

# Foreword

## The Next Frontier: Exploring the Substance of Legal Writing

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### Table of Contents

#### I. Introduction 2

#### II. Understanding the Mission of the Journal of the Association of Legal Writing Directors: Three Components 4

- A. Component #1 – Scholarship on the substance of legal writing 5
  - 1. *What is “scholarship on the substance of legal writing”?* 5
    - a. Distinguishing scholarship on the substance of legal writing from other types of legal writing scholarship 5
    - b. Examples of scholarship on the substance of legal writing 8
      - i. “Best practices” scholarship: Scholarship exploring the nature and dimensions of a legal writing skill, technique, strategy, or process 8
      - ii. Scholarship about audience: Scholarship exploring the nature of legal writing audiences and the effectiveness of legal writing in practice 11
      - iii. Rhetorical analysis scholarship: Scholarship critically analyzing the use of legal writing techniques or strategies in existing legal texts 12
      - iv. Scholarship on ethics and professionalism in legal writing 13
      - v. Scholarship on legal method and the nature of legal authorities 14
      - vi. Scholarship on appellate practice and procedure 16
      - vii. Other types 17
  - 2. *What does “legal writing” encompass in this context?* 17

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B. Component #2 – Scholarship based on legal doctrine, interdisciplinary theory, or empirical research 18

C. Component #3 – Scholarship helpful and accessible to all “doers” of legal writing 20

### **III. Why This Mission is Crucial to the Future Development of Legal Writing as a Discipline and as a Profession 22**

A. Expanding legal writing doctrine: A topic whose time has come 22

B. Sending a new message - Part 1: Legal writing has substance 23

C. Sending a new message - Part 2: The substance of legal writing is intellectually rich and challenging 24

D. Fulfilling the traditional role of legal scholarship: Advice or insights from an expert 25

### **IV. Conclusion 26**

#### **I. Introduction**

The volume you hold in your hands represents another milestone for the Association of Legal Writing Directors (ALWD). Not only does this volume mark ALWD’s official entry into periodical publishing,<sup>1</sup> but also it marks the beginning of ALWD’s latest effort to expand and improve the field of legal writing. More specifically, with the creation of this Journal, ALWD announces in dramatic fashion that it will take a lead role in the development and expansion of substantive legal writing doctrine.

Since its inception in 1996, ALWD has diligently sought to improve legal writing as a discipline and as a profession. Up to now, ALWD has waged this battle on four primary fronts. First, recognizing the power of shared information, ALWD has organized legal writing directors and has created mechanisms through which they can exchange data, ideas, experiences, and strategies.<sup>2</sup> These efforts alone have had a dramatic impact on the growth of

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1. Although this is the second volume of the Journal, it is the first volume to be published after the ALWD Board of Directors voted officially to make the Journal a biennial publication. Volume 1 of the Journal published the Proceedings of the 2001 ALWD Conference held at the University of Minnesota Law School. See *Erasing Lines: Integrating the Law School Curriculum — Proceedings from the 2001 ALWD Conference*, 1 J.ALWD 1 (Pamela Lysaght, Amy E. Sloan, & Bradley G. Clary eds., 2002) [hereinafter *Erasing Lines*]. The *Erasing Lines* proceedings were published as Volume 1 with the thought that future volumes of the Journal could be published on an irregular or occasional basis. *Id.* at copyright page. In October 2002, the ALWD Board voted to make the Journal a biennial publication.

2. ALWD holds biennial conferences for legal writing directors, maintains a listserv for its members, maintains an informational website, and, along with the Legal Writing Institute, conducts an annual survey of legal writing programs and publishes the results. See Association of Legal Writing Directors, <http://www.alwd.org> (accessed Feb. 15, 2004). ALWD has also produced two publications on topics relevant to the work of legal writing directors: (1) Volume 1 of this Journal, *Erasing Lines*, *supra* note 1; and (2) *The Politics of Legal Writing — Proceedings of a Conference for Legal Research and Writing Program Directors* (Jan Levine, Rebecca Cochran, Steve Johansen eds., 1995) [hereinafter *The Politics of Legal Writing*]. The 1995 work is listed as a ALWD publication “even though it predates the creation of ALWD because it was the first conference of LW Directors and it led directly to the creation of ALWD.” ALWD Publications

our discipline. Second, ALWD has offered general support to legal writing professionals as well as to people contemplating careers in legal writing.<sup>3</sup> Third, ALWD has sought to improve the status and working conditions of legal writing professionals by actively participating in the American Bar Association's hearings on law school accreditation standards.<sup>4</sup> Fourth, ALWD, along with Darby Dickerson of Stetson Law School, has revolutionized legal citation with the publication of the ALWD Citation Manual.<sup>5</sup> The success and impact of this project have been dramatic. By clarifying and simplifying the rules on legal citation, the ALWD Citation Manual "became the most popular new law school book in Aspen [Publishers] history."<sup>6</sup>

Now, with the publication of this Journal, ALWD takes a fifth approach. The Mission of this Journal is very specific and unique. Briefly stated, "[t]he purpose of the Journal of the Association of Legal Writing Directors (J. ALWD) is to develop scholarship focusing on the substance of professional legal writing and to make that scholarship accessible and helpful to practitioners as well as to legal writing teachers."<sup>7</sup> Rather than producing a journal on legal writing in general, ALWD has taken a bold move and has

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& LRW Resources, <http://www.alwd.org/alwdResources/alwdResourcesNDX.htm> (accessed Feb. 15, 2004).

3. Each year, for example, ALWD awards summer grants to fund scholarship in the area of legal research and writing. ALWD Summer Scholarship Grant Program, <http://www.alwd.org/alwdResources/alwdSummerScholarshipGrants.htm> (accessed Feb. 16, 2004). In addition, ALWD, along with the Legal Writing Institute, sponsors the Thomas F. Blackwell Memorial Award which recognizes "a person who has made an outstanding contribution to improve the field of Legal Writing." Thomas F. Blackwell Memorial Award, <http://www.alwd.org/blackwellaward/BlackwellAwardInfo.htm> (accessed Feb. 16, 2004). ALWD also conducts a workshop on careers in legal writing at the annual American Association of Law Schools (AALS) recruitment conference. *Erasing Lines*, *supra* n. 1, at About ALWD.

4. See Association of Legal Writing Directors & Legal Writing Institute, Quality Legal Writing Instruction and ABA Accreditation Standard 405: Report and Recommendations to the ABA Standards Review Committee and the Council of the ABA Section of Legal Education and Admission to the Bar (January 21, 2000), available at ALWD Publications and LRW Resources, <http://www.alwd.org/alwdResources/alwdResourcesNDX.htm> (accessed Feb. 16, 2004).

5. ALWD & Darby Dickerson, *ALWD Citation Manual* (Aspen Publishers 2000), now in its section edition, ALWD & Darby Dickerson, *ALWD Citation Manual* (2d ed., Aspen Publishers 2003).

6. Aspen Publishers, *Aspen Publishers 2003 Law School Publications* 64 (Aspen Publishers 2003). A number of articles have been written about the ALWD Citation Manual's dramatic impact on the teaching and practice of legal citation. See e.g. M. H. Sam Jacobson, *The ALWD Citation Manual: A Clear Improvement Over the Bluebook*, 3 J. App. Prac. & Process 139 (2001); Vickie Rainwater, *Citation Form in Transition: The ALWD Citation Manual*, 7 Tex. Wesleyan L. Rev. 21 (2000); Melissa H. Weresh, *The ALWD Citation Manual: A Coup de Grace*, 23 UALR L. J. 775 (2001); Melissa H. Weresh, *The ALWD Citation Manual: A Truly Uniform System of Citation*, 6 Leg. Writing 257 (2000).

7. Editorial Committee, Journal of the Association of Legal Writing Directors, *Policies and Procedures for the Journal of the Association of Legal Writing Directors* ¶ I (July 2003) (copy on file with author) [hereinafter *Policies and Procedures*].

decided to dedicate this Journal to one specific genre of legal writing scholarship: scholarship that explores the substance of legal writing.<sup>8</sup> This article examines the meaning and implications of this novel mission of the Journal. Part II begins by more fully exploring the stated mission of the Journal. Part III then explores why this mission and the scholarship it will foster are important to the future development of legal writing as a discipline.

## **II. Understanding the Mission of the Journal of the Association of Legal Writing Directors: Three Components**

The full Mission and Goals Statement of the Journal reads as follows:

The purpose of the Journal of the Association of Legal Writing Directors (J. ALWD) is to develop scholarship focusing on the substance of professional legal writing and to make that scholarship accessible and helpful to practitioners as well as to legal writing teachers. We hope to generate landmark volumes by encouraging and publishing scholarship that uses theory, research, and experience to propose and develop “best practices” within specific subject areas. Support and publication of such scholarship will advance the discipline of legal writing and meet two practical goals: improving the ability of lawyers to write effectively and helping law teachers better prepare their students for professional legal writing.

To accomplish this purpose, the Journal will solicit (1) articles that develop the theory and research the practice of legal writing as well as (2) articles that apply theoretical and research findings from law and other disciplines to improve the practice and the teaching of professional legal writing. By supporting the development and application of theory and research from law practice and other disciplines, the Journal will build knowledge about professional legal writing. In addition to building the base of knowledge, the Journal will encourage its exchange by connecting practicing lawyers with law teachers and by relating other disciplines to law study and practice.

ALWD is the natural home for a journal that produces theoretical, empirical, and applied scholarship about professional legal writing. Part of the organization’s vision has been to build the profession and discipline of legal writing. Development of a discipline requires further development of the theory of legal writing and more research into the practice of legal writing. In addition, ALWD and its members have supported and produced a substantial base of scholarship about legal writing pedagogy and legal writing

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8. Actually, by clarifying the rules on legal citation, the ALWD Citation Manual represents ALWD’s first effort to improve the substance of legal writing. *See supra* n. 5. This Journal, however, represents a much broader effort.

politics and administration. The scholarship proposed here is a necessary and logical next step.<sup>9</sup>

As one can see from this statement, the mission of this Journal has three primary components. First, as already stated, this Journal is dedicated to scholarship on legal writing “substance.” Second, the Journal is committed to developing scholarship grounded on legal doctrine, empirical research, or interdisciplinary theory. Third, the Journal intends a broad audience. Rather than producing scholarship that would be of interests to only teachers of legal writing, this Journal is targeted to all “doers” of legal writing: practitioners, judges, law students, and legal academicians. The following discussion explores each of these components in more detail.

#### A. Component #1 – Scholarship on the substance of legal writing

##### 1. *What is “scholarship on the substance of legal writing”?*

###### a. Distinguishing scholarship on the substance of legal writing from other types of legal writing scholarship

The scholarship called for by this Journal — scholarship on the “substance” of legal writing — is scholarship that explores the practice of legal writing. That is, it is scholarship that focuses on the doing of legal writing rather than the teaching of legal writing. Perhaps the best way to fully appreciate the type of legal writing scholarship contemplated by this Journal is to distinguish it from other types of legal writing scholarship. Although the term “legal writing scholarship” is often used generally to describe scholarship that focuses on legal writing, this category of legal scholarship can actually be broken down into five broad sub-categories. These five sub-categories of legal writing scholarship differ based on the substantive focus of the scholarship and the audiences to which it is targeted.<sup>10</sup>

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9. *Policies and Procedures*, *supra* n. 7, at ¶ I. Volume one of the Journal stated that the Journal would focus on “special themes and issues relating to the law school curriculum and the administration of legal research and writing programs.” *Erasing Lines*, *supra* n. 1, at copyright page. However, the Board of Directors approved the proposed change in this focus in October 2002.

10. I have examined similar sub-classifications of legal writing scholarship in legal writing conference presentations. See Michael R. Smith, Presentation, “*Skills*” *Scholarship in Legal Writing: Toward an Interdisciplinary Future* (Atlantic Region Leg. Research & Writing Conf., Temple U. Sch. of L., May 30, 1997) (copy on file with author); Michael R. Smith, Presentation, *Legal Writing “Skills” Scholarship: Proposals for the Future* (Leg. Writing Inst. Conf., U. of Mich. Sch. of L., June 19, 1998) (copy on file with author). There are two major difficulties in trying to put legal writing scholarship into categories. First, because of the diverse nature of this scholarship, a list of general categories cannot possibly cover all the articles that exist on legal writing. Some articles on legal writing defy categorization. Second, many legal writing articles fall into more than one category. That is, some articles address a number of different things and, as a consequence, include information relevant to more than one category. Nevertheless, the

Sub-category 1: Scholarship on Program Design and the Administration of Legal Writing Programs. This first sub-category of legal writing scholarship includes articles on the structuring and running of legal writing programs. This type of scholarship includes articles on such things as general program design, program staffing, training and supervising instructors, grading procedures, and other programmatic issues.<sup>11</sup> Articles in this sub-category are generally aimed at law school administrators, curriculum designers, legal writing directors, and legal writing teachers.

Sub-category 2: Scholarship on Legal Writing Pedagogy. The second sub-category of legal writing scholarship focuses on legal writing pedagogy. Scholarship of this type focuses on the teaching of legal writing. Some articles in this category take a broad approach and focus on the theoretical nature of legal writing as a topic of academic study.<sup>12</sup> Other articles take a narrower approach to legal writing pedagogy and focus on how certain identified skills should be taught (i.e., the best teaching methodologies).<sup>13</sup> Not surprisingly,

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discussion in the text is helpful because it sets out the most common categories of legal writing scholarship and helps to differentiate “scholarship on the substance of legal writing” from other types of legal writing scholarship.

11. See e.g. Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching) a First-Year Legal Writing Program*, 29 Val. U. L. Rev. 557 (1995); Jan M. Levine, *You Can't Please Everyone, So You'd Better Please Yourself: Directing (or Teaching) a First-Year Legal Writing Program*, 29 Val. U. L. Rev. 611 (1995); Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who is Doing the Teaching*, 7 Scribes J. Leg. Writing 51 (2000); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 Leg. Writing 123 (1991); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 Leg. Writing 1 (1996).

12. See e.g. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155 (1999); Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 Mercer L. Rev. 1091 (1997); Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489 (2002); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L. J. 1089 (1986); Leigh Hunt Greenhaw, “To Say What the Law Is”: *Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861 (1995); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994); Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 New Eng. L. Rev. 883 (1995); Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7 (1998).

13. This, by far, is the largest category of legal writing scholarship. The following examples are from only the first nine volumes of The Journal of the Legal Writing Institute: Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 Leg. Writing 145 (1996); Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 Leg. Writing 81 (1997); Mark E. Wojcik & Diane Pennys Edelman, *Overcoming Challenges in the Global Classroom: Teaching Legal Research and Writing to International Law Students and Law Graduates*, 3 Leg. Writing 127 (1997); Gail Ann Kintzer, Maureen Straub Kordesh, & C. Ann Sheehan, *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 Leg. Writing 143 (1997); Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 Leg. Writing 163 (1997); Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 Leg. Writing 175 (1997); Angela Passalacqua, *Using Visual Techniques to Teach Legal Analysis and Synthesis*, 3 Leg. Writing 203 (1997); Douglas Miller, *Using Examinations in First-Year Legal Research, Writing, and Reasoning Courses*, 3 Leg. Writing 217 (1997); Suzanne Ehrenberg, *Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing*

articles in this sub-category are generally targeted to legal writing directors and teachers of legal writing.

Sub-category 3: Scholarship on Legal Writing as a Profession. This third sub-category of legal writing scholarship includes articles that focus on legal writing as a profession and occupation. Some articles in this category offer advice on how to become a legal writing professional or explore the nature of the profession in terms of environment, responsibilities, frustrations, and rewards.<sup>14</sup> Other articles take a broader approach and address the professional status of legal writing teachers within the general legal academy.<sup>15</sup> Articles in this sub-category are aimed at existing legal writing professionals, prospective legal writing professionals, and law school faculties and administrators generally.

Sub-category 4: Scholarship on Legal Writing Scholarship. The fourth sub-category is scholarship on legal writing scholarship. Just as “scholarship

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*Pedagogy*, 4 Leg. Writing 1 (1998); Steven J. Johansen, “*What Were You Thinking?*”: *Using Annotated Portfolios to Improve Student Assessment*, 4 Leg. Writing 123 (1998); Mary Barnard Ray, *How Individual Differences Affect Organization and How Teachers Can Respond to These Differences*, 5 Leg. Writing 125 (1999); Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 Leg. Writing 167 (1999); Lorraine Bannai, Anne Enquist, Judith Maier & Susan McClellan, *Sailing Through Designing Memo Assignments*, 5 Leg. Writing 193 (1999); David D. Walter, *Student Evaluations: A Tool for Advancing Law Teacher Professionalism and Respect for Students*, 6 Leg. Writing 177 (2000); Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 Leg. Writing 37 (2001); Pamela Edwards & Sheila Vance, *Teaching Social Justice Through Legal Writing*, 7 Leg. Writing 63 (2001); James B. Levy, *Better Research Instruction Through “Point of Need” Library Exercises*, 7 Leg. Writing 87 (2001); Craig T. Smith, *Synergy and Synthesis: Teaming “Socratic Method” with Computers and Data Projectors to Teach Synthesis to Beginning Law Students*, 7 Leg. Writing 113 (2001); Robin A. Boyle & Lynne Dolle, *Providing Structure to Law Students – Introducing the Programmed Learning Sequence as an Instructional Tool*, 8 Leg. Writing 59 (2002); Jessie C. Grearson, *From Editor to Mentor: Considering the Effect of Your Commenting Style*, 8 Leg. Writing 147 (2002); M. H. Sam Jacobson, *How Law Students Absorb Information: Determining Modality in Learning Style*, 8 Leg. Writing 175 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 Leg. Writing 229 (2002); Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 Leg. Writing 1 (2003); Elizabeth L. Inglehart, Kathleen Dillon Narko & Clifford S. Zimmerman, *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 Leg. Writing 185 (2003).

14. See e.g. Maureen Arrigo-Ward, *Warning the Prospective Legal Writing Instructor, or “So You Really Want to Teach?”*, 4 Perspectives 64 (1996); Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 Fla. St. U. L. Rev. 1067 (1999).

15. See e.g. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117 (1997); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Leg. Educ. 562 (2000); Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 Cardozo Women’s L.J. 75 (1997); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 Vt. L. Rev. 371 (2003); Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. Leg. Educ. 530 (1995); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 Wm. & Mary J. Woman & L. 551 (2001); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 Berkeley Women’s L.J. 3 (2001).

on scholarship” has emerged in the legal academy generally,<sup>16</sup> scholarship on legal writing scholarship is beginning to emerge as sub-category of its own. Some of these articles focus on the substantive nature of scholarship on legal writing topics.<sup>17</sup> Others focus on the unique circumstances and challenges that confront legal writing professionals who endeavor to produce legal scholarship of any type.<sup>18</sup> Such articles are targeted to other legal writing professionals.

Sub-category 5: Scholarship on the Substance of Legal Writing. The fifth and final sub-category of legal writing scholarship is scholarship on the substance of legal writing. This type of legal writing scholarship focuses on the practice of legal writing. That is, rather than focusing on the profession of legal writing or how to teach legal writing, this scholarship provides helpful information to those who practice the craft. As such, the audience of this type of scholarship is broad. Unlike the first four sub-categories of legal writing scholarship (all of which are primarily targeted to other law teachers, particularly other legal writing teachers), the scholarship in this last sub-category is targeted to all people who engage in legal writing as part of their profession such as lawyers, judges, law students, and legal scholars.<sup>19</sup>

#### b. Examples of scholarship on the substance of legal writing

Admittedly, the foregoing description of substantive legal writing scholarship is broad. Below are some examples of this type of scholarship. It should be noted, however, that the categories and examples listed below are for illustrative purposes only. Scholarship on the substance of legal writing would include any scholarship that would be of interest to lawyers, judges, law students, and other “doers” of legal writing (and not just to teachers of legal writing).

##### *i. “Best practices” scholarship: Scholarship exploring the nature and dimensions of a legal writing skill, technique, strategy, or process*

The type of scholarship that most clearly falls within the definition of substantive legal writing scholarship is scholarship that explores in detail a

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16. See generally Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 Mercer L. Rev. 741 (1998).

17. The article you are currently reading would fall into this sub-category. Other examples include: Terrill Pollman & Linda H. Edwards, *Scholarship By Legal Writing Professors: Voices From An Emerging Discipline* (forthcoming 2004) (copy on file with author); and Jill J. Ramsfield & J. Christopher Rideout, *Scholarship in Legal Writing*, in *The Politics of Legal Writing*, *supra* n. 2, at 75.

18. See e.g. Susan P. Liemer, *The Quest for Scholarship, The Legal Writing Professor’s Paradox*, 80 Or. L. Rev. 1007 (2001); Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 Leg. Writing 225 (1999).

19. This is not to say that this type of scholarship is not relevant to the teaching of legal writing. To the contrary, scholarship on the substance of legal writing provides legal writing teachers with more substance to teach!



specific legal writing technique or strategy. Written for anyone who practices legal writing, this type of scholarship offers practical advice on how to make legal writing more effective. Despite the numerous textbooks that have been written on the subject, much is yet to be learned and discovered about legal writing as a skill.<sup>20</sup>

Some articles of this type simply explore a previously identified legal writing skill, but in greater detail. Other articles go beyond the pre-existing doctrine and dissect legal writing even further in an effort to identify aspects of legal writing that previously went unappreciated. Other articles add new dimensions or a new level of understanding to a previously known legal writing skill by exploring the nature of the skill in terms of the theory or doctrine of another discipline. Still other articles borrow from other disciplines to propose novel techniques or strategies never before employed in legal writing. Some articles of this type explore how changes in the profession or in technology affect the practice of legal writing. And still others provide guidance on the writing “process.” Below is a list of examples of articles that explore the substantive nature of legal writing skills.

**Example 1:** Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*<sup>21</sup> – This article examines how recent technology has changed the process of writing and submitting briefs to courts. It also offers instruction on how “lawyers can craft briefs that use technology effectively.”<sup>22</sup>

**Example 2:** Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*<sup>23</sup> – Borrowing from the world of literature (and, more specifically, creative writing), this article offers guidance to lawyers on how to create more effective and more compelling Statement of Facts sections in court briefs.

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20. See generally Ramsfield & Rideout, *supra* n. 17. See also Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 313 (Aspen L. & Bus. 2002):

[U]nderlying effective persuasive writing is a whole world of persuasive forces that we as a profession are just beginning to explore. As we learn more about how the human mind works, as we increase our efforts to borrow and learn from other disciplines, we as a profession will continue to expand our arsenal of persuasive writing strategies. This book is but one step in a new and exciting field of exploration.

21. Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. Rev. 49 (2003).

22. *Id.* at 49.

23. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001).

**Example 3:** Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs* <sup>24</sup> – Targeted to appellate brief writers, “this article explores the theoretical and practical issues involved in using non-legal materials [such as scientific studies and tests] as support for policy arguments.”<sup>25</sup>

**Example 4:** Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems* <sup>26</sup> – Borrowing from the fields of legal realism and classical rhetoric, this article advises that legal advocates should go beyond traditional methods of legal research to research the audience (such as a judge) to whom their advocacy is directed as well as unpublished rules or practices that may affect the decision-making process. The article also provides specific guidelines for practitioners on how to conduct this non-traditional research.

**Example 5:** Paul Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments* <sup>27</sup> – Analyzing several fields of study such as law, argumentation theory, communication theory, cognitive science, and computer science, this article explores the structure of effective persuasive arguments.

The foregoing articles serve as good examples of periodical scholarship that offers guidelines and instruction on specific legal writing techniques or strategies. I have also written in this area. In 2002, I published *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*.<sup>28</sup> This book examines aspects of human nature that have been identified in other disciplines and discusses advanced persuasive writing strategies that are designed to tap into these aspects of human nature. Although the chapters of this book were not written as periodical articles, they nevertheless serve as more examples of “best practices” scholarship designed to provide advanced instruction on

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24. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197 (2000) [hereinafter *Beyond Brandeis*]. Professor Margolis followed with a related article: Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 Mont. L. Rev. 59 (2001) [hereinafter *Closing the Floodgates*]. This follow-up article (1) explores why policy argumentation is an important tool of advocacy in appellate brief writing; (2) “categorizes and explains the different types of policy arguments,” and (3) “discusses how to support policy arguments with authority to make them effective and persuasive.” *Id.* at 62. Although Professor Margolis states that this second article was written for legal writing teachers, *id.* at 59-62, it is not solely (or even primarily) about teaching policy argumentation. The article provides an analysis of the various types of policy arguments and how to present them most effectively in writing. Thus, the article is also very useful to practitioners and, as such, can be classified as scholarship on the substance of legal writing.

25. Margolis, *Beyond Brandeis*, *supra* n. 24, at 201.

26. Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. Rev. 285 (1998).

27. Paul Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 Harv. J. L. & Pub. Policy 195 (1993)

28. Smith, *supra* n. 20.

specific legal writing skills and strategies. The topics covered in the book include the following:

**Example 6:** *The Functions of Literary References in Persuasive Writing: A Multidisciplinary Analysis*<sup>29</sup> – This discussion analyzes various types of literary allusion used in persuasive legal writing and explores their functions in terms of classical rhetoric, literary theory, cognitive psychology, and morality theory.

**Example 7:** *Ethos in Legal Writing: Character and Good Will*<sup>30</sup> – Building on classical rhetoric theory, this chapter explores how an effective legal advocate evinces a credible character and disposition through his or her writing.

**Example 8:** *The Cognitive Dimensions of Illustrative Narratives in the Communication of Rule-Based Analysis*<sup>31</sup> – Have you ever wondered why legal writers, after stating a legal rule, often explain an illustration of the rule's application in a precedent case before applying the rule? This chapter turns to psychology theory in an effort to explain the cognitive bases for this popular legal writing technique.

*ii. Scholarship about audience: Scholarship exploring the nature of legal writing audiences and the effectiveness of legal writing in practice*

A second type of scholarship on the substance of legal writing is scholarship that provides information about the audiences of legal writing. These articles, rather than providing instruction on a writing skill or strategy, focus on how the consumers of legal writing products (like judges) interact with, react to, or are influenced by legal writing. These articles provide important insights into the mental processes, preferences, and tendencies of those people to whom legal writing is directed. Without a doubt, legal writers can be more effective if they know what techniques and strategies work best for their audiences. Articles in this category are directed to legal writers and allow them to more effectively adapt their writing to the needs and desires of their targeted audience. Examples of this type of scholarship include the following:

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29. Michael R. Smith, *The Functions of Literary References in Persuasive Writing: A Multidisciplinary Analysis*, in Smith, *supra* n. 20, at 9-74.

30. Michael R. Smith, *Ethos in Legal Writing: Character and Good Will*, in Smith, *supra* n. 20, at 101-26. Continuing the discussion of ethos, the subsequent chapter analyzes in specific terms how a legal advocate's writing impacts his or her appearance as a intelligent, and therefore credible, source of information. See Michael R. Smith, *Evinces Intelligence in Legal Writing*, in Smith, *supra* n. 20, at 127-73.

31. Michael R. Smith, *The Cognitive Dimensions of Illustrative Narratives in the Communication of Rule-Based Analysis*, in Smith, *supra* n. 20, at 255-84.

**Example 9:** Bryan A. Garner, *Judges on Briefing: A National Survey*<sup>32</sup> – This article summarizes the results of a nationwide survey of more than 100 judges regarding their views on the general nature of effective brief-writing.

**Example 10:** Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*<sup>33</sup> – Summarizing the results of an extensive survey of federal judges, this article provides detailed insights on what judges “want and need” from legal briefs submitted by legal advocates.<sup>34</sup>

**Example 11:** James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*<sup>35</sup> – This article explains the results of a study that compares the thought processes of two legal advocates while they composed appellate briefs in a matter on appeal with the subsequent thought processes of an appellate judge’s law clerks while they read the submitted briefs. The study “permits one to explore empirically why . . . advocates may fail to perceive accurately the effects of their chosen [rhetorical] strategies upon judges and court staff readers.”<sup>36</sup>

*iii. Rhetorical analysis scholarship: Scholarship critically analyzing the use of legal writing techniques or strategies in existing legal texts*

A third type of scholarship on the substance of legal writing is rhetorical analysis scholarship. This type of scholarship critically analyzes the use of rhetorical strategies in existing legal texts such as judicial opinions and law review articles. Examples of this scholarship include the following:

**Example 12:** Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*<sup>37</sup> – This article analyzes Justice Scalia’s dissenting opinion in *United States v. Virginia*<sup>38</sup> based on principles of classical rhetoric.

**Example 13:** Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*<sup>39</sup> – This article analyzes the prevalence of rhetorical

32. Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1 (2002).

33. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Leg. Writing 257 (2002).

34. *Id.* at 260.

35. James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 Discourse Processes 1 (1994).

36. *Id.* at 2.

37. Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*, 91 Ky. L.J. 167 (2002).

38. *United States v. Virginia*, 518 U.S. 515 (1996).

39. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. Rev. 75 (1998).

and linguistic devices in Supreme Court federal jurisdiction cases which tend to obfuscate the doctrine in this area of federal law.

**Example 14:** Kathryn M. Stanchi, *Feminist Legal Writing*<sup>40</sup> – This article analyzes numerous rhetorical strategies and devices employed by authors of feminist legal scholarship.

*iv. Scholarship on ethics and professionalism in legal writing*

A fourth type of scholarship on the substance of legal writing is scholarship that addresses the ethical dimensions of legal writing, particularly the ethical dimensions of written advocacy. The following are examples of this type of scholarship:

**Example 15:** Beverly J. Blair, *Ethical Considerations In Advocacy: What First-Year Legal Writing Students Need to Know*<sup>41</sup> – This article discusses fundamental provisions in both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct that are relevant to advocacy writing in trial and appellate briefs.

**Example 16:** Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*<sup>42</sup> – Borrowing from ethics and morality theory, this article looks at the ways judges, advocates, and legal scholars abuse rhetorical strategies of advocacy.

**Example 17:** Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*<sup>43</sup> – This article sets out examples of unprofessionalism in documents submitted to courts and examines courts' reactions to such behavior.

**Example 18:** Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*<sup>44</sup> – This article explores in detail the duty of advocates to disclose adverse authority “and its implications for opposing parties in an adversarial legal system.”<sup>45</sup>

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40. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 San Diego L. Rev. 387 (2002).

41. Beverly J. Blair, *Ethical Considerations In Advocacy: What First-Year Legal Writing Students Need to Know*, 4 Leg. Writing 109 (1998).

42. Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1 (2000). This article would also fit under category iii, Rhetorical Analysis Scholarship, *supra* nn. 37-40 and accompanying text.

43. Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1 (1997).

44. Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 Clev. St. L. Rev. 303 (1995).

45. *Id.* at 304.

*v. Scholarship on legal method and the nature of legal authorities*

In most law schools today, legal method is no longer taught as a separate course.<sup>46</sup> Instead, legal method, forms of legal reasoning, and the nature of legal authorities are taught as part of the legal writing curriculum.<sup>47</sup> Because formal legal method training is now the primary responsibility of the legal writing program at most law schools, scholarship on this topic also comes under the purview of legal writing professionals. Thus, a fifth category of substantive legal writing scholarship is scholarship that explores forms of legal reasoning or the nature of legal authorities in the context of legal problem solving and decision making. The following are examples of scholarship on legal reasoning:

**Example 19:** Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*<sup>48</sup> – This article first explores the general forms of legal reasoning used by lawyers and judges. The article then examines in depth “the relationship between narrative and other forms of legal reasoning.”<sup>49</sup>

**Example 20:** Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*<sup>50</sup> – This article explores “induction” as an important but largely overlooked aspect of legal reasoning.

**Example 21:** Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*<sup>51</sup> – This article explores various types and aspects of legal reasoning in terms of classical rhetoric theory.

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46. See generally Richard B. Cappalli, *The Disappearance of Legal Method*, 70 Temp. L. Rev. 393, 405-415 (1997) (discussing the results of an informal survey of the course catalogs from 174 American law schools); see also Ralph L. Brill et al., ABA Section of Legal Education and Admission to the Bar, *Sourcebook on Legal Writing Programs* 17-19 (ABA 1997) (“At one time, such concepts as the nature of the common law and the interpretation of a statute were taught in a separate legal method or legal process course. These courses have largely disappeared.”).

47. Cappalli, *supra* n. 46, at 431; Brill et al., *supra* n. 46, at 17-19. As Professor Cappalli points out, most law schools today teach legal method by combining specific instruction on legal method in the context of a legal writing course with general (i.e., “pervasive”) instruction on legal method in the context of all other doctrinal courses. Cappalli, *supra* n. 46, at 415-16, 431. It should be noted, however, that Professor Cappalli is highly critical of this approach. *Id.* at 415-443.

48. Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7 (1996).

49. *Id.* at 9.

50. Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. Leg. Educ. 365 (1998).

51. Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003).

**Example 22:** Anita Schnee, *Logical Reasoning “Obviously,”*<sup>52</sup> – This article explains the relationship between “induction” and “deduction” in legal analysis.

As stated above, this category also includes scholarship on the nature of legal authorities such as case law and statutes and their role in legal decision making. Below are examples of this type of scholarship:

**Example 23:** Michael C. Dorf, *Dicta and Article III*<sup>53</sup> – This article focuses on “the jurisprudential implications of Article III for determining how federal courts ought to distinguish between the holdings and dicta of past cases.”<sup>54</sup>

**Example 24:** Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*<sup>55</sup> – This article examines the precedential value of concurring opinions of Supreme Court justices and “propos[es] a two-step inquiry to help lower courts deal with the confusing task of assigning precedential weight to such concurring opinions.”<sup>56</sup>

**Example 25:** Frederick Schauer, *Precedent*<sup>57</sup> – This article explores the nature of legal precedent and the principle of stare decisis in both practical and philosophical terms.

**Example 26:** Johanna S. Schiavoni, *Who’s Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*<sup>58</sup> – As the title suggests, this article weighs in on the debate, sparked by *Anastoff v. United States*,<sup>59</sup> over the precedential value of unpublished judicial opinions.

As you can see from the above examples, articles on the nature of legal authorities are marketable in elite law reviews. Examples 23, 24, 25, and 26 appeared in the University of Pennsylvania Law Review, the Columbia Law Review, the Stanford Law Review, and the UCLA Law Review, respectively. It is also important to note that none of these articles were written by legal writing professionals. In fact, legal writing professionals are vastly under-

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52. Anita Schnee, *Logical Reasoning “Obviously,”* 3 Leg. Writing 105 (1997).

53. Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997 (1994).

54. *Id.* at 1998.

55. Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995).

56. *Id.* at 2085.

57. Frederick Schauer, *Precedent*, 39 Stan L. Rev. 571 (1987).

58. Johanna S. Schiavoni, *Who’s Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. Rev. 1859 (2002).

59. *Anastoff v. United States*, 223 F.3d 898 (8th Cir. 2000). The *Anastoff* court held that “the Eighth Circuit noncitation rule, which generally prevents the court from citing to its own unpublished cases, was an unconstitutional extension of the power granted to the judiciary in Article III.” Schiavoni, *supra* n. 58, at 1863.

represented in legal method scholarship, and this is true even though, as stated previously, legal writing professionals have the primary responsibility for formally teaching principles of legal method in most law schools today. Thus, this category of scholarship represents a particularly promising area for expansion for legal writing professionals.

*vi. Scholarship on appellate practice and procedure*

A sixth type of scholarship that can be classified as substantive legal writing scholarship is scholarship on appellate practice and appellate procedure. At most law schools, persuasive legal writing is taught in the context of writing an appellate brief for a hypothetical legal problem.<sup>60</sup> As a consequence, the legal writing curriculum at most law schools includes some coverage of appellate practice and procedure. This, in turn, has resulted in many legal writing professionals becoming experts in the area of appellate advocacy. Thus, scholarship on appellate work and the procedural processes of appellate courts has become another category of substantive legal writing scholarship.<sup>61</sup> Examples of this type of scholarship include the following:

**Example 27:** Rebecca A. Cochran, *Gaining Appellate Review by “Manufacturing” a Final Judgment Through Voluntary Dismissal of Peripheral Claims*<sup>62</sup> – Analyzing both the legal implications and public policy implications, this article argues for a more effective approach for gaining appellate review through the final judgment rule.

**Example 28:** Barbara Green, *Cracking the Code: Interpreting and Enforcing the Appellate Court’s Decision and Mandate*<sup>63</sup> – Rather than addressing the precedential nature of an appellate court’s decision, this article discusses the process of enforcing an appellate court’s decision amongst and between the particular parties of the appeal.

**Example 29:** Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*<sup>64</sup> – This article criticizes the

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60. See Brill et al., *supra* n. 46, at 12-15; Association of Legal Writing Directors & Legal Writing Institute, 2003 Survey Results 8-9 (on file with author).

61. For the purposes of this discussion, scholarship on appellate practice and procedure is separate from scholarship on the skills involved in writing an appellate brief, which is covered under the first sub-category of “best practices” scholarship. *Supra* nn. 20-31 and accompanying text.

62. Rebecca A. Cochran, *Gaining Appellate Review by “Manufacturing” a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L. Rev. 979 (1997).

63. Barbara Green, *Cracking the Code: Interpreting and Enforcing the Appellate Court’s Decision and Mandate*, 32 Stetson L. Rev. 393 (2003).

64. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245 (2002).



common appellate court practice of raising new issues in a matter on appeal and deciding those issues without input from the parties themselves.

*iii. Other types*

Above are listed six categories of substantive legal writing scholarship. Undoubtedly, other types of legal writing scholarship would fit under the heading of “scholarship on the substance of legal writing.” The guiding principle is this: Would the scholarship be of interest and beneficial to people who engage in the practice of legal writing, not just to those who teach legal writing? If the answer to this question is yes, then the scholarship would have the breadth of interest contemplated and strived for by the Mission Statement of this Journal.

2. *What does “legal writing” encompass in this context?*

Although this Journal is limited to scholarship on the substance of legal writing, “legal writing” is a broad topic. As the preceding discussion suggests, legal writing in this context is not limited to pure writing skills; rather, it encompasses all the practical skills typically associated with legal writing programs such as legal research, critical reading, legal analysis, legal writing, and oral advocacy.<sup>65</sup> Moreover, the term legal writing includes all of the various sub-genres of legal writing such as objective memo writing, persuasive brief writing, correspondence writing, transactional drafting, litigation drafting, legislative drafting, judicial opinion writing, and scholarly legal writing.<sup>66</sup> Thus, scholarship on the substantive nature of any of these topics would fall within the parameters of this Journal.

That being said, however, this Journal will include clinical scholarship only when it includes a substantive research or writing component. Some legal research and writing programs integrate the instruction on legal research

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65. The expertise of legal writing professionals is not limited to pure writing skills. It is commonly recognized that most legal writing programs teach skills in legal research, legal writing, and oral advocacy. See e.g. Brill et al., *supra* n. 46, at 5-33; Association of Legal Writing Directors & Legal Writing Institute, 2003 Survey Results 8-9 (on file with author). Consequently, the modern legal writing professional is an expert in all three of these areas. Furthermore, as discussed earlier, legal writing professionals have also become the resident experts of formal legal analysis in most law schools. Because legal analysis is inherent in legal writing and because most law schools no longer have a separate legal analysis/legal method course, the legal writing programs at most law schools today serve as the primary vehicle for formally teaching legal analysis. See *supra* nn. 46-59 and accompanying text. Finally, in recent years “critical reading” has begun to emerge as another area of expertise for legal writing professionals. See generally e.g. Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 Wm. Mitchell L. Rev. 491 (1997); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Christina L. Kunz, *Teaching First-Year Contract Students How to Read and Edit Contract Clauses*, 34 U. Tol. L. Rev. 705 (2003).

66. For a detailed discussion of the various genres of legal writing, see Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. Leg. Educ. 119 (2004).

and writing with instruction on other practical skills such as client interviewing, client counseling, negotiation, alternative dispute resolution, and pretrial practice.<sup>67</sup> One by-product of this approach is that some legal writing professionals are also becoming experts on other clinical skills and as such are beginning to produce scholarship on these topics. Without question, this integrated approach to teaching lawyering skills is valuable,<sup>68</sup> as is the clinical skills scholarship it can spawn. Nevertheless, while scholarship that explores legal research and writing skills in combination with other clinical skills is within the focus of this Journal, scholarship that explores clinical skills without reference to or to the exclusion of legal writing skills is beyond its scope. This limitation exists for two reasons. First, a journal already exists that is dedicated to general (i.e., non-legal writing) clinical scholarship: the Clinical Law Review. The ALWD Journal is designed to be unique in its focus, and including all clinical scholarship, regardless of its relation to the skills of legal writing, would make this Journal unwisely similar to the Clinical Law Review. Second and most important, one of the primary goals of this Journal is to demonstrate in clear fashion that legal writing in and of itself is an area of sophisticated substance and one worthy of academic respect.<sup>69</sup> Publishing articles on non-legal writing skills in a journal dedicated to legal writing would send the opposite message: that legal writing lacks enough substance to fill its own law journal.

B. Component #2 — Scholarship based on legal doctrine, interdisciplinary theory, or empirical research

The second primary component of this Journal's Mission Statement is that it calls for scholarship that is based on theory, empirical research, or both.<sup>70</sup> Much legal writing skills scholarship is relatively short, based on experience, and published in state bar journals, newspapers, and other practice-oriented publications. Without question, these "writing tips" articles are beneficial to practitioners in that they provide practical writing advice presented in an accessible way. However, these informal articles are not the type of articles called for by this Journal. Instead, this Journal will solicit

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67. See generally Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 Fla. L. Rev. 709 (1998). Professor O'Neill discusses the difference between a "traditional legal writing course" which focus primarily on three categories of skills – legal research, basic legal method, and legal writing – and the "lawyering" or "law office" model "which may add any or all of the following to the traditional legal writing agenda: increased attention to fact investigation, interviewing, counseling, negotiation, transactional planning and drafting, trial advocacy skills, and ethical issues." *Id.* at 710; see also e.g. Brill et al., *supra* n. 46, at 34-36; Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 Seton Hall L. Rev. 653 (1993); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonz. L. Rev. 1 (1998).

68. See *supra* sources cited in n. 67.

69. See *infra* text accompanying nn. 84-91.

70. See *supra* text accompanying n. 9.

articles that offer insight into the substantive nature of legal writing based on some underlying theory or formal empirical data.

Theory in this context means “a set of general propositions used as an explanation.”<sup>71</sup> Thus, this Journal will solicit articles that explore the substance of legal writing based on some general underlying principles or propositions. Such theory-based scholarship can come in a variety of forms. For example, an author may dissect legal writing in practice beyond that done by the current literature and identify previously unarticulated phenomena underlying effective legal writing. Alternatively, an article may apply to legal writing theoretical principles that have been developed in other areas of legal doctrine.<sup>72</sup> Or the theory may come from outside the law and be borrowed from another discipline. In fact, interdisciplinary theory is a particularly rich source for such scholarship.

Many theories have been developed in other disciplines that could be applied to legal writing skills.<sup>73</sup> In recent years we have seen clinical scholars look to other disciplines to add theory to their scholarship.<sup>74</sup> The same is possible for legal writing scholarship. The possibilities are endless. Classical rhetoric, linguistics, semantics, literary criticism, creative writing, narrative theory, cognitive psychology, discursive psychology, social psychology,

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71. Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Legal Education*, 34 UCLA L. Rev. 577, 595 (1987); see also Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 Clin. L. Rev. 93, 105 n. 47 (1994).

72. See generally Margolis, *Beyond Brandeis*, *supra* n. 24 (analyzing under existing legal doctrine the propriety of using non-legal materials in appellate briefs); Margolis, *Closing the Floodgates*, *supra* n. 24 (applying to appellate brief writing theories about “policy arguments” previously developed by Critical Legal Studies scholars).

73. See e.g. Smith, *supra* n. 20, at xxi:

[This book] explor[es] specific strategies and techniques that lawyers can employ to make their writing more persuasive.

The persuasive strategies presented here are based not merely on anecdotal advice but on theoretical principles of human nature that are relevant to the process of persuasion. A tremendous amount of research and scholarship has been undertaken in other disciplines — such as cognitive psychology, literary theory, and classical rhetoric theory, to name a few — regarding aspects of human nature that are important in persuasion. Accordingly, lawyers, as persuasive writers, have much to learn from these disciplines. This book analyzes persuasive writing strategies that are designed to tap into and account for some of the human behavioral tendencies that have been identified and explored in these other disciplines.

For a general discussion of an interdisciplinary approach to legal scholarship, see Deborah L. Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327, 1329 (2002) (“I believe that the current diversity of approaches is a healthy development, [and] that recent theoretical, interdisciplinary, and “outsider” perspectives enrich the study of legal issues. . . . [L]aw has done better than most fields in transcending rigid disciplinary boundaries and integrating theory and practice.”); Richard A. Posner, *Legal Scholarship Today*, 115 Harv. L. Rev. 1314, 1317-26 (2002) (discussing “why interdisciplinary scholarship has grown so rapidly and what the future may hold for it.”).

74. Hoffman, *supra* n. 71, at 105 (discussing how scholarship on negotiation, which was once primarily anecdotal, has turned to “economic doctrine and psychological principles” in recent years).

sociology, anthropology, economics, journalism, ethics and morality theory, forensics and debate, argumentation theory, communication theory, business writing, advertising, statistics, graphic design — these are just a sampling of the disciplines that offer theoretical principles that could be used to improve the understanding and practice of legal writing. In view of the vast potential for interdisciplinary legal writing scholarship, it comes as no surprise that many of the examples listed in the previous section take such an approach.<sup>75</sup>

In addition to articles based on theory, this Journal will also solicit articles that offer practical advice about legal writing based on an author's own empirical research such as formal surveys, statistical analyses, or read-aloud protocols. Like scholarship based on theory, this type of scholarship uses research to explore the nature of effective legal writing. Examples of such scholarship were also included in the previous section.<sup>76</sup>

### C. Component #3 — Scholarship helpful and accessible to all “doers” of legal writing

Finally, the Mission Statement calls for “scholarship accessible and helpful to practitioners as well as to legal writing teachers.”<sup>77</sup> Three separate ideas are implied in this guideline. First, as explained earlier, the audience to which the scholarship is directed should be broader than the legal writing academy. The scholarship should be of value and interest to all “doers” of legal writing such as practitioners, judges, law students, and legal scholars, and not just to those who “teach” legal writing. Second, the scholarship should have practical application. Although, as explained in the previous section, the scholarship should be based on theory or empirical research, it should not be purely theoretical. The scholarship should combine theory with practicality. The true benefit of the scholarship contemplated by this Journal will come from melding the abstract and theoretical with the concrete and practical. While the practical advice will allow legal writers to write more effectively, the underlying theory will allow them to appreciate why and how the strategies

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75. See generally Crist, *supra* n. 21 (borrowing from composition theory and “tech-rhetoric”); Foley & Robbins, *supra* n. 23 (borrowing from creative writing theory); McDonnell, *supra* n. 26 (borrowing from the fields of legal realism and classical rhetoric); Wangerin, *supra* n. 27 (borrowing from many disciplines including argumentation theory, communication theory, cognitive science, and computer science); Smith, *supra* n. 29 (borrowing from classical rhetoric, literary theory, cognitive psychology, and morality theory); Smith, *supra* n. 30 (borrowing from cognitive psychology); Smith, *supra* n. 31 (borrowing from a number of sub-disciplines of psychology); Frost, *supra* n. 37 (borrowing from classical rhetoric); Little, *supra* n. 39 (borrowing from “critical linguistics” and rhetoric); Stanchi, *supra* n. 40 (borrowing from linguistics theory and classical rhetoric).

76. See Garner, *supra* n. 32 (summarizing the results of a nationwide survey of more than 100 judges); Robbins, *supra* n. 33 (summarizing the results of a survey of federal judges); Stratman, *supra* n. 35 (analyzing the results of a think-aloud protocol conducted on appellate brief writers and an appellate judge's law clerks); Little, *supra* n. 39 (analyzing the results of an empirical study of Supreme Court opinions).

77. *Policies and Procedures*, *supra* n. 7.

work. Knowing the hows and whys will enable legal writers to apply the proffered strategies more effectively and will allow and encourage other legal scholars to build on the work.

Clinical scholar Peter Toll Hoffman explained this idea of combining theory with practicality in the context of clinical scholarship as follows:

Clinical scholarship . . . should be practical in its orientation and design. The degree of abstraction from which a subject is approached can range from the concrete and wholly particular to the purely theoretical. The best scholarship about skills should partake of both extremes, by providing a theoretical underpinning for the analyses being presented and also discussing and presenting the application of the theory in practice. Theory is necessary for understanding and for the expansion and extension of the analysis, but it is not alone sufficient. The guiding principle of clinical scholarship should be improving the ability of lawyers to represent their clients and, therefore, any scholarship presented as clinical should be measured against that standard.<sup>78</sup>

Like Professor Hoffman's vision of good clinical scholarship, this Journal seeks scholarship that strikes an effective balance between theory and practicality.

Third, the scholarship must be accessible to its intended audiences. Again, Professor Hoffman's ideas on good clinical scholarship are instructive:

If clinical scholarship is to improve the representation of clients, then it must be accessible to its intended recipients, lawyers and law students. Scholarship written in the impenetrable prose of many academics is useless to those who are striving to be better lawyers. Lawyers and law students must be able to read, understand, and, most importantly, apply the analysis presented if clinical scholarship is to succeed in its mission of improving the representation of clients.<sup>79</sup>

Similarly, if this Journal is going to fulfill its goal of improving and expanding substantive legal writing doctrine, the scholarship represented here must be understandable and useful to the entire legal writing community, as that term is broadly defined by the Journal's Mission Statement.

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78. Hoffman, *supra* n. 71, at 114; *see also* Fine, *supra* n. 18, at 234 ("Ideally . . . a law review article that includes both practical and theoretical elements would satisfy the elevated appetite of the more erudite members of academe, while serving one's own interests (and the interests of many readers) in providing information that is useful for the reader.").

79. Hoffman, *supra* n. 71, at 114-15.

### III. Why This Mission is Crucial to the Future Development of Legal Writing as a Discipline and as a Profession

As the previous discussion makes clear, the mission of this new Journal — to encourage and publish scholarship on the substance of legal writing — is as unique as it is specific. This novel approach, however, was not arrived at casually. Several very important goals underlie this choice of focus.

#### A. Expanding legal writing doctrine: A topic whose time has come

The first goal underlying this Journal's mission is to expand and improve substantive legal writing doctrine. In many ways, legal writing as a topic of academic study is in its infancy. One reason for this is that legal writing itself is relatively new to the legal academy. Unlike other core curriculum courses that have been around since the beginning of modern legal education, legal writing did not become a generally accepted part of the law school curriculum until relatively recently.<sup>80</sup> Furthermore, the emergence of the "legal writing professional" is a very recent phenomenon. Historically, legal writing courses were taught by part-time or temporary instructors. It wasn't until the last few years that many law schools started hiring full-time people not subject to limitations on their stay (known as "caps") to teach legal writing.<sup>81</sup> As a consequence, for much of its history, legal writing had very few professionals dedicated to exploring legal writing as an academic topic. Until an academic subject is professionalized, that is, until an academic subject is undertaken by people with the experience, time, and resources to explore its intellectual boundaries, the growth of its doctrine will be slow. For many years, this was the situation that confronted legal writing. Today, however, legal writing at many law schools is taught by full-time, uncapped instructors. Thus, now, unlike at any time in its history, legal writing can boast a growing number of professionals who have the expertise and resources to explore the substantive nature of legal writing and its related skills.

Despite the growth in our numbers, however, a recent study of the scholarship produced by legal writing teachers shows that relatively little scholarship is being produced on the substance of legal writing. According to this study, seventy-five percent of the articles produced by legal writing

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80. See generally David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 108-136 (2003) (discussing both the history of legal education in America and the history of legal writing courses in the law school curriculum).

81. See *id.* at 130-136; Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 Leg. Writing 95, 112 (2000) ("There is a dramatic shift in the staffing models for teachers in legal writing programs. . . . While the majority of programs that have full-time teachers continue to use short-term or long-term contracts, the majority of those on contract no longer have a 'cap' or maximum period for the renewable contracts."); Jan M. Levine & Cheryl Beckett, *Status and Salary*, in *The Politics of Legal Writing*, *supra* n. 2, at 10-18.

professionals are on non-legal writing topics.<sup>82</sup> Moreover, of the twenty-five percent of articles on legal writing, many of those address legal writing pedagogy, administration, or politics, not legal writing substance.<sup>83</sup> The irony is compelling: while most legal writing professionals now enjoy enough occupational security and longevity to develop substantive expertise in their field, few legal writing professionals are using this expertise in their scholarship. Thus, one of the primary goals of this Journal is to motivate the new breed of legal writing professionals to mobilize their expertise in the expansion of substantive legal writing doctrine.

#### B. Sending a new message – Part 1: Legal writing has substance

The second goal underlying this Journal's mission is to gain recognition for legal writing as an academic discipline within the broader legal academy. As was noted in the previous section, two compelling observations can be made about the current state of the scholarship being produced by legal writing professionals. First, three-fourths of the scholarship produced by legal writing professionals is on topics other than legal writing.<sup>84</sup> Second, of those articles written on legal writing, a large percentage are on legal writing pedagogy or the politics of legal writing, as opposed to substantive legal writing doctrine.<sup>85</sup> While there may be powerful political reasons underlying the first observation,<sup>86</sup> these two phenomena working together may foster the perception that legal writing as a substantive discipline offers little intellectual challenge and that legal writing professionals must instead pursue other scholarly topics.

In some ways, the legal writing profession's focus on pedagogical scholarship is understandable. Because of the inherent nature and quality of teacher-student interaction in legal writing instruction, many people who are drawn to legal writing as a profession are dedicated "teachers" who put a high value on effective teaching. In fact, I would surmise that legal writing teachers are among the most conscientious teachers in the legal academy. It comes as no surprise then that many legal writing professionals write about teaching, for it is natural to write about what one cares about the most. However, this focus on pedagogical scholarship has set us apart from the rest of the legal

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82. Pollman & Edwards, *supra* n. 17, at 8. Much has been written about the pressures on legal writing teachers seeking promotion or tenure to write on non-legal writing topics. *See e.g.* Mary Beth Beazley, "Riddikulus!": *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 *Scribes J. Leg. Writing* 79, 84 (2000); Liemer, *supra* n. 18, at 1029 n. 88; Levine, *supra* n. 15, at 545; *see also* Hoffman, *supra* n. 71, at 106-107, 108-110.

83. *See generally* Pollman & Edwards, *supra* n. 17; *see also supra* nn. 11-15 and accompanying text. A decade ago, Professor Peter Toll Hoffman made a similar observation about clinical scholarship: "[C]linical teachers are creating a disproportionately small amount of scholarship about the subject they teach, something more about how they teach it, and a great deal about everything else." Hoffman, *supra* n. 71, at 102.

84. *See supra* n. 82 and accompanying text.

85. *See supra* n. 83 and accompanying text.

86. *See supra* n. 82.

academy and has sent a potentially damaging message about the nature of legal writing as a discipline. Professors in other areas of the law do not, by and large, write about how to teach their subjects. Most torts and constitutional law professors, for example, do not write on how to teach torts or constitutional law. They write about the substance of their respective subjects. Such is the nature of doctrinal scholarship which has traditionally been valued in law schools. Legal writing professionals, by contrast, have tended to write not about the substantive nature of legal writing and legal analysis, but about how to best teach these subjects. This disparity, this deviation from the norm in the legal academy, allows the perception that legal writing lacks enough substance to engage its own scholars.

Scholarship on the substance of legal writing is a necessary next step for legal writing scholars. Pedagogical scholarship has helped to dramatically improve the structure of legal writing programs and the teaching of legal writing skills across the country. Moreover, scholarship on legal writing politics has been and will continue to be essential to the improvement of status and working conditions for all legal writing professionals. Much of this scholarship is extremely sophisticated and intellectually challenging. The problem is not the inherent nature of pedagogical or political scholarship, but the disproportionate quantity of this type of scholarship currently being produced by legal writing professionals. As was discussed in the previous section, much is yet to be discovered and written about the substantive nature of legal writing.<sup>87</sup> Thus, the second goal of this Journal is to encourage scholarship on substantive legal writing doctrine and, in doing so, to demonstrate in dramatic fashion that legal writing has substance worthy of academic exploration.

C. Sending a new message – Part 2: The substance of legal writing is intellectually rich and challenging<sup>88</sup>

The third goal is related to the second in that it too involves gaining more recognition for legal writing within the more general legal academy. As was discussed in Part II, much of the skills scholarship that is produced by legal writing professionals consists of informal “nut and bolts” pieces based primarily on experience rather than in-depth research or theoretical principles.<sup>89</sup> By producing such pieces in great numbers, the legal writing profession has allowed others to conclude that legal writing skills scholarship lacks the intellectual depth of other areas of legal study.

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87. *See supra* pt. III.A.

88. This phrase is borrowed from Hoffman, *supra* n. 71, at 108-109 (“While some lawyering skills scholarship is pedestrian in form, the best of the scholarship is intellectually rich and challenging.”)

89. *See supra* pt. II.B.



If legal writing skills scholarship is to gain recognition and respect in the academy, it must embrace a more theoretical approach. As Professor Peter Toll Hoffman observed:

The nature of law school faculties and legal education is such that, until a subject matter can be presented in the guise of a theory, it will receive little respect or recognition from law teachers . . . and there will be little writing about it in the law reviews. Recognition and acceptance are accorded only to what can be translated into some form of theory suitable for study.<sup>90</sup>

As discussed previously, this Journal will solicit articles based only on theory or empirical research.<sup>91</sup> One goal underlying this approach is to improve the status of legal writing skills scholarship within the academy by demonstrating that this type of scholarship can be as intellectually rich and challenging as the more traditional types of legal scholarship.

D. Fulfilling the traditional role of legal scholarship: Advice or insights from an expert

The fourth goal of this Journal is to expand our conversation beyond ourselves. Much of what legal writing professionals write is targeted to other legal writing professionals only.<sup>92</sup> By concentrating on legal writing pedagogy, administration, and politics, we spend a lot of time and resources “talking amongst ourselves.” This approach to scholarship, however, is inconsistent with the traditional purpose of legal scholarship. As Judge Richard Posner observed:

It used to be that law professors were in the university but of the legal profession. The job of the professor was to produce knowledge useful to practitioners. To be useful it had to have a credible source and to be packaged in a form the practitioner could use. The source was the law professor viewed as a superior lawyer.<sup>93</sup>

Law teachers, by virtue of their profession, have the time and resources to explore their areas of expertise in great detail. Accordingly, legal scholarship was traditionally viewed as advice or insights to the bench and bar from a legal expert. As of today, however, much of the serious legal writing scholarship is

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90. Hoffman, *supra* n. 71, at 105; *see also* Fine, *supra* n. 18, at 234 (“There is little doubt that the legal academy today looks more generously on articles that are more theoretical than practical.”).

91. *See supra* nn. 70-76 and accompanying text.

92. *See supra* nn. 11-18 and accompanying text.

93. Richard A. Posner, *Overcoming Law* 82-83 (1995) (quoted in Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 Clin. L. Rev. 385, 389 (1996)).

“internal” scholarship targeted to other legal writing professionals rather than the practitioner.

Two things make this trend toward internal legal writing scholarship even more surprising. First, legal writing, perhaps unlike some other topics of study in the legal academy, is undeniably a practical skill. Thus, while some legal scholars may have some difficulty making a connection between their areas of expertise and the practice of law, the connection between legal writing and law practice is natural.<sup>94</sup> Second, the missions of both major legal writing associations, ALWD and the Legal Writing Institute, proudly declare their commitment to “improv[ing] understanding among legal educators, students, and the bench and bar about the field of legal writing.”<sup>95</sup> Thus, producing information that is beneficial to those who practice the craft of legal writing is at the heart of these organizations.

The purpose of this Journal is to develop legal writing skills scholarship that reflects the wisdom of dedicated experts. By serving this mission, this Journal will expand the conversation about legal writing beyond academic audiences and, in doing so, will help the legal writing profession fulfill its obligation to the general legal profession.

#### IV. Conclusion

Back in 1995, at the inception of ALWD, Professors Jill J. Ramsfield and J. Christopher Rideout eloquently described the immense potential for legal writing scholarship:

We are scholars of a new discipline. Our work, so carefully cut out for us by our predecessors, continues. . . . We do not yet know the depth of our discipline, nor have we fully articulated its breadth. We own a rare moment in scholarship, a moment of discovery and careful preservation, a moment of intellectual adventure. As we develop our discipline, we can work together to chart its magnificent terrain and preserve its natural beauty.<sup>96</sup>

Today, with the publication of this Journal, ALWD takes a major step in exploring this new and exciting frontier.

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94. Professor Peter A. Joy made a similar observation about clinical scholarship. Joy, *supra* n. 93, at 390 (“[By not writing on clinical skills,] clinicians are suppressing our unique perspective as both teachers and practicing lawyers.”).

95. *Bylaws of the Association of Legal Writing Directors*, Art. III(1)(E), <http://www.alwd.org/members/alwdBylaws.htm> (accessed Feb. 15, 2004); *see also* Legal Writing Institute, *Bylaws*, Article II, <http://www.lwionline.org/about/bylaws.asp> (accessed Feb. 15, 2004) (“The purposes of the Legal Writing Institute are to improve legal writing, to promote and improve legal writing instruction, and to educate the public and the members of the bar about legal reasoning, research, and writing.”).

96. Ramsfield & Rideout, *supra* n. 17, at 91.