

“WRITING AS CONVERSATION”¹: USING PEER REVIEW TO TEACH LEGAL WRITING

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In 2007, two important reports challenged law school faculty to re-examine the purpose and pedagogy of legal education. The first was sponsored by the Carnegie Foundation for the Advancement of Teaching and is commonly referred to as the “Carnegie Report.”² The second, *Best Practices for Legal Education: A Vision and a Roadmap*,³ was published by the Clinical Legal Education Association.

The Carnegie Report regards legal education as an apprenticeship of the mind where students start on the road towards assuming the identity of competent and dedicated professionals. The Report identifies three aspects of this apprenticeship:⁴

1. intellectual—focusing on formal knowledge and analytical reasoning;
2. skills used by competent practitioners; and
3. professional values and ethics.

The authors of the Report conclude that the current system of legal education over-emphasizes the first apprenticeship of intellectual skills based on knowledge.⁵ They recommend a curriculum that more fully integrates the three apprenticeships in order to do justice to the full range of skills necessary to prepare stu-

1. Kenneth A. Bruffee, *A Short Course in Writing: Composition, Collaborative Learning, and Constructive Reading* (4th ed., Pearson Longman 2007).

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2. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

3. Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Roadmap* (Clin. Leg. Educ. Assn. 2007).

4. Sullivan et al., *supra* n. 2, at 27–29.

5. *Id.* at 47. Legal education’s signature pedagogy is the case-dialogue method, *id.* at 50, and legal education “shows powerful bias in favor of academic values.” *Id.* at 163.

dents for the legal profession.⁶ Moreover, the Report comments positively on the pedagogy used in legal writing programs, with particular emphasis on feedback, and practical lessons.⁷ In general, the Report has had some impact on law school curricula and on legal writing curricula,⁸ with some schools actively seeking to implement its recommendations.⁹

In *Best Practices for Legal Education*, the authors' central message is similar. They emphasize the value of pedagogy that blends the theoretical and practical—recommending “context-based education.”¹⁰ They call on law schools to:

1. broaden the range of lessons they teach, reducing doctrinal instruction that uses Socratic dialogue and the case method;
2. integrate the teaching of knowledge, skills, and values; and
3. pay greater attention to instruction in professionalism.¹¹

Both the Carnegie Report and *Best Practices* urge that law school faculty give students learning opportunities to practice expert performance and feedback to help them improve that performance.¹²

To consider how those opportunities can be provided in teaching legal writing, I looked back to two critical experiences in my own development as a writer. The first was my work as an attor-

6. *Id.* at 29.

7. *Id.* at 99. “[L]egal research and writing classes have long practiced ways of integrating the conceptual and the practical.” The Carnegie Report also comments, “The legal writing courses . . . provide a pedagogical experience that in many ways complements what is missing in the case-dialogue classes that make up most of the students’ first year.” *Id.* at 104.

8. See Robin Boyle, *LWI Symposium, Short Survey Responses* (Sept. 6, 2009) (on file with Author).

9. See e.g. Kathleen M. Burch & Chara Fisher Jackson, *Creating the Perfect Storm: How Partnering with the ACLU Integrates the Carnegie Report’s Three Apprenticeships*, 3 John Marshall L. Rev. 51 (2009); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 Mercer L. Rev. 909 (2008); Jesse M. Krannich et al., *Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Towards a Comprehensive View of Legal Education*, 86 Denv. U. L. Rev. 381 (2009); Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education’s Signature Pedagogy*, 84 Ind. L.J. 589 (2009).

10. Stuckey et al., *supra* n. 3, at 104–116.

11. *Id.* at vii, 71–76.

12. *Id.* at 175–197; Sullivan et al., *supra* n. 2, at 100.

ney at the National Employment Law Project, a legal services back-up center. Our job was to provide support to local legal service offices by writing appellate briefs representing plaintiffs in federal employment discrimination cases. When I joined, it was a small office with four excellent attorneys. Our common practice was to write a draft of a brief and then circulate it to all of the other attorneys for their comments. That enabled me, as the most junior attorney, to read work by experienced attorneys, to see that I, too, had something to contribute as a reader, and to get comments on my own work. The second critical experience in my development as a writer was, in fact, starting to teach legal writing in law school.

Using peer review as a teaching technique is a way of integrating these two experiences into my classes. I have two main goals for my students. My first goal is to teach students to be good editors of their own work. By editing and commenting on someone else's work, they can heighten their awareness of the writing process and learn to apply those same skills to become good editors of their own work. The second goal is to teach students to be good colleagues. Law school can be competitive and individualistic. Legal practice can be competitive as well. But it is often collegial, because people must work in teams and even work collaboratively with lawyers on the other side.

Two scholars of composition theory have been highly influential in the use of peer review in the legal writing context. Peter Elbow is Professor Emeritus of the University of Massachusetts at Amherst and was the Director of the Writing Program. He is the author of, among other important texts, *Writing with Power: Techniques for Mastering the Writing Process*.¹³ Kenneth Bruffee is a Professor Emeritus at Brooklyn College and author of the classic text, *A Short Course in Writing*.¹⁴ For both, writing is social and collaborative.

13. Peter Elbow, *Writing with Power: Techniques for Mastering the Writing Process* (Oxford U. Press 1998) [hereinafter Elbow, *Writing with Power*]; see also Peter Elbow, *Writing without Teachers* (Oxford U. Press 1981); Peter Elbow & Pat Belanoff, *A Community of Writers: A Workshop Course in Writing* (3d ed., McGraw-Hill, Inc. 2000) [hereinafter Elbow & Belanoff *A Community of Writers*]; Peter Elbow & Pat Belanoff, *Sharing and Responding* (3d ed., McGraw-Hill, Inc. 2000) [hereinafter Elbow & Belanoff, *Sharing and Responding*].

14. Bruffee, *supra* n. 1; see also Kenneth A. Bruffee, *Collaborative Learning: Higher Education, Interdependence, and the Authority of Knowledge* (2d ed., John Hopkins U. Press 1999); Kenneth A. Bruffee, *Collaborative Learning and the "Conversation of Man-*

Professor Bruffee was a Founder of the Brooklyn College Institute for Training Peer Tutors. Recently, the Writing Center Journal celebrated his contributions to peer tutoring and collaborative learning through a special issue.¹⁵ Professor Bruffee writes that his basic goal is to “help students learn to read and write better through collaborative learning. Collaborative learning assumes that reading and writing are not solitary, individual activities, but social and collaborative ones.”¹⁶ He suggests to students that through peer review, while helping other students become better writers, they will learn how to become better writers themselves.¹⁷ He also states that “to become a good writer, you have to be a good reader.”¹⁸ His method is to have each student first describe the writing of another student; second, write a peer review of it; and third, discuss the review with the other student.¹⁹ He suggests that “if students converse constructively with peers about their own and other people’s writing, they will internalize the language of that conversation [and] be able to carry on the same conversation with themselves about their own writing internally when they are working alone.”²⁰

Professor Elbow, the author of *A Community of Writers* and *Sharing and Responding*,²¹ has written extensively on peer response groups.²² Focusing specifically on how writers and readers interact, he identifies two types of feedback: criterion-based feedback and reader-based feedback.²³ Legal writing faculty are

kind”, 46 College English 635 (Nov. 1984).

15. Special Issue, 28 Writing Ctr. J. (Fall 2008).

16. Bruffee, *supra* n. 1, at 1.

17. *Id.* at 171. Writing faculty have learned this from their own personal experiences as teachers.

18. *Id.* at 147.

19. According to Professor Bruffee,

Every essay assignment asks writers to

- describe their essays with a descriptive outline [what each paragraph does and what it says,
- read their essays aloud to their peers, who are their fellow writers in the class,
- exchange their essays with other students and write peer reviews of each other’s essays,
- and then confer, comparing the way they have read their own and each other’s essays and negotiating their differences.

Id. at 3.

20. *Id.*

21. Elbow & Belanoff, *A Community of Writers*, *supra* n. 13; Elbow & Belanoff, *Sharing and Responding*, *supra* n. 13.

22. Elbow & Belanoff, *Sharing and Responding*, *supra* n. 13, at v.

23. Elbow, *Writing with Power*, *supra* n. 13, at 240.

probably more familiar with criterion-based feedback, given the number of checklists on memos and briefs that appear in legal writing texts.²⁴ Professor Elbow identifies four basic questions to use in determining how a piece of writing measures up to certain criteria:

1. What is the quality of the content of the writing: the ideas, the perceptions, the point of view?
2. How well is the writing organized?
3. How effective is the language?
4. Are there mistakes or inappropriate choices in usage?²⁵

I personally have found that peer review seems to work better with law students when they are given more specific questions to which they must respond. They are less likely to feel uncomfortable and more likely to provide feedback that is helpful.²⁶

Professor Elbow finds reader-based feedback even more useful, because it tells the writer how the audience is actually responding to the writing. He suggests asking three broad questions:

24. See e.g. Mary Beth Beasley, *A Practical Guide to Appellate Advocacy* 109–118 (2d ed., Aspen Publishers 2006) (using the self-graded draft); Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 116, 338 (4th ed., Aspen Publishers 2006) (providing a checklist for the Statement of Facts on page 338, and a checklist for Rule Application Half of Paradigm on page 116); Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (6th ed., Aspen Publishers 2009) (specifically, inside front and back covers); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research and Writing* 569–570 (4th ed., Aspen Publishers 2006) (providing a revision checklist); Helene S. Shapo et al., *Writing and Analysis in the Law* 189, 481 (5th ed., Found. Press 2008) (providing a checklist for memos on page 189 and a checklist for briefs on page 481).

25. Elbow, *Writing with Power*, *supra* n. 13, at 240.

26. In discussing his methods of getting feedback, Professor Elbow notes,

You can avoid the most common problems in getting feedback: people beating around the bush and not telling you anything at all; or giving you a vague holistic judgment such as “B-plus” or “I liked it”; or going into negative gear and “critiquing you by finding every real and imaginable mistake there could be (“I hope I didn’t discourage you or anything”); or else trying to imitate what they remember from their teachers and talking about nothing but “topic sentences”; or else grabbing it out of our hands and trying to re-write the whole thing they way they think it ought to be . . .)

Id. at 238.

1. What was happening to you, moment by moment, as you were reading the piece of writing?
2. Summarize the writing: give your understanding of what it says or what happened in it.
3. Make up some images for the writing and the transaction it creates with you.²⁷

As legal writing faculty, we frequently emphasize to our students how the rhetorical context (audience, purpose, tone) differs with the types of documents we assign.²⁸ A focus on reader-based feedback will heighten this emphasis with respect to audience for students.

These principles have been applied in legal writing courses in different ways in different programs, and their use is increasing. The first is the ground-breaking program at Mercer Law School involving Advanced Writing Groups. Described as a course “based primarily on Peter Elbow’s concept of writing groups, in which writers receive weekly feedback from other writers,”²⁹ groups of six students meet one hour a week with their writing professor to participate as writers and readers.³⁰

Another approach is to use peer review to teach skills within a traditional legal writing course. Exercises have been based on writing the statement of facts section of an appellate brief,³¹ the thesis paragraph of a memo, or a summary motion memoran-

27. *Id.* at 240.

28. *E.g.* Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 106 (4th ed., LexisNexis 2004). The Context and Structure Checklist begins:

- Identify and articulate the goal of your document.
- Identify your audience and any expectations you know or suspect that audience has for your document.

Id.; see also Shapo et al., *supra* n. 24, at 172 (audience for a legal memorandum), 365–366 (audience for persuasive writing).

29. Mercer U. Sch. of L., *Certificate in Advanced Writing, Research, and Drafting*, http://www.law.mercer.edu/academics/legal_writing/certificate/index.cfm (accessed Apr. 13, 2010). For a more detailed description of particular workshops, see Linda Berger & Steve Berenson, Presentation, *Leaping from the Peer: Peer Reading and Writing Groups in Action* (11th Biennial Conf., Leg. Writing Inst., June 2006).

30. See Linda H. Edwards, *Law School Writing Without Teachers: Participating in an Advanced Writing Group*, http://www.law.mercer.edu/academics/legal_writing/certificate/advancedwritinggroup.pdf (accessed Apr. 13, 2010).

31. E-mail from Ruth Anne Robbins, to Author, *Peer Editing of Facts (Suggestions on Timing and Kinds of Comments)* (Jan. 28, 2009) (on file with Author).

dum.³² Typically these exercises use criterion-based feedback, with an outline or list of questions given to the students on what to look for. An hour of class time may be divided as follows: five minutes on teacher instructions and context; twenty minutes for each student to work on another student's paper; twenty minutes for the students to give each other feedback; and five minutes to wrap-up the exercises.³³

In my own writing class this fall, I used two peer review exercises. I told the students there were multiple purposes for the exercises. They would learn to better edit their own work by editing another person's work, they would help fellow students improve their writing, and they would begin the process of becoming the person in their law office who others would turn to for help. I used criterion-based feedback,³⁴ asking them to revise a sample memo Discussion section, exchange their revision with another

32. Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 12 Leg. Writing 1 (2003); see also 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, 179–184 (1999) (discussing the Peer Writing Group); Cara Cunningham & Michelle Streicher, *The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing*, 13 Leg. Writing 159, 166 (2007); Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 Persp. 73 (1999); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719 (1997); Lisa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask*, 34 Gonz. L. Rev. 45, 72 (1998); Terry Jean Seligman, *Testing the Waters*, 15 Second Draft (bull. of Leg. Writing Inst.) 13 (June 2001); Susan M. Taylor, *Students as (Re)visionaries: Or, Revision, Revision, Revision*, 21 Touro L. Rev. 265, 281 (2005). For a discussion of cooperative learning generally, see Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 Thomas M. Cooley L. Rev. 201 (2000), and Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 Ariz. L. Rev. 957 (1999).

33. E.g. e-mail from Suzanne Rowe, to Author (Oct. 23, 2009) (on file with Author). For a more intensive session, see Berger & Berenson, *supra* n. 29. See also Davis, *supra* n. 32, at 5 (one-and-a-half hour class period); e-mail from Teresa Phelps, to Author, *Peer Review Feedback; Peer Review Work with Co-Counsel, Work with Opposing Counsel* (Aug. 11, 2008) (on file with Author).

34. In addition, this spring, for the first time I used reader-based feedback as part of an exercise in writing the Statement of Facts in an appellate brief involving the admissibility of evidence on the battered woman's syndrome. The students had already written a Statement of Facts representing one side. I paired up students on the same side and said I wanted them to read their set of facts to each other. As each student read, the other was to think of how she was responding to what was said and how it made her feel about the defendant and her situation. Finally, I asked them to write down their impressions and share them after each had finished reading. For most students, it was a way of getting an immediate response to their writing from another person, and also getting insight from reading their work aloud.

student, and then discuss their comments with each other. The level of engagement varied.

For example, one question regarding the case analysis was: “Are the facts of your case compared to the facts in the precedent when analyzing each issue?”

Student Response #1: In the third paragraph of your discussion, you should talk about the facts of *Suhay* right after the topic sentence. You did this in the second paragraph of the discussion and it makes it clearer for someone who has not read the cases. You do an awesome job of synthesizing the cases in the discussion. Also, you say that a sufficient amount of time hasn’t passed, but you don’t give a concrete enough reason. None of the cases indicates what a sufficient amount of time is. Maybe it would be more effective to talk about what a reasonable amount of time is not with respect to these facts.

Student Response #2: “Yes.”³⁵

Clearly, not every student was equally engaged in this particular exercise, but many students made careful and thoughtful comments. And the exercise succeeded in beginning the discussion of working with colleagues and planting the seeds. I would certainly use the technique again in selected contexts.

In conclusion, using peer review as a teaching technique is an exciting way to work with students. It is empowering for them, and valuable in developing their skills in becoming competent and dedicated professionals.³⁶

35. As the student comments were anonymous, the authors of these two examples are unknown.

36. Sullivan et al., *supra* n. 2, at 27–29.