TAKING LEGAL COMMUNICATIONS SERIOUSLY

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THE ability to communicate ties together an increasingly diverse legal profession. Yet law faculties are ambivalent about how to teach this important skill. Litigators and litigation associates in law firms must write persuasive memoranda and briefs, drawing upon the product of good legal research. For decades, almost every first year law school program has explicitly sought to teach law students the skill of writing briefs. But litigation is hardly the only context in which lawyers must communicate. Transactional lawyers must draft documents that express the terms of a "deal." Often, the most challenging deal document is not one that can be copied mostly from a form book; it is a simple "term sheet" that captures the essence of party understanding on one or two pages. Lawyers representing individuals must be able to communicate clearly with their clients to help clients crystallize their goals and evaluate how the law can help them realize those goals. Lawyers involved in the public policy arena must communicate to the general public, explaining why an issue should concern the ordinary citizen. In-house lawyers often must clarify alternative strategic directions for an enterprise.

This partial inventory of lawyer communications shows that oral communications skills may be as important as written ones, yet few law school-based legal writing programs address oral communication outside the context of an oral argument. It suggests that transaction-oriented communications and counseling is as common as litigation advocacy, and deserves more attention in law school curricula.

During the last twenty years, the legal academy has engaged in a debate over how best to teach legal writing. As with any debate involving complex institutions, disagreement over basic issues continues even as new aspects of the debate focus on specific questions arising from resolution of basic questions. Thus, in some law schools, faculties continue to be divided over whether their institutions should teach legal writing at all. Others agree that explicit attention to legal writing is appropriate, but disagree over how prominent a place legal writing should occupy in the curriculum, and how legal writing programs should be staffed. A large amount of energy has been invested in efforts to increase the status of specialized legal writing faculty.[1]

Almost twenty years ago, the faculty of the Chicago-Kent College of Law decided that teaching legal writing skills was an important part of its responsibility to offer sound professional education. It developed a model in which full-time faculty were recruited to teach legal writing, and in which legal writing instruction occurs in all three years of the basic JD curriculum. Law students were required to do more

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1. *See generally* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994) (reviewing debate over the place of legal writing in the curriculum).

writing and graded rewriting. They received careful, thorough critiques from faculty members, and explicit classroom instruction on legal method, persuasion, and the structure of different writing performances tasks.

But the revolution begun by those steps is incomplete. The litigation context dominates the first year legal writing curriculum. Little attention is given to oral communication outside the oral argument setting. Some exercises and some courses involve communications skills needed by transactional lawyers, but the effectiveness of legal drafting courses too often depends on the luck of the adjunct draw The communications skills used by personal counselors and public policy advocates and in corporate strategic analysis usually receive no attention. Almost nothing has been done to learn from teachers of written and oral communications skills outside the law school context.

Equally troubling, the "professionalization" of the teaching of legal writing has defined legal writing education as an autonomous discipline, isolated from other higher education programs in communications,[2] and increasingly isolated from the concerns of regular tenure track faculties. This has occurred even as legal scholarship in general has become less autonomous, increasingly drawing upon insights from other disciplines such as economics, political science,[4] history,[5] sociology,[6] and literature itself.[7]

Now is the time to begin a fundamental rethinking of how legal education teaches the skills of legal communication. This is not simply a matter of resequencing the exercises in traditional first year legal writing courses. It is not simply a matter of determining appropriate compensation policy or job security for teachers of legal writing. It is not a matter to be sloughed off to a director of legal writing and ignored by the faculty at large. It is not a matter of concern only to local and regional law schools whose students may begin the study of law with poorer writing skills than students at elite law schools. It is a matter that goes to the heart of being an effective lawyer, and therefore a matter that should occupy center stage in any assessment of the effectiveness of a law school's program.

This essay is intended to sketch the agenda for a serious discussion throughout the legal academy of how to teach communications skills to law students; specific programmatic recommendations must arise from that discussion. At this stage, it is possible only to offer some hypotheses and propositions to inform the discussion.

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2. Few non-law-school specialists in rhetoric and writing think about teaching rhetoric and writing to law students; few legal writing faculty think about teaching rhetoric and writing in other parts of higher education.

3. *See, e.g.*, RICHARD POSNER, LAW AND ECONOMICS (1997); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

4. *See, e.g.*, Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000) (theory of international law based on international relations theory in political science).

5. *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

6. *See, e.g.*, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

7 *See, e.g.*, Richard A. Posner, *What Has Modern Literary Theory to Offer Law?* 53 STAN. L. REV. 195 (2000) (sharply critical book review, acknowledging utility of analysis of narrative); Richard A. Posner, *Judges Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV 1421 (1995).

1 *Link the Teaching of Communications Skills to the Teaching of Rhetoric Outside the Law School Context*

Most law professors now recognize that law is not an autonomous discipline; law expresses social values and institutionalizes political decisions. Scholarly inquiry in law must be informed by knowledge in the social sciences, humanities, and technology Similarly, programs to teach communications skills to law students must be informed by 3000 years worth of inquiry into rhetoric.[8] Legal communications curricula should draw upon the best practices derived from more than a century of effort to teach English composition and public speaking at the undergraduate level. Legal writing as a law school subject should draw more fully on rapidly expanding legal scholarship in the law and literature field. One branch of the law and literature inquiry examines the role of "storytelling" in legal rhetoric. Trial lawyers know that a case is most persuasively presented as a "story" Law student communication skills can be improved by more explicit integration of storytelling theory and practice.

2. *Legal Communication Instruction Should Emphasize Techniques of Oral Communication as Much as Techniques of Written Communication*

Most lawyers communicate orally more than they communicate in writing. Communications skills training should seek to improve oral communications skills as much as improving legal writing skills. But practicing a few oral arguments in a simulated appellate court setting is hardly enough. Lawyers make presentations, give speeches, and participate in or lead group discussions far more often than they make oral arguments. A young man or woman should not graduate from law school knowing less about how to make a speech than he or she would learn from a six-session Dale Carnegie course or from six month's participation in Toastmasters Club.

In expanding its mission beyond writing and appellate argument, legal communications instruction should teach how to use technology effectively. PowerPoint presentations are a staple of business communications. Lawyers should know how to design and deliver effective slide presentations. They should know when slides get in the way of effective communication. They should know something about designing an effective visual aid. They should understand how to direct audience attention appropriately to a visual image or to their voice.

Additionally, effective trial lawyers have learned that video can dramatically enhance the power of their message in a courtroom. Effective use of flow charts, still images, and full motion video should be an integral part of instruction and trial techniques.

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8. *See* ARISTOTLE, TREATISE ON RHETORIC 111 (Theodore Buckley trans., Prometheus Books 1995). Some individual legal writing faculty members are interested in linking their teaching to more general rhetorical theory, but the absence of a robust literature on the linkage makes fulfillment of their interest more difficult than it should be.

3. *Legal Communications Instruction Should Be Integrated with Other Parts of the Law School Program*

The ability to communicate is central to being an effective lawyer. Accordingly, instruction in legal communications should not be segregated from other parts of the law school experience and delegated entirely to a specialized teaching corps. Every regular law school course offers opportunities for analysis of argumentation, close textual analysis, and exploration of the rhetoric of legal opinions. Taking advantage of these opportunities requires an institutionalized commitment for all members of law faculties to cooperate in inviting student attention to good and bad examples of legal communications throughout the legal process.

Courses in legal writing should not be separated organizationally or pedagogically from trial advocacy and clinical programs, or from courses in mediation and negotiation. Not only should law faculties examine opportunities to reduce the separation between doctrinal courses and skills courses, they should also integrate skills instruction in every course in the curriculum.

Such integration is possible only if all law school faculty seek a deeper understanding of the goals and methods of the various parts of a law school program. Clinical instruction should not be left only to the clinical faculty Legal communications instruction should not be left only to the legal writing faculty. Trial advocacy should not be left only to adjunct faculty comprising trial lawyers. Teachers of doctrinal subject matter should solicit insights from their legal writing and clinical colleagues as well as from the practicing bar and vice versa.

All kinds of law teachers need to work together, shaping appropriate curricular experiments, with better assessment of the results than is typical in legal education.

4. *More Serious Scholarship Is Needed*

A Westlaw search conducted on 18 July 2001 turned up 64 articles with the term "legal writing" in their titles. Only a handful involved any deep analysis of the legal communication process.[9] Most involved tips for more effective writing, published in practitioner journals. Many advocated greater status for legal writing faculty. No doubt, other search terms would have revealed a larger number of articles. It is possible that more good content is written about legal communications skills than is accepted for publication by law reviews. Still, the legal academy surely could benefit from more serious work on the processes of legal communications, exploring how the theory of rhetoric in general should be adapted to the particular needs of the legal profession, linking scholarship in law and literature to teaching communications skills to law students,[10] and relating theories of human interaction to effective communication between lawyers and lay people. As such legal

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9. Three exceptions are Brian J. Foley & Ruth Anne Robins, *Fiction 101. A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); Susan McCloskey, *The Keys to Clear Writing Lead to Successful Results*, 72-Dec. N.Y ST. B.J. 31 (2000) (offering consulting services to law firms and corporate law departments to improve writing; see http://www.susanmccloskey.com); Rideout & Ramsfield, *supra* note 1.

10. *See, e.g.*, Foley & Robins, *supra* note 9, at 459

scholarship materializes, there is no reason that customary standards for good scholarship should be relaxed; there is no reason that the best legal scholars should refuse to give the subject their attention.

5. *Law Faculty Should Help Law Students Learn from Their Work Experiences*

The image of the majority of law students completely engaged with each other and their teachers in an academic setting, spending their out-of-class time in study groups and cafeteria conversations discussing the latest Supreme Court case is a fantasy Most law students work. Many consider their work experience a more relevant bridge to what they will do after law school than their classroom activities. Failing to integrate student work experience with academic guidance represents the great lost opportunity of American legal education at the beginning of the twenty-first century. Important differences between the institutional structure for delivery of legal services and the delivery of healthcare make it difficult to reconstruct significant parts of legal education along the lines of clinical education in medicine. Nevertheless, law faculty should make more effort to connect the guidance they give their students with the opportunities the law students have outside law school. Our students should be invited to relate "learning to think like a lawyer" with "working as a lawyer's apprentice."

The opportunities exist with respect to everything students should learn in law school—torts as well as trial techniques, contracts as well as communications with clients. But given the desire of legal employers for better communications skills in their law clerks and associates, particular opportunities exist to bridge the communications elements of law student practice experience with good instruction on legal communications in law schools. Drafting assignments from part-time employment could and should be brought into legal writing classrooms. Student uncertainty about how best to communicate with partners and clients can provide much of the raw material for instruction in informal oral communication. Communicating to one's classmates and teachers about one's part-time job can provide opportunities for improving presentation skills.

MAKING PROGRESS

So what should be done to test these hypotheses and to extend the revolution begun by a serious law school commitment to teaching legal writing? A major strength of legal education in America is its diversity. The best intellectual capital results not from the execution of some central plan but by individual law professors in particular law schools writing law review articles and organizing symposia. We can all do our part to take legal communications more seriously. Those who specialize in the teaching of legal writing should invite other members of the legal academy to share their insights, particularly those who have thought about law and literature. Everyone can seek out the knowledge available from the academic disciplines of rhetoric, English composition, public speaking, and drama. As all of us engage in the ongoing process of revising the structure of our curricula, we should be more willing to decompartmentalize doctrinal instruction, legal writing instruction, clinical education, and trial practice.

We should be more flexible in utilizing the techniques—and experimenting with the contracting out—of some forms of skills instruction. What would be wrong with a legal communications program that requires law students to take a Dale Carnegie course in basic public speaking techniques?[11] The point is not that this kind of instruction should be contracted out; the point is that the approaches used in Dale Carnegie public speaking courses and by Dale Carnegie's competitors may be worth trying in the law school context.

If we increase our emphasis on teaching oral skills, it also may be appropriate to adapt our traditional examination techniques. Other disciplines use oral examinations as well as written ones at the doctoral level. We should formally evaluate our students' ability to explain application of a legal concept, face-to-face, as well as in writing.

In summary, we need to recognize the importance of explicit instruction in communications skills; we need to acknowledge that lawyers talk at least as often as they write; we need to be open to experimentation; we need to build on the achievements of the first two decades of the legal writing movement.

11. *See* Dale Carnegie Training Website (Learn with DCT link), *available at* http://www.dale-carnegie.com/M10/M10S2-05.htm.