

Preface

This is the inaugural appearance of a fine, familiar journal under its new name—Legal Communication & Rhetoric: JALWD. We, the editorial and the ALWD boards, believe that this name reflects this journal's long-standing mission to be a forum where legal practitioners and legal writing professors converse and share scholarship and ideas that have enlightened their experience with the language of law. "Communication," then, reflects what goes on in the courtroom as well as in the academy; it is communication between and among lawyers and clients, teachers and students, the bench and the bar. By "rhetoric" we mean the art of persuasion in the Aristotelian sense: the roles reasoning, credibility, and feeling play in argument, whether it be written or spoken.

Articles in this volume: rhetoric and communication

Not entirely by happenstance, the articles selected for this issue reflect these themes in one way or another. And all have something to say of interest and value to the practicing lawyer or judge as well as to the legal scholar. The lead article, by Michael R. Smith, one of our journal's founders, examines how the plain-meaning approach to what a term signifies is broadened (and complicated) by our common, "stock" understanding of its meaning. This phenomenon, in which ambiguity is often rooted, informs our communication with one another and the lawyer's efforts to persuade a court that a term's meaning includes its common-sense significance. To use an everyday example, would "grabbing a sandwich" include buying a slice of pizza? A taco? Dim sum? A calzone? In the legal context, does the "use" of a firearm include bartering it for drugs, or is it restricted to its use as a weapon? Is a term's meaning confined to its dictionary definition, or does its meaning include its meaning as a prototype? Smith explores how legal advocates and judges have interpreted words that are technically "inside" or "outside" either their stock, common-sense, definitions or their dictionary definitions, and offers insights and solutions for attorneys facing that issue.

Thomas Berg, Julie Oseid, and Joseph Orrino's article fits neatly into the "rhetoric" category. They continue with Professor Oseid's series on persuasion techniques used by our founding American Presidents. *James Madison: The Power of Rigor* offers insights into the discipline, thoroughness, and precision—rigor—that informed President Madison's life and writing. The authors use examples of his writings to gently persuade us, as lawyers, to adopt similar rigor in when writing on behalf of our clients.

In *Attorneys At the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom* Jason K. Cohen, serendipitously for this journal's editorial board, a new associate editor, approaches rhetoric from its Aristotelian starting point: persuasive speech. Cohen looks at Lloyd Bitzer's "rhetorical situation" and offers attorney-speakers a systematic way to approach public speaking. He first examines what is meant by "rhetorical situation"—essentially any circumstance that calls for a speech. He then moves to a systematic way to approach the event: understanding the situation and its constraints, being aware of the various subaudiences that will be present and the limitations for presenting to each, then strategizing the content of the speech in a way that best delivers its message.

Jennifer Romig reviews Atul Gawande's *The Checklist Manifesto: How to Get Things Right*. Gawande, a physician, recognized that clarifying the task for which each person in a team is responsible and memorializing that task with a checklist leads to better communication among team members and more-successful outcomes. Romig translates such advice into the practice of law and exhorts us to think about using checklists to enable best lawyering practices.

For the practitioner, professor, or judge, communication means careful listening as well as processing and delivering a message. Ian Gallacher's article, *Thinking Like a Nonlawyer*, urges that such communication include listening with the heart as well as with the brain. He observes the absence of empathy from the regimen of legal training—a skill critical to communication with one another as well as with our clients—and a skill no less critical to effective rhetoric. He reviews law schools' fixation with curricular models that focus on analytical thinking and leave empathy on the other side of the moat around the ivory tower. Empathy, Gallacher theorizes, can and should be a regular part of a lawyer's skills training, both in law school and in CLE training thereafter. As one might expect of the former coeditor in chief of this Journal, Ian's writing is delightful reading. The subject matter is also timely, given the growing discussion about legal education's allowing a legitimate place in the law-school curriculum and, thereafter, in practice, for the model of

citizen–lawyer or attorney–storyteller in lieu of that of the sterile legal analyst.

As Ian Gallacher takes to task law schools’ fixation on analytical reasoning, so Aliza Kaplan and Kathy Darvil criticize the failure of law-school research curricula to address the needs of the Millennials, the “Net” generation, who learn more effectively by doing than by being told what to do. Modes of teaching and doing legal research should reflect the preferences of those who favor process and collaboration over attending to a “talking head.” And such modes should reflect how lawyers actually research—working as teams and accessing wide sources of material far beyond casebooks. The authors helpfully survey some of the latest and most useful online tools with which the Millennials will be familiar but their law profs may not. They suggest that upper-level courses team the teaching of research with substantive-law courses and clinics, exposing the students to “real world” applications of their research.

Nantiya Ruan, too, evokes “real world” sources to make the law-school curriculum richer and more meaningful for law students by urging legal writing professors to communicate and collaborate with public-interest lawyers. In her article she explores the Carnegie Foundation’s call for allowing students to develop true and meaningful engagement with client matters and their associated ethics. In response, Ruan does not assign “canned” memo files to her first-year law students, but instead has them actively research issues for public-interest groups around the country. As Ian Gallacher does in his article, Ruan urges that empathy be one of the tools of practice, which her students easily discover and enthusiastically embrace in a setting of real-life client issues.

In Michael Murray’s imaginative and amusing Socratic dialogue between an advocate of the law school pattern of analysis, Ireacus, and one of the analytical paradigm for legal practice, Treatis, Socrates plays the student, for a change, rather than the teacher. Socrates learns what we legal writing profs and practitioners already know: that the analytical form is both a means of communication and a means of persuasion. Treatis explains that the particularities of practice ideally demand that the rule of law be explained by analogy to a similar case. But if such a case does not exist, the lawyer must engage in “explanatory synthesis,” which inductively teases a pattern of decisions from any number of cases that are not otherwise “on point.” This differs from the rule synthesis of Ireacus’s mode of analysis in that, for the practitioner, the rule must often be crafted to fit the client’s circumstances; the major premise does not come, neat and readymade, from a synthesis of recognized legal rules.

In each volume of this journal we have included a bibliography of resources that we hope our readership finds useful. In this volume, Mary

Dunnewold, Beth Honetschlager, and Brenda Tofte offer a thoughtful and thorough bibliography of judicial-writing sources. Such a comprehensive list of sources is surely invaluable to those who are beginning to work in chambers as well as to experienced judicial staff, to those who teach (or are considering teaching) judicial writing, or to those who see judicial writing as a subject for scholarship.

Finally, Amy Vorenberg's essay recounts her experience with a teenaged client, musing on the role of personal narrative to express a professional interest: the error of the "adultification" of juveniles in the criminal and corrective system. She echoes the scholarship of many others who have argued that stories are persuasive because they motivate and inspire—and they persuade.

Thanks to our inestimable forebears

This volume would not have been possible without its predecessor issues and those who inspired the journal and ably saw it through its first eight years. We reluctantly but gratefully say good-bye to Michael Smith, one of our cofounders, who has stepped down from this journal's editorial board. We can only begin to thank to our predecessor editors in chief, Linda Berger and Ian Gallacher, who, happily for the rest of us on the editorial board, have stayed on in the roles of lead editors, to ascertain that the next volumes are created with the care and expertise of those for which they were most responsible.

Professor Michael Smith is author of this journal's mission, to advance the study of professional legal writing and lawyering and to become an active resource and a forum for conversation between the legal practitioner and the legal writing scholar. Michael has personally mentored many of the published authors and served as a paradigm to many others. His encouragement and unshakeable belief that there is independent substance to the study of legal writing and lawyering has been a keystone to the success of this journal and to the explosion of doctrinal legal writing scholarship during the past decade. His own writing continues to inspire us and to amaze us with its creativity and brilliance to where we, awe-struck, wonder, "How does he come up with this stuff? How does he find all those examples? Can he really be so well read that he just knows these things before he starts searching to verify them?"

As lead editor to the editorial board, Professor Ian Gallacher will now be rediscovering the pleasures of his Aprils and Mays. Ian is just as his articles suggest him to be: kind, generous, gracious in word and deed, and thorough. He is exactly the kind of person that you might hope to have as

a teacher, and we all consider ourselves fortunate to learn from his example. He is as witty as he is scholarly, and both qualities endear him to his colleagues on this journal as they no doubt do to those in Syracuse, where the winters are surely less severe now thanks to his warm presence there.

Professor Linda L. Berger, the cofounder and editor in chief until this volume, is one of the most glorious, luminous, yet unsung, members of the legal writing community. To meet and hear Professor Linda Berger is to immediately want to hear more of Professor Linda Berger. As a person, she is persuasive in the most eloquent, subtle, and enchanting of ways. Her magic is in her unprepossessing approach: she rarely asks for things (or maybe she always does and we are simply unaware that she is asking). As a mentor, scholar, and editor, her work is remarkable. It is possible to trace a line from Linda's work directly to the continued emphasis on rhetoric in many of the scholarly articles being published in the legal writing field today, as well as to the increasing interest in narrative and storytelling among lawyers and legal writing scholars. Linda was one of the first to perceive the rhetorical value of the story in any legal argument; without her own published work and support, it is unlikely that these areas would have inspired as much scholarship as they have. Linda's work as a founding member of J.ALWD is perhaps the most public sign of her commitment to helping support and to develop legal writing scholarship. Her work on this journal is likewise a very public, and widely appreciated, display of affection for the field: one that we have found wonderful and been privileged to witness.

Joan Ames Magat & Ruth Anne Robbins
Editors-in-Chief, June 2011