

Education & Practice

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Why is Coherent Legal Writing So Anomalous? By James M. Boland

Mark Twain is reputed to have said, “Everyone talks about the weather, but no one does anything about it.” One could just as easily apply this to legal writing, “Everyone complains about poor legal writing, but no one seems to do anything about it.” You don’t need to be a Supreme Court Justice to recognize inadequate legal writing. For instance, one of the students who is currently taking my legal externship course, in answering what was the most challenging aspect of his externship, wrote:

The most challenging thing that I have encountered during my externship this summer is making sense of some of the briefs that have been submitted (mostly by defense counsel). My (main) job entails taking cases petitioned to the Court and summarizing the proceedings below, summarizing each sides argument, and giving a ‘staff analysis’ of how the law fits into all of that. When I get a 30+ page brief that rambles on incoherently and has many spelling and grammatical errors, it is extreme-

ly difficult to actually know what the appellant is arguing, which in turn makes it difficult to summarize this for the justices. Not being able to articulate what the appellant is asking for makes it much less likely that the Court will grant the appeal. Through this experience I have learned how truly important clear and succinct legal writing is in this profession.

This critique was given by a rising 2L. I have also been serving on a task force at the Virginia State Bar that has been asked to produce a report on how to improve the legal writing of lawyers in Virginia. The task force has not completed its work, but as a director of a legal writing program at an ABA accredited law school, I have some opinions and suggestions to offer.

First, there are two aspects of legal writing – the writing part and the legal analysis part. Sometimes, critiques of legal writing, wrongly I think, merely lament that this generation of students can’t write, in the English composition sense. I routinely hear from multiple sources

that our crumbling education system bears much of the responsibility for the deterioration of legal writing because students can’t do basic grammar or write a coherent sentence. This is undoubtedly somewhat true. Bryan Garner wrote in a recent article that:

Writing standards have consistently fallen over the last century in secondary and higher education. (It would take a full-scale book to unpack that set of issues.) For law firm associ-

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Chair's Column

**Professor
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In this challenging time for legal education, our Section is committed to developing ideas for improving the training of lawyers.

In the wake of the 2012 20th Anniversary Conclave on Legal Education held by our Section, legal writing was identified as one of the areas most in need of attention and improvement. The Section's Board thus decided to form a Task Force on Legal Writing to study the issue and to make recommendations.

We now have the benefit of this report, which is discussed in this newsletter and is available for your review. In short, the report makes suggestions that touch on three areas: (1) supporting the efforts of law schools to offer high quality legal writing instruction; (2) modifying the bar examination in ways that permit it to test examinees on their legal writing ability; and (3) expanding the scope of continuing legal education courses to embrace programming that offers legal writing instruction for practitioners. Although all of these ideas are only in the formative stages, a few words about them are appropriate here.

Each law school in Virginia has its own approach to legal writing instruction. Our role as a Section is not to interfere with that instruction but rather to find ways to facilitate communication among the various schools so that each can learn from the other what is working and what is not. Thus, bringing people together to discuss the best practices in legal writing education seems like a good first step in providing that support.

Although the Virginia Bar Exam contains multiple essays that involve writing by the examinee, the bar examiners do not evaluate those essays for the quality of the writing but rather for the correctness of the legal analysis. If we want to signal the importance of legal writing to law schools and to assess the writing ability of bar applicants in a meaningful way, revisions to or expansions of the bar exam may be worth considering.

Finally, given the apparent need for practitioners to receive better training on how to improve their legal writing, might it be possible for CLE providers to create intensive writing skills courses like those that exist for trial skills? Beyond staying updated on substantive legal issues and improving the ability to perform in the courtroom, honing one's written advocacy skills seems like an equally worthwhile effort that our CLE programmers should be offering.

Making strides in these areas will take more than words. Those with influence in each of these spheres will need to recognize the need for improvement and commit to doing what it takes to make it happen. The Section on the Education of Lawyers in Virginia will be there to encourage and to assist with this effort every step of the way. ✧

Why is Coherent Legal Writing So Anomalous?...

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ates, their senior lawyers too often decry any emphasis on writing style ("I'm just concerned with the substance of it! I leave style to others!"). And in general society, serious readers are becoming an endangered species.¹

It appears there is general agreement that our education system is failing us, and with a few exceptions, students are not prepared to write coherently on any subject. However, we in the legal writing community generally agree that it is not our job to remedy, even if we could, the defects in the American education system. Also, when grading the work product of a myriad of 1L students over the years, it is sometimes difficult to determine whether the student does not know how to write (grammar, sentence structure) or whether they have do not know how to construct a legal argument. It is hard to write coherently when you don't know what you are taking about. So we end up with lawyers who can't write or who can't think logically, or maybe can't do either.

It is amusing to me that the legal community is constantly complaining about the inability of new lawyers to write well and how quickly we lay the blame on those that came before us in the educational assembly line. Most law students, however, are reasonably intelligent. Therefore, they should be able to learn to write a coherent brief even if they came to law school deficient in writing skills and even if they have not been challenged in their prior education to think clearly and logically. This is

based on my premise that you can teach reasonably intelligent people almost anything if you are willing to allocate the time and resources. Let me give a personal example. When I was discharged from the army many years ago (honorably, just for the record), my cousin, who was an executive at Chrysler got me a job working on an assembly line. The plant that I worked at, like the rest of Detroit, is now defunct. At any rate, I knew nothing about cars other than how to drive one. In his wisdom, my supervisor gave me a job putting power steering pumps on engines. Someone trained me for the first morning I was on the job, and then walked away. In that morning he was tasked with explaining what a power steering pump was, where it went on the engine, and which pump to put on the six cylinder engine and which to put on the eight cylinder engine. Unfortunately, the engines did not come down the line with a sign indicating which was a six cylinder engine and which was an eight. Suffice it to say the first few days were a bit stressful, and I always wonder who bought the cars on which I worked during those first days on the job. ("Honey, this car doesn't turn very well; what's the matter, it's brand new?"). I was the matter with any problems with the steering on that car. One half day of training was not enough, but I eventually figured it out. Of course when I figure it out they changed my job to installing fuel lines, but that's another story. I eventually figured out that task too. Why did I figure it out? I figured it out because an engine came by my station every fifty-six seconds for nine hours every day. That's a lot of engines and even I, a person with no interest in cars and even less talent in working on

them, became very skillful in looking at an engine, determining what kind it was and smoothly putting on the correct part.

I can almost hear law professors sputtering with indignity because I'm comparing something in the legal profession with a blue collar task. Very pedestrian, I know, but we must face the reality that legal writing involves skills that can be learned, just like working on an assembly line involves skills that even a person with no mechanical skills like me could learn. I can hear another law professor (who probably has never practiced law) booming out: "We're not a trade school; we're an institution of higher learning. We do scholarship and we teach students to think like lawyers." Yeah, sure. Keep believing that. If we are doing enough, why then are lawyers producing incoherent briefs?

The answer seems obvious, at least to me. Brain Garner nails it if we are willing to listen. He writes:

Here some science comes into play. What does it take to master a skill? The popular science writer Malcolm Gladwell says, in his best-selling book *Outliers*, that you can't truly master a skill until you've spent about 10,000 hours doing it. That makes perfect sense to me.

It also strikes me, however, that few junior lawyers have spent 10,000 hours writing. As the great William Prosser once said, a lawyer over the course of a career will probably write as much as a productive novelist. But it takes years before one starts talking about "the course of a career."²

Ok, law students are not going to have the time to write for 10,000 hours, but can we do better than the one or two courses required in the first two years of law school? Most law schools, even with the greater emphasis on legal writing in the last twenty years, thanks to yeoman work by the Legal Writing Institute,³ are not designed to produce excellent legal writers. Only the most intelligent students who bring writing skills to the table will leave law school with the title, "Excellent Legal Writer." Most law schools offer elective writing courses, but poor writers usually avoid these courses because it is only human to avoid those areas of life in which we don't do well. Thankfully, some mature students recognize their deficiencies and take elective writing courses, but I find this, after almost twenty years of teaching legal writing, to be the exception rather than the rule. Garner points out that "[b]ad golfers do tend to know they're bad. Mediocre golfers tend to know they're mediocre. In golf, there are qualifying tournaments. The four major championships aren't weighed down by incompetent pretenders. But with an *unscored* activity like writing, the field gets crowded with the unskillful who have no idea that they're unskillful."⁴ Garner feels that this is an intractable problem, but from a legal writing professor's perspective, it seems self-evident that if we give law students more obligatory experience in *scored* writing, not only might students have an epiphany ("I need help with my legal writing), but they would actually be forced to write more before they impose themselves on a law firm, a client or a judge.

So the answer is simple - more

legal writing in law school. But you knew it wouldn't be that simple, didn't you? First there is the "we are not a trade school" substantive professors who have always denigrated clinical programs, legal writing programs included. As Elie Mystal, a Harvard Law School graduate summed up the dilemma in a recent legal blog:

But law school isn't just about constitutional law and jurisprudence and philosophy. For many, it's just a trade school. You go to learn a skill. So you can get a job. And the educational strategies that work when you are training the next crop of Supreme Court justices aren't necessarily the same ones that need apply when you are training the next crop of local prosecutors and civil defense attorneys⁵

Those who think of law school as a quasi-trade school probably include most 1L students before they enter law school and catch on to what they are actually doing in their substantive courses. Students undoubtedly think when they enroll that they are learning how to practice law. However, we as former law students, remember that sinking feeling at the point in law school when we realized we had no idea how to practice law. We were given a law license because we passed a test, but were scared to death on the first day we reported to work because we knew what we dared not say. I had no idea what lawyers do. Couldn't law schools and accrediting bodies at least ensure that in order to get a law degree, much less a law license, students can adequately write a brief, maybe even a complaint, an answer and possibly even be able

to draft a simple contract. Actually, not just write it, but write it well - all that for only \$100,000.

As a clinical professor myself I am sensitive to the trade school-type aspects of what we are doing or should be doing. Clinical professors cost money, but from a professional point of view, what do we in law schools think we are doing if students can't do even the basics of law practice when they graduate from law school? Law schools are under great pressure as the recession continues and students begin doing a basic cost/benefit analysis of attending law school. When students do that cost/benefit analysis, can we at least assure them they have the rudimentary skills needed to practice law when they graduate? If they don't have those skills, they have no right to a law degree and no right to receive a law license. And it is we, the law schools and faculty, who bear the blame for students' inability to practice the rudiments of law, and we have the responsibility to fix it. ✧

1. Bryan Garner, *Why Lawyers Can't Write*, ABA Journal, March 13, 2013, at http://www.abajournal.com/magazine/article/why_lawyers_cant_write/

2. *Id.*

3. See Legal Writing Institute, <http://www.lwionline.org/>, "The Legal Writing Institute (LWI) is a non-profit organization dedicated to improving legal writing by providing a forum for discussion and scholarship about legal writing, analysis, and research. LWI promotes these activities through its publications, workshops, specialty conferences, and the national biennial conferences held in even-numbered years."

4. *Id.* (italics added).

5. Elie Mystal, *Law Professors Enter A Time Of Consequences As ABA Fights To Preserve Their Status Quo*, ABOVE THE LAW (16 Jul 2013 at 2:50 PM), <http://abovethelaw.com/2013/07/law-professors-enter-a-time-of-consequences-as-abafights-to-preserve-their-status-quo/>. ✧

Section's Legal Writing Task Force Issues Report

In January 2013, Section Chair A. Benjamin Spencer established a Task Force on Legal Writing chaired by Senior Justice Elizabeth B. Lacy. The task force included representatives from the bench, bar and legal academy: Professor James M. Boland; Dean Davison M. Douglas; John Holland Foote; Jeanne F. Franklin; Dean Lucy S. McGough; Monica Taylor Monday; Thomas E. Spahn; Professor David H. Spratt; and Jacquelyn E. Stone.

The need to address the problem of inadequate legal writing became apparent during the 20th Anniversary Conclave on the Education of Lawyers held in Charlottesville in April 2012. Professor Spencer charged the Task Force with gathering information about the efforts in Virginia and elsewhere to improve the writing ability of lawyers.

After breaking into subgroups to collect data, the task force produced its report and submitted it to the Section's board of governors in September. Included in the report are recommendations that the Section support efforts to assess and improve legal writing skills during law school and later in practice; support efforts to include evaluation of legal writing as a component of the bar exam; and encourage CLE providers to offer legal writing seminars. Look for additional coverage in the December issue of the *Virginia Lawyer*. The complete task force report is available online at <http://www.vsb.org/site/sections/educationoflawyers-news/legalwriting2013> ✧

A BIG THANK YOU!

The Board of Governors of the Education Section wishes to express its gratitude to Bill Glover for his participation in, and leadership of, the committee which oversees the Virginia State Bar's Law School Professionalism Program. He is stepping down from the board and this committee in order to better honor his commitments to his firm's growing clientele.

Bill has served as a member, co-chair and chair of the Law School Professionalism Program committee since 2004, following his service as chair of the VSB's Standing Committee on Professionalism from 2002 to 2004. He has served as a member of the Board of Governors

of the Education Section since 2008. Bill is dedicated to professional values and has diligently endeavored to impart those values to the next generation of lawyers, irrespective of whether they intend to practice in Virginia. During his tenure as chair, Bill worked closely with the deans of the various Virginia law schools to improve and modify the program in ways that allowed the program to fit into each school's curriculum.

Bill truly is an example of a professional attorney. He practices primarily commercial litigation in Fredericksburg with his wife, Jeannie Dahnk, a former president of the State Bar. ✧

CONTRIBUTIONS

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The section gratefully acknowledges the following Virginia law firms and law schools for their generous support of section activities during the last bar year.

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Faculty News

Washington & Lee

- ◆ David Baluarte joined W&L from American University Washington College of Law, where he was Practitioner-in-Residence and Arbenz Fellow in the International Human Rights Law Clinic (IHRLC).
- ◆ Margaret Hu joined from Duke University, where she was Visiting Assistant Professor of Law.
- ◆ Prior to joining W&L, Victoria Shannon served as Deputy Director of Arbitration and ADR in North America for the International Court of Arbitration of the International Chamber of Commerce.
- ◆ Kish Vinayagamoorthy joined from Villanova University School of Law, where she was a Visiting Assistant Professor of Law.

William & Mary

- ◆ Evan J. Criddle joined the faculty from the Syracuse University College of Law.
- ◆ Prior to arriving at W&M, Thomas J. McSweeney was a visiting assistant professor of law at Cornell.
- ◆ James Y. Stern joined from the University of Virginia Law School, where he was a research assistant professor.
- ◆ Erin Hendrickson and Stacy Kern-Scheerer joined the Legal Practice program as legal writing faculty. ◆

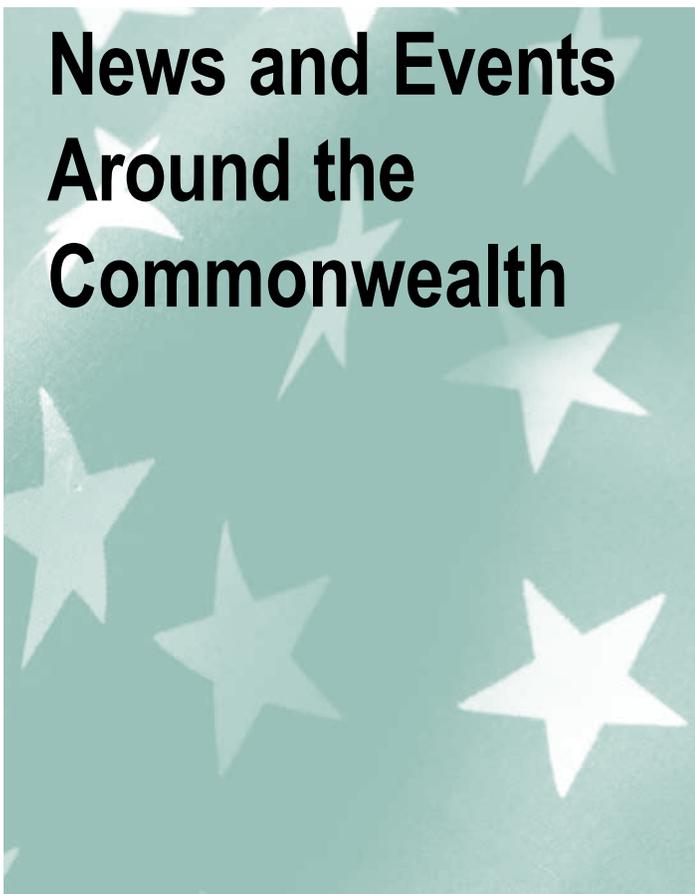
University of Richmond

- ◆ Jacqueline Lainez joined the faculty as Director of the Intellectual Property and Transactional Law Clinic.
- ◆ Five faculty, three of them new to the school, form a new team that will strengthen the law school's legal writing program: Christopher Corts, Tamar Schwartz Eisen, Laura Khatcheressian, Doron Samuel-Siegel, and Rachel Suddarth.

University of Virginia

- ◆ Stephen L. Braga joined UVA as a professor of law and director of the Law School's Appellate Litigation Clinic.
- ◆ Associate Professor Andrew Hayashi was formerly the Nourallah Elghanayan Research Fellow at the Furman Center for Real Estate and Urban Policy at New York University.
- ◆ Michael A. Livermore, also an associate professor, joined the faculty from the Institute for Policy Integrity at New York University School of Law.
- ◆ Ruth Mason, formerly the Anthony J. Smits Professor of Global Commerce at the University of Connecticut joined UVA as a professor of law.

News and Events Around the Commonwealth



Regent

- ◆ Regent Law launched two new degree programs recently, The Master of Arts in Law and The LL.M. in Human Rights.
- ◆ On Nov. 1-2, 2013, Regent's Center for Global Justice, Human Rights, and the Rule of Law will host a summit on human rights abuses in North Korea.

University of Richmond

- ◆ In October, Richmond Law celebrated the 90th anniversary of the first female graduate of the law school with the Richmond Law Women's Forum.

University of Virginia

- ◆ On October 18-19, the University of Virginia School of Law celebrated 15 years of the Child Advocacy Clinic during a conference that brought back many of the clinic's alumni to discuss their work and how the clinic influenced their careers.
- ◆ The "Association for the Study of Law, Culture and the Humanities Annual Conference," will be held on March 10-11, 2014.

Washington & Lee

- ◆ "Roe at 40 - The Controversy Continues," a symposium to be held on November 7-8, 2013, at Washington and Lee University School of Law, will contribute to the ongoing debate about the significance of the Roe decision.

William & Mary

- ◆ Co-sponsored by the Special Education Advocacy Clinic, Wrightslaw, and the Oklahoma Disability Law Center, the Third Annual Institute of Special Education Advocacy was held from July 29 to Aug. 1.
- ◆ On October 8-10, the Third McGlothlin Leadership Forum Sponsored by the Law School and the Mason School of Business taught classes and engaged students and faculty in a discussion of leadership challenges in business, law, and politics.
- ◆ The Law School hosted the 10th Annual Brigham-Kanner Property Rights Conference on Oct. 17-18, and will host the 59th Annual Tax Conference on Nov. 6-8. ✧

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<http://www.vsb.org/site/sections/educationoflawyers>

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