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# THE NEW LEGAL RHETORIC

by

*Teresa Godwin Phelps\**

*Whoever speaks a language that no one else understands does not speak.*<sup>1</sup>

**D**ENOUNCING the way lawyers write has become a national pastime, and much of the denunciation comes from within the profession. One law professor wrote recently that “[t]o write as a lawyer is to choose a perspective that can cheapen language and force us to relate to a narrow world of rules, not people.”<sup>2</sup> A practicing lawyer wrote that “[l]egal writing is one of those rare creatures, like the rat and the cockroach, that would attract little sympathy even as an endangered species.”<sup>3</sup>

These pessimistic voices offer warning but little hope to those entering the profession who must engage in legal writing. Additionally, these voices pose a particular dilemma to those increasing numbers of people who teach legal writing, suggesting that what we attempt to do is unavoidably insidious. Language is and will remain irrevocably central to the law, and rather than beat our breasts and lament our lot, it is surely wiser to roll up our sleeves and get about the task of doing and teaching legal writing more effectively.

This Article diagnoses what seems to have gone wrong with legal writing and what might be done to improve it. Because too much of what is said and written about legal writing is “evangelical” rather than analytic,<sup>4</sup> this Article sets out some practical steps toward defining legal writing and developing a substantive<sup>5</sup> pedagogy that can teach law students to write well. The first brief section uses a theory of discourse to classify and define legal writing in general and good legal writing specifically. Next, the Article describes what contemporary rhetoricians call the “current-traditional paradigm” and argues that the continued use of this paradigm afflicts the way legal writing is taught. A discussion of the principles of the “new rhetoric,” the alternative to the current-traditional paradigm, and an application of its principles to teaching legal writing follows. The Article concludes with the proposition that legal writing is essentially an ongoing conversation and that re-visioning

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1. H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* 65 (1976).

2. Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1393 (1984).

3. Hyland, *A Defense of Legal Writing*, 135 U. PA. L. REV. 599, 600 (1986).

4. Harris, *Applications of Kinneavy's Theory of Discourse to Technical Writing*, 40 C. ENG. 625, 625 (1979). Harris uses the evangelical/analytic distinction in reference to technical writing, but the distinction also aptly fits legal writing.

5. Indeed, one of the frequent student complaints about legal writing is that it is not substantive, and, given the way legal writing has been taught, the students have a point.

the act of writing as a lawyer in this way requires the development of a personal, professional "voice." One cannot converse without an authentic voice. Teaching legal writing as conversation allows for far more than just the polishing of a necessary skill; it encourages students actually to see the law differently. The enormity of the task is formidable, but we should not shirk it.

#### WHAT IS WRONG WITH LEGAL WRITING?

For centuries legal writing has been described as wordy, abstruse, and unintelligible. These adjectives accurately describe much current legal writing; yet while they capture the symptoms, they fail to pinpoint the underlying problem. Wordiness, abstruseness, and unintelligibility result when legal writers fail to recognize that the discourse they produce is essentially a conversation<sup>6</sup> with another or several others intended to solve problems and to discover answers to questions together. The law, thus seen, is a communal activity in which people speak and write for and to each other. As this Article's epigraph suggests, language that is difficult or impossible to understand is tantamount to silence, and a sad and lengthy silence has befallen legal writing. Lawyers write, too often, as if they existed alone in the world and ignore those with whom they converse. We persist in a somewhat romantic idea of the legal writer as a solitary figure struggling alone to say what he means. By recognizing and teaching legal writing as conversation, we can begin to re-vision what legal writing is and what it does.

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6. See J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 14-20 (1984). Professor White introduces the idea of conversation as a way of reading and understanding texts and the relationships that are established between writers and readers. He writes:

The idea of such a relationship may be somewhat novel or uncomfortable—a book is not a person after all—but I mean nothing mysterious or out of the ordinary. Every writer speaks to an audience and in doing so of necessity establishes a relationship with that audience based on the experience of reading that the text itself offers. The experience of reading is not vicarious—it involves no pretense that one is an Achaean or a Trojan—but actual and intimate, first occurring in the present, then living in the memory; and the community that a text establishes likewise has a real existence in the world. While a book is not a person, a writer always is; and writing is always a kind of social action: a proposed engagement of one mind with another.

*Id.* at 15.

Conversation is used somewhat differently in this Article in that it is approached from the writer's, rather than the reader's, viewpoint. This approach is extremely helpful in imagining and understanding what language, or text, does. Additionally, the use of the word rhetoric in this Article is premised on what White makes clear in a more recent book, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. He writes:

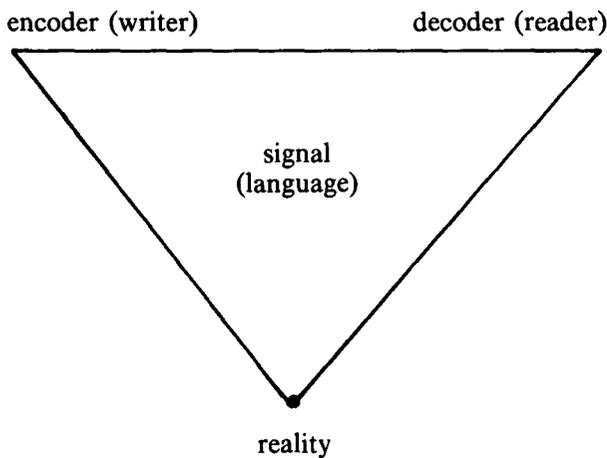
My general idea is that while there are of course many useful and familiar ways to talk about law—say as a system of rules or a structure of institutions—it is most usefully and completely seen as a branch of rhetoric. But "rhetoric" also needs definition, and I think it should be seen not as a failed science nor as an ignoble art of persuasion (as it often is) but as the central art by which culture and community are established, maintained, and transformed. This kind of rhetoric—I call it "constitutive rhetoric"—has justice as its ultimate subject, and of it I think law can be seen as a species.

J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28 (1985).

These comments are nothing but more evangelism, however, unless we can develop methods of teaching legal writing in this new way. When students enter law school, they begin an initiation into a new "discourse community"; they find their legal personalities by mastering a new "tribal speech."<sup>7</sup> They need to know how this tribal speech resembles and differs from the speech and writing they already know, and we need a pedagogy that emphasizes law's communal and conversational nature. The following sections provide methods for defining legal discourse for students and for easing the students' initiation into it.

#### AN ANATOMY OF LEGAL WRITING

A model of discourse helps in understanding the nature of legal writing and in developing a definition of good legal writing. The following triangle<sup>8</sup> encompasses all uses of language:



#### *The Communication Triangle*

In this triangle discourse is classified by aim, or intent, rather than type (description, narration, argument, for example). The unity of the triangle implies that all writing necessarily involves the four components: writer, reader, language, and reality. The aim of any particular discourse is determined by which of the four components of the triangle the writer intends to emphasize or affect with his writing. In other words, we can talk about writing in terms of its effectiveness in fulfilling what the writer set out to do, rather than measuring it against some ideal form.

If the emphasis is on the writer, we have expressive writing, such as jour-

7. K. BURKE, *LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD* 53 (1966).

8. J. KINNEAVY, *A THEORY OF DISCOURSE* 19 (1971).

nals or diaries.<sup>9</sup> The writing is mainly for the writer himself. If the emphasis is the language, we have literary writing. The language itself is predominantly important. If the emphasis is on the reality, we have referential (exploratory, scientific, or informative) writing, and if the emphasis is on the reader, we have persuasive writing.<sup>10</sup>

Anyone familiar with legal writing will recognize that legal writing is primarily concerned with the last two types of discourse; it exists along the reality-reader line of the triangle.<sup>11</sup> Thus we can begin to narrow, for ourselves and for our students, the nature of legal writing and to define it in a helpful way. Legal writing is writing designed to do things: to reveal and explain a particular reality, or to persuade a reader. Office memoranda, for example, fit the first category. The writing seeks to represent the reality, the thing outside; the writing at the apex of the communication triangle should propose a solution, diagnose, define, inform, or explore. Its purpose is to inform rather than to persuade; clarity and accuracy are its hallmarks. The reader serves a relatively passive role, merely receiving information.

On the other hand, advocacy documents such as briefs and memoranda of points and authorities belong on the upper right of the triangle because the emphasis is on the effect the document has on the reader. The writing's purpose is to bring about a change in the reader, to get the reader to act in a certain way, to persuade. The other two aims present in the triangle, expressive and literary aims, although perfectly legitimate, are not within the purview of most legal writing.<sup>12</sup>

The implications of this anatomy are clear. First, if we describe legal writing as professional writing that has specific and definable aims and audiences, then we can define good legal writing as writing that effectively fulfills its aim and meet its audience's needs. Second, keeping the triangle in mind forces writers to acknowledge that factors other than themselves are present when they write; all four components are at play and interact. A successful pedagogy for a legal writing course must have ways of teaching students to produce this kind of writing by discovering aim and analyzing audience. It must also provide students with "a conceptual framework that encourages exploration of each of the elements in the communication triangle in the attempt to bring forth discourse."<sup>13</sup> Unfortunately, many legal writing courses operate on the current-traditional paradigm and thus fail to achieve

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9. Case briefs that law students use as study aids can fall into this category; they are written for the writer alone. Kinneavy also places contracts and constitutions here. *Id.*

10. A caveat: "[A] classification of diverse aims of discourse must not be interpreted as the establishing of a set of iron-clad categories which do not overlap." Kinneavy, *The Basic Aims of Discourse*, 20 C. COMPOSITION & COMM. 297, 297 (1969).

11. This Article, for example, is on that line. The aim of the Article is to explain the new rhetoric and how it applies to legal writing; thus, it is written to reveal something. The Article also attempts to bring about a change in the reader; it tries to persuade readers to do something about the way legal writing is taught.

12. Considerably more attention should be given to applying Kinneavy's model to legal writing, much as Elizabeth Harris applies the model to technical writing. *See supra* note 4. That attention, however, is beyond the scope of this Article.

13. Berlin & Inkster, *Current-Traditional Rhetoric: Paradigm and Practice*, FRESHMAN ENG. NEWS, Winter 1980, at 1, 2.

these goals. The following section describes the current-traditional paradigm and its effect on teaching legal writing.

#### THE CURRENT-TRADITIONAL PARADIGM

In a now famous 1982 article, "The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing,"<sup>14</sup> Maxine Hairston outlines the new paradigm for the teaching of writing. Drawing from Thomas Kuhn's notion of a "paradigm shift," the change that occurs in a discipline "when old methods won't solve new problems,"<sup>15</sup> Hairston compares the old method of teaching writing, known as the current-traditional paradigm, to the emerging method, the new rhetoric. The crucial difference between the current-traditional paradigm, which most of us experienced as students, and the new rhetoric is that the current-tradition paradigm focuses on the composed product rather than on the composing process.

Influenced, knowingly or not, by the current-traditional paradigm, teachers assign paper topics, students write the papers outside of class and turn them in, teachers grade and comment on the papers and return them to the students. This procedure is repeated for the duration of the course. Kinds of writing are frequently divided into four modes: exposition, description, narration, and argument. Students are expected to write a given assignment in one or another of these modes. The stress on the modes of discourse results in a stress on the form of the writing. It neglects the role of the reader and the writer, seeing writing as form rather than as conversation.

The writer's role in producing the text remains mysterious, and a tacit assumption of the current-traditional paradigm is vitalism, which stresses the natural powers of the mind and "leads to a repudiation of the possibility of teaching the composing process."<sup>16</sup> The composing process is a creative act not susceptible to conscious control by formal procedures. "[T]he writer is, in a sense, at the mercy of his thoughts. He does not direct them at this or that point; instead, he follows them with more thoughts, spontaneously, naturally. It is hard to say whether he has the thoughts or they have him."<sup>17</sup> The composing process is thus not teachable, and writing teachers have relied on the "frequent writing followed by careful criticism"<sup>18</sup> method. "[T]he teaching of composition proceeds for both students and teachers as a metaphysical or, at best, a wholly intuitive endeavor."<sup>19</sup>

Hairston points out three other misconceptions of the current-traditional paradigm: (1) "writers know what they are going to say before they begin to write";<sup>20</sup> (2) the writing process is linear, proceeding systematically from

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14. Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76 (1982).

15. *Id.* at 76.

16. Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, in RESEARCH IN COMPOSING 29, 31 (1978).

17. *Id.* at 32.

18. Young, *supra* note 16, at 33.

19. J. EMIG, *THE COMPOSING PROCESS OF TWELFTH GRADERS* 1 (1971).

20. Hairston, *supra* note 14, at 78.

prewriting to writing to revising; and (3) teaching editing is really all a writing teacher can do.<sup>21</sup> These same misconceptions flaw the way legal writing is taught. Specific problems are detailed in a later section.

Despite the lengthy hegemony of the current-traditional paradigm, it has fallen on hard times. The current-traditional paradigm has been criticized for failing to provide adequate instruction at "the 'prewriting stage' of the composing process and in the analytical and synthetic skills necessary for good thinking."<sup>22</sup> The failure of the current-traditional method to teach students to write well is evidenced by the ubiquity of complaints about the lack of writing skills in nearly all students. As a result, a new field has arisen called the new rhetoric, which rejects the assumptions and methods of the current-traditional paradigm.

### THE NEW RHETORIC

*Watching the world of rhetorical theory over the last twenty years has been like witnessing the rebirth of the phoenix from the ashes of the ancient discipline . . .*<sup>23</sup>

To describe the phoenix fully, to explain all the theory and principles that comprise the new rhetoric, is impossible in this space. Thus, only selected points that seem most relevant to legal writing will be discussed. Important to this discussion is that the new rhetoric borrows heavily from classical rhetoric, and so echoes abound of Aristotle, Quintillian, and others.

Primarily, the new rhetoric focuses on the process of writing itself. Its principle features include the following five theses:

1. Writing is a process; the process is recursive rather than linear; pre-writing, writing, and revision are activities that overlap and intertwine;
2. Writing is rhetorically based; audience, purpose, and occasion (the components of the rhetorical situation) figure prominently in the assignment of writing tasks;
3. The written product is evaluated by how well it fulfills the writer's intention and meets the audience's needs;
4. Writing is a disciplined creative activity that can be analyzed and described; writing can be taught;
5. The teaching of writing is fruitfully informed by linguistic research and research into the composing process.<sup>24</sup>

Each thesis should be explained briefly before the discussion returns to our principal concern, legal writing and the new legal rhetoric.

1. *Writing is a process; the process is recursive rather than linear; pre-writing, writing, and revision are activities that overlap and intertwine.* The admonition "teach process, not product" is becoming conventional wisdom

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21. *Id.*

22. Young, *supra* note 16, at 33.

23. Lauer, *The Teacher of Writing*, 27 C. COMPOSITION & COMM. 341, 341 (1976).

24. Principally adapted from Hairston, *supra* note 14, at 86.

among those in the vanguard of professional writing teachers.<sup>25</sup> Less than two decades ago, however, scholars such as Janet Emig, James Britton, Donald Murray, and Mina Shaughnessy first began to publish articles and books that insisted on the necessity of looking behind the written product into the writing process. Professional writing teachers concluded:

[W]e cannot teach students to write by looking only at what they have written. We must also understand *how* that product came into being, and *why* it assumed the form that it did. We have to try to understand what goes on during the internal act of writing and we have to intervene during the act of writing if we want to affect its outcome. We have to do the hard thing, examine the intangible process, rather than the easy thing, evaluate the tangible product.<sup>26</sup>

The early paradigm for the writing process was a stage process model; one of its best known examples is Rohman's Pre-Write/Write/Re-Write model.<sup>27</sup> Attention to the pre-writing stage of writing greatly improved the teaching of composition. Further research, however, revealed that "[t]he problem with stage descriptions of writing is that they model the growth of the written product, not the inner process of the person producing it."<sup>28</sup> Rather than a clear-cut linear progression from beginning to end, the writing process is a recursive one in which the writer moves back and forth among planning, drafting, and revising. Revising begets more planning, for example.

2. *Writing is rhetorically based; audience, purpose, and occasion (the components of the rhetorical situation) figure prominently in the assignment of writing tasks.* The concept of the rhetorical situation reminds us that writing does not occur in a vacuum. A rhetorical situation encompasses those entities, other than the writer, present when a writing is produced: (1) the exigence (the urgency of the situation), the problem that needs to be solved; (2) the audience; and (3) constraints (time, form, and tradition, for example). A good writer, then, generates text that is appropriate to a given rhetorical situation.

Any writing "is pragmatic; it comes into existence for the sake of something beyond itself; it functions ultimately to produce action or change in the world; it performs some task."<sup>29</sup> Any writing assignment, then, should approximate what happens in rhetorical situations: students are guided in dis-

25. *Id.* at 78. Hairston qualifies this statement by pointing out that many writing teachers are not among the informed elite:

[T]he overwhelming majority of college writing teachers in the United States are not professional writing teachers. They do not research or publish on rhetoric or composition, and they do not know the scholarship in the field; they do not read the professional journals and they do not attend professional meetings . . .

*Id.* at 78-79.

26. *Id.* at 84.

27. Flower & Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365, 367 (1981).

28. *Id.*

29. Bitzer, *The Rhetorical Situation*, in CONTEMPORARY THEORIES OF RHETORIC 384 (R. Johannesen ed. 1971).

covering the why and how of their writing rather than merely given a what about which to write. Students in composition classes discover meaningful problems and use various methods of inquiry to discover what they know and need to know about their topics.

The new rhetoric is concerned primarily with a creative process that includes all the choices a writer makes from his earliest tentative explorations of a problem in what has been called the "prewriting" stage of the writing process, through choices in arrangement and strategy for a particular audience, to the final editing of the final draft.<sup>30</sup>

3. *The written product is evaluated by how well it fulfills the writer's intention and meets the audience's needs.* Although the new rhetoric emphasizes process rather than product, the written products can be, indeed must be, evaluated. Evaluation, however, is not merely a search for an error-free document, as it tended to be under the current-traditional paradigm. A written product is good because it achieves what the writer set out to do. The document produces the action or change the writer intended, and it is appropriate for its particular audience. A document, therefore, could be free of technical errors and still not be good because it uses language inappropriate to influence its reader to act in a certain way.

These new standards of evaluation affect who may evaluate the written product. Because the teacher has intervened in the student's writing process and provided guidance in the rhetorical choices made, the I-thou, teacher-student dichotomy that prevailed in the current-traditional paradigm ceases. In fact, students can effectively and accurately evaluate each other's work by being or simulating an audience.<sup>31</sup>

4. *Writing is a disciplined creative activity that can be analyzed and described; writing can be taught.* This notion may be the most radical of the new rhetoric. Under the vitalism that permeated the current-traditional paradigm, "disciplined creative activity" was an oxymoron. Editing could be taught, but writing itself was mysterious, intuitive, and unteachable.

The new rhetoric recognizes writing as a rational and intuitive process that can be taught. Teachers provide students with methods of inquiry that aid them in probing the nonrational parts of their minds. The teaching role ebbs and flows throughout the student's writing process in accord with the "Dionysian-Appollonian struggle between his spontaneous insight and the discipline of form."<sup>32</sup>

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30. R. YOUNG, A. BECKER & K. PIKE, *RHETORIC: DISCOVERY AND CHANGE* xii (1970).

31. An example is due here. Under the current-traditional paradigm a teacher might assign the topic, "What Is Poetry?" Most wise students will try to figure out what the teacher wants and deliver it, free of misspellings and grammatical errors, probably in five paragraphs. Among other failures in this assignment, the student learns nothing about invention, inquiry, or audience. Under the new rhetoric paradigm the teacher guides the student into "a genuine composing process [that] springs from tension, from a felt incongruity in the writer's image of his world." Lauer, *supra*, note 23, at 342. The student discovers his or her own topic about poetry and then is guided by the teacher into inquiry, and so forth, until the written product is achieved.

32. Lauer, *supra* note 23, at 342.

5. *The teaching of writing is fruitfully informed by linguistic research and research into the composing process.* In order to be able to teach the writing process, we need to know what should occur during this process. Since part of the process is unseen and takes place in the writer's mind, researchers have developed a multitude of methods to discover what happens during the entire writing process. A few of the methods are discussed briefly here.

Protocol analysis, used by Linda Flower, John Hayes, and others, uses the taped transcripts of writers thinking aloud during writing. Seeing writing as a thinking problem rather than an arrangement problem, they describe the heuristic procedures<sup>33</sup> that expert writers use in planning documents and translate these heuristics into teachable techniques.<sup>34</sup> In the past ten years Flower's and Hayes's work has generated increasingly sophisticated models of the cognitive processes that result in texts.<sup>35</sup>

A number of scholars have conducted research in the area of rhetorical invention. From this research three prominent theories have emerged: Burke's pentad,<sup>36</sup> Rohman's pre-writing,<sup>37</sup> and Pike's tagmemics.<sup>38</sup> These scholars have shown that writing can help students to develop insights, and that writing is indeed a way to formulate and solve problems.

In addition the new rhetoricians have increased our understanding of form and style. In "The Teacher of Writing" Janice Lauer elaborates:

Such studies as Christensen's of the cumulative sentence and paragraph, Winterowd's grammar of coherence, and Becker's tagmemic paragraph analysis provide for us alternative descriptions of form. Milic's work with stylistics offers a mode for analysis, while Kinneavy's discourse theory proposes a new basis for classification. A number of authors, including Doherty, O'Hare, and Ohmann, press transformational grammar into the study of syntax. Rhetoricians have responded to the call for interdisciplinary work by seeking insights from such philosophers as Langer, Lonergan, Natanson and Johnstone, as well as from psychologists like Piaget and the behaviorists.<sup>39</sup>

This cursory sketch of the research completed and underway does an injustice to its breadth and importance. The purpose here, though, is to apply the five principles of the new rhetoric to legal writing in an effort to define a new legal rhetoric.

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33. The new rhetoricians define heuristic procedures as sets of questions or operations that the writers use to facilitate inquiry and bring about understanding. "[T]he process of inquiry is undulatory; periods of subconscious activity alternate with periods of conscious activity. During the conscious periods a person can systematically ask questions or perform operations that speed up the process . . . [This process] is called a *heuristic procedure*." R. YOUNG, A. BECKER & K. PIKE, *supra* note 30, at 119-20 (emphasis in original).

34. See generally Flower & Hayes, *Problem-Solving Strategies and the Writing Process*, 39 C. ENG. 449 (1977) (defining heuristic strategy for analytical writing).

35. See Flower & Hayes, *Images, Plans, and Prose: The Representation of Meaning in Writing*, 1 WRITTEN COMM. 120 (1984).

36. See Burke, *Questions and Answers About the Pentad*, 29 C. COMPOSITION & COMM. 330 (1978).

37. See Rohman, *Pre-Writing: The Stage of Discovery in the Writing Process*, 16 C. COMPOSITION & COMM. 106 (1965).

38. See Pike, *Language as Particle, Wave and Field*, TEX. Q., Summer 1959, at 37.

39. Lauer, *supra* note 23, at 341.

## THE NEW LEGAL RHETORIC

"These students just can't write well," has been an recurring lament. It has come from law school faculties as well as from many practitioners. Using the current-traditional model, legal writing teachers generally focused attention on an error-free product and the three ABCs of legal writing, accuracy, brevity, and clarity.<sup>40</sup> Most writing rules were actually revision rules: omit surplus words and use the active voice, for example.<sup>41</sup> These rules are correct, but they do not help students understand the writing process or to control it in an effective way. Teachers expected students to learn to write well, but did not teach them how to do this. Efficient revising does eliminate the problems found in many advanced writers: wordiness and overuse of nominalizations and passives.<sup>42</sup> Efficient revising does not, however, remedy the primary symptom of ineffective legal writing: the lack of a sense of audience and purpose in a legal document.

Although many in the legal profession see legal writing courses as remedial, teachers of advanced writers generally concur that first-year law students possess "flat competence,"<sup>43</sup> which is the ability to produce, for the most part, a document not marred by mistakes of spelling or grammar. Nonetheless, their writing lacks an authentic voice<sup>44</sup> that reaches out to an audience in an effort to fulfill a particular purpose. Although the current-traditional method of teaching legal writing can reinforce competence and clarity, it cannot remedy the absence of voice or successful communication in much legal writing. The principles of the new rhetoric, on the other hand, provide a pedagogy for teaching good legal writing.

## APPLYING THE FIVE THESES

The worst example of the product approach to legal writing is the legal writing course that still exists at many law schools. Under the rubric of Legal Research and Writing or Moot Court, students are given an appellate case to research and brief. Upperclass students, who may help familiarize the writing students with library materials and the appropriate writing format, supervise and judge the writing students. With "sink or swim" as the operative pedagogy, the students prepare the brief and argue the case. They are then told what was wrong with the brief and given a grade. The briefs are evaluated on the quality of the research and the absence of spelling and grammatical errors. Some credit may be allowed for style and tone. Students experience this course as a lesson in survival, which may be valuable, but they learn little about how to write.

With the new rhetoric as a guide we can more effectively introduce students into the alien world of legal discourse by looking behind the products

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40. See E. RE, *BRIEF WRITING AND ORAL ARGUMENT* 7-13 (4th ed. 1974).

41. See generally R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (1978).

42. See Hairston, *Working with Advanced Writers*, 35 *C. COMPOSITION & COMM.* 196, 197 (1984).

43. *Id.* at 198.

44. *Id.* at 199.

we expect them to write and into the process of legal writing. Specifically, we can aid students in appreciating the complexity of the task of writing, in defining the rhetorical situation in which they write a particular document, and in becoming comfortable with the recursive writing process. Like the new rhetoricians we must dispel forever the "think it, say it" model of the composing process<sup>45</sup> that leads to a sense of frustration and inadequacy.

We can begin by analyzing with the students why a legal document comes into existence. What problem needs to be solved? This approach applies readily to legal writing in that all legal documents are answers to questions. In order to write an accurate and effective legal document the writer must be able to identify and state the issue or issues properly; otherwise, the writer answers the wrong question and the entire document misses the mark. This miss is usually more subtle than obvious, and even the writer may remain unaware of the miss until too late.

Frank E. Cooper in *Writing in Law Practice* devotes an eighty-five-page chapter to "Selecting and Stating the Issue."<sup>46</sup> In that chapter he says

While it is true that in writing letters, or drafting opinions to clients, or preparing pleadings, or negotiating the settlement of a claim, or writing contracts, or drafting statutes, it is not the customary practice to include, under a separate topical heading, a paragraph entitled "Statement of Issue Involved" . . . , nevertheless the implicit formulation of the issue involved is in many respects the most important step which the lawyer must take in any of these diverse types of rhetorical effort.<sup>47</sup>

Thus, stating the issue, even if the issue statement never appears in the document, is one of the first steps the legal writer must take in the planning or pre-writing stage of writing. Using heuristic procedures developed by the new rhetoricians, students can more efficiently identify and state issues because a heuristic procedure serves three crucial ends: (1) it retrieves relevant information, (2) it draws attention to important information that needs to be discovered, and (3) it prepares the mind for the intuition of an ordering principle.<sup>48</sup>

Additionally, we can instruct students on methods of analyzing audience and purpose while planning a document. Various heuristics exist to enable students to understand why and to whom they are writing a particular document.<sup>49</sup> With these heuristics students can then make intelligent and informed choices as to what words to use and what to include.

By defining the rhetorical situation students can recognize the constraints typical to legal writing: time, format, and permissible arguments, for example. Since trying to satisfy all constraints at once can lead to frustration and

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45. See generally Hayes & Flower, *The Dynamics of Composing: Making Plans and Juggling Constraints*, in *COGNITIVE PROCESSES IN WRITING: AN INTERDISCIPLINARY APPROACH* 31-50 (1980).

46. F. COOPER, *WRITING IN LAW PRACTICE* 67-152 (1963).

47. *Id.* at 67.

48. R. YOUNG, A. BECKER & K. PIKE, *supra* note 30, at 120.

49. T. PHELPS, *PROBLEMS AND CASES FOR LEGAL WRITING* 43 (1982) provides a Writer-Reader Covenant that students fill out before drafting. It compels them to analyze their audience's knowledge, attitude, and needs.

wasted time, we can introduce students to strategies for reducing constraints and juggling them successfully.<sup>50</sup>

This new manner of teaching legal writing requires, of course, that assignments and classes be designed to simulate real rhetorical situations. This idea opens the way for much creative thinking. For example, legal writing assignments can be geared so that students write for each other. Many legal documents are used by another attorney to create a new document. For example, an interoffice memorandum may be used as the basis for a letter to a client, for a pleading, or for a brief to the court. The classroom assignments can follow this progression, with Student *B* writing a client letter based on Student *A*'s memorandum. In this way the students recognize that someone else will use their writing to do something else and that all discourse must communicate to the audience in order to be successful.

A variation is to use role-playing situations in which students act as clients for each other, create problems, and act as audience. Still another variation is to use case files that provide problematic situations and require students to assume various roles as legal writers. In any case, a legal writing course should not require students to practice skills or to write in a vacuum. The legal writing classroom represents an ideal opportunity to create and use rhetorical situations.

In this way both peers and teachers can intervene and guide the writing process. Students get response at various stages in the process, rather than response to the product alone. They learn more effective ways of planning, drafting, and revising and can pay selective attention to various aspects of the writing process. This method means multiple drafts and fewer finished products, but it results in students learning how to improve their writing.

Memos, letters, and briefs may be evaluated by how well they fulfill the writers' intentions and meet the audiences' needs. Grades are not subject to the vicissitudes of the teacher's unfathomable likes and dislikes, but instead result from the students' ability to comprehend and control their own writing processes and produce documents that communicate successfully and appropriately. The students learn to make informed rhetorical choices, and they can use this knowledge in any writing task they may confront. Instead of teachers arbitrarily and endlessly answering questions about the use of jargon, incomplete sentences, long sentences, gender-neutral language, and an infinite number of other possibilities, the students learn how to answer these questions for themselves. Certainly spelling, grammar, clarity, and organization remain important, but these are important because of the impact their use or misuse has on the document's audience and purpose.

Revision, which students tend to view as punitive, takes on a new role. First of all, it is not the last thing students do before turning in a paper. The students revise throughout the writing process, rather than make minor changes at the end. Revising, as its root suggests, can be a way of re-seeing

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50. See Collins & Gentner, *A Framework for a Cognitive Theory of Writing*, in *COGNITIVE PROCESSES IN WRITING: AN INTERDISCIPLINARY APPROACH* 51-72 (1980) (methods of generating ideas and text); Hayes & Flower, *supra* note 45 (methods of juggling constraints).

the problem and thus can result in substantive changes. Like skilled writers, students will become less satisfied with first drafts and effectively revise at the level of content and form.

Legal writing can be, must be, taught by encouraging students to explore all four components of the communication triangle. What are the various roles of reader, writer, reality, and language? How do these roles interact?

Because we can only learn about any writing process, including the legal writing process, by somehow observing the process in ourselves and others, the new legal rhetoric can benefit greatly from protocol analysis and other research. James Stratman at Carnegie-Mellon University is currently conducting research into the composing process of appellate attorneys and the effect the attorneys' rhetorical choices have on the judges reading their briefs.<sup>51</sup> The Document Design Center has researched comprehensibility of jury instructions.<sup>52</sup> Another researcher has performed a stylistic analysis of some United States Supreme Court opinions.<sup>53</sup> Indeed, all of these areas deserve further research. Learning more about what skilled legal writers do during the writing process can only improve the way we all teach legal writing.

Legal writing can be taught: it is not remedial, but substantive. As long as legal writing is taught as process and with regard to rhetorical situations, it matters little whether the subject is taught as a separate course or as part of another first-year course. By recalling rhetoric from exile in legal writing, as has been done in composition studies, we can redefine legal writing as something we do rather than some thing. We can re-vision legal writing as a verb rather than a noun and alter the way we teach legal writing as well as the way we see ourselves as legal writers.

The time for a paradigm shift in the teaching of legal writing is long overdue. Our old methods will not solve our new problems. If it is true that, as Robert W. Benson argues in "The End of Legalese: The Game is Over,"<sup>54</sup> "the law schools have begun to train a generation of lawyers who will know that criticizing legal language is more than just a game,"<sup>55</sup> then responsibility falls to legal writing teachers to outline the shape of the emerging paradigm and apply the principles of the new rhetoric to legal writing. This responsibility means, of course, eschewing the easy, albeit time-consuming, task of looking only at finished products and assuming the harder task of

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51. See Stratman, *Studying the Appellate Brief and Opinion Composing Process* (pts. 1 & 2), *JURIS*, Fall 1984, at 9, Winter 1985, at 12.

52. R. Charrow & V. Charrow, *Characteristics of the Language of Jury Instructions* (1979) (paper presented at Georgetown University Roundtable on Language and Linguistics) (available from Document Design Center).

53. B. Wall, *Supreme Court Rhetoric: The Debate over Verbosity* (March 1975) (speech given at Four C's (Conference on College Composition and Communication) Convention); B. Wall, *Applying Rhetorical Theory to Supreme Court Opinions* (March 1984) (speech given at Four C's (Conference on College Composition and Communication) Convention).

54. Benson, *The End of Legalese: The Game Is Over*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 519 (1985).

55. *Id.* at 573.

analyzing, describing, and teaching the intangible process behind the product.

#### CONCLUSION: THE LAW AS CONVERSATION

In a recent book some lawyers and law professors complain that the traditional legal education acculturates students "to an unnecessarily limiting way of seeing and experiencing law and lawyering, a way which can separate lawyers (as well as the other actors in the legal system) from their sense of humanity and their own values."<sup>56</sup> Certainly, the way we have allowed students to learn legal writing has buttressed this separation. Law students too frequently acquire their new "tribal speech" by imitating the style of the appellate opinions they read, by quoting judges' words at length, and by incorporating alienating and stuffy legalese. They cower behind their research, avoiding assertion, much less commitment. They fraudulently enter their new discourse community by adopting language not their own and by renegeing in the struggle to find their own valid professional voices. Instead of actively becoming lawyers, they identify with the role of lawyer.<sup>57</sup>

Teaching legal writing as conversation opens the way for students' re-visioning legal writing and the law. What does re-vision mean? As the root suggests, it means, of course, to re-see, to see again, to see anew. Certainly, seeing legal language anew as a means of exchange between and among actors engaged in a cooperative activity is crucial. We teach our students to be conversant in the law by engaging in conversation. The students' own common sense will tell them that a conversation necessarily includes someone out there listening, reading, needing to know, needing to act.

As legal writing teachers, we can do something far more important than merely teaching law students the writing skill they need to be able to practice law. We can enable them to find their professional and personal voices that will allow them to engage in the ongoing conversation of the law. This is the new legal rhetoric.

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56. BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONAL IDENTITY 3 (E. Dvorkin, J. Himmelstein & H. Lesnick eds. 1980).

57. See generally Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 731-43 (1975) (analysis of role and identity and conflicts between the two).