

The New Legal Writing Pedagogy: Is Our Pride and Joy a Hobble?

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If your primary motivation is status or money, you would not teach legal writing. For the most part, all of us who teach legal writing teach it because we love teaching.¹

I. Introduction

The most ardent proponent of legal education's breakneck quest for ever-higher *U.S. News & World Report* status must respect, even if she would not agree with, Laurel Currie Oates' paean to the craft of teaching. The legal writing professoriate has, for the most part, commendably embraced a labor-intensive methodology that stresses individual interaction with students, at least with students who attend law school in the daytime.

In the title I refer to this pedagogy as "our" pride and joy even though I have only recently renewed my membership in the legal writing community and have attended only one conference of the Legal Writing Institute. That is because it is impossible for the legal writing teacher, or at least I find it so, to disregard what has happened in legal writing pedagogy in the last three decades. My younger colleagues have come of age in this period, and because decisions at my school about the legal writing curriculum and methodology are made collectively, my teaching must reflect their views.

We no longer live in a world, as I once did, where the director of the teaching fellows told his callow charges: "Go teach those ninety students legal writing and if there is no mob of students at my door, you are successful." Since such courses were often graded on a "pass-fail" basis, such mobs rarely materialized.

1. Laurel Currie Oates, interviewed in Mary S. Lawrence, *The Legal Writing Institute the Beginning: Extraordinary Vision, Extraordinary Accomplishment: Based on Interviews with Laurel Currie Oates and J. Christopher Rideout, and Documents from the Archives of the Legal Writing Institute*, 11 *Legal Writing* 213, 220 (2005) [hereinafter Lawrence].

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Legal writing teachers now inhabit a better world than the one I just described. But better for whom? Although it is hard to imagine that law students, law schools and, perhaps ultimately, the legal profession and people who hire lawyers do not benefit from the individual attention legal writing professors now shower on law students, for those professors, one must hope that virtue is its own reward. Notwithstanding their work ethic, legal writing professors have been an overworked,² underpaid,³ and under-appreciated⁴ cadre within the legal academy.

Notwithstanding the egregiousness of these circumstances, I will not dwell on them here. They have been chronicled by those who have endured them as I, who have tended mostly other vineyards in legal education, have not.⁵ But as a newcomer to this labor-intensive field, I must ask whether in creating this new pedagogy we have allowed the perfect to become the enemy of what would more than suffice, whether we have created a job that no one in his or her right mind would want to do? And if we have done precisely that, is there anything we can do to make things better—for us?

In addressing these issues I will first, in Part II, examine the “rules” of our new pedagogy, the process or constructive approach to legal writing, highlighting the rationale for its adoption as well as the arduous demands it places upon us. In Part III I will examine various contradictions and incongruities that a rigid embrace of the process approach creates. Finally, in Part IV I will examine alternatives and ponder whether the Church of Legal Writing should happily embrace doctrinal variations among its adherents.

II. The New Legal Writing Pedagogy

Perhaps the quickest means of describing what constitutes the new legal writing is to identify its pedagogues and what they are not teaching. First, a clear majority of legal writing teachers are full-time faculty.⁶ This is remarkable because such a cohort of full-time legal writing teachers did not exist a generation or so ago.⁷ Doctrinal professors appear to have retreated further

2. See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 *Temp L. Rev.* 117, 121 (1997) [hereinafter Arrigo, *Hierarchy Maintained*].
3. See Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 *U.C.L.A. W.L.J.* 1, 8 (2005).
4. Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 *U.M.K.C.L. Rev.* 253, 258 (2004).
5. See John A. Lynch, Jr., *Teaching Legal Writing After a Respite of Thirty Years—No Country for Old Men?*, 38 *Cap. U.L. Rev.* 1 (2010).
6. According to the 2008 survey of the Association of Legal Writing Directors and the Legal Writing Institute, over half of 191 law schools reporting staff their legal writing programs with full-time teachers. ALWD-LWI, *Survey Results*, available at <http://www.alwd.org>.
7. According to a much-acclaimed survey done in 1973:

from legal writing than they had been in the past.⁸ And this new cohort of legal writing teachers has a body, the Legal Writing Institute, which advances philosophy and reform in teaching legal writing.⁹ No other faculty cohort in legal education has established and maintained such a consistent focus on classroom teaching.

Not surprisingly, this organized focus on teaching has yielded a reasonably consistent scholarly voice about appropriate legal writing pedagogy. From its earliest stirrings, the new legal writing community has rejected the so-called “product” approach to teaching legal writing. This has been described as a method “in which writing instruction focuses on the written product, especially on its clarity and accuracy.”¹⁰ Contemporary legal writing professors substitute a focus on the process of creating a legal document rather than on the end product itself.¹¹

Modern legal writing professors regard the ancien regime, the product approach, as having shortchanged students by ignoring the important reasoning steps in creating legal writing.¹² The new practitioners of legal writing view these steps as a well-nigh metaphysical “constructing” of the law.¹³ Part of the focus on the writing process is based on making the writer aware that she is writing for an audience.¹⁴

A diversity of staffing methods were still being used for the 1969–70 survey among the sixty-three schools responding with respect to a research and writing course. For example, sixteen schools used students in combination with faculty members, sometimes with attorneys as well. Three schools relied exclusively on attorneys. Twelve used short-term instructors. The remainder relied primarily on faculty members, both regular and library directors.

Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 *J. Legal Educ.* 538, 543–44 (1973).

8. See Eric B. Easton et al., *ABA Sourcebook on Legal Writing Programs* 107 (Amer. Bar Ass’n. 2006).
9. See Lawrence, *supra* note 1, at 214.
10. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 *Wash. L. Rev.* 35, 50 (1994). Rideout and Ramsfield also describe this as the “current-traditional paradigm.” *Id.*
11. See Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 *Vand. L. Rev.* 135, 140 (1987). See also Susan Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 *Loy. U. Chi. L.J.* 123, 142 (2007).
12. Rideout & Ramsfield, *supra* note 10, at 50.
13. *Id.* at 55.
14. Provenzano & Kagan, *supra* note 11, at 160. See also Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 *Dick L. Rev.* 7, 12 (1998).

Another article of faith of the new writing professoriate seems to be that most of what was done in the Dark Ages of legal writing, before the creation of the cadre of full-time teachers that began in the 1980s, was wrong and yielded bad results.¹⁵

In truth, there is considerable support for that notion.¹⁶ And the Carnegie Report seems to give legal education credit for steps in the right direction with respect to legal writing.¹⁷ But, as one who taught legal writing in the bad old days, I can confidently assert that we understood that the end product of legal writing represented a synthesis of legal authorities and that a student needed to make such a synthesis with its audience in mind.¹⁸ In reviewing the scholarship, I see no convincing evidence that the new legal writing pedagogy has produced a golden age of better writing by law school graduates, but given the added attention to individual students implied in the new pedagogy, one must assume that there has been improvement.

While I doubt that there was significant difference between the new or old legal writing pedagogies over what students should learn about legal writing, what most clearly characterizes the new is the direct, personal involvement of the teacher with the student.¹⁹ That one-on-one contact occurs mostly

15. See Ellen Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 *Santa Clara L. Rev.* 93, 98 (2005). According to the new thought, even when the old approach succeeded, it was not really successful:

[W]hile some students may [have succeeded] by mimicking clear writing styles, others too often generate documents replete with run-on sentences, multi-syllabic words, obscure Latin phrases, and jargon they may not even understand.

Jo Anne Durako, Kathryn M. Stanchi, Diane Penneys Edelman, Brett M. Amdur, Lorry S.C. Brown & Rebecca L. Connelly, *From Product to Process: Evolution of a Legal Writing Program*, 58 *U. Pitt. L. Rev.* 179, 721 (1997). I must confess, I would be happy to see my students attempt to mimic (I might even say emulate) clear writing style and I am not entirely sure why it is so important to tell students to dispense with the Latin before an assignment is turned in for a grade rather than after.

16. Both the Cramton and MacCrate Reports took legal education to task for deficiencies in legal writing skills of law school graduates. See American Bar Ass'n, Section of Legal Education and Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of Law Schools* 15 (1979); MacCrate, American Bar Ass'n, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum* 264 (1992).
17. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 109 (Jossey-Bass 2007) (referred to commonly as the Carnegie Report).
18. My favorite metaphor in teaching legal writing is that the writer must take the reader on a "magic carpet ride" to wherever the writer wants him or her to go. If the reader does not get there easily, it is the writer's problem, not the reader's.
19. As one leading scholar stated: "The way to teach writing 'is for the teacher to actively "intervene" in the many stages of the writing process.'" Stanchi, *supra* note 14, at 12.

through the teacher's review of a student's first drafts and at teacher/student conferences.²⁰

On at least one level, it is difficult to argue that lavishing such individual attention on beginning legal writers does not add value to the legal education enterprise.²¹ With respect to preliminary drafts, perhaps I might sidestep all of the "learning theory" I do not know by conceding that practice makes perfect, or at least better than without practice.

With respect to student conferences, a leading proponent of the technique asserts that they have "the potential to be the most effective forum for law professors to help students develop as legal thinkers and writers."²² While I will dispute later the notion that reviewing drafts of student work is necessarily a desirable thing,²³ I cannot dispute the value of one-on-one conferences. And I do conduct more conferences for legal writing students than for students in civil procedure, though I conduct a fair number for the latter. My issue with the new writing pedagogy is whether they must be required for all students, perhaps more than once.

I do not believe that a professor—in any course—should ever refuse a non-vexatious²⁴ request of a student for an individual conference. Sometimes I strongly urge that a student confer with me individually. I have "conferred" with evening legal writing students by email or telephone when their schedules have required. I have broken my legal writing class into smaller groups for conferences in anticipation of major assignments. But I do not believe that the benefits of requiring conferences justify the burden it imposes on legal

20. Margolis & DeJarnatt, *supra* note 15, at 99. See also Stanchi, *supra* note 14, at 12.

21. The objective is surely laudable:

Essentially, the process approach changes the goal of teaching writing from perfecting the product to teaching life-long skills adaptable to new writing situations. The primary tenets of the process approach are: that writing is a recursive process that overlaps and intertwines prewriting, writing, and revision activities; that writing is rhetorically based, focusing on audience, purpose and constraints; and that the written product is judged by how well it communicates the writer's message and meets the reader's needs.

Durako et al., *supra* note 15, at 722.

22. Robin Wellford-Slocum, The Law School Student-Faculty Conference: Towards a Transformative Learning Experience, 45 S. Tex L. Rev. 255, 262.

23. See *infra* § III.

24. One knows vexatious when one sees it, even though it is quite rare.

writing faculty.²⁵ I have no doubt that mandatory student conferences would help students in my civil procedure course and perhaps even in income tax, which I also teach. In those courses I am, however, permitted to balance the platonic pedagogical ideal with my other responsibilities. Legal writing teachers should be entitled to use the same good judgment.

American Bar Association standards for law school accreditation require that students receive substantial instruction in “writing in a legal context, including at least one rigorous writing experience in the first year....”²⁶ This open-ended requirement, which is similar to requirements for other parts of the law school curriculum, has been amplified by an ABA interpretation that forces a rigid orthodoxy in the approach to the course:

Factors to be considered in evaluating the rigor of writing instruction include: the opportunities a student has to meet with a writing instructor for purposes of individualized assessment of a student’s written products; the number of drafts that a student must produce of any writing project; and the form of assessment used by the writing instructor.²⁷

There is no comparable pedagogical orthodoxy foisted upon law schools with respect to any other part of the curriculum.²⁸

Although I agree that providing “opportunities” for students to meet with faculty pertaining to their written products is generally a good thing, providing opportunities for some students, particularly evening students, can be extremely difficult whether or not the professor is an ardent believer in the value of such conferences.

25. I am not alone in this view. Stewart Harris, a self-proclaimed legal writing “heretic,” contends that legal writing professors should stop “coddling” students with endless one-on-one conferences. Stewart Harris, *Giving Up Grammar and Dumping Derrida: How to Make Legal Writing a Respected Part of the Law School Curriculum*, 33 *Cap. U.L. Rev.* 291, 299 (2004). Even Maureen Arrigo-Ward, who seems more sympathetic to conferences, does not believe they must be mandatory. Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching In) A First-Year Legal Writing Program*, 29 *Val. U.L. Rev.* 557, 586 (1995).
26. American Bar Ass’n, *Standards for Approval of Law Schools*, at Chapter 3, *available at* http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011_abastandards_pdf_files/chapter3_authcheckdam.pdf.
27. *Id.* at Interpretation 302-1.
28. For example, as to substantive law, the ABA standard requires instruction in “the substantive law generally regarded as necessary to effective and responsible participation in the legal profession.” *Id.* at Standards 302(a)(1). With respect to clinics, an interpretation provides: “A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.” *Id.* at Interpretation 302-5.

Given the general tenor of legal writing scholarship over the last generation, we cannot say that we have been given any burden we did not ask for.²⁹ Whether we asked for it or not, the view of legal writing pedagogy that is now enshrined in the ABA interpretation not only imposes significant burdens on legal writing professors, it is not the best model in all circumstances. These issues are addressed in the next section.

III. Disadvantages of the New Legal Writing Pedagogy

A. The Burdens on the Legal Writing Professors

Even in the days when the “product” approach to legal writing was the order of the day, legal writing professors spent more time grading papers than other professors. The new pedagogy increases a professor’s workload enormously by requiring review of preliminary drafts of student work and requiring that a professor spend many hours in individual conferences with students. These duties create a crushing workload for any conscientious legal writing teacher³⁰ and interfere with the ability of those instructors to produce scholarship,³¹ an essential element of the AALS understanding of a law professor’s duties.³²

AALS requirements note that law schools are required by accreditation standards “to limit the burden of teaching so that professors will have time to do research and share its results with others.”³³ That law schools have failed to meet this requirement may be seen anecdotally in Susan P. Liemer’s

29. And while the ABA interpretation is quite specific about what is to be demanded of us, it is notoriously cryptic about our faculty status. Standard 405(d) provides:

A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well-qualified to provide legal writing instruction....and (2) safeguard academic freedom.

Id. at Chapter 4, available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter4_authcheckdam.pdf. Of course the American Bar Association is considering changes to its accreditation standards that would permit law schools to provide as little job security to all faculty as they often do to legal writing teachers. See Scott Jaschik, Law School Tenure in Danger? Inside Higher Ed., available at <http://www.insidehighered.com/layout/set/print/news/2010/07/26law>. Until such proposals are adopted, legal writing teachers remain the lowest caste in legal education. This contrasts with Standard 405(b), which requires a tenure policy for faculty generally and 405(c) which requires for clinicians “a form of security of position reasonably similar to tenure.” *Id.*

30. See Arrigo, Hierarchy Maintained, *supra* note 2, at 121. See also Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Legal Educ. 562, 583 (2000).

31. Kathryn M. Stanchi, Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors, 73 U.M.K.C.L. Rev. 467, 482-84 (2004).

32. Association of American Law Schools 2008 Handbook 93.

33. *Id.*

chronicle of her efforts to write in the face of the demands of the job³⁴ as well as lack of institutional and financial support. Liemer has obviously succeeded, notwithstanding these obstacles, in producing a creditable volume of scholarship.³⁵ But many legal writing professors have not been able to overcome these obstacles and, even if they did, the overwhelming majority of law schools do not offer tenure to them.³⁶

If legal writing professors were somehow inherently incapable of producing scholarship, perhaps for some reason akin to the left-handed person's inability to play third base, then it might be acceptable to preclude them from appointment as tenure-track faculty. But when it is the nature of the writing professor's job that inhibits publication, then the job needs reverse-engineering. Scholarship has become the sine qua non to survival and prosperity in legal education. Much more than in the past, legal writing professors must look out for number one, and law schools must help them to do so. Law schools may expect legal writing faculty to spend extraordinary amounts of time engaged in conferencing or reviewing preliminary drafts only if they are willing to provide extraordinary institutional support for such faculty to produce scholarship.

B. Hello!! Some of Us Teach Evening Students

I have been unable to unearth any scholarship addressing the obvious and serious issues as to the adaptability vel non of the new legal writing pedagogy to part-time students, especially evening students who are also employed full

34. For example, Liemer notes:

The typical LRW professor...spends some twenty hours per week providing individualized teaching for students, by critiquing papers, holding conferences, and generally answering questions. This twenty hours per week, multiplied over two fourteen-week semesters during the academic year, equals fourteen forty-hour work weeks. So during the academic year the typical doctrinal professor may have the equivalent of fourteen forty-hour work weeks to spend on scholarship, while for the typical LRW professor that same amount of time becomes student contact hours.

Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 *Or. L. Rev.* 1007, 1021 (2001) [hereinafter Liemer, *Quest for Scholarship*].

35. See, e.g., Susan P. Liemer, *The Hierarchy of Law School Faculty: Who Votes*, 73 *U.M.K.C.L. Rev.* 351 (2004); Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 *Scribes J. Legal Writing* 113 (2003-2004).

36. Only 24 of 181 responding law schools in 2008 employ tenure or tenure-track teachers to teach legal writing. ALWD-LWI 2008 Survey, *supra* note 6, at 6. Liemer noted that professors who are tenured or on a tenure track are much more likely to have terms of employment that include expectations of and support for scholarships. Liemer, *Quest for Scholarship*, *supra* note 34, at 1013.

time.³⁷ It is long past time for that dog to bark. It is highly impractical, perhaps impossible, to schedule individual conferences for evening students who are employed full time, and it is probably not a good idea to require them to provide multiple preliminary drafts of written assignments.

We in legal education play a great deal of “make pretend” with evening students. Those of us who teach day and evening sections of the same course pretend that we can insist on the same degree of preparation for class from each cohort. We pretend that the evening students can accomplish what we pretend to demand from them, and if we are required to apply a uniform mandatory grading curve to them, we can pretend to prove, in black and white, that they have done so. We do the best we can, of course, but we cannot pretend that they pass the bar exam at the same rate as their brothers and sisters in the day division.³⁸

Another thing we cannot pretend is that there are eight or nine days in a week or thirty hours in a day. Anyone who has taught evening students for decades knows that they rise before dawn (unless they work the third shift), work all day, and then just barely make it to class. When circumstances warrant, many will skip their lunch hour, leave work early, or stay after their last class (for the few professors who will meet with them then) for a conference. But most do not do so often, and some cannot do so at all.

And that is NOT why the Good Lord created Saturday and Sunday! First, evening students neglect their families for the entire work week. They must attend to their own personal needs. They also need a good part of the weekend to prepare for the next week’s classes. They need those things more than they need to travel to their legal writing professor’s office to attend a conference to review a preliminary draft of a writing assignment.

This is not to say that taking an assignment through more than one draft is not a good idea. It is and legal writing teachers should tell their students that. They can also tell their students that doing more than one draft is likely to result in a better grade on the assignment. Some students, however, would be better off devoting such herculean efforts to keeping up with their substantive courses rather than polishing legal writing assignments. This is particularly true of evening students, for whom time allocation among law school and other priorities is usually a zero-sum game.

37. Full disclosure, I have served as chair of the AALS Section on Part-Time Division Programs. I have an axe to grind, I suppose.

38. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 *S.M.U.L. Rev.* 493, 527–28 (2007); Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass their Bar Exams*, 45 *Brandeis L.J.* 269, 286 (2007); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage*, 29 *Law & Soc. Inquiry* 711, 751 (2004); Leslie Yalof Garfield & Kelly Koenig Levi, *Finding Success in the “Cauldron of Competition:” The Effectiveness of Academic Support Programs*, 2004 *BYU Educ. & L.J.* 1, 35.

While ABA Interpretation 302-1 implicitly requires more than one meeting with a legal writing professor,³⁹ such a requirement is impractical for many evening students. That does not mean that the legal writing professor should not insist on individual conferences when that is patently necessary and be available by email or telephone (or both simultaneously) for guidance on written assignments. Evening students are entitled to the same level of professorial attention as other students; it is not clear, however, that proponents of the process method of legal writing instruction have acknowledged that we must provide such attention in a more flexible way.

C. Review of Preliminary Drafts and Mandatory Grading Curves

The process approach to legal writing instruction espouses a view of the teacher not “merely correcting papers after they [are] written...” but as intervening in the writing process through critiques and conferences.⁴⁰ It is hard to argue that law students do not benefit greatly from such attention.⁴¹ However, as the student’s work improves in the process of rewriting, it may be impossible to assess how much of the improvement is attributable to the intervenor/professor’s contributions (which the writer may or may not even understand) and how much reflects the student’s “aha!” moment. How often does the process approach yield false positives?

I hate grading curves! At my school we have a curve that requires me to lie to the world about how many excellent students I have in my substantive courses. The same curve, however, requires me to give a small percentage of poor grades in legal writing, sometimes more than I think is appropriate.

All my students are intelligent. Almost all are capable of being coached in their writing and, with sufficient intervention from me, probably no student need suffer a grade lower than C. And yet I must hand out at least a few such grades. As I stated above, I find it awful to give less than honest grades. I find it intolerable to give undeserved low grades even if a student’s performance largely reflects my intervention. I am not the first person who has noted this quandary. Laurie Magid has written:

The process-centered approach to LRW, with its emphasis on feedback and instructor intervention during the drafting process, increases the difficulty of fairly grading the final product.⁴²

39. See *supra* note 27.

40. Margolis & DeJarnatt, *supra* note 15, at 99.

41. A skeptic might argue that training students to depend excessively on rewriting to get a satisfactory written product is not compatible with some forms of law practice, particularly that involving clients of limited means. Presumably, however, supervised rewriting in the first year of law school can lead to development of good writing habits and, in turn, the need for less rewriting later on.

42. Laurie Magid, Awarding Fair Grades in a Process-Oriented Legal Research and Writing Course, 43 Wayne L. Rev. 1657, 1661 (1997). It should be noted that Magid believes that this difficulty may be remedied with a research report assignment that she has devised. *Id.* at

Another commentator has contended that the feedback entailed in the process method stunts the incentive for students in preliminary drafts because the professor will eventually just tell them the right way⁴³ and annoys students by narrowing the range of student performance on assignments.⁴⁴

These may be fair criticisms of the process approach, and perhaps they may be overcome through creative design of assignments. What apparently is not an option, at least under ABA Interpretation 302-1, is to not use preliminary drafts at all. Tinkering with assignments can resolve some of the anomalies this method may create in the context of mandatory curves, but I believe that the process of reviewing preliminary drafts makes it very difficult to comply with the lower-end requirements of mandatory grading curves.

Because, as I have suggested, the process approach to legal writing, at least as it is embodied in ABA Interpretation 302-1, is impractical for evening students and works poorly in some instances when a law school has a mandatory curve, I believe that modifications are in order.⁴⁵

IV. Creative Alternatives for Teaching Legal Writing

I am certainly not suggesting that legal writing pedagogy return to pre-1980 practices and staffing models. But some creative alternatives to the most intervention-laden model of the process approach have been suggested in recent years, and they warrant consideration.

In a thoughtful article, Michael Madison proposed a method of teaching intellectual property that should be adaptable to first year legal writing programs.⁴⁶ He suggests assigning three memos: at five weeks, ten weeks, and at the conclusion of the semester. These intervals permit the instructor to spend at least two weeks grading the memos and still return them to the students before following memo is due.⁴⁷ During the class in which he returns the memos to students, the instructor comments on major themes in his evaluation of the memos.⁴⁸ He makes a great deal of written comments in the

1670. Perhaps so with respect to fairness of the grades of a class overall, but Magid did not address my problem, i.e., the requirement that I give at least some poor grades.

43. John D. Schunk, Can Legal Writing Programs Benefit from Evaluating Student Writing Using Simply Single-Submission, Semester-Ending, Standardized, Performance-Type Assignments?, 29 Hamline L. Rev. 308, 314 (2006).

44. *Id.* at 322.

45. There are circumstances in which this would not be necessary. If a law school has only full-time day students, does not require a minimum number of low grades, and provides an environment in which its tenured or tenure-track legal writing faculty can fulfill its arduous demands and produce scholarship, the process approach, as its strongest proponents envision it, would work very well.

46. Michael J. Madison, Writing to Learn Law and Writing in Law: An Intellectual Property Illustration, 52 St. Louis L.J. 823 (2008).

47. *Id.* at 834.

48. *Id.* at 836.

body of the memos and at the end.⁴⁹ It appears that in lieu of the prewriting conferences and preliminary drafts, the instructor plays the role of senior partner, answering—or not—student questions about the memos.⁵⁰ Upon returning each set of memos, the instructor makes available to the class copies of “model” memos from those submitted by the class.⁵¹

While Madison applies this method in an upper-level course, presumably after the students have taken their first-year legal writing course, he is attentive in his comments to “grammar, syntax, organization, and presentation,” a good part of our chores in the first-year writing course.⁵²

I must confess that I extol Madison’s method because it is quite similar to my own. And, yes, I suppose that a devotee of the process approach might disparage it as the product approach.

Maybe, maybe not. In my classes, as it appears Madison does,⁵³ I work with the students in briefing the authorities upon which they base their memos. I suggest to them how to begin to synthesize the cases. I make them think about the audience for their memos. They go to work and synthesize the authorities with the facts of the problem—or not. But in the end, the final product—whatever its quality—is more the student’s effort than mine. Concededly, my students, and presumably Madison’s, probably learn as much about the process of writing after examining the instructor’s evaluation as they do before they turn in the assignment. If that entails a departure from the platonic ideal of the process approach, it is at least more compatible with the busy lives of evening students.

Although that is not my objective, this approach is more efficient for me. I have fewer conferences than if I required them for all students and I do not spend nearly as much time answering questions before students turn the assignments in as I would if I were reviewing drafts. But I do enjoy the conferences and encourage students to meet with me if they think it would be useful.

Another writing professor, Stewart Harris, takes a much more jaundiced view of student conferences and suggests that many of the writing issues that might otherwise require the legal writing teacher’s attention would more appropriately be addressed by writing center staff.⁵⁴ Harris dismisses the review of preliminary drafts with the acerbic observation that

49. *Id.* at 834

50. *Id.*

51. *Id.* at 836.

52. *Id.* at 834.

53. *Id.* at 833.

54. See Harris, *supra* note 25, at 299.

Students who have you at their beck and call will not spend their own valuable time editing their papers. They will expect you to do it for them. . . . And if you fail to correct something in a given draft, you are, in the student's opinion, permanently estopped from raising the issue again.⁵⁵

Harris strikes a different bargain with his students than do the most strenuous adherents of the process approach. He dismisses what he calls the coddling entailed in the ethos of student conferencing thusly: "I cannot remember the last judge who 'empowered' me."⁵⁶

Harris also suggests use of models instead of written comments on student papers.⁵⁷ I part company with him there as I am inherently skeptical of "models" in any context. On that point, I agree with process approach proponents that we must encourage the potential of the individual student, whatever it is. That student may not be Hemingway, but he or she has an individual approach to written communication that must be the point of departure for efforts at improvement.

John Schunk, who is as skeptical about the value of preliminary drafts as Harris,⁵⁸ suggests a de-emphasis on grading assignments during the semester, replacing it with a graded legal writing assignment at the end of the semester. It appears that this suggestion stems from Schunk's concern that students shift the burden of doing an assignment onto the professor if he or she comments on preliminary drafts.⁵⁹ Schunk believes that students take more seriously even ungraded assignments during the semester if they know that these assignments lead to the final graded assignment.⁶⁰ While I share his skepticism about the legitimacy of grading a paper after I have prompted improvements through comments, I must part company with Schunk on the importance of providing grades throughout the semester. Though I provide my reaction to my students' insights mostly after they have turned in their papers for a grade, I believe that the grade, especially if it is not what the student hoped for, encourages the student to focus on my explanation of why he or she needs to improve.

In light of these alternatives to the orthodoxy of the process method, I think it is regrettable that the ABA has chosen to embody this orthodoxy in its accreditation standard.

55. *Id.* at 300.

56. *Id.*

57. *Id.* at 301.

58. Schunk, *supra* note 43, at 314.

59. *Id.*

60. *Id.* at 324.

V. Conclusion

The legal writing community has embraced a labor-intensive model for legal writing pedagogy and an ABA interpretation has foisted this model on legal education. This pedagogical model tends to stunt the academic careers of legal writing teachers. It is not entirely a good model for evening students and is incompatible with mandatory grading curves in some instances. Under some circumstances, it is perfectly suited to its environment, but there are, and undoubtedly will be, alternatives better suited to other circumstances. It is most unfortunate that the ABA has strait-jacketed legal writing more than it has any other cohort of legal education while paying scant attention to the professional well-being of the legal writing professoriate. The professional well-being of such a large segment of the legal academy is a far more pressing concern than forcing conformity to legal writing orthodoxy, particularly when the legal academy is a constant source of innovative ways to teach legal writing.