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## ARTICLES & ESSAYS

**The Legal Writer's Checklist Manifesto: Book Review**

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# The Legal Writer's Checklist Manifesto:

## Book Review

Jennifer Murphy Romig\*

### I. Introduction

*A surgery patient requires the insertion of central lines into his veins and arteries for the delivery of life-preserving medication, yet these lines can deliver deadly infections if they are not inserted properly and continually monitored for signs of contamination.*

*An airline pilot and copilot begin the process of warming up the large aircraft in which they will shortly take off. The pilot and copilot may know each other from prior flights, or they may not; either way, they must work together to fly the aircraft.*

*A pipefitter on a multimillion-dollar construction project discovers a pool of water gathering near the elevator bank on an unfinished floor. The project is about halfway complete.*

Each of these stories plays a role in Atul Gawande's *The Checklist Manifesto: How to Get Things Right*,<sup>1</sup> and each of these stories has something to teach practicing lawyers who wish to enhance their own professional performance. *The Checklist Manifesto*, a *New York Times* bestseller, draws from a variety of fields to show how the use of ostensibly simple checklists can help professionals—at all levels of expertise and in every professional discipline—overcome mistakes and “improve their outcomes with no increase in skill.”<sup>2</sup>

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<sup>1</sup> Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Metro. Bks. 2009).

<sup>2</sup> *Id.*

Gawande, a practicing surgeon, professor at Harvard Medical School, and author of *Complications: A Surgeon's Notes on an Imperfect Science*, mentions the legal field only in passing.<sup>3</sup> Yet lawyers interested in more effective and efficient performance would do well to study and implement the insights of *The Checklist Manifesto*.<sup>4</sup> The analytical and practical challenges of the legal field mean that practicing law can be just as complex as performing surgery, flying sophisticated aircraft, or constructing skyscrapers and that checklists can provide analogous benefits in the context of law practice. Just as a medical team must observe the steps necessary to avoid infecting a patient's central lines, lawyers must handle legal representation ethically and competently, checking for conflicts before assuming a representation and, in litigation, locating and disclosing adverse authorities to the court as required by the applicable professional conduct rules.<sup>5</sup> Just as a team of pilots flying an aircraft must coordinate many individual tasks into the overall goal of safely controlling the airplane even if they are not personally familiar with one another, lawyers working together on large legal projects must coordinate and combine hundreds or even thousands of individual legal tasks with other lawyers who may not work out of the same office, same law firm, or even in the same country.<sup>6</sup> Just as a construction team must discover and handle unforeseen problems in the midst of the construction process even when no simple or definite solution applies, lawyers must be able to detect potential problems interfering with their pursuit of a client's ultimate goal and then generate and choose from potential solutions even when the solution are not clear-cut.<sup>7</sup>

3 Atul Gawande, *Complications: A Surgeon's Notes on an Imperfect Science* 11 (Picador 2003) (noting "the 36 percent increase between 2004 and 2007 in lawsuits against attorneys for legal mistakes" as well as the fact that two-thirds of death-penalty cases are overturned on appeal).

4 Cf. Anthony Kearns, *Risky Business: What Law Firms Can Learn from Airlines and Hospitals*, available at <http://amlawdaily.typepad.com/amlawdaily/2010/07/kearnscolumn.html> (July 6, 2010) (describing how lawyers should model risk-management techniques from the aviation and medical industries, such as self-reporting and analyzing errors in a peer group and implementing organizational structures that encourage subordinates to challenge poor decisionmaking by senior practitioners).

5 Model R. Prof. Conduct 1.7 (governing conflicts with current clients); Model R. Prof. Conduct 3.3(a)(2) (requiring disclosure of directly adverse authority in the governing jurisdiction). *The Checklist Manifesto's* relevance to multi-step lawyering tasks has previously been recognized. See John Gillies, *The Checklist Manifesto and the Smarter Lawyer* ("One could envisage, in our context, a general checklist relating to firm opinions; one each for addressing issues where our client is a corporation, a limited partnership, or a trust; a checklist where we are acting as agent; etc."), available at <http://www.slw.ca/2010/02/24/the-checklist-manifesto-and-the-smarter-lawyer/> (Feb. 24, 2010).

6 See e.g. Brian Baxter, *Freshfields, Dewey Advice on BP Sale of Pakistani Assets*, available on [www.amlaw.com](http://www.amlaw.com) (Dec. 13, 2010) (describing the \$775 million sale of Pakistan-based assets by London-based British Petroleum (BP) to a Hong Kong-based buyer, guided by lawyers from the international Freshfields firm as well as by Chicago-based in-house counsel from BP, and by energy lawyers, based in Houston, from the Dewey firm).

7 William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 117 (Jossey-Bass 2007) (hereinafter *The Carnegie Report*).

As Gawande observes, “extreme complexity is the rule for almost everyone.”<sup>8</sup> That is not to say that law practice is always complex. But like the other professional disciplines illustrated in *The Checklist Manifesto*, law practice consists of a range of tasks from the simple (for example, formatting a brief to meet the local court rules) to the complex (for example, shepherding a proposed corporate agreement through negotiations to closing among numerous parties with various and conflicting interests). Gawande’s inquiries into the medical, aviation, and construction fields show how checklists can improve outcomes for any professional endeavor faced with “complex problems,” defined as problems where rote solutions do not apply and outcomes are uncertain.<sup>9</sup>

Although checklists could be helpful in most—and perhaps all—aspects of lawyering, this review focuses specifically on the lawyer’s role as a legal writer. As a mode of expression for the practice of law, legal writing<sup>10</sup> is as complex as the practice it embodies. Legal writing easily meets Gawande’s definition of complexity: situations where “[e]xpertise is valuable but most certainly not sufficient” and the outcome is uncertain.<sup>11</sup> Legal writing is also an area where outcomes are perceived to be less than desirable. Critiques of legal writing are not new,<sup>12</sup> but current scholarship is measuring the dissatisfaction more concretely than ever. Practicing attorneys asked to comment on the state of writing skills among new lawyers do not hesitate to share their complaints.<sup>13</sup> Judges share their dismay over the state of legal writing, as evidenced in the written work

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<sup>8</sup> Gawande, *supra* n. 1, at 21.

<sup>9</sup> *Id.* at 49.

<sup>10</sup> This review uses the term “legal writing” to refer to prose-style writing in paragraphs, such as letters, e-mails, memoranda, briefs, and articles, although many of Gawande’s points apply equally to the process of drafting contracts, pleadings, and discovery requests.

<sup>11</sup> Gawande, *supra* n. 1, at 49.

<sup>12</sup> See e.g. Terence Collins & Darryl Hattenhaur, *Law and Language: A Selected, Annotated Bibliography on Legal Writing*, 33 J. Legal Educ. 141, 142 (1983) (observing that, in literature on legal writing from 1969 to 1980, “many authors note among prelaw students, law students, and working attorneys the decline in writing skills noted generally over the last decade”).

<sup>13</sup> Susan Hanley Kosse & David ButleRitchie, *How Judges, Practitioner, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Legal. Educ. 80, 84–85 (2003) (noting high response rate from survey recipients and that “[n]early 94 percent, overall, of the respondents found briefs and memoranda marred by basic writing problems”); Erika Abner & Shelly Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 Leg. Writing 363, 380–83 (2010) (surveying supervising partners and recording comments such as “[a]ppalling grammar”; “[t]hey don’t think about the order of sequencing of, of the structure of the thoughts and how that one fits into the other”; “[t]hey just say well, here’s a case, here’s another one, here’s twenty cases”; “[t]here’s no rational ordering principles [in how new graduates use cases]”); see also Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 Phoenix L. Rev. 1, 9 (2010) (describing survey of practitioners and judges in which these respondents noted problems with legal writers’ “conciseness, organization, and analytical skills”).

submitted in their courts.<sup>14</sup> Scholars argue for ways to solve the problem of “lawyers who cannot write effectively.”<sup>15</sup> Nationally recognized legal writing consultants describe seemingly perpetual common mistakes and how to avoid them.<sup>16</sup>

The lessons of *The Checklist Manifesto* suggest that, just as checklists can help hospitals avoid fostering dangerous central-line infections, so too can checklists help lawyers to avoid poor legal writing. This review briefly sums up Gawande’s central insights and then addresses how legal writers can apply them to enhance their writing processes and products.

## II. Central Insights of *The Checklist Manifesto*

Gawande opens the book with several anecdotes of near-fatal errors in the operating room, anecdotes that lead into a larger discussion of why errors occur. Increasingly, professional errors—across fields and disciplines—stem not from lack of ability or ignorance, but from ineptitude: situations in which “the knowledge exists, yet we fail to apply it correctly.”<sup>17</sup> Gawande describes the sometimes fatal consequences of ineptitude so as to prepare the reader to accept his solution, namely the use of checklists, which come in several classic types.

The first and most rudimentary type of checklist is the type that helps with memory recall by serving a “forcing function.”<sup>18</sup> Such checklists force their users to follow the “minimum steps necessary in a process.”<sup>19</sup> Checklists in this “forcing” category may themselves take one of two formats: a “read–do” format in which the professional reads the checklist while doing each step of the task; or “do–confirm” format, in which the professional does the whole task and then uses a checklist as confirmation

<sup>14</sup> Kosse & ButleRitchie, *supra* n. 13, at 85; Kristin K. Robbins, *The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write*, 8 Leg. Writing 257, 264 (2002); see also Ruggero Aldisert, *Winning on Appeal: Better Briefs and Oral Arguments* 25–27 (2d. ed. Nat’l Inst. Trial Advocacy 2003) (listing thirty-one items as “criticisms generally expressed by judges against lawyers’ briefs today”); comments by Hon. Edith Hollan Jones at [www.lawprose.com](http://www.lawprose.com) (describing “grotesque” usage errors in current usage).

<sup>15</sup> Wayne Schiess, *Legal Writing Is Not What It Should Be*, 37 S.U. L. Rev. 1 (2009) (“I believe most lawyers would agree with me that most legal writing is mediocre at best . . . .”); Kathleen Elliott Vinson, *Improving Legal Writing: A Life-long Learning Process and Continuing Professional Challenge*, 21 Touro L. Rev. 1, 8 (2005); accord Tom Goldstein & Jethro Lieberman, *The Lawyer’s Guide to Writing Well* (2d ed., U. Cal. Press 2002) (“Nearly fifteen years after we began the first edition of this book [published in 1988], lawyers still write poorly.”).

<sup>16</sup> E.g. Stephen V. Armstrong & Timothy P. Terrell, *Why Is It So Hard to Front-load?*, 18 Persps. 30 (2009) (describing new law-firm associates’ failure to make their point up front as their most frequent writing problem with the most “damaging effects”); Ross Guberman, *The Three Biggest Mistakes I See*, available at [www.legalwritingpro.com](http://www.legalwritingpro.com), select More Articles, scroll down to Legal Writing (May 12, 2010).

<sup>17</sup> Gawande, *supra* n. 1, at 8.

<sup>18</sup> *Id.* at 50.

<sup>19</sup> *Id.* at 36.

that the task meets the checklist's standards.<sup>20</sup> Either type of checklist can help prevent error and enhance performance by providing a "cognitive net" that "catch[es] mental flaws inherent in all of us—flaws of memory and attention and thoroughness."<sup>21</sup>

A second type of checklist that enhances outcomes is not built around specific content to "do" or "confirm," but rather requires team members to stop and communicate with one another at specified moments, called "pause points."<sup>22</sup> Rather than force an individual to check off a discrete task, this type of checklist forces communication by "detail[ing] who ha[s] to talk to whom, by which date, and about what . . . before the next steps could proceed."<sup>23</sup> Gawande's illustration here is the model used in complex construction projects, in which the architects, pipefitters, electricians, and everyone else on the building team must communicate at certain specified pause points in the building process—or else the building process stops.<sup>24</sup> Such pause points generate valuable ideas from all members of the team and thus tease out potential problems that otherwise would be suppressed.

Although appreciating the conceptual benefits of checklists may be easy, creating an effective checklist is not. To illustrate these challenges, Gawande outlines his own process of generating a "read-do"-style checklist for improving surgical outcomes. Setting out to create this checklist (intended for use by the World Health Organization), he knew it must be realistic for the professionals who would be using it, namely surgical teams working in all types of public-health environments including those with extreme public-health challenges. He also knew that, apart from any cultural and environmental factors, the checklist must be short enough that surgical teams would actually use it in practice.<sup>25</sup> Gawande's first attempt to create a checklist meeting these needs fell short; for example, the nurse responsible for its implementation silently ran through each step rather than stating the steps out loud for the surgical team's benefit.<sup>26</sup> Moreover, the checklist itself was so long and potentially ambiguous that the patient began to shift around on the table as the team struggled together to complete it.<sup>27</sup> As a result, Gawande heavily revised the checklist, clarifying who should administer the checklist and when, and reducing the list of checklist items to those that could cause the most severe consequences if missed—the items that literally could be "killers."<sup>28</sup>

20 *Id.* at 123.

21 *Id.* at 48.

22 *Id.* at 111.

23 *Id.* at 66.

24 *Id.*

25 *Id.* at 90.

26 *Id.*

27 *Id.*

28 *Id.* at 123.

As the implementation of this checklist demonstrates, a major premise of *The Checklist Manifesto* is that, across professional disciplines, complex professional tasks are often, if not almost always, undertaken by teams—and that checklists are an important tool in facilitating such teams and in optimizing the results of their work. As Gawande shows through multiple extended anecdotes related to medicine, doctors, anesthetists, and nurses work in teams to perform surgery. Within the construction industry, the idea of one “master builder” responsible for all aspects of a construction project no longer holds; large modern projects are simply too complex for any one person, regardless of experience and expertise, to manage single-handedly.<sup>29</sup> And in aviation, many modern aircraft are too complex for a single pilot to fly.<sup>30</sup>

While Gawande tantalizes professional managers with the pragmatic benefits of checklists, *The Checklist Manifesto* also contains a more radical approach to the concept of management itself. Gawande asserts that attempts at top-down management of such teams are inherently misguided. In such situations, “[e]fforts to dictate every step from the center will fail,” he writes, because “people need room to act and adapt.”<sup>31</sup> Instead, teams should operate around checklists that force certain tasks but also—critically—force decisionmaking to the periphery of the group and create a sense of shared responsibility among all members of that group. For example, nurses given the opportunity to say their name and share concerns at the beginning of a case “were more likely to note problems and offer solutions,” a beneficial byproduct of the checklist described as an “activation phenomenon.”<sup>32</sup> Checklists focused on communication among team members foster good decisionmaking by creating a “seemingly contradictory mix of freedom and expectation.”<sup>33</sup>

### III. Benefits of Checklists for Legal Writers

Judges’ and lawyers’ critiques of the legal writing they see strongly suggest that much legal writing being produced today is quite poor.<sup>34</sup> One implication of this criticism is that if individual legal writers do better, the state

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<sup>29</sup> *Id.* at 67.

<sup>30</sup> *Id.* at 33 (detailing the unsuccessful test flight in 1935 of Boeing’s Model 299, which was deemed “too much airplane for one man to fly” but which was later mass produced and successfully flown throughout World War II through the use of pilot checklists).

<sup>31</sup> *Id.* at 79.

<sup>32</sup> *Id.* at 108.

<sup>33</sup> *Id.*

<sup>34</sup> See *supra* nn. 12–15.

of legal writing generally will improve. This implication is particularly strong for writers who fail to complete the simple tasks of proofreading and editing for grammar and punctuation.<sup>35</sup> Critiques also arise from the more forgivable difficulties of writing. As Flower and Hayes have observed, “It is no wonder that many find writing difficult. It is the very nature of the beast to impose a large set of converging but potentially contradictory constraints on the writer. Furthermore, to be efficient the writer should attend to all of these constraints at once; when all is said and done they must be integrated.”<sup>36</sup>

These general difficulties of generating and polishing something worthwhile are magnified in any reader-based writing context, whether in law or any other professional discipline. The act of writing is fraught because the audience by definition brings a different perspective to the written text than that of the writer.<sup>37</sup> “Taking the perspective of another mind is . . . a demanding cognitive operation. It means holding not only your own knowledge network but someone else’s in conscious attention and comparing them.”<sup>38</sup> Moreover, as anyone who has missed catching a glaring error during the self-editing process can attest, it can be quite difficult for a writer to gain any distance from what that writer thinks is on the page and instead edit what is actually there.<sup>39</sup>

In addition to the classic and discipline-neutral difficulties of using proper grammar and communicating clearly to one’s audience, a good argument can be made that at this particular moment in the life of the legal profession, legal writing is becoming even more difficult. For legal writing based on legal research, there are more primary and secondary

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**35** *E.g. Johnson v. Roma II–Waterford, LLC*, 769 N.W.2d 573 (table), 2009 WL 929049 at \*3 (Wis. App. 2009) (noting several proofreading errors and stating, “[w]e are left shaking our heads” at counsel’s disregard of the rules and failure to proofread); Wilbur F. Pell, Jr., *Read Before Signing*, 66 A.B.A. J. 977, 977 (1980) (“The number of errors of spelling, punctuation, and misuse of words in briefs suggests that a post-transcription reading was not given by the lawyer whose signature appears at the brief’s end; indeed, on occasion, not by anyone at all.”).

**36** Linda S. Flower & John R. Hayes, *The Dynamics of Composing: Making Plans and Juggling Constraints*, in *Cognitive Processes in Writing* 40 (Lee W. Gregg & Erwin R. Steinberg, eds., Rutledge 1980).

**37** Peter Elbow, *Writing with Power* 10 (Oxford Univ. Press 1981) (“What prevents most people from being inventive and creative is fear of looking foolish.”); Cheryl Armstrong, *Reader-Based and Writer-Based Perspectives in Composition Instruction*, 5 *Rhetoric Rev.* 84, 85 (1986) (describing how writers’ conscious attempts to write for the reader can be counter-productive).

**38** Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See through the Eyes of the Reader*, 14 *Leg. Writing* 291, 302 (2008) (quoting Linda Flower, *Writer-Based Prose: A Cognitive Basis for Problems in Writing*, 41 *College English* 19, 36 (1979)).

**39** Elsa Jaffe Bartlett, *Learning to Revise: Some Component Processes*, in Martin Nystrand, ed., *What Writers Know: The Language, Process, and Structure of Written Discourse* at 349–50 (Acad. Press. 1982) (whether writers can edit their own work effectively depends on the “crucially importan[t] . . . ability to inhibit interpretations based on knowledge of the writer’s own intentions”).

sources to draw from,<sup>40</sup> more debate about what to cite given controversy over unpublished opinions,<sup>41</sup> and more citation methods<sup>42</sup> for such sources than ever before. The standard intraoffice memorandum format with somewhat consistent expectations of content is breaking down in favor of shorter analytical pieces often communicated by e-mail.<sup>43</sup> Both in fee-based and non-fee-based practices, the pressure to be efficient appears to be more intense than ever, despite the unchangeable fact that the pressure to be efficient stands in inevitable tension with the pressure to write well.<sup>44</sup> One of the primary audiences for legal writing, the court system, is dealing with heavier caseloads than ever;<sup>45</sup> thus, the value of quickly and forcefully making one's point in writing has never been higher. And digital distractions endemic to law practice interfere with the opportunity to focus on the writing process.<sup>46</sup>

In light of these factors creating complexity and generally raising the stakes of legal writing, lawyers may be willing to embrace checklists as a concrete method for improving work product and outcomes. A good writing checklist could help a writer rid the writer's work of structural weaknesses and line-by-line errors in the same way that a good pre-surgery checklist can help a doctor rid the surgery site of potential harmful bacteria that could lead to central line infections.

Luckily for the legal writer who is convinced of the benefits of checklists, legal writing checklists are not new. They are widely available in

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<sup>40</sup> Stephen M. Barkan, Roy M. Mersky, & Donald J. Dunn, *Fundamentals of Legal Research* 32–33 (9th ed., Found. Press 2009) (noting 200,000 new American cases reported each year from 600 courts but encouraging lawyers not to be “frightened by the ever-increasing number of reports” because many of them are repetitive).

<sup>41</sup> Fed. R. App. P. 32.1.

<sup>42</sup> See e.g. Ian Gallacher, *Cite Unseen: How Neutral Citation and America's Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 Alb. L. Rev. 491 (2007).

<sup>43</sup> E.g. Kristin K. Robbins-Tiscione, *From Snail Mail to E-mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 Leg. Writing 32, 33 (2008) (noting the increasing role of informal e-mail communications and the decline of formal intraoffice memoranda in law practice, and further observing that “[w]hereas the elements of the traditional legal memorandum are static, the elements of the informal memorandum and substantive e-mail appear to be organic, determined by the nature of the question at issue, as opposed to a prescribed set of elements”).

<sup>44</sup> See e.g. Sarah Ricks & Jane Istvan, *Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs*, 38 U. Toledo L. Rev. 1113, 1113 (2007) (“A heavy caseload allows little time for the brief writer to achieve the critical distance from the document necessary to edit and revise effectively.”).

<sup>45</sup> *Judicial Caseload Indicators for 12-Month Periods Ending March 31, 2010*, available at <http://www.uscourts.gov> (last visited Dec. 10, 2010) (noting that since 2001, the number of cases pending has increased 16.8 percent in the U.S. Courts of Appeals, 20.2 percent for civil cases in the U.S. District Courts, 59.8 percent for criminal cases in the U.S. District Courts, and 10.1 percent in the U.S. Bankruptcy Courts).

<sup>46</sup> See M.H. Jacobson, *Paying Attention or Fatally Distracted?, Concentration, Memory, and Multi-tasking in a Multi-media World*, 16 Leg. Writing 420, 431–33 (2010) (“[E]ach novel and sudden change, whether a motion, a noise, or a flash, affects our brain” by capturing our attention, interfering with memory and reasoning, and “put[ting] our brains in survival mode so that [the stimuli] interferes with any complex cognition.”); cf. Gawande, *supra* n. 1, at 26 (describing analogous distractions in the practice of medicine: “[w]hen you've got a patient throwing up and an upset family member asking you what's going on, it can be easy to forget that you have not checked her pulse”).

textbooks<sup>47</sup> and in material for practicing lawyers.<sup>48</sup> They are also useful for trial lawyers formulating a theory of the case<sup>49</sup> as well as for transactional lawyers.<sup>50</sup> There is even a text formulated in its entirety as a list of writing checklists.<sup>51</sup>

#### IV. Why Checklists Work

What is new and interesting about *The Checklist Manifesto* is Gawande's exploration of why checklists work and how well they work, and his consequent exhortation for the rigorous and consistent use by experts of expertly constructed checklists. Gawande's focus on the rigorous use of checklists offers a wake-up call to practicing lawyers. One can imagine an experienced lawyer appreciating—and perhaps even clipping and saving, or e-mailing to subordinates—a pithy checklist in a bar journal article or CLE packet. But one can also imagine that same lawyer scoffing at being required to use that checklist in a time-consuming fashion when actually writing or editing a brief. It is easy to imagine a response to such a requirement analogous to the resistance of doctors at a Detroit hospital when faced with a new checklist protocol: “Forget the paperwork. Take care of the patient.”<sup>52</sup>

Gawande goes to great lengths to show how such objections can be overcome, primarily by demonstrating that indisputably better outcomes are associated with the use of checklists. In delineating his public-health experience of making an effective checklist for high-performing surgical teams and in describing how the checklists transformed acceptable surgical outcomes into stellar ones, Gawande holds out a promise that professionals in any field may similarly improve their outcomes through the skillful development and implementation of checklists.

It is true that many of the existing legal writing checklists, particularly those from textbooks, are designed to educate students with little to no knowledge of the legal writing discourse community and its conventions. Indeed, the whole point of such checklists is to spell out virtually every

47 E.g. Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 226–29 (5th ed., Aspen Pub. 2010) (stating seven items to check in “avoid[ing] wordiness”).

48 E.g. Stephen V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* 409–15 (2d ed., P.L.I. 2003) (summing up principles and techniques of 400-page book in seven-page chart).

49 Richard K. Neumann, Jr., *Legal Writing: Structure, Strategy, and Style* 296–98 (6th ed., Aspen Pub. 2009).

50 Practical Law Company, *Confidentiality and Nondisclosure Agreements Checklist*, available to law students and faculty (no fee) and practitioners (fee-based) at <http://uscoperate.practicallaw.com> (Dec.14, 2010) (copy on file with author).

51 Dennis Yokoyama & Austin Parrish, *Effective Lawyering: A Checklist Approach to Legal Writing and Oral Argument* (Carolina Acad. Press 2007).

52 Gawande, *supra* n. 1, at 41.

single step in the writing process, and to list virtually every common mistake to avoid. Thus, for the experienced, expert practicing lawyer, such checklists seem to violate Gawande's suggestion that only the most important—or, in the colloquial language of medicine, “killer”—items should be included.<sup>53</sup> Whereas experts in a field simultaneously perceive the particulars and grasp their overall meaning, novices need to learn how to perceive the particulars as well as how to integrate them into a meaningful whole.<sup>54</sup> A checklist is ideal for teaching novices to perceive the particulars. For example, in legal writing, a checklist can guide novice writers to examine case law in an analytically thorough way, such as by noting whether cases are binding or persuasive and by assessing each case not just for its explicit language but also for its implicit meaning and significant silences.<sup>55</sup> A checklist can also reinforce common usage practices already widely known to practicing attorneys, such as using the word “guilty” for criminal cases and “liable” for civil cases.<sup>56</sup>

These types of checklist items are not likely to be useful beyond the first year of law school because experienced law students and lawyers know to assess whether a case is binding or persuasive and are unlikely to mistake a New Zealand case for being binding in the state of Tennessee<sup>57</sup> or to describe a criminal defendant as “liable.” However, many of the items on textbook-style checklists do have continued vitality. For example, examining a draft for unnecessary verbiage<sup>58</sup> should benefit many writers across seniority levels. Like the suggestion above to check for mistakes regarding the use of “guilty” and “liable,” these suggestions often take the form of a negative “do–confirm” checklist in which writers create a draft and then look for common errors and stylistic weaknesses. In this sense, checklists serve to “get[] the dumb stuff out of the way, the routines your brain shouldn't have to occupy itself with . . . and let[] it rise above to focus on the hard stuff.”<sup>59</sup>

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<sup>53</sup> *Id.* at 123.

<sup>54</sup> See e.g. *The Carnegie Report*, *supra* n. 7, at 116 (describing the progress from novice to expert as a process of “a distanced manipulation of clearly delineated elements of a situation according to formal rules toward involved behavior based on an accumulation of concrete experience”); Michael Polanyi, *Knowing and Being*, 70 *Mind* 458, 458 (1961) (describing a medical classroom in which the teaching psychiatrist instructed students that he could not in fact tell them how to distinguish a true epileptic seizure from other types of seizure because “you will learn this by more extensive experience”).

<sup>55</sup> See e.g. Edwards, *supra* n. 47, at 56–61 (leading students through a checklist of various factors that they should consider in analyzing various cases bearing on the same doctrinal area and, from those cases, synthesizing a statement of the legal standard or rule governing that area).

<sup>56</sup> *Id.* at 231.

<sup>57</sup> During her first year teaching legal writing, the author encountered this error from a student due to an overly enthusiastic and broad use of research in law journals.

<sup>58</sup> Edwards, *supra* n. 47, at 231.

<sup>59</sup> *Id.* at 177.

But textbook-style checklists have continued vitality (beyond law school) in the form of positive “do–confirm” items, even those that cover the “dumb stuff.” For example, brief writers across seniority levels would do well to examine fact statements and ensure that strong facts are emphasized at the beginning and end of textual units and unfavorable facts are camouflaged in the middle of larger units.<sup>60</sup> Likewise, legal writers of varying degrees of experience would likely benefit from a “self-graded” assessment process in which they examine each section of a draft and confirm that it actually has a clear focal point stated early in the section.<sup>61</sup> Although this type of self-assessment may be relatively easy when applied to a simple legal problem, such as those assigned early in law school, it is more challenging—but just as important and valuable—in the context of a sophisticated and difficult legal analysis such those that arise in law practice.

Moreover, experienced lawyers should pause before unilaterally placing themselves in the “expert” category in the first place. Part of the source of bad legal writing is that many lawyers have either forgotten or never learned fundamental writing concepts. Such mistakes are among the causes for ineptitude that Gawande lays out as the premise of the book. Lawyers are also not immune from the other cause for ineptitude posited by Gawande: knowing the necessary steps in a particular process but just not following them.

Thus, experienced lawyers who hold their work up to scrutiny against comprehensive textbook-style checklists could find that their knowledge is not as thorough as they believed, or that they have fallen into bad habits of skipping valuable steps. Gaps in knowledge or bad habits of skipping steps can occur anywhere in the writing process, from analyzing and explaining the relevant legal authorities in a thorough way,<sup>62</sup> to editing the final written work product for usage errors.<sup>63</sup> A checklist can serve a forcing function to help the checklist user avoid skipping steps.

These textbook-style checklists can also help individual lawyers begin to develop their own personalized writing checklists. Lawyers can glean a sense of their individual strengths and weaknesses by studying these comprehensive checklists and then consulting feedback and revisions they

60 *Id.* at 352. The author notes that she once cotaught a class on writing persuasive fact statements with an experienced trial consultant, who noted that many experienced lawyers would benefit from reading (or rereading) chapter 22 of Linda Edwards’s *Legal Writing: Process, Analysis, and Organization* on how to write persuasive fact statements.

61 See e.g. Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 136–44 (3d ed., Aspen Pub. 2010) (guiding students through a self-graded draft exercise including, among other tasks, finding the “focus” or main point of each section—a form of a “do–confirm” checklist in which students examine their draft to locate and label various elements of the draft).

62 Edwards, *supra* n. 47, at 99–100.

63 *Id.* at 231–32.

have received on a variety of their own written work product. From there, individual lawyers could create checklists that compensate for writing issues that they tend to miss. For example, one lawyer might recognize that she needs clearer transitions between paragraphs, sometimes leads with a case's details rather than a helpful topic sentence about what the case means, often misses comma splices, and frequently mistakes "affect" for "effect." Each of these items would be on her personalized writing checklist.

Lawyers who have not received meaningful feedback, or who do not have the opportunity to receive it, could use the comprehensive textbook-style checklists to help them evaluate their own work and more accurately assess their strengths and weaknesses. A self-assessment along these lines could help with generating a personalized checklist of writing issues to watch out for. In this way, by creating their own personalized writing checklists, lawyers can make the equivalent of their own "flight manual" for legal writing, covering specific legal writing tasks as well as effective writing across documents, just as pilots' flight manuals cover a breadth of situations including preflight instructions, in-flight procedures, and trouble-shooting.<sup>64</sup>

## V. Broader Implications for Legal Writing and Lawyering

These types of individualized checklists seem very promising to help improve the state of legal writing. However, the concept of individualized, personal, self-motivated, and self-created checklists is actually not the precise solution to professional ineptitude that Gawande has in mind in *The Checklist Manifesto*. Gawande is most concerned with the resistant professional, i.e., the doctor who says, "Forget the paperwork. Take care of the patient."<sup>65</sup> Gawande must address the objections of such resisters. He ultimately seeks to show how checklists can help large groups of professionals—including both resisters and adapters—collaborate on complex tasks in high volumes to improve their outcomes in statistically significant ways.

This emphasis on the role of checklists within teams suggests *The Checklist Manifesto's* greatest potential for enhancing the writing products

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<sup>64</sup> Gawande, *supra* n. 1, at 116 (describing flight manuals from various major airlines as "hefty" but "comprised not of one checklist but of scores of them," each of which was "remarkably brief, usually just a few lines on a page in big, easy-to-read type," and each of which applied to a different situation; "[t]aken together, they covered a vast range of flight scenarios").

<sup>65</sup> *Id.* at 51.

that lawyers produce. Writing is often portrayed as a solitary activity,<sup>66</sup> but team-based legal writing is very common. It seems a fair supposition that many such teams function as follows: senior lawyer gives writing assignment to junior lawyer, who then completes the assignment and gives it to senior lawyer, who then reads and edits the assignment and gives the edits back to the junior lawyer for revision. *The Checklist Manifesto* suggests that this basic, linear model of “assign–draft–review” may be fundamentally flawed. Waiting until a full draft is complete, and then using a checklist to diagnose the failings of that draft—while better than using no checklist—can waste both the writer’s and reviewer’s time. To take Gawande’s example of the construction industry, a communication checklist would not be very efficient if the team waited to discuss potential problems and address flaws until after the building was constructed. The benefit of the checklist is that workers can discover and call managers’ attention to potential problems as they arise, enabling the team to be aware of such problems and to generate solutions.

Similarly in law practice, legal writing teams could use a communication-based checklist consisting of “pause points” to foster problem-solving and efficient revisions at the critical stages of the writing process. Such checklists would work particularly well for longer writing projects, more difficult projects, and those that carry particularly high stakes. For example, a legal writing team could meet to review and discuss a junior lawyer’s preliminary outline before that junior lawyer went onto invest time and other resources in completing a full first draft. These meetings would not necessarily involve written feedback—or even exchange of the outline or draft—and they certainly should not involve a line-by-line edit by the senior member of the team. Premature line-by-line editing would be the equivalent, in the construction analogy, of pulling the project manager away from the management function and into the task of welding down two problematic bolts.<sup>67</sup> Rather, these pause points would allow for the airing of questions and problems along the lines suggested by Gawande. The supervising lawyer would gain the benefit of knowing and providing input on potentially significant questions such as whether to include a policy argument in a brief or an arbitration clause in an agreement. Participating in the process in this way would also put the supervising lawyer in a better position to understand the final draft and deliver even more valuable suggestions to the writer.

66 Richard K. Neumann, Jr., *supra* note 49, at 60 (quoting Red Smith, “Writing is easy. You just sit at a typewriter until blood appears on your forehead.”).

67 See Gawande, *supra* n. 1, at 68.

A complete study of such legal writing teams—both descriptively how they function, and normatively how they should function to produce the best work—is outside the scope of this review. However, using pause points during the drafting process is consistent with prevailing advice to senior lawyers on how to edit junior lawyers' work effectively. The process is to prioritize the editing task, starting with overall issues such as reaching the appropriate audience and organizing the document effectively, then moving into paragraph- and sentence-level edits, followed by edits to grammar, punctuation, and proofreading.<sup>68</sup> Communication-based checklists would bring this type of editing process out into open conversation between the editor and writer, and would thereby almost certainly create more opportunities for senior lawyers to “use the edit to teach.”<sup>69</sup>

Moving beyond the topic of legal writing to lawyering more generally, checklists can help individual lawyers and teams of lawyers deliver more-competent and more-efficient legal services to clients. For lawyers working individually and independently, substantive checklists can contribute to the consistent and competent delivery of legal services. For example, the formalities of executing a will are certainly amenable to verification by checklist. In addition, when lawyers work in groups, the use of checklists can help ensure basic competence on substantive legal tasks and can also encourage efficient workflow and open communications. Within the construction and medical industries that Gawande writes about, the various role players represent distinct professionals on the team—such as nurse, anesthetist, and surgeon; or pipefitter, engineer, and architect. Similarly, a legal team may comprise transactional, litigation, and regulatory lawyers, each with a distinct doctrinal or skills-based specialty. When lawyers work on a team to deliver legal services across a breadth of substantive areas, checklists using pause points may prevent conflicts or inefficiencies among team members.

Finally, the use of communication-forcing checklists could also contribute to lawyers' job satisfaction. Such checklists encourage responsibility, open communication, and contributions from team members at all seniority levels. Thus, these types of checklists can give junior lawyers a more robust opportunity to contribute to the teams on which they work. Using such checklists could foster important mentoring and modeling opportunities for senior professionals interested in passing on their knowledge, thereby contributing to enhanced job satisfaction and reduced

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<sup>68</sup> See Armstrong & Terrell, *supra* n. 48, at 300.

<sup>69</sup> *Id.* at 317.

attrition among junior lawyers as well. Perhaps the use of checklists could create more experiences in which lawyers work together and find that everything just “click[s].”<sup>70</sup>

## VI. Conclusion

Whether applied to individuals or teams, and whether applied for a competitive advantage within one organization or at the level of policy across an entire profession, checklists appear to be enormously promising. *The Checklist Manifesto* is a call for all professionals to take a closer look at their processes and outcomes and their strengths and weaknesses, and to open themselves up to the possibility that rigorously applying checklists could make a real difference in improving outcomes. Within the legal context and within legal writing specifically, the consistent use of well-constructed checklists can help lawyers improve outcomes on behalf of clients and—just maybe—reduce some of those perennial complaints about the way lawyers write.

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<sup>70</sup> See Gawande, *supra* n. 1, at 107.