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Teaching Upperclass Writing: Everything You Always Wanted to Know But Were Afraid to Ask

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Teaching Upperclass Writing: Everything You Always Wanted to Know But Were Afraid to Ask

Lissa Griffin*

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I. INTRODUCTION

There is little disagreement today about the importance of teaching law students to write effectively. Even before the MacCrate Report in 1992,¹ the legal community was well on its way to a profound awareness of the need for more and better writing training for law students. This awareness was fueled by increasing dissatisfaction from the judiciary and the bar with the analytical and writing skills of law school graduates.² In addition, changes in the practice of law forced recent graduates to represent clients more quickly and without

1. See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1992) [hereinafter MACCRATE REPORT]. The MacCrate Report identified the following fundamental skills, each of which can be taught in a writing course:

“Problem Solving” skills:

- 1.1 Identifying and Diagnosing the Problem;
- 1.2 Generating Alternative Solutions and Strategies;
- 1.3 Developing a Plan of Action;
- 1.4 Implementing the Plan;
- 1.5 Keeping the Planning Process Open to New Information and New Ideas.

“Legal Analysis and Reasoning” skills:

- 2.1 Identifying and Formulating Legal Issues;
- 2.2 Formulating Relevant Legal Theories;
- 2.3 Elaborating Legal Theory;
- 2.4 Evaluating Legal Theory;
- 2.5 Criticizing and Synthesizing Legal Argumentation.

“Legal Research” skills:

- 3.1 Knowledge of the nature of legal rules and institutions;
- 3.2 Knowledge of and ability to use the most fundamental tools of legal research;
- 3.3 Understanding of the process of devising and implementing a coherent and effective research design.

“Communication” skills:

- 5.1 Assessing the Perspective of the Recipient of the Communication;
- 5.2 Using Effective Methods of Communication.

The Report also identified “Professional Self-Development” as a “Fundamental Professional Value,” which includes the following:

- 4.1 Seeking Out and Taking Advantage of Opportunities to Increase His or Her Knowledge and Improve His or Her Skills. *Id.* at 141.

2. See, e.g., Joan S. Howland & Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. LEGAL EDUC. 381 (1990); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201 (1996); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381 (1997).

substantial post-law school training. These facts, combined with the increasingly competitive job market, caused both future employers and current law students to demand more writing training.³

However, these are difficult times for many law schools. In the current climate of shrinking enrollments⁴ and reduced giving,⁵ it is unlikely that large sums of money and unlimited energy will be available for devotion to upperclass writing programs. While many law schools have committed resources to the development and teaching of the first-year writing curriculum, most schools seem to have ignored the need for systematic writing training in the upper-level curriculum. It is unlikely that this emphasis will change in these difficult times, and it seems inescapable that many law schools simply will have to make more out of what they currently offer.

A survey conducted as part of this project reveals that law schools generally require their students to have an upperclass writing experience taught or supervised by non-writing tenured or tenure-track faculty.⁶ These teachers currently bear the responsibility for assigning, supervising, reviewing, and evaluating most of the writing by upperclass students, either through substantive seminars or independent study projects.⁷ In almost all schools there is no major

3. See Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203 (1995) (analyzing the need for advanced legal writing courses).

4. See, e.g., Matthew Goldstein, *Applications Down 13% at Local Schools*, N.Y. L.J., Mar. 10, 1997, at 1 col. 3.

5. Lisa Benavides, *Corporate Donors Offer Higher Education Less but Want More*, B. BUS. J., Nov. 1, 1996, at 1 (businesses giving less to higher education); Andrew Blum, *Firms Give, But Carefully, Bad Times Affect Charitable Donations by Lawyers*, NAT'L L.J., Sept. 16, 1991, at 1 (reduced charitable giving by law firms).

6. "Non-writing faculty" is meant to refer to law school teachers who have not had formal experience or training in teaching writing and analysis and who do not teach writing and analysis except in the context of teaching substantive law.

7. This Article is based on several assumptions.

1. *Most schools do (and should) offer their students an upperclass writing opportunity under the supervision of a faculty member.* However, in most schools there is no programmatic curriculum, no teacher training, and little institutional support.
2. *Politics and reality.* In their hearts, many non-writing faculty teaching seminars do not really want to teach writing. Writing instruction, despite its strides in status, is still stereotyped as labor-intensive and non-intellectual. Certainly, in the name of academic freedom, non-writing teachers do not want to be told how to do such teaching or to take what they consider valuable time away from substantive law to teach students how to write.
3. *Faculty workload inequities and the allure of seminar courses.* There are workload inequities among law school professors. Some professors continuously teach large classes that require preparation of an examination and a major time commitment for grading. Other professors teach smaller classes or seminars that are satisfied by a term paper and require a substantially smaller

curricular planning, systematic instruction, faculty training, or institutional support for upperclass writing.

II. A STATEMENT OF GOALS AND A SUMMARY OF PROPOSALS

From the administration and faculty perspective, the goal of this article is to offer ways in which the professors teaching upperclass writing can participate in a uniform and high-quality writing experience that is financially manageable and politically acceptable. Broadly stated, the goals of the writing program would be (1) to improve student skills in legal analysis, legal problem-solving, and legal communication; (2) to make students more self-directed learners;⁸ (3) to teach students to reflect on and learn from their own professional experience;⁹ and (4) to improve students' ability to benefit from and give effective feedback and critique.¹⁰

time commitment for grading. Generally, law faculty like to teach seminars because such teaching (1) allows them to focus on an area of their specialty; (2) generally involves fewer students; (3) involves students who self-select for participation in the course; and (4) involves less time, less grading, less class preparation, and less non-intellectual effort (e.g., classroom control).

4. *Legal Writing Absolutism.* Legal writing experts decry the delegation of writing teaching to professors without expertise in the area and the back-seat status writing takes in a substantive seminar intended to satisfy an upperclass writing requirement.

5. *Unavailability of Funds.* In many law schools, it is unlikely that large sums of additional funds will be devoted to development of upperclass writing programs in the near or longer term. In the long term, writing may well be integrated into many substantive courses. In the short term, specialized writing courses may proliferate. Regardless of these positive developments, however, to give upperclass students a writing experience many law schools will depend on so-called paper courses or seminars where students will be required to write, but where little teaching about writing actually takes place.

6. *Experience of the seminar professor.* Generally, seminar professors have experience in drafting, writing persuasive legal documents, law review articles, or other legal scholarship. That is, seminar professors have experience in the kind of legal scholarship they are demanding of their students.

8. See GUIDEPOSTS TO SELF-DIRECTED LEARNING (Gary J. Confessore & Sharon J. Confessore eds., 1992) (summarizing 12 of the most widely respected pieces on self-directed learning and referencing other publications).

9. MACCRATE REPORT, *supra* note 1, at 218-19 (describing the fundamental professional value as "making use of the process of reflecting upon and learning from experience, which entails: 4.1(a)(i) [c]ritically assessing one's own performance . . ." and 4.1(a)(ii) "[i]dentifying practices that will make it possible to replicate effective aspects of the performance in the future and/or guard against repetition of ineffective ones . . ."). See generally DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER (1983).

10. See Michael Meltsner et al., *The Bike Tour Leader's Dilemma: Talking About Supervision*, 13 VT. L. REV. 399, 425-44 (Winter 1989) (noting the characteristics of effective

In brief, we propose a syllabus for the writing component of an upperclass writing experience that includes some or all of the following:

1. A required writing text;
2. The use of checklists;
3. An initial student exercise geared toward self-diagnosis, self-editing, and goal setting;
4. Faculty supervision of topic selection;
5. Faculty involvement in the pre-writing process through review of a fully-flushed out, full-sentence outline together with supporting authority;
6. Submission and review of an early first draft;
7. A peer review exercise; and
8. Revision of the first draft and submission of a final product.

We hope that teachers of upperclass writing will adopt this syllabus in full. The syllabus is designed to maximize student learning without adding appreciably to faculty workload. Hopefully, professors who cannot complete the full syllabus will pick and choose those parts that make sense, or will be inspired by our discussion to develop new techniques on their own. We suggest ways to offer assistance to the faculty through a colloquium devoted to teaching about writing and the writing process. Finally, we offer suggestions for evaluating whether an upperclass writing program is effective.

III. THE SURVEY AND SURVEY RESULTS

As noted above, the goal of this Article is to enhance the level of learning about analysis and writing that takes place within the prevailing structure of upperclass writing programs. To accomplish this, the first step was to determine what law schools are currently doing in the area of upperclass writing. Thus, in the fall of 1995, a questionnaire was distributed to all Association of American Law School members seeking various information about whether they had an upperclass writing requirement, the nature of their upperclass writing requirement, and the options available for satisfying the requirement. Information was also sought about which faculty were responsible for teaching or supervising the upperclass writing program and the experience and training of those faculty in the area of teaching writing. Finally, information was requested about whether there was any standardization or coordination in the

supervision and discussing the important roles of both the supervisor and supervisee in making the process effective). Indeed, many in-house clinical and externship programs require students to learn this skill. *See, e.g.*, materials for preparation of supervisory session, John Jay Legal Services, Inc., Pace University School of Law (available from the author).

upperclass writing program, i.e., whether there was a coordinator of the program, a required text, uniform course components, or uniform feedback materials.¹¹

One hundred and twenty-five responses were received.¹² As the tables below indicate, 118 schools report having an upperclass writing requirement and seven report that they did not. Almost all of the schools having an upperclass writing requirement rely heavily on non-writing teachers to satisfy their upperclass writing requirements, either through seminars or independent study projects. In most schools, however, these professors are not expected to have training or experience in teaching writing, and there is little support or training given to them.

Very few schools — only 12 — have a required text and only 16 have any sort of standard materials for use by the faculty. However, a large number of schools require supervision of topic selection, and a substantial number of schools — over one-third — require submission of an outline. Almost the same number require submission of one draft and a final product. Approximately one-fourth of the schools require individual conferences before drafting, whereas close to one-third require individual conferences after submission of a draft. Just over one-quarter of the responding schools have a coordinator for the upperclass writing program.

11. A copy of the questionnaire is available from the author.

12. A list of responding schools is available from the author.

SURVEY ON UPPERCLASS WRITING PROGRAMS

TABLE I – The Upperclass Requirement	Raw #	Percent
1. Does your school have an upperclass writing requirement?		
Yes	118	
No	7	
2. What is the requirement?		
A. Number of credits required? ¹³		
1	3	2.54
1-2	1	.85
2	38	32.20
2-3	8	6.78
2-5	2	1.70
3	16	13.56
4	6	5.08
5	4	3.39
6	1	.85
B. Number of courses required? ¹⁴		
1	37	31.36
2	10	8.50
3	2	1.70
C. Number of projects required? ¹⁵		
1	24	20.34
2	7	5.93
3 or more	3	2.54

13. Some schools state the upperclass writing requirement in terms of the number of required credits.

14. Some schools state the requirement in terms of the number of courses required.

15. Some schools state the requirement in terms of the number of projects required.

TABLE I – The Upperclass Requirement (continued)	Raw #	Percent
3. How is the requirement satisfied?		
Specific Writing Courses	33	27.97
Menu of Substantive Courses	104	88.14
Independent Study	73	61.86
Moot Court Competitions	34	28.81
Student Supervised Law Reviews & Journals	71	60.17
Clinical Courses	19	16.10
Trial Advocacy Courses	6	5.08
Trial Advocacy Competitions	5	4.24
4. What type of writing satisfies the requirement?		
Law Review-Type	102	86.44
Appellate Brief	49	41.52
Trial-Level Advocacy-Type Document	22	18.64
Pleadings	13	11.01
Empirical Research	12	10.16
Other:		
Legal Research	5	4.24
Client Letters & Transactional Drafting	5	4.24
Client letters	2	1.70
Professor's Discretion	4	3.39
5. Is there a page requirement?		
Yes	59	50
No	59	50
If yes, what is the requirement?		
10+	4	3.39
20+	19	16.10
25+	15	12.71
30+	16	13.56
40+	3	2.54
Other	2	1.59

TABLE II – Faculty and Coordinator	Raw #	Percent
1. What is the status of the faculty who teach the courses that satisfy the upperclass writing requirement?		
Tenured	107	90.67
Tenure-Track	108	91.52
Legal Writing	32	27.12
Adjuncts	57	48.31
Clinical	27	22.88
Emeritus	1	.85
Visitors	1	.85
2. Are the faculty expected to have any experience or training in teaching writing?		
Experience	13	11.02
Training	10	8.47
3. Are the faculty given any formal training in teaching writing?		
Yes ¹⁶	9	7.63
No	109	92.37
4. Is there a coordinator for the upperclass writing program, and if so, what is the coordinator's status?		
Yes	32	27.12
No	86	72.88
Tenured	7	5.93
Tenure-Track	5	4.24
Contract	5	4.24
Administrator	10	8.47
Combined Status	5	4.24

16. The schools most frequently reported having a training session or workshop at the beginning of the year.

TABLE III – Course Components	Raw #	Percent
1. Is a text required?		
Yes	12	10.17
No	104	88.14
Required ¹⁷	12	10.17
Recommended ¹⁸	2	1.69
2. Are there standard course components for the faculty teaching upperclass writing?		
No Standard Requirements	29	24.58
Supervise Topic Selection	69 ¹⁹	58.47
Submission of Proposed Bibliography	20 ²⁰	16.94
Submission of Outline	44 ²¹	37.29
Submission of Component Parts	4 ²²	3.39
Submission of 1 Draft & Final	46 ²³	38.98
Submission of 2 Drafts & Final	7	5.93

17. Texts required by more than one school were ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS* (1995), SUSAN L. BRODY ET AL., *LEGAL DRAFTING* (1994), ALAN L. DWORSKY, *THE LITTLE BOOK ON ORAL ARGUMENT* (1992), and MICHAEL R. FONTHAM, *WRITTEN AND ORAL ADVOCACY* (1985), each of which was required by two schools. Other required texts included BRADLEY G. CLARY, *PRIMER ON THE ANALYSIS & PRESENTATION OF LEGAL ARGUMENT* (1992), BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS* (1988), GIRVAN PECK, *WRITING PERSUASIVE BRIEFS* (1984), and ARISTOTLE ON RHETORIC (George A. Kennedy trans., Oxford Univ. Press 1991).

18. Both schools recommended ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS* (1995).

19. Four additional schools reported that use of this component varied among the professors teaching upperclass writing.

20. Seven additional schools reported that use of this component varied among the professors teaching upperclass writing.

21. Eight additional schools reported that use of this component varied among the professors teaching upperclass writing.

22. Nine additional schools reported that use of this component varied among the professors teaching upperclass writing.

23. Ten additional schools reported that use of this component varied among the professors teaching upperclass writing.

TABLE III – Course Components (continued)	Raw #	Percent
Submission of Final Only	8 ²⁴	6.78
Peer Review Exercise	2 ²⁵	1.69
Self-Critique Exercise	2 ²⁶	1.69
Individual Conferences:		
Pre-Drafting	28 ²⁷	23.73
After Submission of Draft	38 ²⁸	32.20
Pre-Draft & after Submission of Draft	27	22.88
Pre-Draft & after Submission of Final	9	7.63
After Submission of Draft & after Submission of Final	8	6.78
After Submission of Final	9 ²⁹	7.63
Pre-Draft, after Submission of Draft & after Submission of Final	8	6.78

24. Seven additional schools reported that use of this component varied among the professors teaching upperclass writing.

25. Eight additional schools reported that use of this component varied among the professors teaching upperclass writing.

26. Six additional schools reported that use of this component varied among the professors teaching upperclass writing.

27. Eight additional schools reported that use of this component varied among the professors teaching upperclass writing.

28. Eight additional schools reported that use of this component varied among the professors teaching upperclass writing.

29. Seven additional schools reported that use of this component varied among the professors teaching upperclass writing.

TABLE III – Course Components (continued)	Raw #	Percent
3. Are there standard materials for use by the faculty? ³⁰		
Yes	16	13.56
No	102	86.44
To give guidance to students	13	11.02
To give feedback	7	5.93
To evaluate student work	10	8.47
All three used	6	5.08

30. We have been unable to review all of these materials. Some that we have reviewed have consisted merely of the description of the upperclass writing requirement contained in the school's catalogue.

IV. THE PROPOSALS

A. *Suggestions for Augmenting the Upperclass Writing Experience*

1. A Required Text

A simple but effective way to improve students' writing is to require that every student undertaking an upperclass writing project purchase and use a writing text or manual in addition to whatever substantive text is required.³¹ Such a text will place the writing component of the course on a co-equal basis with the substantive component, and will be an important teaching tool that the students can use independently, without requiring substantial teaching time. A text should be selected based on the following criteria:

1. The text should not be a first-year writing text. The goal of the upper-class writing requirement is to refine the skills learned in the first year of law school, making the students' writing more sophisticated. By assigning a higher level text faculty can enhance learning by communicating high expectations: the students are now more sophisticated writers and thinkers and that something more is required of them.³²

2. The text should be short and focused on the kind of writing the students will be doing. Our survey reveals that most upperclass students are doing one of two types of writing: law-review-type writing or persuasive writing (appellate briefs).³³ The text should cover the appropriate type of writing and its abbreviated length should reflect that it is simply building on the skills learned in the first year.

3. The text should elaborate on frequently recurring problems of grammar and style that many upperclass students continue to make. In the second and

31. For students writing briefs or other persuasive documents, a suggested manual is available from the author. This manual, which was written by the author, has been used successfully in many teaching contexts: in large and small upperclass writing classes, as a moot court guide, and in clinics. For students doing scholarly writing (e.g., research papers, case notes, and comments), we recommend ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS* (1995) [hereinafter FAJANS & FALK, *SCHOLARLY WRITING*]. This text is the one most frequently required or recommended by law schools. It is clearly and efficiently written, and it satisfies all four criteria discussed here. Moreover, the authors have written an invaluable article that is, in substance, a teacher's manual to the text, Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342 (1996) [hereinafter Fajans & Falk, *Comments*].

32. See Fajans & Falk, *Comments*, *supra* note 31, at 344; 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, 352 (1990).

33. See *supra* Table I.

third year of law school, the student should be responsible for correcting grammar and style errors once and for all.

4. The text should contain at least one example of the kind of writing the students will be doing. Students need a model to work from and need to know what good writing is supposed to look like.³⁴

5. The text should demystify the writing process. Students need to know that the process of writing, like other lawyering skills, is not magic or innate, that it is not entirely mysterious, but rather can be articulated, understood, and mastered.³⁵

2. The Use of Checklists

Another way to supplement the upperclass writing experience is to distribute and use checklists geared toward both writing style and the kind of writing the students will be doing, whether it be scholarly, law-review type writing or an appellate brief. Checklists developed by the professor can be distributed to the students to use as they write; the student can give attention to all of the skills involved in good writing. Checklists can also be used by the professor —

34. See Fajans & Falk, *Comments, supra* note 31, at 349; FAJANS & FALK, *SCHOLARLY WRITING, supra* note 31, at 155; see generally Nancy Millich, *Building Blocks of Analysis: Using Simple "Sesame Street Skills" and Sophisticated Educational Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 SANTA CLARA L. REV. 1127 (1994). In addition, professors would be well advised to select up to five examples of good legal writing of the type assigned to the students and to place those examples on library reserve. These can be made available by the author.

35. Over the past twenty years, a new approach to legal writing has emerged called "The New Legal Rhetoric." Unlike its predecessor, "The Current-Traditional Paradigm," which many have concluded proved unsuccessful in teaching law students to write, this new approach focuses on the composing process, rather than on the final written product.

The "New Rhetoric" has five principal theses:

1. Writing is a process; the process is recursive rather than linear; pre-writing, writing, and revision are activities that overlap and intertwine;
2. Writing is rhetorically based; audience, purpose, and occasion (the components of the rhetorical situation) figure prominently in the assignment of writing tasks;
3. The written product is evaluated by how well it fulfills the writer's intention and meets the audience's needs;
4. Writing is a disciplined creative activity that can be analyzed and described; writing can be taught;
5. The teaching of writing is fruitfully informed by linguistic research and research into the composing process.

Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1094-97 (1986), adapted from Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76 (1982). See also Millich, *supra* note 34, at 1127.

instead of or in addition to students' use — as a method of feedback and/or as a method of grading.³⁶

A comprehensive checklist is an effective learning tool and an extremely helpful writing tool. As a learning tool it communicates that the writing process is not a mysterious process at which only the talented can succeed. Rather than give a counterproductive impression, a checklist communicates that the process and elements of good writing can be articulated — indeed, listed — and learned.³⁷ It also fully informs the students of what is expected of them from the outset of the course, thus legitimizing the evaluation process. The checklist, in conjunction with the short required text, communicate to the students that they are at a more sophisticated level than they were in the first year of law school and thus do not need extensive textual instruction.³⁸ Finally, the checklist is a short, easy to use efficient tool that can be kept at the writer's side for constant reference.

A checklist for appellate briefs should highlight the features of a tightly written, persuasively focused statement of facts and an argument that is clearly, logically and persuasively organized, based on the effective use of authority, and grounded in cohesive and unified paragraphs. A checklist for scholarly writing should demonstrate the requirements for each of the sections of a traditional law review article (introduction, background, analysis, conclusion) offering the student a quick criteria list for clear, well-organized, and thorough presentation of those sections. A checklist for style should list the rules of grammar, usage, and style that are most important to legal writing and highlight the most common errors found in student work.³⁹

36. Copies of suggested checklists are available from the author. The Checklist for Persuasive Writing includes sections on overall appearance, preliminary sections, statement of facts, the argument, and the conclusion. The Checklist for Scholarly Writing includes sections on topic selection, the introduction, the background section, statement of the case, analysis, and conclusion. Each of the sections in these checklists are broken down into specific requirements. For example, the argument section of the Persuasive Writing Checklist includes subsections on the skills required for strategic selection of points, grouping claims, organization of points, logical internal structure, persuasive structure, creating subdivisions, persuasive paragraphing, and proper use of authority.

For the purposes of this Article, and for the purpose of early distribution to students, these checklists are intended to be comprehensive. They can be used as they are, addressed to brief writing or scholarly writing; the checklists cover all of the skills involved in writing an effective brief or article. However, if the professor chooses to discuss individual parts of the brief or article or otherwise wants to address different parts or different skills at separate times, the checklists may be divided and used accordingly.

37. Millich, *supra* note 34, at 1132-35; *see generally* Cox & Ray, *supra* note 32.

38. *See supra* Table I.

39. Suggested checklists are available from the author.

3. The Diagnostic Exercise

An effective way to begin the semester with little additional faculty effort is to require the students to complete a self-diagnosis, goal-setting exercise.⁴⁰ This could be the first written exercise of the semester.

As one possible exercise, each student could review, edit, and evaluate his or her last piece of legal writing, i.e., a first-year brief, a memorandum or brief drafted over the summer, or a competitive submission for membership on the law review. The student should be given the diagnostic checklist as well as the feedback checklist the professor will use to evaluate the student's writing. The student should edit and analyze his or her own writing outside of class, ideally before the first class.⁴¹ A copy of the student's writing and checklist should be retained by the student with the originals submitted to the professor for comment.⁴²

From the student's perspective this initial diagnosis, identifying the various tasks the student will be asked to perform, and early formation of a "learning agenda" serves several important teaching purposes without requiring significant teacher time.⁴³ It orients the student to thinking about the writing process, it

40. Copies of two types of such exercises are available from the author. One is a simple diagnostic exercise and the other is a more advanced diagnostic exercise. Professors could choose one or the other depending on whether the course is offered to second or to third year students and depending on the anticipated degree of the students' sophistication.

41. An example of a student's product would be an edited draft, and an evaluation on a scale of from 1-5 of strengths and weaknesses in the skills listed on the diagnosis. A student's statement of learning goals should be as specific as possible, and ideally would be stated in terms of the skills identified in the checklist, for example:

I want to focus on learning how to emphasize essential facts and de-emphasize others, synthesize case law and articulate legal principles, and I need help in organizing my thoughts.

Even if a student is not capable of such a specific diagnosis, the student should be able to set his or her own learning goals. A more typical general statement might be:

1. I have a hard time focusing my discussion of facts on the issues I'll be analyzing. I don't know how to do that without leaving anything out.
2. I'd also like to work on figuring out what to do when there are several cases that seem to go in different directions. How do you support your position and still be honest?
3. I have a really hard time organizing my thoughts.

Faculty could respond to such a statement by articulating it in terms of the skills listed on the checklist.

42. This pre-seminar writing piece will also become part of the evaluation of the success of the course. *See infra* Part IV.C.

There would appear to be little to no value in grading the quality of performance of this exercise since there really are no right or wrong answers. However, as discussed *infra* Part IV.A.6.c., the professor could allocate a small percentage of the final course grade to an overall evaluation of the diligence and completeness of the student's performance on this and other small writing exercises.

43. This is a teaching method that has been recognized to enhance the learning process.

forces the student to evaluate his or her own strengths and weaknesses, and it forces the student to take responsibility for deciding what he or she should learn rather than passively accepting what the professor decides to offer. It similarly enables the student to focus his or her efforts and to judge what progress he or she has made by the end of the semester.⁴⁴ From the professor's perspective this exercise is a quick way to make the importance of writing clear from the outset, permit more focused and effective feedback, and enlist the student as jointly responsible for deciding what he or she will learn.⁴⁵

4. Topic Selection and Thesis Formulation

Many law schools currently require faculty supervision and approval of topic selection for all participants in the upperclass writing program.⁴⁶ Because topic selection and formulation of a thesis can be the most creative and difficult part of the writing process,⁴⁷ faculty supervision should be required.

Phelps, *supra* note 35, at 1100; see also Cox & Ray, *supra* note 32, at 359; Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653 (1993). Indeed, "learning agendas" have become an integral part of many clinical programs. See Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985); J. P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 68-72 (1996) (use of journals to help teach self-directed learning); learning agenda materials, John Jay Legal Services, Inc., Pace University School of Law (available from the author).

44. Another way to do this exercise and retain most of these benefits is to have each student review another student's last work product by exchanging them during the first class. From what they learn from this review the students could then evaluate their own strengths and weaknesses and set learning priorities. This variation on the exercise would have all the pedagogical benefits of the peer review exercise discussed *infra* Part IV.A.7. It would also minimize some of the obvious difficulties in being objective about one's own work.

However the exercise is conducted, the same type of diagnosis could be done at the end of the semester on the student's final product to evaluate each student's perception of the success of the course.

45. See sources cited *supra* note 43.

46. Sixty-nine of the 118 schools that reported having an upperclass writing requirement require faculty supervision of topic selection. *Supra* Table III.

47. Arriving at a thesis seems to present real problems to many students. Law students tend to be caught in the "tyranny of paraphrase." Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993). That is, they seem unable to read law critically and to go beyond the facts, reasoning, and holding expressed by the courts. Frequently students can do no more than agree with the majority for the reasons expressed in the majority opinion or disagree with the majority for the reasons stated by a dissent.

Scholarly Writing offers several helpful suggestions, which should be discussed by the professor. These include freewriting, keeping a reading journal, or adopting a problem-solving approach. "Freewriting" is the process of writing down "in a stream-of-consciousness mode" whatever comes to mind as you focus on a selected topic. It is uncensored writing for the writer alone." FAJANS & FALK, *SCHOLARLY WRITING*, *supra* note 31, at 30-31.

A "reading journal" is a written record of one's thoughts about what one is reading and one's reactions to the material. It is not simply note taking about the information one gets from reading.

Topic selection should be covered early, probably as part of the first class, but no later than the third class.⁴⁸ Some professors may wish to offer students a list of possible topics. Alternatively, teachers might find it helpful in the first class, or before the first class in a memo to all registered students, to draw students' attention to various sources for ideas (e.g., the student's own interests, newspapers, Westlaw's Highlights and Lexis's Hot Topics, BNA's specialized publications, weekly reporter services, etc.) and instruct them to begin the process of selecting an issue.⁴⁹

One of the hardest parts of scholarly writing is formulating a thesis. This usually involves reading existing authority critically by identifying what is missing, wrong, troublesome, administratively unfeasible, etc. about the current state of the law. For a variety of reasons, including lack of experience and confidence, or lack of a larger world-view, students find this extremely difficult.

As part of an early class discussion or initial memorandum on topic/thesis selection, the professor could alert students to the different types of law review articles,⁵⁰ which will arm them with an approach to an existing problem that

It is a record of one's thinking and feeling about what someone else has said. FAJANS & FALK, *SCHOLARLY WRITING*, *supra* note 31, at 28-30. *See also* Fajans & Falk, *Comments*, *supra* note 31, at 350-51; Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 *TEMP. L. REV.* 885, 894 (1991).

Adopting a "problem-solving approach" to a case is a method of analysis developed by Karl Llewellyn in which the reader imagines the case "as a problem to be solved" and uses the imagination to "recreate the litigation" and generate "every possible argument that could have been made by the parties." FAJANS & FALK, *SCHOLARLY WRITING*, *supra* note 31, at 21; Karl Llewellyn, *The Current Crisis in Legal Education*, 1 *J. LEGAL EDUC.* 211, 213 (1948). As noted, *supra* note 1, at 138, the MacCrate Report identified problem solving as an essential legal skill that should be learned in law school.

48. The importance of early topic selection has been noted by other writers. *See, e.g.*, Fajans & Falk, *Comments*, *supra* note 31, at 352.

49. *See generally* Fajans & Falk, *Comments*, *supra* note 31; *see also* Richard Delgado, *How to Write a Law Review Article*, 20 *U.S.F. L. REV.* 445, 446-47 (1986).

50. *See* Delgado, *supra* note 49, at 446-48. Professor Delgado identifies ten different types of law review articles:

1. The typical law review article "analyzes case law in an area that is confused."
2. The law reform article argues "that a legal rule or institution is not just incoherent, but bad"
3. The legislative note "analyzes proposed or recently enacted legislation."
4. The interdisciplinary article demonstrates "how insights from another field, such as psychology, economics, or sociology, can enable the law to deal better with some recurring problem."
5. The theory-fitting article "examines developments in an area of law and finds in them the seeds of a new legal theory or tort."
6. "Discussions of the legal profession, legal language, legal argument, or legal education form yet another category of law review writing"
7. "There are bookish, learned dialogues that continue a pre-existing debate"
8. There are articles that concentrate on legal history.

could help them develop a critical rather than simply an accepting approach. For example, a typical law review article might look for confusion, argue that a legal rule or institution is bad or impractical, demonstrate how insights from other fields can improve the law, or identify a new legal theory or tort.⁵¹

Professors could also devote some part of a class or student assignment to reading a legal opinion critically, providing the students with a list of questions to help them go beyond the language of the majority opinion and any dissent.⁵² Other techniques that can help students think independently and creatively to develop their own “take” on a subject include freewriting, keeping a reading journal, and adopting a problem-solving approach.⁵³ Each technique should be discussed at length in the students’ text.

5. Faculty Involvement in the Pre-writing Process

Proponents of The New Rhetoric⁵⁴ suggest that faculty intervention is needed during the early process of writing, before the first draft. The traditional paradigm of teaching writing – evaluative review of a reader-ready draft, then revision by the student into a final product – misses tremendous opportunities for teaching and learning. When initial feedback from teachers comes in the form of a post-mortem evaluative review of a graded draft it simply comes too late.⁵⁵ Substantial amounts of creative thinking and expression have already occurred; students have already committed themselves to what they will say and how they will say it. Creative revision is much more difficult at this late stage, and revision is likely to become merely the mechanical insertion of what the professor suggests.

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9. “Comparative law articles are often valuable [because] . . . it will sometimes happen that other legal systems treat a problem more effectively or humanely than does ours.”

10. “The final categories are the casenotes, which examine a recent decision, . . . and the empirical research article.”

51. *Id.*

52. Examples of such questions include: Has the majority accurately interpreted the precedent upon which it relied? Has the majority answered every step in the dissent? Can you identify an unstated motivation behind the majority’s outcome? Is there anything about the status of the parties that might have influenced the outcome, even if that reason was unstated? Does the court’s choice of language reveal an unstated political viewpoint? Are there any gaps in the reasoning of the majority or the dissent? Does placing the decision in its historical context (legally and/or socially) reveal anything about the decision-making process? Does the court’s definition of terms reveal anything about the decision-making process?

53. See Fajans & Falk, *Comments*, *supra* note 31, at 349-52. These skills are discussed below as part of the process of teaching students to read critically.

54. See Phelps, *supra* note 35, at 1094-97.

55. See Fajans & Falk, *Comments*, *supra* note 31, at 344; see also Kearney & Beazley, *supra* note 47, at 885; Phelps, *supra* note 35, at 1100.

There are many ways in which faculty can teach students during the pre-writing process. For example, faculty could (1) review a thesis statement and an extended outline; (2) review a thesis statement and research logs or research plans; (3) review a preliminary draft; (4) review a writing journal; or (5) any combination of the above.⁵⁶

a. Review of a thesis statement
and an outline

Once the student has chosen a thesis it can be checked by the professor for thoroughness, logic, and a solid basis in reality.⁵⁷ Further, our survey revealed that many schools require students to submit an initial outline. We urge faculty to take a new look at this traditional teaching tool before deciding to use it.

First, review of an outline necessarily occurs after the student has completed his or her critical reading of the relevant authorities, that is, after the student has completed research and formulated his or her ideas. For that reason, it should not be relied upon as the sole pre-drafting intervention.

Second, giving effective feedback on a student outline is extremely difficult and time-consuming. To do so, a professor must be able to determine how the article should be organized and be aware of all steps in the anticipated analysis or argument. Certainly, effective review of an outline requires the student to submit, and the professor to be familiar with, all relevant legal authorities. Without such review the outline may appear fine as it is, but what is missing may not be apparent. Moreover, unless the outline is written in full sentences the professor will be unable to give any meaningful feedback on the student's writing skills or on the logical and rhetorical connections between outline entries.

Finally, the danger of giving ineffective feedback despite a substantial time commitment is exacerbated by the reality of the writing process: problems with

56. It is also clear, however, that there are many types of writers and many different ways to approach the process of writing. Fajans & Falk, *Comments*, *supra* note 31, at 353 (succinct description of different types of writers). In addition, students have different learning styles: the student knows best both how he or she approaches the task of writing and the type of feedback that will be most meaningful. Thus, faculty may want to leave it up to each student to determine what type of feedback to seek. Giving the student the power to affect what the student will learn, so-called collaborative learning, has been recognized to enhance the learning process. See also Phelps, *supra* note 35, at 1100; Cox and Ray, *supra* note 32, at 359; Campbell, *supra* note 43, at 684-93. Also, and importantly, the skill of seeking assistance and preparing for and planning a feedback session are essential lawyering skills that are especially important to young attorneys. See Meltsner et al., *supra* note 10, at 439-41. Finally, the assumption of responsibility for his or her own learning will make the evaluative process seem fairer to the student.

57. The "basis in reality" test may be impossible for the student to formulate herself. For example, students proposing a change in police procedures may not understand that such a change could be administratively impossible to enforce.

an organizational scheme may not be revealed until the draft-writing stage, and even good organization can be obscured by bad writing.

The disadvantages of spending time reviewing an outline can be overcome if the student is encouraged to do the following: (1) "freewrite" a draft and/or use annotated research logs before making up the outline (neither of which would necessarily have to be submitted and reviewed);⁵⁸ (2) draft the outline in full sentences that will ultimately become the topic sentences of the article's paragraphs and demonstrate connections; and (3) submit all of the authorities to be relied upon with the outline.⁵⁹

This exercise can help the student in several extremely important ways that frequently are missed by the submission of a more skeletal outline. Even if not submitted for feedback, freewriting or annotating research logs should ensure that the student has engaged in the creative process of generating ideas and arguments, not merely retrieving or paraphrasing them.⁶⁰ Forcing the student to

58. See Fajans & Falk, *Comments*, *supra* note 48, at 351-52.

59. Fajans & Falk, *Comments*, *supra* note 31, at 353-54, presents a short example of a freewriting exercise and the kinds of topic sentence/outline entries that might evolve out of the freewritten draft. Another example is provided here. Suppose the student is writing a casenote or comment about a case involving the Sixth Amendment right to the effective assistance of counsel. The seminal case on that subject is *Strickland v. Washington*, 466 U.S. 668 (1984) in which the Supreme Court articulated a two-prong standard for establishing ineffective assistance of counsel: (1) deficient performance; and (2) prejudice. Part of the section of a freewritten draft that involves *Strickland* might read as follows:

The Court in *Strickland* seems to have departed from its typical analysis and required a showing of prejudice before it would find a constitutional violation. The right to counsel is different from other rights. But how? It's harder to define, I guess, what a good lawyer is. But does the constitution even guarantee a good lawyer? Why is the lawyer there in the first place? It's almost impossible to police effectiveness. Hey, the government doesn't really cause it, does it? So why penalize them. And the defendant has some say in what his lawyer does, doesn't he?

The student could try to create an outline of this section of the draft. The following are some possible outline entries:

In *Strickland*, the Supreme Court held that there could be no violation of the right to counsel without a showing of both deficient performance and prejudice. This was a departure from its typical bill-of-rights analysis.

The Court needs a showing of prejudice because good lawyering depends on the circumstances.

The constitutional right to effective counsel could be interpreted not to mean a right to a good lawyer.

The Court's analysis rests in part on the fact that courts cannot police the defendants relationship with his attorney's quality of representation.

The government has nothing to do with whether a defendant's lawyer is ineffective.

60. "Freewriting" a draft consists of putting one's thoughts, reactions, and ideas down on paper (e.g., any observations about the importance of certain case law, any thoughts about the social implications of the issues, any unanswered questions, any unpursued or abandoned lines of reasoning or argument, any problems understanding the law, any personal reactions). See FAJANS & FALK, *SCHOLARLY WRITING*, *supra* note 31, at 30-33 (discussing the topic at length).

outline in full sentences requires the student to formulate topic sentences that demonstrate a logical progression of ideas and their relationships, accurately reflect the content of the paragraph, and (with respect to analysis) extract legal principles rather than just describing individual cases or holdings. This permits faculty input on these essential skills as well as on the writer's style at an early stage in the writing process.⁶¹ Submission of the authorities allows the professor to see how the analysis has been organized by the courts and helps the professor comment on whether the authority supports the student's topic sentences.

b. Review of a thesis statement and research
logs/journals

As noted above, formulation of a thesis is an extremely difficult task that should be the subject of faculty feedback. Under this option, the student may seek assistance on his or her course of research by submitting a research log or a research journal that documents the student's impressions and questions.

Submission of a research log or journal permits the student to articulate and reveal the problem-solving steps taken to complete the research task and the obstacles encountered, such as questions raised during the critical reading of authority.⁶² In this way, the professor can give feedback not only on the

61. In my experience, two of the main problems with student writing are (1) the students' inability to formulate topic sentences that signal a new discussion, demonstrate a connection to the prior paragraphs, and articulate rules based on authority; and (2) the students' related inability to construct paragraphs that focus solely on and prove the topic sentence. Requiring that these topic sentences appear in the outline for feedback would be a great help to most students and make the faculty's review of the draft substantially easier.

62. A typical entry in a student research log might be as follows:

Date: May 31, 1997

Resource/Case Name: *Strickland v. Washington*

Shepardized/Update: too many entries

Summary of Finding: deficient perf. plus prej.

Reflections/Questions: Why is there no violation here without prejudice. Not the same in analysis of other rights? Which rights? Right to present a defense? Is it like due process or different? Is whether the defendant is guilty the point? Is Marshall right?

A similar entry in a research log might read as follows:

Strickland seems to be an unusual case because the court held that there could be no constitutional violation without prejudice while in other cases the court holds that there is a constitutional violation whether or not there is prejudice and that prejudice is a separate, later question. Is that right? Maybe I should look at the framer's intent in drafting the Sixth Amendment. I wonder if there are other rights that have the same sort of analysis? Maybe it's analogous to the right to present a defense? What's the reason — how have other courts dealt with that aspect of the analysis — what's the court worried about?

These documents present several possibilities for feedback: the student needs to pursue how *Strickland* has been interpreted by the courts; the student should be encouraged to explore other areas where prejudice is part of the question of whether there has been a constitutional violation (*Brady* violations) and to examine the nature of the right to counsel; that the student has not been

thoroughness and accuracy of the research, but also on the student's critical reading, problem-solving skills, and analytical abilities.⁶³ The professor may be able to spot any gaps or inaccuracies in the analytical steps the student is pursuing, or misunderstandings of the law, or inability to get beneath the language of the text.

Feedback on research logs could include questions designed to clarify the student's choices and interpretations, suggestions for additional avenues of research, questions raised in the reader's mind by the questions the student has posed, and, if necessary, advice on more effective ways to use the resources that have been chosen.

c. Review of a preliminary "zero" draft⁶⁴

As noted above, many writers begin the process of writing by freewriting. The main advantages of freewriting are that it (1) permits early intervention in the process; (2) encourages the broadest range of creative input from the student; and (3) permits the professor to give some feedback on the student's skill of expression. Its main disadvantage is that it may come early in the process, before many of the obstacles or analytical problems present themselves.⁶⁵

The problem of giving premature feedback can be met effectively, in part, by requiring the student to re-draft the zero draft before submitting it, so that the discussion is more focused and developed, or, as suggested above, to draft an outline from the zero draft and to submit both for review.

able to analogize correctly and has therefore missed alternative arguments; that the student has misinterpreted the cases or the problem and pursued an irrelevant line of authority. The process of having the student reflect on the case has broadened the student's ability to creatively develop analysis.

63. See Ogilvy, *supra* note 43, at 73-74 (the value of journals in teaching problem-solving, with a discussion about research journals as problem-solving devices); THOMAS A. ANGELO & K. PATRICIA CROSS, CLASSROOM ASSESSMENT TECHNIQUES (2d ed. 1993) [hereinafter CAT] 222-25 (CAT #21, "Documented Problem Solutions"); *Id.* at 263-66 (CAT #29, "Double Entry Journals"). Both CAT #21 and #29 closely resemble the annotated research log. CAT at 222-25, 263-66. Moreover, as noted, *supra* note 1, at 15-21, the MacCrate Report identified problem-solving as an essential lawyering skill, and broke it down into five discrete skills: "identifying and diagnosing the problem," "generating alternative solutions and strategies," "developing a plan of action," "implementing the plan," and "keeping the planning process open to new information and new ideas." These skills can be taught quite effectively through feedback on student research and through feedback on student writing.

64. Fajans & Falk, *Comments*, *supra* note 31, at 353. A "zero" draft can be used by students who need to write about a topic before they can outline it. It is essentially an extended freewrite. *Id.*

65. This would not be a problem if the type of predrafting feedback suggested above were planned. If there is no such plan, however, the professor should attempt to anticipate the development of problems out of the student's responses, and substantial feedback should be given.

d. Review of a writing journal

A journal is a “regular, written communication from a student to a teacher, related to the course of study, that is authored by the student at the request of the teacher and to which the teacher may respond in writing.”⁶⁶ The advantage of the journal in a seminar offering is that it deepens the level of involvement with the substantive subject matter, the level of involvement in the writing process, and the degree of intimacy between the professor and student. However, because it is so preliminary, it may not allow for sufficient feedback.

e. Recommendation

Based on the discussion above, it seems most effective for the faculty’s early involvement in the writing process to take the form of a review of a fully flushed out, full sentence outline including the student’s supporting authority. Students should be urged to freewrite a draft and to compose the outline based on that draft, keeping annotated research logs even if the logs are not submitted for

66. Ogilvy, *supra* note 43, at 56. An example of a journal entry follows:
I wanted to briefly run through the order which things happen/occur in a lawsuit. I have never participated in a suit from start to finish, so I want to see if I have a clue (This was just a random thought I had in class the other day when I probably should have been paying attention). A suit commences with the filing of a complaint, okay I know this isn't earth shattering but I have to start somewhere. This is usually followed with a form of notification, usually a summons, to the other party in the suit, that says yes you are being sued. The other party responds to this summons, but not always, and can either make its own motion and/or answer. For example, a 12(b)(6) motion to dismiss for failure to state a claim may be filed by the opposing party. Assuming that all motions have been filed and decided and the case has not been dismissed, then the attorneys for both sides begin the discovery process. This process involves finding the issues the other side has for its argument and against your argument in an effort to prepare for a speedy, efficient trial. Assuming the case is not settled or dismissed, then the case goes to trial. Here the plaintiff presents his case in chief, followed by the defendant's case, which is usually followed by rebuttal by the plaintiff. From here the case either goes to the jury to decide or the judge(s) decide the case. Upon reaching a verdict the loser in most trial level cases can appeal to a higher court and things go on from there. My idea in doing this brief sketch, and I realize it is very brief, is to go back and add to it, breaking each section down in an effort to help me prepare for the final exam. I realize the intricacy of the FRCP and how important it is to see how they work and interrelate but I also hope this type of broad overview will act as a skeleton. I would also welcome any suggestions.

Id. at 67-68 (footnote omitted).

Ogilvy notes:

By providing students with a tool by which they can interact, in a concrete way, with the products and processes of their learning, the journal serves a valuable purpose, but it has other goals and benefits as well. One of these is to ensure that this interaction continues after the student leaves the class and the school.

Id. at 68.

feedback.⁶⁷ Review of an outline is already required at many schools.⁶⁸ Preparation of the kind of outline suggested here will require substantial creative and independent work by the student and can maximize the amount of feedback a professor can give with a realistic amount of time and effort.⁶⁹ We recommend the outline be submitted by about the fifth week of the semester.

It is important to note that feedback on the outline should be largely “exploratory” and not evaluative.⁷⁰ At this stage, four important goals exist: (1) to ensure thoroughness by raising questions (directed at gaps in research or analysis, inconsistencies, or organizational problems); (2) to make sure the thesis is sound; (3) to warn the student if the student’s work is not progressing quickly enough to be completed before the end of the semester; and (4) to encourage continuing enthusiasm and effort. If possible, review of the outline should take place at an individual conference.⁷¹ Consider this time well spent. Simply talking with a student at this stage about the choices made can lead to a student epiphany, for example, through the revelation of leads the student has prematurely rejected, or by exposing gaps in the student’s understanding. Moreover, discussion at this stage almost invariably helps the student organize his or her research findings into a more coherent analysis.⁷² If a conference is held, students should be informed in advance that they must prepare in order to get the kind of feedback they think they need.⁷³

67. See discussions *supra* Parts IV.A.5.a-b.

68. See *supra* Table III.

69. Of course, in an ideal upperclass writing course the students would have the opportunity to seek feedback on a journal, a zero draft, an outline, and a research log, even before the first draft is submitted for review. Where, as in most schools, a substantive course is the vehicle for teaching writing, this level of faculty involvement is not realistically possible.

70. Fajans & Falk, *Comments, supra* note 31, at 349. If the professor wants to grade the student’s pre-writing submission, the submission should probably not be given a significant amount of weight in proportion to the final product.

71. Twenty-eight schools already require a pre-drafting conference. See *supra* Table III.

72. What I call “getting the ears involved” has been severely overlooked as a tool for legal writers. At this early stage in the writing process, hearing one’s self talk may assist in exposing the lack of connection between thoughts. At the writing stage, hearing one’s own tongue trip over itself in attempting to articulate a sentence will expose difficulties in expression. Reading a draft of a brief out loud to one’s self is an excellent way to detect run-on thoughts, sentence fragments, dull writing, excess words, redundancies, and lack of elegance that frequently are difficult to detect in one’s own writing.

73. Also, and importantly, the skill of seeking effective supervision and preparing for and planning a feedback session are essential lawyering skills that are especially important to young attorneys. See MACCRATE REPORT, *supra* note 1, at 218-19.

6. The Draft

Many schools currently require submission and revision of one draft before submission of a final product.⁷⁴

a. Timing

The more difficult pedagogical question is one of timing: at what stage in the process should submission of a draft be required? Should professors let students write and revise extensively on their own, requiring a fully “reader-friendly”⁷⁵ or reader-ready piece at, for instance, the ten-week point of the semester and thereby, leaving little time for revision of the draft? Or should the draft be required earlier, at about the eighth week? If it is required early it may not be taken as seriously by the student and may require such substantial changes before the final draft that the student may be overwhelmed. Ultimately this question must be answered in light of the goals of the individual professor.⁷⁶ Whatever the decision, the professor’s expectations of the draft’s degree of finality should be communicated clearly to the students (as should the amount of weight, if any, the draft will be given in arriving at the student’s final grade).⁷⁷

b. Feedback/Critique

Feedback on a draft should respond to “breadth, depth, development, originality, credibility,”⁷⁸ and skill of expression. It should focus on whether the

74. Forty-six schools require submission of a draft and final; seven schools require submission of two drafts and a final; eight schools require submission of a final product only. See *supra* Table III. The importance of submitting and revising a draft has been well established. See, e.g., Karl Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 373 (1945) (in teaching students to write “it is the *redoing after critique* which is the crux of the learning”). See also Mary Ellen Gale, *Legal Writing, The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 332-33 n.130 (1980); Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program – The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 395-96 (1959).

75. Fajans & Falk, *Comments*, *supra* note 31, at 364.

76. It probably makes sense to have submission of the draft come after the student has pre-written, written, and revised the writing, but before the final revising and polishing stages. See FAJANS & FALK, *SCHOLARLY WRITING*, *supra* note 31, chapters 4-5 (discussing stages). For example, if the professor’s initial feedback occurs about four weeks into the semester, the draft should be due no later than the eighth or ninth week. That way the students will not panic at the need to turn in a completed version of the paper too early or at the extensive time they are expected to devote to redrafting. This timing should also give the professor at least two weeks to complete review of and hold conferences about the drafts, with four or five weeks available for revising and polishing. If a longer period is desired for final revisions, the professor can make the final product due during or at the end of the exam period.

77. See *infra* Part IV.A.6.c. for a discussion of grading the draft.

78. Fajans & Falk, *Comments*, *supra* note 31, at 366.

student's writing has achieved its goals, and the effect of the writing on the audience. Several methods can be used: the feedback checklist, line-by-line editing, comments in the margin, and global comments. Feedback should address both form and content and should be polite, organized, specific, comprehensive, and encouraging.

There are four specific characteristics of good feedback. First, where possible, the professor should communicate respect for the student's choices. Although this may seem like a small point, red pen or pencil sends a message that the professor is correcting something that is wrong.⁷⁹ Similarly, the professor should avoid crossing out the student's writing and substituting his or her own words for the student's own. Instead, the professor should raise questions or make suggestions. The message that should be sent is that a student's writing and analysis can be made more effective, not that it is incorrect.⁸⁰

Second, try to make sufficient written global comments (i.e., comments addressed to the work as a whole or to a skill as executed throughout the whole, e.g., organization, usage, terms of art, etc.) so that the student will have to think about what to do to improve the draft, rather than simply inserting the professor's suggestions. If there are organizational problems, discuss them; if there are analytical problems, discuss them; if there are persistent problems of expression, discuss them.

Global comments should not merely be inserted in the margins. All feedback should be included, if possible, in the body of the paper, even if it means using the backs of pages. Handing a student a separate sheet of written comments can be demoralizing and humiliating.⁸¹ It generally is better to note recurring problems on the back of a page. For more global comments, try to make them at the end of the paper, even on the back of the final page, or require that students attach a back cover to the draft (like a document filed in court) and write on that.

79. In my experience, the best feedback is done by pencil. It gives the impression that the critiquer views his or her own contribution as changeable.

80. Campbell, *supra* note 43, at 688 (noting that facilitative commenting is a way "for teachers to avoid imposing their 'ideal text' on students"). Of course, a professor may want to be directive with respect to certain aspects of the writing or may want to communicate that the student should focus on other aspects of the writing. For example, a professor may want to communicate that he or she does not want to spend a lot of time discussing grammar and usage. In that case, it might be appropriate for the professor simply to make the grammar and usage changes.

81. If this method is used, it should be reserved only for evaluative feedback, e.g., to explain a final grade. The demoralizing effect of receiving an independent document addressing the student's work makes it almost impossible for the student to do any individual creative work in redrafting the paper. Since an end-of-the-semester evaluation should leave the student with a good understanding of his or her strengths and weaknesses, it may not even be a good idea to submit a separate document at that point.

Third, a good critiquer should try to communicate some perspective on the relative importance of his or her comments.⁸² It should be clear to the students, for example, that fixing any single choice of words is not as significant as the need to restructure the analysis. One way to communicate this perspective is to be more direct with respect to less significant changes. This means, for example, that the professor should simply make some changes rather than raising questions about them, particularly those relating to grammar, style, word choice, or citation. Unless these problems clearly interfere with the quality of the work, they should rarely be mixed with more global comments.⁸³

Finally, in giving feedback the professor should review the student's self-diagnosis and give particular attention to the student's learning priorities.⁸⁴

Although a conference at this stage may not be as important as it was at the earlier stage, it would be extremely helpful to go over a student draft at a conference or to extend office hours so students can seek such a conference at their option. Either way, the conference should focus on major issues and not on minor corrections. Again, students should be required to prepare for these conferences by determining what they need to discuss with the professor.⁸⁵

c. Grading

A draft may or may not be graded, depending on the professor's goals. If it is graded, the grade should reflect the professor's expectations for reader-readiness: the less reader-ready the draft is expected to be, the less weight it should be given in grading.

7. Peer Review

Peer review, the process through which students review each other's work, has been recognized as an extremely effective learning method.⁸⁶ Accordingly,

82. To make the revision process a meaningful learning experience, the student should not be overwhelmed or discouraged by the sheer amount of work required. *See* Kearney & Beazley, *supra* note 47, at 895-99.

83. Another problem with listing minor observations, suggestions, or edits on separate pages is that it tends to be overwhelming, making it look like everything is wrong with the writing and thus discouraging. I used to put a number on the page of the student paper that corresponded with a list of comments on a separate sheet of paper. I found that this was extremely discouraging to the students. It also permitted the students to re-write by simply executing each comment rather than stepping back and thinking about what needed to be done. *See also* Fajans & Falk, *Comments*, *supra* note 31, at 366.

84. Feedback sheets (checklists) for reviewing the first draft and final product are available from the author. As a reminder, these sheets should be given to the students at the beginning of the semester so that they know exactly what is expected of them.

85. *See supra* notes 9 and 73 and accompanying text.

86. Fajans & Falk, *Comments*, *supra* note 31, at 370. *See also* Cox & Ray, *supra* note 32,

if at all possible, a peer review exercise should be part of the upperclass writing experience.

Since a peer review experience will be new to many professors, a sample, suggested exercise is offered here. First, the students can be divided into groups of no more than eight. Select one or more of the students' papers, or identify parts of the papers that would be suitable for this exercise. Make sure that all of the students in any one group are given the same paper.⁸⁷ During the week before the next class, the students should review, edit, and grade the paper. Students should be given the same feedback and grading sheet that will be used by the professor. During the next class, the students will meet in their groups to discuss global issues such as those that appear in the diagnostic exercise or in the checklists.⁸⁸ The professor should monitor the discussions by circulating throughout the room and acting as a facilitator.⁸⁹ The students should be required to turn in their edited version of the distributed piece, with comments either on the draft or on a completed checklist.⁹⁰

This exercise is likely to add very little to the professors' work load (especially since there should be no substantive class during the week of the exercise),⁹¹ but can serve several important purposes.⁹² First, review of another writer's draft forces the reviewer into the role of the audience.⁹³ This is an

at 359; Phelps, *supra* note 35, at 1096; Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 MONT. L. REV. 373, 406 (1991).

Ideally, the professor should select not whole papers, but simply parts of the papers that present the student's major choices and method of expression. This may be difficult to do in the time required. An alternative would be to create these pieces during the week after the papers are submitted and to distribute a small piece (up to five pages) on which the students can collaborate in class.

87. This should be done as soon as possible after the papers are submitted. The students can be told to pick them up or they can be placed in the student mail boxes.

88. To the extent that students perceive that the students whose papers are reviewed will have a grading advantage, this could be taken care of by the professor during the grading process. The students should be informed in advance that the professor is sensitive to this issue.

89. Being a facilitator is a unique aspect of the teaching role. Essentially, the professor should circulate among the groups, encouraging the discussion that is going on, redirecting it or refining it by asking questions or raising different possibilities, but not actually sharing his or her views.

90. The professor can either use the checklists as they are, cull them down so that they focus on fewer skills, or use the simple diagnostic checklist discussed, *supra* note 84.

91. These papers can be graded, ungraded, or reviewed by the professor for diligence and completeness and used as part of a small portion of the student's final grade devoted to the small writing exercises. See *supra* Part IV.A.9.

92. In sum, writing groups have been found to "contribute to important gains in critical thinking, revising and organizing skills, and confidence." Fajans & Falk, *Comments*, *supra* note 31, at 370.

93. Placing the student in the role of audience should succeed in teaching the student to appreciate the role of audience in the writing process and, by reflecting on her own reactions, to

effective learning tool. For example, the reviewer will experience first-hand the disorienting frustration of trying to follow a discussion that is not explicitly and clearly connected to the reader's thesis, the loss of reliability caused by a messy product, and the lack of credibility that results from sloppy language. Second, it provides an alternative method of learning for those with different learning styles. Third, peer review allows the student to experience the role of the professor. In this way, it legitimizes the evaluative process. In addition, being placed in the role of reviewer should enable the students to reflect on what kinds of critique are helpful and what kinds are not (i.e., directive v. facilitative, discouraging v. encouraging, insulting v. inspiring).⁹⁴ Finally, working in a group forces students to articulate their conclusions and to reflect on and learn from the collaborative process.⁹⁵

identify the characteristics of that audience. "Audience" is one of the three principal elements of the new legal rhetoric: knowing the purpose of the writing, knowing the audience for the writing, and knowing the constraints on the writing. See Campbell, *supra* note 43, at 674-77.

Briefly, the concept of constraints, when applied to legal writing, generally refers to page limitations, time requirements, format, and citation form.

The audience for most legal writing has many similar characteristics. That audience "(1) wants exactly the material needed for making a decision; (2) is busy and does not want to read a document twice; (3) is aggressively skeptical and will look for gaps or weaknesses; (4) is disgusted by sloppiness, imprecision and inaccuracy; and (5) is conservative about grammar, style, citation form, and format." *Id.* at 675 (relying on RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 48 (1990)).

Another author has suggested that a writer should ask ten questions about the audience before beginning to write:

1. Who is the primary audience?
2. If there is more than one audience for the document, will you need to concentrate on one at the expense of the other?
3. What is the audience's education level?
4. What knowledge of the law does the audience have?
5. If the audience is an attorney, what legal specialty does he or she have?
6. What history does this audience have with similar legal matters?
7. Are there biases or prejudices present?
8. How many years of experience does the audience have on the job?
9. Under what circumstances will the audience read the document?
10. Are there any external pressures that might influence how the audience will interpret the document?

KRISTIN R. WOOLEVER, *UNTANGLING THE LAW: STRATEGIES FOR LEGAL WRITERS* 11-12 (1987).

94. The skill of identifying and securing effective supervision and critique is discussed *supra* notes 10, 73 and accompanying text.

95. For a thorough discussion of the process and benefits of collaboration, see Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993).

8. The Final Product

Many schools already require students to revise a draft and submit a final product.⁹⁶ What was said above about feedback on the first draft applies equally to feedback on the final product, with one additional suggestion.

Feedback on the final product should give an evaluation of what the student does well and what specific writing and analysis skills the student should work on in the future. To the extent that faculty time is limited at this point, we would recommend that effort and emphasis be placed on such an overall analysis and to more global comments, as opposed to more detailed line-editing of the final draft, since no additional work is expected on the written product.

9. The Final Grade

Which components of the course the professor decides to grade rests largely on whether the professor considers a grade to be required for effective learning. One reasonable possibility is that the final grade for the writing component of the course be composed of independent grades for the draft and the final product, with a higher proportion of the grade (say 60%) given to the final product, a smaller proportion (say 30%) given for the draft, and a small portion (say 10%) being rewarded for the diligence, completeness, and quality of any other written work. Students should clearly be rewarded for any improvement between the draft and final-product stages.

B. Offering Teacher Training: A Faculty Colloquium

How can the law school expect to make the learning process in upperclass writing courses better and more consistent without offering some help to the faculty responsible for teaching those courses? One answer would be to offer a faculty colloquium/luncheon once or twice each year led by one or two faculty writing experts or faculty with experience in teaching upperclass writing. The colloquium would be devoted to the topic of teaching and supervising upperclass writing.

The goals of a faculty colloquium should be relatively modest: to inspire the faculty to try something new or re-evaluate something already in use; to leave each faculty member with something to reflect on about the process of writing; and to leave each participant with one or two new ideas that will enhance the professor's teaching and supervision of upperclass writing. Accordingly, the major themes that could be discussed at the colloquium are: (1) teaching the

96. See *supra* Table III.

process of reading critically; (2) teaching the process of writing; (3) teaching the thesis development process; (4) peer review or collaborative learning; (5) giving effective feedback; and (6) identifying recurring student problems.

There are many good ways to conduct a colloquium. One way would be simply to talk and share ideas. Remember, all faculty have written; they could be encouraged to articulate how they write. For example, faculty could discuss the process of reading case law, talk about the creative process of formulating a thesis,⁹⁷ and discuss what they do to organize their thoughts. This process of reflecting on what one actually does in order to teach a subject may be something some of the faculty have never done before. You can put the various steps, approaches, and problems on an overhead or blackboard, or just keep it informal. The discussion might resonate for everyone.

An initial colloquium may work best if kept as an informal exchange of ideas with the faculty urged to reflect on their own writing or writing/teaching experience. However, another idea or an idea for a second or follow-up colloquium could be to incorporate a workshop format by circulating before or bringing in a few pages of a student piece (or faculty writing) or a student outline. Try to find a topic that demonstrates recurring problems, such as paragraphing, facts unconnected by a thesis or theme, paragraphs without topic sentences or an obvious unifying subject, unfocused case discussion, or gaps in analysis. Ask the faculty to read the writing piece and think about how they would diagnose it, use it as a teaching tool, and critique it. Again, you might use an overhead or just keep it as an open discussion.

Another way to conduct the seminar could be to elicit comments from the faculty concerning frustrations or experiences they have encountered in supervising upperclass student writing (or for those who do not do that, problems the faculty may have in teaching the students to analyze generally). The faculty might even be asked to bring problematic writing samples with them or provide them for copying before the colloquium begins. If no one sends anything in or volunteers during the colloquium, the leaders should be prepared with some of their own experiences that represent issues the upperclass faculty may encounter, addressing all articulated problems and encouraging others to brainstorm too.

If one of the goals of the colloquium is to acquaint the faculty with the benefits of peer review and collaborative learning, try the following, or any variation. Divide the faculty into groups of three to eight. Give them a short

97. Find out from the audience and organize their responses on such subjects as: How do they develop a thesis? How do they maintain focus on the thesis? How do they start the writing process? What if they lose interest before they're done? How do they organize their thoughts? What is the first thing they do when it is time to write? What section do they write first? Do they outline? Where do they do their best thinking — shower, car, gym, in front of the television? What do they do when they hit a writer's block? What do they do when they begin a paragraph? Do they write first and edit later, or do they write word by word?

piece to review; it could be the same piece used to demonstrate critique above.⁹⁸

Instruct the faculty to edit the paper, diagnose any problems, and think about giving effective feedback to the writer. Suggest that they jot down some notes for discussion purposes. After they have done this, let them discuss it among themselves. The colloquium leaders should circulate among the groups acting as facilitators and trying to get everyone to contribute. Give the groups about ten minutes to work and about ten minutes to talk amongst themselves.

Call the process to an end. The leaders can then present the same piece with examples of effective and ineffective feedback or engage in the same feedback demonstration and narration as above. The discussion should focus on the process of identifying, articulating, and diagnosing problems, giving effective feedback, and the effect of the collaborative process.⁹⁹

C. Evaluation of the Program

How to evaluate the success of pedagogical choices is currently a subject of discussion among legal academics.¹⁰⁰ Although there are many ideas about how best to teach, there are few suggestions for how to evaluate whether those ideas really work, or whether they work better than others. Indeed, in this respect, educators at the college level are ahead of law school teachers.¹⁰¹ It does seem clear, however, that student and faculty input are both essential to an institution's evaluation of its upperclass writing program.

1. Evaluation by the Students

A questionnaire could be distributed to the students who participate in the upperclass writing program. That questionnaire should address each of the components used in the program, i.e., the text, diagnostic exercise, research logs, checklists, feedback, thesis development, outline development, peer group experience, the drafting process, and conferences.¹⁰²

98. This exercise is likely to be more intimidating than the overhead demonstration discussed above, because faculty who are not good at critique may fear being exposed to their peers. In my experience, students participating in peer review exercises do not experience this type of intimidation.

99. Campbell, *supra* note 43, at 687.

100. See, e.g., Vanessa Merton, Presenter at the AALS Workshop on Clinical Legal Education, Plenary Sessions IV and V: Evaluation of Clinical Legal Education Programs (May 1996); discussion of AALS Committee on Clinical Legal Education, Sept. 1996; law professors' discussion on the effectiveness of externship programs (discussion page available to law professors at <<http://www.jmls.edu/law/lawprof.html>>).

101. See, e.g., THOMAS A. ANGELO & K. PATRICIA CROSS, CLASSROOM ASSESSMENT TECHNIQUES (2d ed. 1993).

102. A suggested questionnaire is available from the author. For example, with respect to the text, the questionnaire might ask: How and when did you use your text? Which parts of the

2. Evaluation by the Teachers

The first step in any evaluation by a teacher is to have the teacher identify his or her goals.¹⁰³ The diagnostic checklists discussed above could help in formulating a list of teaching goals.

Another good place to start might be to refer to the Teaching Goals Inventory set out in Angelo and Cross's *Classroom Assessment Techniques*.¹⁰⁴ Although designed primarily for college-level teachers, several of the Inventory's fifty-two teaching goals are relevant to law school teaching in general and specifically to law school teaching of writing and analysis.¹⁰⁵ Angelo and Cross's categories need not be adopted, but can be used to stimulate thought and help teachers articulate their own goals.¹⁰⁶

Next, some method must be devised to determine whether the students learned what the professor intended over the course of the semester. To accomplish this, faculty could compare the writing that was the subject of the early self-diagnosis to the student's final product, or compare the student's draft to the student's final product using either the diagnostic checklist or the feedback checklist.¹⁰⁷ Concededly, this method of evaluation would not control for other factors that might have contributed to the student's progress, e.g., being in law school for several additional months, and understanding the substantive portions of the course. Finally, faculty could be asked to respond to a questionnaire about the course.¹⁰⁸

3. Evaluation by the Institution

A program to evaluate the success of an upperclass writing program should contain at least four basic elements:¹⁰⁹ (1) systematic evaluation by experts;¹¹⁰

text were most helpful? Would you recommend the text to a friend or fellow student? Why or why not? What did you learn from the text that you want to make sure to remember?

103. See CAT, *supra* note 63, at 13.

104. See CAT, *supra* note 63, at 20-21.

105. For example, "develop analytical skills," "develop problem-solving skills," and "develop ability to synthesize and integrate information and ideas." CAT, *supra* note 63, at 20-21.

106. Angelo and Cross suggest five questions to ask in formulating a goal: "Is it the right size? Is it precisely stated? Is it relatively easy to assess? Is it worth assessing? Is it actually taught in class?" CAT, *supra* note 63, at 59.

107. See *supra* Part IV.A.3.

108. A suggested questionnaire is available from the author.

109. The question of evaluating pedagogy is a sensitive one because it is usually raised in the context of saving money and it is not raised evenly; because they are expensive, skills and writing courses are generally the targets for "evaluation."

110. It would be best for an evaluation to be coordinated by the upperclass writing program coordinator or other coordinating body (such as a properly constituted faculty committee or subcommittee) with expertise in the teaching of writing. Outside experts could be recruited either

(2) a comparison between the papers received from the students in the newly designed course and those received from students in other earlier courses;¹¹¹ (3) feedback from the students; and (4) feedback from the faculty who taught the upperclass writing courses.¹¹² Questions posed to secure student and faculty feedback should reflect the goals of each course component.¹¹³

V. CONCLUSION

Some law professors will undoubtedly say this proposal does not go far enough or that it reflects a pessimism about the future course of legal writing education. At the other extreme, some will say it misconceives the doctrinal, analytical, and informational role of the upperclass seminar, is insulting to non-writing faculty, and is a wholesale violation of academic freedom. Nevertheless, the reality, as reflected in our survey, is that a large amount of upperclass writing is being conducted as an upperclass writing experience without major curricular planning, faculty training and support, or systematic instruction. The suggestions set forth in this Article are intended to achieve improvement in all three areas based on a realistic use of available resources.

to conduct the evaluation or to consult in the evaluation. The evaluating body should first identify the goals of its upperclass writing program before it begins its evaluation proceedings.

111. The diagnostic checklists discussed *supra* Part IV.A.3. could supply the criteria for this comparison. Alternatively, a comparison could be made between the pre-seminar writing used by the students for the initial diagnosis exercise and the final product submitted in the seminar. Again, the criteria set forth in the feedback or diagnostic checklists could be an appropriate evaluative tool.

112. Whether this input should be written or oral is a complicated question. Faculty may perceive that they are in essence evaluating themselves, although evaluating the quality of the program and not of the teaching is the evaluative goal. That fear would make a written feedback sheet seem quite threatening, although written feedback would be easier to collect and analyze reliably than would oral reporting. On the other hand, one could interview all upperclass writing faculty, either individually or together, to get their reactions to any new components of the program. In either event, the same sorts of questions should be asked of the faculty. For the reader's convenience, *Suggested Subjects for Faculty Input* is available from the author. The questions could either be answered in writing by the faculty or be used in faculty debriefings.

113. CAT, *supra* note 63, at 8-9. Sample questionnaires are available from the author.