Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs

Amy Vorenberg
*University of New Hampshire School of Law, amy.vorenberg@law.unh.edu*

Margaret Sova McCabe
*University of New Hampshire School of Law*

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PRACTICE WRITING: RESPONDING TO THE NEEDS OF THE BENCH AND BAR IN FIRST-YEAR WRITING PROGRAMS

Amy Vorenberg & Margaret Sova McCabe

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* Amy Vorenberg is a Professor of Legal Skills at Franklin Pierce Law Center in Concord, N.H. Margaret and Sova McCabe is a Professor of Legal Skills at Franklin Pierce Law Center in Concord, N.H. The authors thank Pierce Law for its support of this research and article. The authors’ deep appreciation goes to our colleagues and friends for their support and input including Sophie Sparrow, Kimberly Kirkland, Chris Johnson, Mitch Simon, Michael Hunter Schwartz, and Elizabeth Vorenberg. The authors are also thankful for the capable research assistance of Andrea Lamy. Finally, the authors are eternally grateful to the survey participants, particularly the judges, without whom their work would not exist.
I. INTRODUCTION

When people hear we teach legal writing, dinner parties are fun—or challenging. On the fun side, lawyers, judges, and sometimes clerks tell priceless stories of writing fiascos: the essential pleading that used the wrong party names, auto-corrected “misspellings” with bawdy meanings, and gaffes that make even the most seasoned writer wince. The downside to these stories is that the conversation often turns to laments about how bad legal writing is today. Attorneys and judges complain of newer lawyers’ seeming unfamiliarity with legal writing, grammar and concise style. Inevitably, we are asked, “so... what are you teaching them today anyway?”—at which time we usually like to change the subject. Yet, the question has gnawed at us: Do first-year legal-writing programs, which have grown substantially in recent years, adequately prepare students for practice?

The answer is no. Although students who graduate from law school should expect that their professors have adequately prepared them for practice, students are not as prepared as they could be for the demands on their

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1 **AM. BAR ASS‘N, SEC. OF LEG. EDUC. & ADMIS. TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS** xii, 217-21 (Eric B. Easton, gen. ed., 2d ed. 2006) [hereinafter SOURCEBOOK].

2 According to a Carnegie Foundation report:

The ability to grasp the legal significance of complex patterns of events is essential, but so are skills in interviewing, counseling, arguing, and drafting a whole range of documents. Beyond these lie the intangible— but publicly evident—qualities of expert judgment: the ability to size up a situation well, discerning the salient features relevant not just to the law but to legal practice, and, most of all, knowing what general knowledge, principles, and commitments to call on in deciding a course of action. Research validates the widespread belief that developing professional judgment takes a long time, as well as much experience. It cannot typically be achieved within three years of law school no matter how well crafted the students’ experience. But those years in law school can give
writing. Although legal-writing programs have made gains in terms of added staff and resources, the last twenty-five years have seen few substantive changes in legal-writing curricula. The upshot is a disconnect between what students learn in legal-writing classes and what professional legal-writing skills they need once they graduate.

This article will show that while legal-writing programs have improved, most programs should consider reviewing and changing the curricula to ensure that first-year students are ready for the rigors of writing in modern practice. Part I of this article examines how law schools are currently teaching legal writing. Part II reveals how members of the bar and bench perceive the quality of legal writing and addresses an emerging disconnect between what is taught and what is expected in practice. Part III explores the many ideas gleaned from our findings and how we are integrating those ideas into our first-year curriculum. It also makes suggestions that all law schools should consider for developing more effective, realistic skills programs.

Who will find this article interesting? People concerned about both the quality of students’ preparation for practice and the legal-writing curriculum will. We hypothesize that legal-writing programs adequately teach writing and related skills, but they should be more responsive to changes in the legal profession. Although legal-writing programs have increasingly gained recognition as an essential part of a first-year program, those gains have

_Students a solid foundation and, as they begin their careers in the law, useful guidance on what they need to continue to develop._


3 See ROY STUCKEY ET AL., **BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP** 26 (2007).

4 See SOURCEBOOK, _supra_ note 1, at xiii ("One of the most significant improvements in legal education over the past twenty years has been the greatly increased quality and intensity of legal writing, research, and analysis instruction."). These changes have come about in particular since the American Bar Association adoption of the first-year, legal-writing requirement in Standard 301. AM. BAR ASS’N, SEC. OF LEG. EDUC. & ADMIS. TO THE BAR, **STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS** stand 301 (2005).

5 See STUCKEY ET AL., _supra_ note 3, at 165-206 (Ch. 5: Best Practices in Experiential Courses).

6 See id. at 24 (noting that legal writing instruction is one way to connect the “case-dialogue method” to real world lawyering skills). The report further states: “The teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.” _Id._ at 111.

7 The advanced legal writing requirement is beyond the scope of this article. However, we believe that the skills obtained through the first-year, legal-writing requirement are not
also led the field to turn inward, developing writing programs from an academic perspective instead of from a practice perspective. This article presses for change in that trend.

II. METHODOLOGY AND EMPIRICAL RESEARCH: UNDERSTANDING THE PERSPECTIVES

To understand whether there was truly a gap between what students learn in first-year writing classes and practice, we conducted two surveys. The first survey went to lawyers, judges and clerks. Subsequently, we surveyed only judges with specific questions designed around their experiences on the bench. We followed the judges' survey with an exercise that required them to read first-year student briefs and comment on them. The capstone of our research was to interview the judges about what they observed in lawyers' writing and how law schools might better prepare their students for law practice.

Our research suggests that legal skills programs should engage in continuous conversations with the profession to ensure that legal-writing curricula reflect modern practice. This article represents a step toward greater dialogue between academia and the profession and about what both view as high-quality legal writing. We need to know exactly what expectations our students face on the job, in summer employment, externships, clinics, and after law school. One concern is our growing awareness that there is a gap between what students are expected to do in practice and what we are teaching them to do in class. For example, students report after summer employ-

adequately reinforced in subsequent years. SOURCEBOOK, supra note 1 (explaining that in addition to the rigorous first-year course, students must have "an additional rigorous writing experience after the first year."); see also Kenneth D. Chestek, MacCrave (In)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools, 78 U. COLO. L. REV. 115, 137 (2007) (questioning whether academic papers really meet the intent of ABA Stand. 302). We also urge first-year programs to allow students more opportunities to practice skills, such as time management and organization, that when lacking in today's lawyers, often resulting in poor legal writing.

ment that while they did a lot of writing, they were instructed to abandon the "IRAC" model. 9

Our baseline data came from three surveys: legal-writing programs, 10 judges, 11 and lawyers. 12 Our goals were to determine whether there is a generally consistent approach to teaching legal writing; how lawyers viewed other lawyers' writing; and whether judges rank lawyers' writing as effective.

In the second phase of the study, we asked eight judges to read, comment, and grade three first-year students' briefs. The goal was to compare judges' comments and grades to legal-writing professors' comments and grades to determine whether the two groups viewed legal writing consistently.

In the final phase of the study, we interviewed the judges to get their views on the briefs and writing in general. This was the most important phase, because it was a rare opportunity for legal educators and practitioners to learn what judges are looking for in legal writing. 13

In the course of gathering data, we realized that the number of participants in our lawyer and judge surveys was small compared to the national number of lawyers and judges. However, with smaller numbers came the opportunity for greater depth of discussion with the judges. Not only were their sentiments consistent with the lawyers surveyed, they also provided very candid and thought-provoking observations about modern legal practice. As a result, we feel that what our data points may lack in quantity they make up for in quality.

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9 This is one of the most common organizational paradigms students encounter in legal writing. The acronym stands for: Issue, Rule, Analysis, and Conclusion. MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS 211-12 (2005) ("It is extraordinarily common for law students and law professors to refer to the process of applying rules to facts as IRACing."). We recognize that most legal-writing programs use similar acronyms, but we believe that the fundamental structure is found in IRAC.

10 Survey of Law Schools, posting of Amy Vorenberg to Legal Writing Institute ListServ (Summer 2006) (on file with author). The survey is also reproduced as Appendix A.

11 Amy Vorenberg & Margaret Sova McCabe, Judge Survey (June 2006) (on file with authors). The survey is also reproduced as Appendix B.

12 Amy Vorenberg & Margaret Sova McCabe, Survey of New Hampshire Bar Members Working at Firms Employing More Than 35 Lawyers (Summer 2005) (on file with authors). The survey is also reproduced as Appendix C.

13 Writers should know their audience. Knowing the audience is a fundamental concept taught in first-year, legal-writing programs—and one that we practice. See, e.g., RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STYLE AND STRATEGY 288-302 (4th ed. 2001); see also JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 300-02 (3d ed. 2007).
A. The Academic Perspective: What Law Schools Are Teaching

First-year writing programs universally have the same basic goals: to teach legal analysis, effective writing, and persuasive oral skills. Like many other first-year courses, the legal-writing curriculum is somewhat standardized.14 Most law schools teach legal writing in the first year only. Typically, students learn predictive writing in the fall. The semester usually ends with students writing a long memo analyzing how a court would likely resolve a legal problem. The spring is devoted to teaching students to write and argue persuasively. Rather than informing the reader about the law and its proper application to the facts, the goal is to persuade the reader to resolve the problem in a certain way.

There is a new trend to teach legal writing in the second year—using the third and fourth semesters to teach drafting.15 Research is taught either along with the writing classes in an integrated fashion or in separate classes.16 The overall goal is to teach students to “think, write, and speak like a lawyer.”17

Learning to think like a lawyer requires students to read cases, statutes and secondary sources and to synthesize the information so that they can understand the state of the law pertaining to the issue at hand.18 Students learn to use a set structure in their writing, typically referred to as some iteration of the IRAC formula.19 This requires writing the issue statement first, followed by an explanation of the rules. The rules are then applied to the facts of a given problem. Last, students write a conclusion.

Separating the explanation of the law from the application of the law to the facts is the favored format because it breaks down the difficult tasks of legal synthesis (case illustrations, synthesis of rules) and analysis (application of case illustrations and rules to the client’s facts). Use of the IRAC

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14 SOURCEBOOK, supra note 1, at 217.
15 Nine of the thirty-four schools that responded to a questionnaire reported that they have a three- or four-semester program. Vorenberg, supra note 10; SOURCEBOOK, supra note 1, at 214.
18 See generally DEBORAH A. SCHEMEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING AND WRITING (3d ed. 2007); see also STUCKEY ET AL., supra note 3, at 22 (noting that students’ practice with synthesis is a major area of inadequacy in legal education).
19 SCHWARTZ, supra note 9, at 211.
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2009]

formula means that students will first set out the rules of law, and then explain the rules by describing the facts and reasoning of cases. Next, students apply the reasoning from the cases to the facts in an assignment, and through a process of analogizing and distinguishing, show support for their conclusion. This format is generally used in both predictive and in persuasive writing. As students learn to understand and explain cases, they learn to synthesize the information so that they do not write about each case separately, but rather they organize around thesis points. This necessitates that students understand and explain how various holdings fit together. The most popular texts used by law schools reflect the entrenchment of this structure. These texts explain how to derive and explain a rule, and in subsequent chapters, how to apply the rule of law. Many of the sample memos in the texts are written in this format.

The prevailing thought on this method is that students will only fully develop and understand the nuances of the law if they do so before they actually apply the law to the facts. Here lies one of the potential disconnects between what is taught to students in law school and what is expected after law school. Typically, most practitioners integrate law and facts and do not address them separately. Because this method is what students can expect in practice, they should be taught to write this way, or at least have some assignments that allow them to practice the integrated approach.

Neither first-year writing programs nor legal-writing texts focus attention on how the novelty or complexity of a given issue should dictate the structure and depth of analysis. Instead, students learn to explain and synthesize the law and then apply it; they are generally not instructed on how to vary their analysis according to the complexity and nature of the issue. Thus, even when a long explanation of the law is not warranted (for exam-

20 See, e.g., DERNBACH ET AL., supra note 13, at 155-62 (instructing students how to organize legal analysis); see also SOURCEBOOK, supra note 1, at 24.

21 The results of our law school survey, Vorenberg, supra note 10, show these to be: LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS (2003) and HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (2003).

22 Murray, supra note 8; see also SCHWARTZ, supra note 9, at 212-13 (recognizing that "the IRAC formula actually omits the most important part. It does not tell how an application of a rule to a set of facts is done.").

23 Some texts acknowledge that IRAC is not the only structure but do not teach alternative methods without reliance on a similar paradigm. The A.B.A.'s SOURCEBOOK ON LEGAL WRITING PROGRAMS tends to indicate a broader approach to organization but seemingly sanctions IRAC for the predictive model. SOURCEBOOK, supra note 1, at 18-19, 24; see also Diana Donohoe, Teachinglaw.com (acknowledging IRAC as a novice tool but emphasizing that other organizational models are also useful and, while not a legal-writing text, revealing very well how IRAC can be misapplied).
ple on a simple *Miranda* issue), students are taught to give the legal explanation before applying it. Instruction on issue-driven analysis requires guiding students to use judgment as to what is or is not a settled issue.24

Most law-school writing programs integrate writing mechanics in the program, but do not emphasize it as much as legal analysis. Students' writing style and mechanics are part of what they are graded on, but it appears that they are not given instruction geared specifically to grammar and structure.25

There is an absence of regular dialogue between the practicing bar and legal-writing teachers. While legal-writing faculties certainly have interactions with lawyers and judges, these are not necessarily institutionalized or part of an ongoing curriculum initiative to ensure that students are being adequately prepared for the actual practice of law.26

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24 We believe that this one of the most essential components of a legal-skills program based on the work of the Carnegie Foundation and the Best Practices project. According to the Carnegie Report:

Those in law who have the ‘wisdom of practice’ know how and when to draw on theoretical knowledge in order to respond to needs, institutional context, and the demands of being a good lawyer in the situation. Law students’ growth toward the wisdom of practice in the law can benefit from effective pedagogies, that is, carefully constructed experiences in legal thinking and performance—the ‘active learning in context’ promoted by the Best Practices project.

SULLIVAN ET AL., *supra* note 2, at 115; see also STUCKEY ET AL., *supra* note 3, at 26; SCHWARTZ, *supra* note 9, at 192 (noting that an essential function of mastering legal-writing skills is issue spotting and appropriate analysis).

25 Writing programs use some supplemental texts on writing such as BRYAN GARNER, *The Redbook*, A MANUAL ON LEGAL WRITING (2004); RICHARD WYDICK, *Plain English for Lawyers* (5th ed. 2005). In addition, many law schools offer tutoring and extra support for students who request it. See also SCHWARTZ, *supra* note 9, at 187 (noting that legal skills courses “assume students have already developed excellent writing, paragraphing, and grammatical skills.”). See generally Robert Eagleson, *Plain Language: Changing the Lawyer’s Image and Goals*, 7 SCRIBES J. LEGAL WRITING 119, 138 (2000); Debra R. Cohen, *Competent Legal Writing-A Lawyer’s Professional Responsibility*, 67 U. CIN. L. REV. 491, 515-16 (1999).

26 One piece of evidence that supports this absence is the fact that while the practice of law has changed significantly over the last twenty-five years, law-school writing programs have stayed relatively the same in terms of curriculum content and structure, though the status of the programs and their faculty have improved substantially.
B. The Practice Perspective: What Do Members of the Bar an
Bench Think About Legal Writing?

Understanding the law practice perspective and expectations of legal
writing is essential to developing a high-quality, legal-writing program. To
gain a better understanding of the practice perspective, we surveyed lawyers
and judges and then asked judges to review student work and sit for inter-
views about legal writing. The following describes our methods and results.

1. Initial Survey of Lawyers, Judges and Law Clerks

We began in 2004 with a written survey that targeted large law firms, judges, and judicial clerks. Participants rated legal-research and writing
skills. The top three problems identified were conciseness, organization
and analytical skills. Given this response it is unfortunate that we observed
that, "[c]larity and concision were the two most important elements of legal
writing." Participants indicated whether lawyers' writing used effective authority,
used that authority accurately, had proper citation format, and was com-
plete. The survey asked participants to identify how frequently they ob-
served the following: conciseness, clear organization, easily understood
language, proper grammar and format. Participants also rated whether law-
yers adequately explained the law, whether these explanations were ade-
quately applied to the relevant facts, and whether they were actually persua-
sive.

Poor organization results in poor legal writing. Over half the lawyers
surveyed said that the writing was disorganized. As one lawyer put it: "To
quote Yogi Berra: 'If you don't know where you're going, when you get

27 Large-firm lawyers (thirty-five or more lawyers) were selected, because these firms
often have more resources dedicated to writing programs, peer review, and research.
28 Amy Vorenberg & Margaret Sova McCabe, Verbose, Disorganized Documents Taint
29 Of the ninety-one lawyers who responded, eighty-one were private practitioners and
eight were judges. The average number of years in practice was nineteen. While many prac-
tice areas were represented, most respondents were litigators. Some surveys were returned
with incomplete information.
30 Susan H. Kosse & David T. Ritchie, How Judges, Practitioners and Legal Writing
Teachers Assess the Writing of New Law Graduates: A Comparative Study, 53 J. LEGAL
EDUC. 80, 87 (2003). Our survey results came as no surprise. Indeed, Kosse's reported results
of her multistate survey on legal writing, conducted in 2001, indicated that too much ver-
biage was a common complaint about new attorneys' writing.
31 Vorenberg & McCabe, supra note 28, at 12.
there, you’ll be lost.”

Certainly, lawyers expect good organizational structure in writing, but it appears that many lawyers neglect this.

Specifically applying law to facts using case comparisons was another problem noted frequently by those surveyed. According to the survey, lawyers are researching well but not translating their understanding of the law into detailed, useful writing. In the eyes of our survey participants, without better case comparison skills the value of good research is diminished.

In comments, survey takers raised the concern that poor writing reflects negatively on the profession. Some remarked that there is a general deterioration in writing skills and that the quality of legal writing needs “vast improvement.” These responses echoed the views of one state supreme court justice who noted that some appellate writing resorts to hyperbole and over reasoned arguments. He emphasized that this technique distracts from the writer’s overall argument.

Some survey takers offered opinions about the cause of poor writing such as computer-generated “spell checking” contributing to a lack of proof-reading. Noting that young lawyers generally excel in research but are weak in analysis, one experienced lawyer wondered: “Too much TV/Too many sound bites?” Survey participants offered other explanations for the lack of good legal writing: not getting enough practice in law school and deficiencies in early legal education. Lack of continuing legal education in writing skills and time and financial constraints were also listed among the possible explanations.

The poor quality of writing noted by practitioners begs the question: Are law schools doing an adequate job of teaching legal writing? To answer that question, we went to the judges to put the work of legal-writing programs to the test.

Our research focused on state and federal trial judges in Maine, Massachusetts, New Hampshire, and Vermont, because trial judges have a unique view of the practicing bar. They have significant interaction with lawyers

32 Yogi Berra was invoked on several occasions by several survey participants. We have also seen this quote expressed as “if you don’t know where you are going, you’ll end up somewhere else.”

33 Justice James E. Duggan, Hyperbole May Be Memorable, but Detracts from Legal Argument, N.H. BAR NEWS, May 7, 2004; see also Mark Cooney, Do the Opposite for Better Legal Writing, STUDENT LAW., Dec. 2007, at 14, 17.

34 Kosse & Ritchie, supra note 30, at 98.

35 Id. at 99.

36 The same survey criteria were used in our 2004 survey of the bar and bench. See supra note 12. We selected these courts based on convenience—if the judges agreed to be interviewed, we wanted to be able to conduct the interview in person.
during trial and often read multiple documents from the same attorney during the course of a case. Trial judges observe more fully a lawyer's overall communication skills—written and oral. In addition, trial courts are where the bulk of our students will spend their early years practicing, and we should therefore fully understand the judges' expectations. Finally, it seems that trial courts exemplify modern law practice—all involved (judges, lawyers, staff, parties, etc.) are pressed for time and resources. This dynamic is also important to proper legal training since a lawyer must be as adept at time management as he or she is with legal writing and other legal skills.

First, we surveyed twenty-three trial judges in Maine, Massachusetts, New Hampshire, and Vermont. The original survey drew eleven responses. The original survey group recommended additional judges and three of those also participated. The survey was designed to be short and specific. It asked judges how often they observed specific skills in practitioners' writing. The survey also asked judges to engage in another exercise—reading, commenting on, and grading student briefs. By asking judges to review students' writing and comparing their evaluation with those of writing teachers, we identified disconnects between what students learn and what is expected of them in practice. After the judges evaluated the briefs, we interviewed them about the briefs and legal writing generally. These interviews were more valuable than the survey, because we were able to have in-depth conversations with one of our students' most important audiences—the courts. While surveys are an excellent way to identify issues,
resolving those issues requires more dialogue.41 Judges were eager to share their thoughts on how lawyers can write more effectively and better serve the purpose of resolving cases. Six of the original survey respondents agreed to participate. This is a small sample of United States judges,42 but this small number provided an opportunity for in-depth discussion about legal writing quality.

The survey results indicate that while first-year, legal-writing programs may do a good job of training students to find effective authorities and apply them, in-depth research is more problematic.43 One judge’s perception is very consistent with our lawyer survey responses: “I frankly think that the biggest problem lawyers face is that they do not have time to do thorough research.”44 Another judge noted that research was “all over the map” and that it was too hard to identify a trend one way or another. Our 2004 survey of the bench and bar reflected a perception that lawyers generally find accurate authority,45 but though the authorities may be accurate, judges perceive that authority is not used and applied effectively. Based on lawyers’ responses, it does appear that time management is an issue. While many first-year programs address this issue, and law schools’ academic support programs provide guidance, greater attention may be necessary.46

The judges see concise writing less than half of the time. This observation is consistent with our lawyers’ survey. Whether this is purely a writing

41 At least two articles have already reviewed what judges and practitioners think of young lawyers’ writing and found trends such as writing that is too verbose, disorganized, and unfocused. Kosse & Ritchie, supra note 31, at 80; Kristin K. Robbins, The InsideScoop: What Federal Judges Really Think About the Way Lawyers Write, 8 LEGAL WRITING 257 (2002). Professors Kosse, Ritchie, and Robbins used surveys based on academic criteria to poll judges and practitioners. These articles do a very good job of quantifying and identifying the “problem” with young lawyers’ writing.
43 See Appendix E for Survey Results Tables.
44 See Vorenberg & McCabe, supra note 28, at 9-11.
45 For example, some students are taught to analyze using the “TARPP” method—thing, action, relief parties and place. See, e.g., TERESA J. REID RAMBO & LEANNE J. PFALUM, LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS 77-79 (2001).
46 Lawyers’ and students’ time management skills are beyond the scope of this article. We suspect that the nature of modern practice may require lawyers to choose between high-quality research and writing, and the quantity of work required to make a living. See generally Terry Jean Seligmann, Beyond “Bingo!”: Educating Legal Researchers as Problem Solvers, 26 WM. MITCHELL L. REV. 179 (2000); Scott Turow, The Billable Hour Must Die, A.B.A. J., Aug. 2007, at 15 (noting that the pressures of the billable hour on young associates may take a toll on skill development).
issue, however, is open to debate. For example, a history professor noted that, "reading, writing and thinking are all integrated . . . [a]n idea can have value in itself, but its usefulness diminishes to the extent that you can't articulate it to someone else." Applying this sentiment to legal writing, our survey of both lawyers and judges indicates that verbosity is indeed obscuring meaning. One judge, who observes a wide range of writing quality, noted that verbosity and incompressibility were closely related. Whether this is a function of poor analytical skills or lack of time is unclear.

The judges rarely see organized arguments. Lack of organization may be attributed to lack of writing time, as one judge noted, or lack of understanding the depth of an argument. In any event, learning how to organize is a central theme of most legal-writing programs. Because the survey results indicate organization is lacking in most legal writing, thought should be given as to why. For example, like conciseness and incomplete research, poor organization may be an indication of limited time. A more serious question is whether the lack of organization indicates poor analytical and persuasive skills—both core concepts of most legal writing programs.

The skill of effectively explaining and applying authority drew the most comments in the survey. One judge noted he perceived the continuum of lawyers' skills as "generally adequate, rarely both concise and authoritative, hardly ever concise, authoritative, complete and persuasive, though it does happen." Another described pervasive problems as the "inability to accurately paraphrase case authority and apply to the case at hand," and another said, "[l]awyers tend to cite a case for a general proposition of law without making any serious effort to apply the principle to the specific case at hand." Because this is the core of "thinking like a lawyer," legal writing programs and law-school curriculum committees should consider how to better teach this essential skill not only in first-year writing programs but also in the following two years.

\footnotesize{\begin{itemize}
\item\textsuperscript{47} WILLIAM ZINSSER, WRITING TO LEARN 45 (1988) (citing Associate Professor of History Kevin Byrne).
\item\textsuperscript{48} See, e.g., LYNN BAHRYCH & MARJORIE ROMBAUER, LEGAL WRITING IN A NUTSHELL 31 (3d ed. 2003).
\item\textsuperscript{49} Emphasis in original.
\item\textsuperscript{50} The concept of "thinking like a lawyer" is core to SULLIVAN ET AL., supra note 2, at 115 and STUCKEY ET AL., supra note 3, at 26. That judges identify this deficiency speaks to the urgency with which law schools should review curricula and emphasize greater skills training.}
\end{itemize}}
2. Would Judges and Writing Teachers Grade Student Briefs Similarly?

Comparing academics’ and judges’ reactions to student work helped us narrow our understanding of the seemingly different perspectives. Seven judges who responded to our survey also agreed to read sample student briefs. This exercise revealed whether writing professors and judges would provide similar comments and grades on the briefs. Each judge read three sample moot court briefs written by first-year students during their spring semester. All briefs were graded in the “B” range by their professors.\(^{51}\) The briefs addressed civil claims based on federal or state issues. Briefs 1 and 3 adhered to the commonly taught IRAC method (explaining the law first and then applying the law to the facts), while Brief 2 allowed for greater organizational flexibility and often combined explanation of the law with application of client facts in the same paragraph.

Judges were asked to read the briefs using a simple rubric and provide margin notes.\(^ {52}\) The rubric asked judges to rank the following areas as “excellent, good, fair or poor.” The results were:

\[ a. \text{ Persuasiveness} \]

Brief uses motivating arguments that are organized to be persuasive.

<table>
<thead>
<tr>
<th>Brief</th>
<th>Judge 1</th>
<th>Judge 2</th>
<th>Judge 3</th>
<th>Judge 4</th>
<th>Judge 5 (^ {53})</th>
<th>Judge 6</th>
<th>Judge 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
<td>DNR</td>
<td>Fair</td>
<td>Good</td>
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<td>2</td>
<td>Good</td>
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<td>Good</td>
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<td>Good</td>
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<tr>
<td>3</td>
<td>Good</td>
<td>Poor</td>
<td>Good</td>
<td>Good</td>
<td>DNR</td>
<td>Fair</td>
<td>Poor</td>
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</table>

\(^{51}\) The briefs came from three different schools. Although we do not believe that law-school rankings are an accurate or helpful way to understand legal-writing dynamics, in the interests of full disclosure we will say the following: Brief 1 came from a third-tier ranked law school, with no legal-writing ranking; Brief 2 came from a law school ranked in the bottom half of the top one-hundred law schools and a top-ranked legal writing program; and Brief 3 came from a fourth-tier ranked law school. \(^ {52}\) See \textit{U.S. News & World Rep., America’s Best Graduate Schools} 45-47 (2006).

\(^ {53}\) Reproduced in Appendix D.

\(^ {53}\) Judge 5 “gave up” grading briefs but still sat for interview to discuss her thoughts on their content.
b. **Organization**

Overall organization is easy to follow, readable and clear.

<table>
<thead>
<tr>
<th>Brief</th>
<th>Judge 1</th>
<th>Judge 2</th>
<th>Judge 3</th>
<th>Judge 4</th>
<th>Judge 5</th>
<th>Judge 6</th>
<th>Judge 7</th>
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<tbody>
<tr>
<td>1</td>
<td>Poor-Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>DNR</td>
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<td>Good</td>
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<td>Fair</td>
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<td>3</td>
<td>Good</td>
<td>Poor</td>
<td>Fair</td>
<td>Good</td>
<td>DNR</td>
<td>Fair</td>
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c. **Legal Explanation**

Explanation of the law educates the court about the cases’ facts, holdings, and reasoning behind the rule of law.

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<th>Brief</th>
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<th>Judge 2</th>
<th>Judge 3</th>
<th>Judge 4</th>
<th>Judge 5</th>
<th>Judge 6</th>
<th>Judge 7</th>
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<tbody>
<tr>
<td>1</td>
<td>Fair-Good</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
<td>DNR</td>
<td>Fair</td>
<td>Exc.</td>
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<td>2</td>
<td>Good</td>
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<td>Good</td>
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<td>3</td>
<td>Fair-Good</td>
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<td>Good</td>
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<td>DNR</td>
<td>Good</td>
<td>Fair</td>
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d. **Legal Analysis**

Application of the facts of the client’s case is done persuasively, using explicit factual comparisons and distinctions to make the arguments.

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<th>Brief</th>
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<td>Fair</td>
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<td>DNR</td>
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<td>Fair</td>
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</table>

e. **Writing Mechanics**

Writing is clear, concise; grammar, sentence structure and paragraphing are strong.

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<th>Brief</th>
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</table>
f. Citation.

<table>
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<tr>
<th>Brief</th>
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<th>Judge 4</th>
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<tbody>
<tr>
<td>1</td>
<td>Fair-</td>
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<td>Fair</td>
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<td>DNR</td>
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<td>3</td>
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Judges were asked to report whether the brief was better, similar, or worse than the quality of work in their own docket and to assign a letter grade.

Results of the overall rubric scoring were:

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<tr>
<th>Brief</th>
<th>Prof.</th>
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<th>J. 2</th>
<th>J. 3</th>
<th>J. 4</th>
<th>J. 5</th>
<th>J. 6</th>
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<tr>
<td>1</td>
<td>B</td>
<td>C-</td>
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<td>C-</td>
<td>B to B-</td>
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<td>A</td>
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<tr>
<td>2</td>
<td>B</td>
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<td>A-</td>
<td>B+</td>
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<tr>
<td>3</td>
<td>B</td>
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<td>C</td>
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All of the students’ briefs were ranked in the “B” range by the professor. The judges, however, placed Briefs 1 and 3 below the “B” range. Brief 2, which takes the “integrated approach” of weaving the explanation of law with application to client facts, was ranked slightly above “B.” This result indicates a probable preference for the “integrated approach” in practice. As a consequence, as discussed below, legal-writing programs should seriously consider whether IRAC models of legal analysis are truly helpful in practice.

Several of the judges made extensive margin notes but then “gave up” because of the volume of grammatical and mechanical issues in the briefs. Among the top issues noted in this area were: excessive use of passive voice and nominalizations, lack of verb tense and pronoun agreement, lack of parallelism, and general wordiness. Judges universally commented that in all of the briefs the author needed to “get to the point” more quickly. This was often the springboard for discussion in our interviews.

3. The Interviews with Judges

The judges who participated in this study were extremely generous with their time. Not only did they read the briefs, but they gave follow-up interviews. Judges were assured anonymity so that they could speak candidly about lawyers’ writing and legal-writing programs. At each interview,
judges were asked four standardized questions. The following is a summary of our discussions.

Question One: Most law schools teach students to organize writing by stating the rule; explaining the rule using authorities, using specific examples from the authorities; applying the law to the client facts; and then concluding by restating the rule applied to the client (also known as IRAC, BARAC). Do you find IRAC effective or do you prefer organization that combines rule explanation with application to client facts?

As noted, most law schools teach some sort of organizational paradigm, with most programs emphasizing a model that requires students to "explain" the law and then later apply it to client facts. While judges are familiar with this approach and clearly want organized text, most want the writer "to get to the point." Judges reminded us that, of course, their job is to make a decision about the client's case. One judge noted that because his job is to produce justice for litigants, he does not view cases with "academic leisure" and does not have time to "wade through a dissertation" that, while interesting, may not be entirely relevant. A writer who educates the court about the law is certainly appreciated; one that immediately informs the court about the specific issue in the case is valued more. Several judges also pointed out that the use of an organizational paradigm that separates "explanation" from "application" is not helpful where a particular legal issue is settled and frequently before the court.

For example, several judges mentioned suppression motions. This is an area of law that is largely settled, and thus there is minimal need for a recitation of rules or legal analysis; what judges need to know is what specific case facts warrant suppression. Yet, they may get pages and pages of legal analysis with sparse factual analysis leading to a perception that the client's case was weak or based on hyperbole. One judge emphasized that while the court may trust a brief, its legal authority will always be verified. Since clerks will do the legal research for the court, it is even more important that the lawyer clearly apply legal precedent to the client's facts in pleadings before the court.

If writers do use an organizational paradigm, then they should narrow the issues to those before the court. As one judge noted, if one prong of a three-part test is at issue, then the judge should primarily read about that one prong, not all three. Most of all, judges expressed a desire for writers to

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54 See supra note 23.
55 Examples of such issues included evidentiary issues (suppression, probative value) and zoning cases.
understand their task and vary their approach depending on the legal issue at hand.

Question Two: To you, what makes one piece of legal writing more persuasive than another?

Judges consistently responded that persuasive writing requires addressing any ambiguity in the law. They noted that while some lawyers do this, many resort to just emphasizing their argument. The most effective approach is to explain why there is ambiguity and then show the court how it can be resolved in the client’s favor. As one judge noted, “it is harder to make [writing] short rather than long.” In addition, several judges noted that careful fact selection is essential to persuasive writing. Furthermore, a large element of professional reputation was noted by judges. Many spoke of looking at who wrote the material before reading it. Depending on the author, there was a differing level of persuasiveness. According to one judge, lawyers build their professional reputation in his court by writing concise, accurate, and focused material. Conversely, another judge said that “sloppiness stands out” and creates a poor reputation for the lawyer that is difficult to overcome.

Judges also articulated what is not persuasive. In relation to the judges’ answers to Question One, several noted that summarizing the law and following with a “therefore, we win” sentence is not persuasive at all. Another judge characterized this as the lawyers “failure to tell the court what the problem is.” In that judge’s view, the trial court’s job is to solve a problem; it is the lawyer’s job to identify the problem. When the lawyer does not do this, the judge loses confidence in the lawyer’s understanding of the case and is less likely to be persuaded by the positions taken by that lawyer.

Related to lack of factual analysis is the lack of clear analogies and articulated reasoning. As legal-writing professors, we were familiar with this complaint since a common margin note we make on students’ case descriptions is “true, but why did the court hold this way?” Judges had similar comments and related the question “why” to persuasion. For example, when a writer does not obviously make the specific factual comparison between a client’s facts and the case facts and include the reason for the comparison, it does not persuade the judge. It follows that legal-writing programs need to add even more emphasis on close reading of cases and careful crafting of factual comparisons and reasoning.

Question Three: The surveys and research we have conducted to date indicate that lack of conciseness is the number one problem in legal writing. Can you describe what makes one piece of writing concise and another not?

We asked this question because we were struck by the number of times lawyers and judges noted that conciseness is largely lacking in legal writing. We were not sure whether the lack of conciseness referred to wordiness or
defective analysis. After carefully listening to the judges, we think it refers to both problems.

The first issue judges discussed was wordiness; too many words, passive voice, and nominalizations. They also noted that run-on sentences and lack of parallelism contribute to poor legal writing. Judges connected these problems to faulty analysis, pointing out that where writing is wordy the legal issue is often obscured. Several judges posited that the problems were related: where lawyers are unsure of the analysis, lack of concision follows. Wordy documents also tend to be less organized. One point raised by judges that is also an issue in law schools is that proper grammar and mechanics are expected in legal writing. Several judges spoke of a general decline in linguistic skills but attributed it to various problems: lack of time to edit and revise (relying on unedited dictated documents); lack of educational background in these areas; and a general decline in the use of formal writing evidenced in e-mail and blogs. As a result of the judges’ comments, we were reminded that even the most brilliant legal mind will have great difficulty in practice without basic writing skills. While teaching students to write in short, active sentences may not sound as exciting as structuring deductive analysis, it is just as essential.

Question Four: If you could speak to law-school, legal-writing professors, what are the top three things that you would ask them to make sure law students learn how to write?

This is the most important question, because this research is aimed at improving legal-writing programs so that they are grounded in the expectations of the bench and bar. The top answer to this question was a plea to legal-writing professors and law schools generally to emphasize mechanics. Grammatical mistakes, poor mechanics, and bad stylistic errors prevent judges from focusing on the legal analysis. They pointed out that legal analysis is their job and that dealing with these types of issues is a frustrating waste of time. Such problems also convey to the bench that lawyers do not value legal writing. Universally the judges agreed that good legal writing is a key component to successful lawyering.

The second most frequent answer called for legal-writing programs to emphasize precision. The judges articulated the need for precision in several

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56 This point is also emphasized in recent legal writing scholarship. Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 J. ASS’N LEGAL WRITING DIRS., 75, 79 (2006).

57 Legal writing professors are also aware of this point. Kathleen Elliott Vinson, *Improving Legal Writing: A Life-long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507, 514 (2005) ("Until the legal profession shows it values legal writing and offers opportunities to improve it, the quality of legal writing will continue to suffer.").
ways: discerning factual selection, consistent use of terms, and complete research. Again, all judges wanted law students to learn to write what the court needs to know. Judges related this to precision by noting what all lawyers should ask: what does the court need to know? What does the lawyer want the order to say? Answering these questions in a way that carefully selects facts and authorities is what lawyers need to do.

Judges want students to learn how to approach legal analysis. This means teaching students to recognize at least two major areas: (1) the difference between fact-driven and law-driven issues; and, (2) the difference between settled law and unsettled law. While these two areas are related, judges made a distinction. New lawyers tend to overemphasize the law. Writing should always address the specific facts at issue in a case and vary the amount of the law depending on the issue. Similarly, judges want law students to know when to present an issue as settled and when to provide greater analysis of the law. This skill was also described as “issue spotting” and “narrowing the issue.”

In addition to answering the four questions, judges provided valuable insight into the effect that legal writing has on their jobs. First, judges are very busy and have huge amounts of legal reading. Thus they preferred legal documents that begin with a short summary of the argument. The summary should have more substance than a typical “Brief Answer” but be brief enough so that if the judge wants to obtain a fast review of the argument, there is enough analysis to gain a quick understanding. Judges would like attorneys to get to the point immediately. The most effective writing tells them up front what is at issue, what relief the party seeks, and why it is justified.

Similarly, judges want lawyers to recognize ambiguity, acknowledge it, and resolve it where appropriate. If there is no ambiguity, then judges would like lawyers to state the rule quickly and show them how the client’s facts fare. Judges noted that lawyers often fail to narrow the issues for the court, resulting in writing that includes “the kitchen sink,” which is rarely helpful to the court.

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58 When one of the judges we interviewed showed us her docket, at first we thought it was a week’s worth of cases, if not a month’s worth. She informed us it was her docket for one day.

59 One judge provided a great view of the appeals court from the lower bench on this point. See D. Brock Hornby, Appellate Judges: Think Before You Publish, LITIGATION, Winter 1996, at 3, 62-63.

60 One judge noted that this approach probably comes from the lawyer’s desire to address any and all potential issues rather than risk omitting one that is later grounds for appeal.
Lawyers also fail to use judgment in gauging how much information the court needs on a given area of law. Judges described as unpersuasive advocates' tendency to ignore or minimize ambiguity, often "writing around" the issue but never addressing it.

Finally, judges noted that in today's time-pressured practice many lawyers do not pay attention to the details. This is manifested in many ways. Lawyers need to "write for reading comprehension," not merely to meet the filing deadline. Several judges noted that both excellent and sloppy work stand out, resulting in appropriate professional reputations for the authors. As a result of our interaction with judges, we recommend several approaches to integrating their concerns into legal-writing and law-school curricula.

**III. CONCLUSIONS, RECOMMENDATIONS AND CHANGES FOR LEGAL-SKILLS PROGRAMS**

The need to bridge the gap between law school and real world expectations of law practice is not a new idea. In the last fifteen years, three extensive reviews of legal education, the MacCrate Report, the Carnegie Report, and Best Practices\(^6\) noted as a weakness in law school curricula the lack of real practice training in law school.\(^6\) Indeed, the Carnegie Foundation identifies as a "major limitation of legal education" the absence of direct practical legal training.\(^3\) Legal writing is the law student's first exposure to developing professional judgment.\(^6\)

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\(^6\) [Amer. Bar Ass'n, Sec. of Leg. Educ. and Admis. to the Bar, Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession (1992) [hereinafter MacCrate Report]; the "Carnegie Report" is the common title of Sullivan et al., supra note 2, and 'Best Practices' is the common title of Stuckey et al., supra note 3, at 26.]

\(^3\) Sullivan et al., supra note 2, at 87 ("[D]eveloping lawyers must at some point learn another set of demanding skills . . . . This movement toward practice is generally the secondary focus of legal education.").

\(^6\) Id.

\(^6\) We believe that legal writing represents a first step in understanding how to think through legal problems with the client in mind and, as a result, represents the beginning of the professional judgment skill:

With proper coaching and sufficient experience, the novice can progress toward competence. This development is triggered when the amount of accumulated situational information starts to overwhelm the carrying out of the rule-governed procedures. What saves the competent performer from situational overload is discovering a goal. (The novice is often too beset with remembering and following context-free rules to think about purpose at all, or, when imagining a goal, may attempt things that a competent performer knows from experience to be impractical.) The new
The need for a law school education that more effectively balances real practice expectations and legal doctrine warrants taking a closer look at how first-year, legal-writing classes can adapt. The results of our research led to some specific changes and suggestions that should be considered in first-year skills programs.

A. Regular Input from the Bench and Bar

Writing programs need to have greater dialogue with the bench and bar so that students are practice ready. Our first recommendation is the formation of an advisory panel comprised of judges, decision makers—such as marital masters, administrative law judges or hearing examiners—and practicing lawyers. Ideally, such a committee would provide ongoing input into the content and delivery of legal-writing instruction. For example, two of the most consistent ideas we received from judges—addressing mechanics and varying organizational paradigms depending on the issue—are probably underrepresented in most legal writing programs. Further, such an advisory committee could keep legal-writing professors abreast of current legal trends. For example, is it acceptable to cite to Wikipedia? Legal analysis and writing is a skill, not a doctrinal endeavor. Therefore, it is critical that legal-writing programs teach in a way that makes students as practice ready as possible.

A very efficient way to develop a greater understanding of what students will face as lawyers today is to simply ask the experts—practicing lawyers. At Franklin Pierce, we took a first step toward engaging the bar in our curriculum. During the fall and spring semesters, members of the bar, including judges and recent graduates, will talk with students. For example, a recent panel about practice writing reinforced the importance of the dreaded Bluebook. In response to a student question about whether citation capacity—what the competent person has that the novice does not—is the ability to judge that when a situation shows a certain pattern of elements, it is time to draw a particular conclusion, that one should act in a certain way to achieve the selected goal.

SULLIVAN et al., supra note 2, at 117.
65 STUCKEY ET AL., supra note 3, at 272 (noting that “many law schools make curriculum decisions, even significant decisions without consulting practitioners” and recommending a change in this practice).
even mattered, an experienced practitioner responded quickly: “Of course it does; it is part of the language you are learning. You have to pay attention to the details. When you don’t, you aren’t credible.” While it may not have been the answer the student hoped for, it certainly went far to reinforce the curriculum’s inclusion of citation skills. The purpose of these presentations was for students to understand the context for the skills they are learning and the importance of effective writing.

B. Teaching a Varied Approach to Writing

Law students should not get the impression that there is a “one size fits all” approach to legal writing. They need greater training in tailoring their analytic approach to the legal issue. Understanding their audiences’ and their clients’ needs is an exercise in developing professional judgment and skill. Developing professional judgment and skill requires frequent, varied practice.\(^6\)

Instead of the typical long memo assigned in the first semester, first-year writing programs should require students to write several short complete analytical assignments, where the focus is on brevity and efficiency.\(^6\) Legal readers, including all of the judges interviewed for this article, said they rarely want to read anything more than five-to-six pages, and shorter would be better. They want writing that is geared to the issue. For example, if it is a settled area of law, they want writing that is focused on application of the facts and not a recitation of law that is well understood, followed by application of the facts. Thus, law-school writing classes should be less rigid about using IRAC or similar organizational paradigms.

One way to address the issue of varied writing is to allow students more opportunities to practice. Each practice opportunity is then designed to help students develop varied writing skills depending on audience and subject matter. Also, within each assignment is emphasis on essential writing skills such as organization, synthesis, and case comparisons.

At Franklin Pierce Law Center, the fall semester includes seven short projects given to the students in the form of case files.\(^6\) These varied assignments replace two long memos. Each assignment focuses on a particular

\(^6\) SCHWARTZ, supra note 9, at 324 (noting that a key to analytical skills is frequent practice); STUCKEY ET AL, supra note 3, at 166 (“Optimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory, and application.”).

\(^6\) SOURCEBOOK, supra note 1, at 21.

\(^6\) Each case file contains a memo to the student with the facts and the assignment, other documents such as contracts or deeds and copies of cases, if the assignment requires no independent research, and a sample.
skill. For example, the first assignment is a three-page, inter-office memo on a settled issue of law. This assignment requires reading several cases closely, analyzing the cases, and applying the cases to client facts.

The next memo requires students to write a client letter on a real property issue. The case file contains a deed and a memo about the client’s question, as well as the cases they must read. The letter must be fewer than three pages, single-spaced and must begin with a short summary. This assignment requires students to synthesize cases around a particular issue and emphasizes concise, clear, straightforward writing.

Students must then do a problem that requires them to analyze an issue of unsettled law. The goal of this assignment is to help students begin to see the difference between writing about an area of law that is straightforward and writing about one that is more complicated and has no clear legal precedent. This assignment introduces students to the idea that the format, organization and length of their writing should be designed around the legal issue. Students are also introduced to the idea that a clear prediction may not be possible but that they still must make a prediction based on a reasoned interpretation of trends in the law.

The first graded event of the semester concerns employment law and has two components: a non-competition contract clause for an employer and a memo that advises the client about how the clause meets the client’s objectives. The assignment requires students to pay attention to language choice and introduces drafting, while also requiring students to practice more traditional case analysis skills in preparing the advisory memo.

Next, students write a short memo summarizing the steps to evict a tenant. Here students must communicate the process required under the state eviction statute, including the forms that must be filed. The emphasis is on statutory research and clear communication of the steps. Next, students must write a non-compete clause in an employment contract. We designed this assignment to help students write clearly about statutory requirements and necessary procedural steps.

Instead of a long memo for a final assignment, students take an “exam” modeled around the Multistate Performance Test (hereinafter MPT). Our goal is to address the need for students to see that different legal problems often require different analytical approaches transparently. See STUCKEY ET AL., supra note 3, at 63 (noting that “[l]aw schools give students some of the tools they need to solve legal problems. Students acquire legal analytical, writing, and research skills, and an overwhelming amount of doctrinal knowledge.”).

PRACTICE WRITING

lyze and answer the problem. This is done in an exam setting and requires students to write a short memo starting with a summary of their answer. Here the goal is to introduce students to the MPT format and give them practice in writing under exam conditions. Students take a practice MPT before this final and have an additional optional practice MPT. Because students have already completed several assignments modeled on the "case-file" format, they are well prepared for the test.

Each short assignment is returned to students with individual feedback and a model answer. In addition, because we have repeatedly heard that one-on-one time with the professor provides the best learning for students, we have restructured the class model to include a one-and-a-half hour class session and thirty-minute tutorial. The semester is planned so that before every assignment is due, students have a tutorial where they can bring drafts, get feedback, and talk with their professor or teaching assistant ("TA") as well as their colleagues about the assignment. Three to five students attend the tutorial weekly. Each week, they alternate between meeting with their professor or with their TA. The small group allows students to get individual and group feedback on their writing and their understanding of the analysis. The small groups also allow time for discussion of the law and in-depth analysis. The increased student-teacher contact and opportunity for more practice and feedback are designed to optimize the time students have in their first semester skills class.

C. Focusing on Problem-Centered Learning, Rather than Text and Paradigms

Most legal-writing teachers probably perceive that they are already problem-centered learning courses:

In the problem-centered approach, the curriculum is organized around problems; students are active learners who work on problems, or simulate problem solving [or solve real-life problems]. Teachers are facilitators who guide students in the process of learning by doing. During this

72 At Franklin Pierce Law Center, the first-semester, legal-writing program carries four credits (two credits from a once-a-week research class, and two credits from a ninety-minute class and thirty-minute tutorial each week). For tutorials, students are on a two-week rotation. They meet with three or four other students and the professor one week and their faculty assistant the next week.

73 See generally STUCKEY ET AL, supra note 3, at 235-63 (Chapter 7: Best Practices for Assessing Student Learning).
process, students work, usually in small groups, discovering solutions on their own, gaining insights into their own performance, and acquiring skills and knowledge as they solve problems.\textsuperscript{74}

Nevertheless, most legal writing classes use a textbook and emphasize its content as the knowledge required to produce good writing.\textsuperscript{75} It is important that students do not learn that following IRAC or similar models automatically produces high-quality legal writing. The judges emphasized that students need to understand the process of how to create good content. By asking deeper questions such as "why did you organize that way?" or "what made you decide to mention those facts from that case?" or "why mention the client facts here?" students gain a greater understanding of their own thought process in writing. When they do this, they can see beyond the organizational paradigm and into the deeper process of how to include the appropriate content for each writing assignment they encounter.\textsuperscript{76}

Related to the need to create good content, judges emphasized that students need to understand their cases well enough to summarize their salient points concisely. All of the judges interviewed suggested that every piece of writing should include a summary.\textsuperscript{77} Law students must be adept at writing a summary. The length depends on the particular issue; a paragraph is sufficient in a straightforward legal issue, while a page or two would be warranted in a more complex case. Judges—and indeed, many of the lawyers we encountered in our first survey—said that they want to know up front what the issue is as well as the answer. This requires something more than the typical brief answer but something far less than the whole analysis. Students should be taught the art of the summary—a skill that is difficult to

\textsuperscript{74} Id. at 146.

\textsuperscript{75} Id. at 145-46 ("A problem-solving curriculum is different from a traditional knowledge-based curriculum. In the knowledge-based approach, the curriculum is organized into subjects and teachers are regarded as the experts in their subjects. They impart their subject knowledge to learners who are expected to remember, understand, and apply it.").

\textsuperscript{76} SULLIVAN ET AL., supra note 2, at 109 ("These procedures help students learn to make their thinking visible in writing so that it can be worked over and improved under the instructor's guidance.").

\textsuperscript{77} While some may view this as the "issue" and "brief answer" portion of a memo, it was clear that judges were referring to something else. A few of them noted that the summary paragraph in pleadings is the touchstone of the case—a brief identification of the problem and solution that can be integrated into every document before the court.
master, but is worthy of more specific practice than students currently get in law school.\textsuperscript{78}

One way to emphasize the problem-centered approach is to de-emphasize a particular organizational paradigm. While this does not mean that organization is jettisoned, it does require the teacher to facilitate more discussion about what analytical content the legal reader needs and the best way to provide it. This year, we have done just that. Before assignments were due, students wrote the rule along with a reasonable way to break it down, discussed the relevant authorities, and showed how they would be applied. As a result, they did not rely on IRAC but instead thought through how the writing addressed the legal authority and the target audience (judge, client, co-worker etc.).

In addition, at Franklin Pierce Law Center, for every assignment outlined above, students must write summaries of their answer before analyzing the issues. Students are encouraged to write this last or at least edit it last, so that it informs the audience of the most important information about the case.

\textbf{D. Mechanics and Grammar}

Few professors want to teach mechanics and grammar. Fewer students want to revisit this often-weak skill from their educational past, but it is essential. For reasons beyond the scope of this article, many law students arrive at law school with an insufficient understanding of simple writing mechanics and rules.\textsuperscript{79} First-year writing classes should require students to

\textsuperscript{78} Several of the judges invoked the quote, "I didn't have time to write something short, so I had to write something long."

\textsuperscript{79} The following articles provide some insight into the shortcomings of English language instruction that afflict many of our students—and the problem is not limited to American education. Roger O'Neil, 'Woe is us'—Bad Grammar Permeates Language. MSNBC.com, Nov. 11, 2005, http://www.msnbc.msn.com/id/100004296/ (reporting on a recent survey finds that Fortune 500 companies are spending more than $3 billion a year retraining employees in basic English); Daniel de Vies, \textit{Claususes and Commas Make a Comeback, SAT Helps Return Grammar to Class}, washingtonpost.com, Oct. 23, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR20061022-01135 (noting that "[g]rammar lessons vanished from public schools in the 1970s, supplanted by a more holistic view of English instruction. A generation of teachers and students learned grammar through the act of writing, not in isolated drills and diagrams."); Alexandra Fean, \textit{A-level Students Unable to Write Essays}, Aug 15, 2007, http://www.times-online.co.uk/tol/life_and_style/education/article2260498.ece ("You should not be able to get an A [grade] if you can't string a sentence together. These aren't people who can't spell antidisestablishmentarianism—these are very infantile mistakes, like confusing been and being; there and their.").
learn or review and apply some of the basic rules of grammar, and individual feedback from professors should address grammatical and mechanical issues.

While it is often hard to fit grammar and mechanics into an already content-abundant syllabus, we now emphasize grammar and mechanics through regular class exercises and through on-line exercises and quizzes. The goal is to refresh students' use of rules of grammar and convey that good writing includes attention to mechanics. Spending five to ten minutes every class on a particular mechanics issue, such as passive voice or parallelism, contributes to that goal.

IV. Conclusion

Our research, findings and program changes have given us a better answer to the question "so . . . what are you teaching them today anyway?" We are preparing students for the current expectations of practice. Legal-writing instruction should develop that skill in a way that provides an excellent foundation in legal research and analysis while also introducing students to how these skills are relevant to their chosen profession. The increased pressure to produce practice-ready students dictates that professors, in particular, pay close attention to the profession's expectations. This is not to say that academics do not have much to offer to the profession—they do. Our hope is that academics will work more closely with the profession to harmonize legal writing curricula with real world expectations.

80 We recognize that this is challenging to do, and often students who need to learn this skill the most need to spend additional time on this skill. See generally Stuckey et al., supra note 3, at 161-62 (encouraging schools to establish learning centers that can, in part, support students who need to develop specific skills).
APPENDIX A: ONLINE SURVEY OF LEGAL-WRITING PROGRAMS

I am forwarding a request on behalf of two of my colleagues at Franklin Pierce Law Center. Professors Amy Vorenberg and Margaret McCabe are gathering information about the connection between the way legal writing is taught and the expectations of judges. Once they finish surveying professors and judges they hope to publish their findings in a manner that may be useful to all of us who teach in this area.

I have attached a short survey at their request. I have also copied this at the bottom of the email in case the attachment does not come through properly. Please note: responses should be emailed, or attached and emailed to Professor Vorenberg at avorenberg@piercelaw.edu rather than replying to this posting, as neither Amy nor Margaret are currently able to access the list-serve. (We are working on that!)

On behalf of Amy and Margaret, thank you!

Linda Anderson
Acting Director—Franklin Pierce Law Center

SHORT LEGAL WRITING QUESTIONNAIRE

Margaret Sova McCabe and Amy Vorenberg are working on an article that examines the connection between what we teach is taught in the first year and the expectations of judges and practitioners. A small section of this article will explain generally what is actually being taught in first year writing curricula and what texts are commonly used. Below you will find some questions that require very brief answers. This information will be collated and used in the article. Please take a few minutes to fill this out.

Name ________________________________
Law School ________________________________
E-mail address ________________________________
Is your program a two semester program? ________________
If not, how many semesters is your program? ________________

Briefly, how is your program structured? (i.e. Do you teach predictive writing in the fall and persuasive in the spring? How many memos/briefs do you assign?)

__________________________________________________________
__________________________________________________________
__________________________________________________________

2009] PRACTICE WRITING 29
Do you teach some form of the IRAC/BARAC structure?


Do you require students to write an explanation separate from an application?


What text(s) do you use?


Do you use a separate text for writing mechanics, such as grammar? If so, which one do you use?


Do you use Blue Book or ALWD for citation?


Thank you very much for taking the time to do this.

If you have any questions, e-mail Amy Vorenberg at avorenberg@piercelaw.edu.
APPENDIX B: JUDGE SURVEY

SURVEY OF JUDGES REGARDING QUALITY OF LEGAL WRITING

INSTRUCTIONS:

This survey tracks the presence of certain skills considered essential to high quality legal writing.

Please check the box that best describes the frequency with which you observe the skills listed. If you are unable to comment on a skill, please mark an “X” on that number.

Use the following key:

ALWAYS (A): Observe the skill 100% of the time
FREQUENTLY (F): Observe the skill about 75% of the time
OCCASIONALLY (O): Observe the skill about 50% of the time
SELDOM (S): Observe the skill about 25% of the time

SURVEY RESPONDENT INFORMATION

Name: ____________________________ (participation in this study is confidential and names will not be disclosed without your specific consent)

Are you a:
Federal Judge____ State Judge____Special Master____ (State or Federal?)

Number of Years on the Bench: ____

ADDITIONAL STUDY REQUESTS

I am willing to:

Read 3 first year student appellate briefs & rank their quality: ____ (Yes or No)
RESEARCH SKILLS:

1. Uses effective authority: A F O S N
2. Uses authority accurately: A F O S N
3. Uses proper citation format: A F O S N
4. Research is complete: A F O S N

COMMENTS ON RESEARCH SKILLS:

Writing Skills:

1. Writing is concise: A F O S N
2. Writing is clearly organized: A F O S N
3. Writing uses language that is easy to understand: A F O S N
4. Writing adequately explains authority/rule of law: A F O S N
5. Writing adequately applies authority/law to facts: A F O S N
6. Writing uses proper grammar: A F O S N
7. When appropriate, writing is persuasive: A F O S N
8. Writing follows appropriate format (Court Rules): A F O S N

COMMENTS ON WRITING SKILLS:
APPENDIX C: LAWYER SURVEY

SURVEY OF THE QUALITY OF LEGAL WRITING IN NEW HAMPSHIRE

INSTRUCTIONS

This survey tracks the presence of certain skills considered essential to high quality legal writing.

Please check the box that best describes the frequency with which you observe the skills listed. If you are unable to comment on a skill, please mark an “X” on that number.

Use the following key:

ALWAYS (A): Observe the skill 100% of the time
FREQUENTLY (F): Observe the skill about 75% of the time
OCCASIONALLY (O): Observe the skill about 50% of the time
SELDOM (S): Observe the skill about 25% of the time

SURVEY RESPONDENT INFORMATION

Are you a:

Judge___Law Clerk___Private Practitioner___(# of Lawyers in Firm ___)

Number of Years in Practice: ___

RESEARCH SKILLS:

1. Uses effective authority: A F O S N
2. Uses authority accurately: A F O S N
3. Uses proper citation format: A F O S N
4. Research is complete: A F O S N

COMMENTS:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
WRITING SKILLS:

1. Writing is concise: A F O S N
2. Writing is clearly organized: A F O S N
3. Writing uses language that is easy to understand: A F O S N
4. Writing adequately explains authority/rule of law: A F O S N
5. Writing adequately applies authority/law to facts: A F O S N
6. Writing uses proper grammar: A F O S N
7. When appropriate, writing is persuasive: A F O S N
8. Writing follows appropriate format: A F O S N

PLEASE USE BELOW OR THE REVERSE SIDE FOR COMMENTS ON WRITING SKILLS:
APPENDIX D: JUDGES’ RUBRIC FOR STUDENT BRIEFS

EVALUATION OF BRIEF # ______

1. Persuasiveness: Brief uses motivating arguments that are organized to be persuasive.

   Excellent   Good   Fair   Poor

   Comments:
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________

2. Organization: Overall organization is easy to follow, readable and clear.

   Excellent   Good   Fair   Poor

   Comments:
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________

3. Legal Explanation: Explanation of the law educates the Court about the cases’ facts, holdings, and reasoning behind the rule of law.

   Excellent   Good   Fair   Poor

   Comments:
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
4. Legal Analysis: Application of the facts of the client’s case is done persuasively, using explicit factual comparisons and distinctions to make the arguments.

<table>
<thead>
<tr>
<th>Excellent</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comments:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5. Writing Mechanics: Writing is clear, concise, grammar, sentence structure and paragraphing are strong.

<table>
<thead>
<tr>
<th>Excellent</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comments:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6. Citation:

<table>
<thead>
<tr>
<th>Excellent</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comments:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7. Is this brief (check one)

- Similar to the quality you see in your docket
- Better than the quality you see in your docket
- Worse than the quality you see in your docket
8. Overall comments about this brief:


9. What letter grade would you give this brief? _________
APPENDIX E: JUDGE SURVEY RESULTS

Table E-1, Judges’ Responses to Research Skills Questions

The following summarizes the judges’ survey results for research skills.

<table>
<thead>
<tr>
<th>Research Skills</th>
<th>Always</th>
<th>Frequently</th>
<th>Occasionally</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uses effective authority</td>
<td>0</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Uses authority accurately</td>
<td>0</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Uses proper citation format</td>
<td>0</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Research is complete</td>
<td>0</td>
<td>2</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

Table E-2, Judges’ Responses to Writing Skills Questions

The following table summarizes how the judges ranked lawyers’ writing skills.

<table>
<thead>
<tr>
<th>Writing Skills</th>
<th>Always</th>
<th>Frequently</th>
<th>Occasionally</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Writing is concise</td>
<td>0</td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Writing is clearly organized</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Writing uses language that is easy to understand</td>
<td>0</td>
<td>6</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Writing adequately explains authority/rule of law</td>
<td>0</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Writing adequately applies authority to law/facts</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Writing uses proper grammar</td>
<td>0</td>
<td>6</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>When appropriate, writing is persuasive</td>
<td>0</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Writing follows appropriate format (Court rules)</td>
<td>0</td>
<td>7</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

81 One state judge provided commentary to the questions but did not answer them. Another master declined to answer because in that master’s court legal argument is rarely supported with research.