writing (for example, focusing comments on the quality of rule synthesis or fact analysis), (2) the expectations of the "real-world" audience (for example, beginning a comment with "A judge would expect . . ."), and (3) the purpose of the writing (for example, highlighting the differences between predictive and persuasive writing) places emphasis on the professor's membership in the legal practice community and her competence within it.

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<sup>128</sup> This experience might be different for "doctrinal" faculty who do not have a skills focus for teaching. Their perceived membership in the academic community associated with the particular doctrine they teach, as evidenced through scholarship, might be more meaningful to students in creating a positive *ethos*. However, even though perhaps a different legal community, students still likely expect authentic membership in that broader relevant community, and a perceived lack of membership would still be considered negative. This is not to say that legal writing professors' expertise as teachers and scholars of legal writing is unimportant as a general matter. The point here is that in the margins of a student paper, membership in the practice community can be particularly relevant.

<sup>129</sup> Anne Enquist notes that students like role-playing comments that remind them of the "real-world" reader they will have for their professional writing. Enquist, *supra* n. 16, at 185–186.



3. *Sensitivity to the power relationship between teacher and student and how it affects the way the student responds to the margin comments is critical to negotiating a perception of goodwill and competence.*

Because the professor generally holds a perceived superior position of knowledge and control in the learning environment, students bring that perception with them to their interaction with the professor's comments. In other words, students tend to not see the marginalia as reader responses; rather, they see them as evaluator critiques. Because of this power imbalance, the mere physical presence of professor comments in the margins of student writing can result in an unintended flip-flop of the marginalia to the center of the text. Unless legal writing professors intend to divest students of their ownership in the text they have written, professors must pay careful attention to develop an *ethos* of commenting that reflects the trustworthiness of a responsive reader rather than the demands of an evaluator.

Attempting to take on the role of a "fellow legal reader" rather than of an evaluator can create an *ethos* that appeals to students. Assuming the personality of the "fellow legal reader" may help the professor phrase comments in the form of reader responses.<sup>130</sup> For example, an evaluator response might be "This is sub-standard analysis. Use analogies," whereas a "fellow legal reader" might offer "This analysis doesn't compare our facts to the *Smith* facts; it is less helpful to the lawyer/reader." Although the difference in these comments is perhaps small, the positioning of the professor in the comment is significantly different—authority figure versus reader—and will affect the way in which the student perceives the goodwill and competence of the professor.

Additionally, being overt in the role that is assumed in the evaluative process can create a positive *ethos*. Because marginalia written at the beginning of documents can control how a reader perceives the remainder of the text, advising the reader of the persona assumed in the margins (for example, "For this draft, I am taking on the role of the supervising partner") at the beginning of the assignments can reflect both an expertise and an investment in the text—but not an investment that is personal to the professor

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<sup>130</sup> Indeed, Berger suggests that teacher comments on early drafts (at the very least) be "fellow-writer comments, similar to those that a lawyer might make on a colleague's early draft," which appear in the margins and reflect the reader's response to the text. Berger, *supra* n. 82, at 177.

in the teacher-student relationship. Moreover, if the professor is taking on a supervising lawyer persona in particular, overtly stating that role up-front can help students accept subsequent critical comments more positively because they are prepared to read comments that might be typical to a supervisor-subordinate relationship. Additionally, reinforcing that persona in a holistic end comment can remind students of the professor's commitment to guiding the student into the practice community.

4. *Professor trustworthiness and competence can be further developed by carefully tailoring comments to what has been taught in the legal writing classroom, to authoritative texts, and to community standards.*

Students may lose trust in the teacher-as-annotator if they believe they are held to a standard not related to the course work. Thus, clearly articulating evaluation standards in advance of the assignment and tying those standards to readings and classroom instruction can be helpful. Moreover, to bolster perceptions of competence, a professor can access "certified expertise" in the marginalia by referring students to outside resources (rather than personal preferences) as the basis for the comments. Comments that rely on outside authority for support can take the emphasis off the professor-student relationship and emphasize the reader-writer relationship, a perspective that increases professor credibility because the professor is seen in the role of the expected future reader who will hold the student to the accepted standards of the discourse community.

For example, margin comments can refer students to specific pages in course texts for more explanation about or examples of ways to correct a particular writing problem. Alternatively, when returning the paper, the legal writing professor could provide a short article or excerpt from a practice-oriented text (such as a bar magazine article) that addresses ways to tackle a particular writing issue. Another option would be to provide students with a list of resources to help with specific problems (for example, rule synthesis, drawing analogies, or addressing counter-arguments) and then use margin comments to refer to specific sources on that list. Another strategy might be to keep a set of good "real world" examples of particular writing skills and attach relevant excerpts to the graded assignment. For example, an excerpt from an appellate brief that demonstrates the efficient use of language could give a

student struggling with wordiness a sense of why brevity matters in legal writing.

5. *In the early point of most law students' careers, students have very little professional context for the legal writing they are asked to do; as a result, perceptions of professor trustworthiness and goodwill can be bolstered by student interactions with discourse community "insiders."*

Students may have difficulty objectively judging whether evaluative comments substantively reflect the concerns they will face in practice. As a result, some students will have a difficult time seeing the relationship between paying attention to the comments and achieving their career goals (other than receiving a good grade). In this circumstance, the perceived credibility of the legal writing professor as a knowledgeable, authentic, trustworthy member of the community to which students aspire can be more powerful and persuasive than the rationality, accuracy, or helpfulness of the comments written in the margins of the students' assignments. As such, the perception of professor's trustworthiness and goodwill is particularly important because students may have little other basis on which to judge the effectiveness of their legal writing professor.

In dealing with the issue of the dominance of personal characteristics on persuasion in legal writing commenting, one rhetorical strategy (in addition to drawing upon certified expertise) is to make special efforts to give the students the context needed to evaluate the logic of the comments. To do this, a writing professor might invite guest speakers from the practice community—discourse “insiders”—to class to talk about what is expected of legal writers in the discourse community. That way, students can learn the perspective of someone outside the professor-student relationship, a perspective they could use to enhance their understanding of the professor's marginalia on their papers. Another strategy might be to offer students materials written by judges and practitioners that describe what is expected in legal writing. Upper-level students can also serve as knowledge sources for students about “real world” legal writing; thus, having upper-level students come into the classroom and talk about their writing experience in summer clerkships and explain how the legal writing course helped prepare them for that experience, can help students pay more attention to comment *content* than to professor personality. If the professor has an upper-level student as a teaching assis-

tant, for example, encouraging that student to participate in classroom discussions on the expectations of the practice community can be a great way to offer students some “peer” expertise that can bolster the credibility of what the professor may write in the margins of a student assignment.

6. *Offering personalized comments can enhance students’ perceptions of the professor’s trustworthiness and goodwill.*

Comments that are personalized to the paper, directly address the text, and are detailed, show that the teacher is engaged in the paper. This creates a sense of authenticity and goodwill. The issue of personalized comments arises when legal writing professors use “global” comments to respond to student writing. Frequently, these comments take the form of word-processing macros that are inserted into the text for “common problems” or a numbering system in the margins to connect a writing problem in the student paper with a generally applicable sheet of comments.

As a general matter, universally applicable comments are useful in the commenting process. They permit a legal writing professor to be consistent and thorough in describing writing problems and prescribing remedies. Additionally, they are efficient; they permit the grading process to move more quickly. Moreover, they facilitate another principle of developing a strong commenting *ethos*; that is, they permit a legal writing professor to make good use of certified expertise by easily drawing students’ attention to outside resources where necessary.

On the other hand, however, a paper full of standardized comments might seem to a student to be mechanical, formulaic, and impersonal. They might suggest to a student that all legal writing must look exactly the same and that his or her own contribution to the personality of the assignment is unimportant. They might convey that the professor is not interested in the student as an individual, and the student may perceive the professor in a negative light.

Accordingly, even if universally applicable comments are used in the commenting process, a legal writing professor should take steps to ensure that her engagement with each student’s *individual* text is reflected in the comments. Strategies here might include using macros that encourage personalization; for example, a macro that originally read, “The analogy here is unpersuasive. Remember, only compare precedent facts that are relevant to the court’s holding,” might be modified to say, “The analogy here be-

tween plaintiff's back injury and the injuries in *Jones* is unpersuasive. Remember, only compare precedent facts that are relevant to the court's holding; the defendant's injury in *Jones* was not a fact the court relied on in finding causation." Another strategy may be to write a few quick comments in the margins that directly address the specifics of the student's writing along with a number that refers the student to a generally applicable comment sheet. In either scenario, the comments will be more effective from a credibility perspective because they suggest the professor was invested in and engaged with the student's writing.

7. *Carefully controlling the language of the marginalia can bolster student confidence as well as enhance perceptions of teacher goodwill and competence.*

Although margin comments may raise objections to the text, the responses should not raise objections to the writer. Addressing the writer ("you") in the margin comments, for example, creates an unnecessary opposition between reader and writer that can be seen as confrontational by the student; this type of language only enhances the "rival" role that comes from the inherent nature of marginalia. Rather, addressing the text ("it") gives a personalized response in an impersonal way and uses the natural oppositional tone of marginalia effectively. For example, a comment that reads, "I don't understand why you don't address the favorable causation facts here," might be revised to read, "This section doesn't address the favorable causation facts."

Even better, the comment might be revised to be a question: "How can this section address the favorable causation facts?" Using the margins to ask questions that guide revision changes the way in which the marginalia interacts with the text and the way in which *ethos* is constructed. The legal writing instruction community has already recognized the importance of a "sit-beside-the-writer" *ethos* in the margin comments that engages rather than commands the reader.<sup>131</sup> Asking engaging questions can enhance learning: "[S]tudents learn the most when they are engaged in a dialogue with their teacher about their writing . . ."<sup>132</sup> Certainly, asking questions reduces the authoritarian *ethos* of the legal writ-

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<sup>131</sup> See generally Berger, *supra* n. 11.

<sup>132</sup> Enquist, *supra* n. 10, at 1129 (quoting survey respondent Mary Beth Beazley); but see Enquist, *supra* n. 16, at 189 (suggesting "[t]oo many questions, especially terse questions, can create an antagonistic reaction from students").

ing professor and reinforces the students' power and authority over their own texts.

Moreover, in their work on using the Socratic method in legal writing instruction, Mary Kate Kearney and Mary Beth Beazley note that “[u]sing Socratic questions to comment also helps professors strike the proper balance between comments that are so vague that they give students too much responsibility for their revisions and comments that are so specific that they take away all responsibility for revision from the students.”<sup>133</sup> Anne Enquist writes that the questions must be written to allow the student “to determine what problem the instructor is pointing out and what solution would be acceptable.”<sup>134</sup> Legal writing professors can use principles of *ethos* to guide them in drafting effective Socratic questions in the margins; questions should reflect the professor's expertise as well as give the student enough information to empower him or her to make the expected changes, such as, for example, pointing the student toward a source of certified expertise for writing strategies or examples.

8. *Perceptions of goodwill result when constructively critical comments are encouraging, professional, and engaging and are coupled with positive comments.*

Comments that suggest a negative, incredulous, sarcastic response, expressed either through content or typeface<sup>135</sup> (for example, “WHY DID YOU OMIT THE HOLDING?!?!”) should be avoided. Rather, specific, detailed, and positive comments can create credibility because the tone suggests goodwill on the part of the teacher. For example, the comment “The summary of *Jones*' facts is compelling, but the judge will expect to see the holding, too,” is likely to be more positively received. That is, the comment suggests that the professor does not have an agenda of just pointing out what the students do wrong; the professor is committed to a balanced assessment. And, if she must point out a problem with the assignment, the tone demonstrates it is done in the spirit of coaching students in meeting their professional goals.

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<sup>133</sup> Kearney & Beazley, *supra* n. 55, at 901.

<sup>134</sup> Enquist, *supra* n. 16, at 189.

<sup>135</sup> See generally Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Texts of Legal Writing Documents*, 2 J. ALWD 108 (2004) (discussing the power of typeface in legal writing).

### III. CONCLUSION

Regardless of how fair and authentic the professor believes the legal writing evaluation is, it is not unless students perceive it to be.<sup>136</sup> Negotiating an *ethos* that reflects this fairness and authenticity in the margins of student papers is not an easy task and is rife with pitfalls; yet, the margins of student papers are key venues for legal writing professors to shape student perceptions and enhance student learning. A legal writing professor can develop a positive commenting *ethos* in marginalia discourse by focusing on competence, trustworthiness, and goodwill. A professor can demonstrate competence in marginalia through illustrating membership in the legal community, taking on a persona of the future legal reader the student will likely encounter, and offering detailed, personalized comments and Socratic questions.

Carefully tying the comments to the course content and other certified expertise can bolster trustworthiness and competence by demonstrating that students have been held to already-articulated standards and by giving them “objective” information by which to assess the value of the margin comments. An *ethos* of goodwill and balanced assessment can be developed by including positive comments along with constructively critical comments, emphasizing the relationship between the student’s work and the legal practice community, and orienting the comments toward the improvement of the text itself rather than toward the writer. Ultimately, attention to the ways in which marginalia acts as a negotiation and dialogue with students and affects the ways in which the students perceive the goodwill, competence, and trustworthiness of the legal writing professor can help to improve students’ learning experience and transition to the legal practice community.

Future research in this area would be worthwhile. In particular, exploring differences in how students construct *ethos* based on the group memberships of both students and professors can create an even more nuanced understanding of how commenting works. For example, does changing the gender of the student or the professor impact how the student constructs the professor’s commenting *ethos*? Additionally, the intersect between classroom *ethos* and commenting *ethos* might be explored. Can a “positive” *ethos* in the

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<sup>136</sup> See Eminem, *The Way I Am*, in *The Marshall Mathers LP* (Aftermath Ent./Interscope Recs. 2000) (CD) (“I am whatever you say I am. If I wasn’t, then why would you say I am?”).

writing conference rehabilitate a “negative” margin *ethos*?<sup>137</sup> Does anonymous grading affect how *ethos* is constructed? Empirical studies, similar to Anne Enquist’s 1996 study of law student responses to commenting, would be fruitful in further understanding how *ethos* is constructed in the margins and the role it plays in this critical part of legal writing education.

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<sup>137</sup> Anne Enquist suggests similar lines of research including research that explores whether “students may be more receptive to, and therefore able to benefit from, extensive critiques if the legal writing professor has established a good rapport with the class.” Enquist, *supra* n. 10, at 1131.