

**THE ETHICS AND SCIENCE OF THE LEGAL
WRITING ART:
AN INTERDISCIPLINARY APPROACH**

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INTRODUCTION

For such an important component of legal practice,¹ legal writing seems to be tangential to the focus of a lawyer's education.² Although writing is emphasized in many classes, there are relatively few classes dedicated to the development of legal writing skills.³ It is critical that students and lawyers understand the substantive law, but those efforts are undermined if the practitioner is unable to communicate his or her knowledge in a persuasive manner.⁴ Approximately half of professors are nontenure-track, suggesting law schools do not want to make long-term investments in legal writing.⁵ Most writing programs require less than six credits.⁶ Even in extracurricular organizations devoted to writing, it does not appear substantive writing is the focus of students' daily efforts.⁷ For

1. I will make explicit what the reader already knows: this Note cannot escape the universal truth of Muphry's Law. See John Bangsund, *Muphry's Law*, SCENES EDITORIAL LIFE, <http://home.pacific.net.au/~bangsund/muphry.htm> (last visited Nov. 19, 2016). As Bangsund explains:

Muphry's Law is the editorial application of the better-known Murphy's Law. [It] dictates that (a) if you write anything criticizing editing or proofreading, there will be a fault of some kind in what you have written; . . . the stronger the sentiment expressed . . . the greater the fault; [and] (d) any book devoted to editing or style will be internally inconsistent.

Id. Caveat lēctor.

2. See Andrey Spektor & Michael A. Zuckerman, *Legal Writing as Good Writing: Tips from the Trenches*, 14 J. APP. PRAC. & PROCESS 303, 303 (2013) (noting the lack of requirement or encouragement for students to participate in writing activities).

3. See *id.* The American Bar Association (ABA) does require law curriculums contain "one writing experience in the first year and at least one additional writing experience after the first year . . ." STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2016-2017, Standard 303(a)(2) (AM. BAR ASS'N 2016). The ABA does provide factors to assess the rigor of writing experiences. *Id.* at Standard 303, Interpretation 303-2. However, the ABA's standards do not require any particular level of rigor for these writing experiences. Furthermore, the ABA provides minimal guidance on what the writing experience should include, unlike its more detailed guidance for professional responsibility or experiential courses. See *id.* at Standard 303(a)(1), (3).

4. Brian K. Keller, *Whittling: Drafting Concise and Effective Appellate Briefs*, 14 J. APP. PRAC. & PROCESS 285, 285 (2013) (explaining a hypothetical of distracting language "sending one judge scurrying down dead-end rabbit holes").

5. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., 2014 NATIONAL SURVEY RESULTS 5 (2014), <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf>.

6. *Id.* at 8.

7. See, e.g., Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 15-17 (describing student editors as clinging to style manuals and thus editing articles to be less substantively effective than the authors' original submissions).

example, some question the value of writing taught in law journals,⁸ and often students will rely on style manuals because “they lack the experience and training to recognize good writing.”⁹

The legal field has changed. Oral communication, although still important, is not the primary means by which lawyers communicate.¹⁰ Judges rely less on oral arguments for deciding cases.¹¹ Although oral arguments were declining before computers became prevalent,¹² the trend has continued in the “pervasively visual digital era.”¹³ The Digital Age is the Written Age for law.¹⁴

With a growing community powered by increased availability of computing power, legal writing scholars are beginning to apply established empirical research methods to their field.¹⁵ Before the 1980s, much of the legal writing literature focused on teaching methods or epistemological classifications for legal writing faculty.¹⁶ Now the

8. Megan S. Knize, *The Pen is Mightier: Rethinking the “Gladiator” Ethos of Student-Edited Law Reviews*, 44 MCGEORGE L. REV. 309, 323 (2013); Wise et al., *supra* note 7, at 16, 19–20.

9. Wise et al., *supra* note 7, at 16.

10. See Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 255 (2009) (describing the rarity of oral arguments in federal district and appellate courts).

11. *Id.* Outside the legal community, audiovisual media forms are tremendously popular through platforms like *Snapchat*, *YouTube*, *Instagram*, and other sites. Computer graphics algorithms are incredibly sophisticated and are implemented through easily manipulated systems. However, the legal community lags behind. To my knowledge, no soul has been brave enough to include a GIF in an electronically filed brief as a method to communicate to judges and their staff, even if it may be more effective and persuasive than writing in a given context. Even today, clerks of court would likely have to scrutinize the proper rules if a lawyer included a static table to summarize prior cases. Until the age of multimedia legal briefs arrives, writing will dominate the field. For a general discussion of the initial changes to legal writing due to technological innovation, see generally R. Lainie Wilson Harris, *Ready or Not Here We E-Come: Remaining Persuasive Amidst the Shift Towards Electronic Filing*, LEGAL COMM. & RHETORIC, Fall 2015, at 83, for a discussion on writing to accommodate screen-reading on mobile devices, and Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, LEGAL COMM. & RHETORIC, Fall 2015, at 1, for a discussion on creating multi-dimensional documents in legal briefs.

12. See *id.*

13. Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 230 (2006).

14. See generally *id.* at 237, 270 (explaining that as other industries move toward advanced technology, the legal industry is making a general move toward relying more heavily on written arguments than oral arguments).

15. Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, LEGAL COMM. & RHETORIC, Fall 2004, at 1, 20 n.75.

16. *Id.* at 5–8.

research is focused on the substantive elements of writing.¹⁷ Prior to modern computing technology, all textual analyses needed to be reviewed individually; today, for example, all of William Shakespeare's works can be analyzed within twenty seconds.¹⁸ Combining the research methods with the focus on substantive legal writing, new questions are being answered that would not have been possible to address before.¹⁹

However, the new research findings have not been piercing the judicial veil. Even when faced with objectively bad legal writing, many judges seem unable to articulate the objective explanations for why that is so.²⁰ Opinions criticizing attorneys for poor writing often use it to create colorful commentary instead of focusing on the specifics of why the writing is bad.²¹

This Note proposes a way to merge the current legal writing scholarship with the practice of law in the courts. Because some courts already recognize poor legal writing as a violation of a lawyer's duty of competence, a specific rule within the Model Rules of Professional Conduct can provide clarification for defining competent legal writing.²² This novel approach is to create the criteria of good legal writing by employing the empirical methodology of qualitative meta-analysis. This approach not only creates an objective measure for good writing, but grounds it in current research showing those elements assist clients.²³ However, because the research is currently limited to litigation documents, no attempt to generalize to other legal documents will be made. Furthermore, because criminal cases are subject to different constitutional considerations, the application of good legal writing to criminal cases will be reserved for another time.²⁴

Part I is a literature review of legal writing scholarship. It briefly traces legal writing from the Revolutionary Era through the early 2000s. The history of legal writing in academia has impacted the substantive research available today. Part II describes recent cases applying the principles of competency to poorly drafted litigation documents. Judges recognize the importance of competent legal writing, even if the

17. *Id.* at 8.

18. JAMES W. PENNEBAKER, *THE SECRET LIFE OF PRONOUNS: WHAT OUR WORDS SAY ABOUT US* 8 (2011).

19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part II.

22. *See infra* Part II.

23. *See* Smith, *supra* note 15, at 18–19.

24. *See* U.S. CONST. amend. VI (“[T]he accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).

standards are not well articulated. Part III argues competency standards for legal writing should be grounded in empirical research. Traditional legal tools are designed for argumentation, not truth seeking. To develop competency criteria, a qualitative meta-analysis is used to distill the legal scholarship field into its core components. Part IV proposes a new rule for the Model Rules of Professional Conduct. Finally, Part V concludes the new Model Rule should be adopted because recent research allows for objectively finding characteristics of good legal writing.

I. REVIEW OF SCHOLARLY DEBATE ON GOOD WRITING

Striving to achieve good legal writing is not a new goal for lawyers.²⁵ However, prior to the 1900s, legal writing scholarship and education was not formalized.²⁶ As legal writing research became more sophisticated, the field coalesced around the concept of narrative writing, which is sometimes referred to as legal storytelling.²⁷ Essentially, narrative writing is a method of writing legal analysis in terms of emphasizing the story of the parties.²⁸ Although early examples of legal writing scholarship employed literary techniques for assessing writing quality, more scholars are approaching the question from a scientific perspective which can provide stronger support that narrative writing is objectively good writing.²⁹

A. Formalized Debates on Legal Writing Are a Recent Development

Legal writing is a relatively new subject of formal scholarly study within the legal profession.³⁰ Early American legal instruction³¹ in the

25. Jeffrey D. Jackson & David R. Cleveland, *Legal Writing: A History from the Colonial Era to the End of the Civil War*, 19 LEGAL WRITING 191, 198–99 (2014) (noting a body of legal writing skills accumulated by copying prior works).

26. *Id.* at 229 (discussing role of moot courts in substantive and legal writing education).

27. See Ian Gallacher, “When Numbers Get Serious”: A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals, 46 SUFFOLK U. L. REV. 451, 451 n.2 (2013).

28. Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, LEGAL COMM. & RHETORIC, Fall 2012, at 99, 106 [hereinafter *Competing Stories*].

29. See *infra* Part III.

30. Gallacher, *supra* note 27, at 451; see Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEGAL WRITING 521, 524 (2010) (noting the early expectation that legal writing professors should not publish research on “how to write”). *But see* Jackson & Cleveland, *supra* note 25, at 198–99 (noting a body of legal writing skills accumulated by copying prior works).

31. The scope of this Note is limited to legal writing within the states of the United States. No attempt is made to generalize to other English speaking countries, which are commonly

1700s occurred through the apprenticeship educational model, resulting in repetition of previous templates rather than general theories of writing.³² Even when legal writing classes were introduced to law schools between World War I and World War II,³³ a community of legal writing scholars did not develop until the late 1980s.³⁴ Thus, some paradigms of legal writing are in flux.³⁵

With the rise of formal legal education through the nineteenth century³⁶ and increased reliance on written documents over oral arguments,³⁷ legal writing trends and advice have become more standardized than they would be under an apprenticeship model of education.³⁸ The focus of legal writing in the early twentieth century was logical argumentation.³⁹ This may be due to the general legal philosophy at the time; as one writer observed, “[Appellate] courts, are constituted in the eye of the law a logical machine, and in no sense a group of heartburning philanthropists.”⁴⁰ Today, many recognize that logic does

believed to be “divided by a common language.” Lynne Murphy, *Mavericks*, SEPARATED BY A COMMON LANGUAGE (Dec. 8, 2006), <https://separatedbyacommonlanguage.blogspot.com/2006/12/mavericks-blinders-and-other-friends-of.html> (attributing the name of the blog, about differences between American and British English, to George Bernard Shaw). Although it might be possible that there are universal language characteristics that transcend culture and languages, it is beyond the scope of this Note to generalize these conclusions beyond the American legal context.

32. Jackson & Cleveland, *supra* note 25, at 196–97 (illustrating John Adams’s frustration with his own legal education).

33. *Id.* at 193–94.

34. Gallacher, *supra* note 27, at 451.

35. *E.g.*, Laura P. Graham, *Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis*, 63 U. KAN. L. REV. 681, 681–82 (2015) (“[C]riticisms of the [IRAC] paradigm have steadily mounted. Yet many legal writing professors continue to cling to the IRAC paradigm.”).

36. Jackson & Cleveland, *supra* note 25, at 229.

37. Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS, Spring 2010, at 1, 2; J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 37 n.3 (1994).

38. Historical trends in legal writing could be detected through content-analysis based research, although this does not seem to be the focus of many modern scholars. *See, e.g.*, Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RES. 1277, 1278 (2005) (“[C]ontent analysis is one of numerous research methods used. . . . Other methods include ethnography, grounded theory, phenomenology, and historical research.”); Klaus Krippendorff, *Content Analysis*, in 1 INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION 403, 403–04 (Erik Barnouw et al. eds., 1989) (“[C]ontent analysis is a research technique for making replicable and valid inferences from data to their context.”).

39. Anderson, *supra* note 37, at 3.

40. *Id.* at 10 (quoting JESSE FRANKLIN BRUMBAUGH, LEGAL REASONING AND BRIEFING: LOGIC APPLIED TO THE PREPARATION, TRIAL AND APPEAL OF CASES, WITH ILLUSTRATIVE BRIEFS AND FORMS 589 (1917)).

not dominate judicial decision-making; the law is not created through mathematical formulas but rather “through the lens of . . . personal experiences.”⁴¹

B. Many Legal Writing Experts Suggest Narratives (or Storytelling) Are Key

The current trend in legal writing is to emphasize legal narratives or storytelling.⁴² Despite disagreements in the field about the exact definition of legal narratives or storytelling, the concept focuses on transforming legal arguments from pure analysis to applying the analysis in a way to emphasize the underlying parties and issues in the case.⁴³ Although accepted by many in the legal writing community, the underlying emotional reasoning remains controversial.⁴⁴ Many jurists, such as Justice Scalia, have claimed they were not persuaded by narrative storytelling.⁴⁵ Although narratives by themselves are not effective,⁴⁶ Robert Burns and Kenneth Chestek argue legal argumentation is a “double helix” composed of logical and emotional strands, the logos and pathos of classical rhetoric.⁴⁷ However, because the storytelling strand of DNA has been neglected for so long, many legal scholars focus on storytelling and narration instead of the logos strand.⁴⁸

However, scholarly debate has only sketched the contours of

41. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, LEGAL COMM. & RHETORIC, Fall 2010, at 1, 2 [hereinafter *Judging by the Numbers*]. *But see* Ryan C. Black et al., *The Role of Emotional Language in Briefs Before the U.S. Supreme Court* 18 (Dec. 15, 2015) (unpublished manuscript) (on file with SSRN, File No. 2703875) (concluding there is a negative correlation between emotional language and voting support from justices in logistic regression of Supreme Court voting).

42. Anderson, *supra* note 37, at 15.

43. *See Competing Stories*, *supra* note 28, at 99.

44. *See Judging by the Numbers*, *supra* note 41, at 2, 4 (describing conservative opposition to Justice Sotomayor’s confirmation to the Supreme Court as an example of a fear of bias in judicial decision-making from emotional reasoning).

45. *Id.* at 4.

46. *See* Black, *supra* note 41, at 18.

47. *Judging by the Numbers*, *supra* note 41, at 4–5 (quoting Robert P. Burns, *Studying Evidence Law in the Context of Trial Practices*, 50 ST. LOUIS L.J. 1155, 1171 (2006)). Logos, pathos, and ethos represent logical, emotional, and credibility arguments respectively. Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86 (1994). The divisions represent Roman rhetoricians’ interpretations of Aristotle’s framework. *Id.* In another metaphor, Chestek accounts for the missing ethos by claiming ethos is the chemical bonds holding the strands of DNA together. *Judging by the Numbers*, *supra* note 41, at 6 n.23.

48. *See, e.g.*, J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 53, 55 (2008) (describing storytelling as lying “at the heart of what lawyers do,” but describing storytelling techniques going “beyond models of persuasion based on formal or informal logic”).

narrative writing.⁴⁹ Clearly, it is an emphasis on a story.⁵⁰ Elyse Pepper described legal narration as “what happened.”⁵¹ This description is problematic because even the most unengaging statement of facts states “what happened.”⁵² Another proposed definition for story was that it had a “beginning, a middle, and an end.”⁵³ Many of the definitions in the literature can be described as “too general or vague to be of much analytical value.”⁵⁴

In his empirical research, Chestek argues a story is a “detailed, character-based narration of a character’s struggles to overcome obstacles and reach an important goal.”⁵⁵ In more detail:

What distinguishes “stories” from mere “information-based narratives,” then, is that stories focus on characters, their goals, and their struggles to achieve their goals. Stories need sufficient context to allow the reader to fully see and understand why the participants in the story behaved as they did, and what they were trying to accomplish in the face of various obstacles. The word “story,” therefore, refers to a method of structuring information in a form that a reader will find engaging.⁵⁶

Because legal storytelling is essentially an organizational theme to coordinate structure, grammar, diction, and other language components around the characters of the story, it can be seen as an alternative to the classic IRAC formula.⁵⁷

49. This is not intended to suggest that narrative storytelling scholars have had the same difficulty defining a field as social entrepreneurship. Compare DAVID BORNSTEIN & SUSAN DAVIS, SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW 1 (2010) (defining social entrepreneurship in terms of transformation of institutions to solve social problems), with Shaker A. Zahra et al., *A Typology of Social Entrepreneurs: Motives, Search Processes and Ethical Challenges*, 24 J. BUS. VENTURING 519, 521 (2009) (noting many definitions of social entrepreneurship are focused on the motivations of the social entrepreneurs). Rather, it appears there is a consensus of meaning around the same point.

50. Elyse Pepper, *The Case for “Thinking Like a Filmmaker”*: Using Lars Von Trier’s *Dogville* as a Model for Writing a Statement of Facts, 14 LEGAL WRITING 171, 171 (2008).

51. *Id.*

52. Pepper does not explicitly address that point. However, the distinction seems dependent on the author’s motive, with a statement of facts as an activity that must be “gotten over with.” *Id.*

53. *Judging by the Numbers*, *supra* note 41, at 8 n.31 (quoting KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 12 (2007)).

54. *Id.* at 8.

55. *Id.* (quoting HAVEN, *supra* note 53, at 79).

56. *Id.* at 9 (citing HAVEN, *supra* note 53, at 15).

57. Graham, *supra* note 35, at 694. IRAC is a paradigm for organizing legal analysis, by ordering the analysis into the Issue, Rule, Analysis, and Conclusion. *Id.* at 681.

1. Most Narrative Advice Originates from Best Practices Methods

Despite the general unity of the field, it is not necessarily clear there is a consistent approach for explaining why legal storytelling is the rising paradigm of legal writing. Much of the scholarship does not assess the validity of claims that components of writing are necessary or sufficient for good writing; the scholarship, through “best practices” scholarship, instead fails to include a definable methodology and prescribes rules without providing evidence.⁵⁸ Thus, it is a subset of substantive writing scholarship defined not by qualities of writing it argues is best, but rather the manner in which it argues it.⁵⁹ Best practices scholarship “offers practical advice on how to make legal writing more effective.”⁶⁰ For example, Michael R. Smith identifies Brian J. Foley and Ruth Anne Robbins’s article incorporating literary techniques in legal writing as a best practices piece.⁶¹ There, the authors suggest stories should have “character, conflict, and resolution.”⁶² Similarly, Elyse Pepper looks to the film industry in an attempt to bring “the films that captivate us” into the courtroom.⁶³ Additionally, Ian Gallacher incorporated music theory to further develop writers’ skills.⁶⁴ These articles provide essential help to practitioners, and the major cases and policy decisions are made relying on these skills.⁶⁵ However, best practices pieces can be compared to a ski instructor telling a new skier to “[g]o that way, very fast.”⁶⁶

58. See Smith, *supra* note 15, at 8–9. Much of the earlier scholarship within the legal writing community was focused on teaching legal writing or developing the epistemological boundaries of the field. See *id.* at 5–8.

59. *Id.* at 9.

60. *Id.* at 8–9.

61. *Id.* at 9 (citing Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001)).

62. Foley & Robbins, *supra* note 61, *passim*.

63. Pepper, *supra* note 50, at 172.

64. Ian Gallacher, *The Court’s Dilemma: Or, Harmony and Dissonance in Legal Language*, LEGAL COMM. & RHETORIC, Fall 2012, at 1, 8–11 (providing the reader a “swift canter” through music theory fundamentals).

65. Whether or not judges consciously understand they make public policy decisions from the bench, the third branch of government participates in public policy. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (providing recognition of same-sex marriages when denied rights by legislatures). *But see generally* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (suggesting shifting public opinion and new reforms would have created similar outcome for abortion litigation in the long run absent the Supreme Court’s abortion precedents).

66. Foley & Robbins, *supra* note 61, at 459.

Often, there is no more than “an article of faith” supporting assumptions behind legal writing models.⁶⁷ More rigorous understanding of legal writing is starting to develop based on social science traditions.⁶⁸ This changes the underlying research questions raised by legal scholarship.⁶⁹ While it is important to have a description of writing techniques and a continuing revision of that scholarship, the field can also move onto the daunting task of causal inference.⁷⁰

2. *New Scholarship About Writing Incorporates Empirical Methods*

Empirical methodologies are becoming more common in legal writing scholarship.⁷¹ For example, Gallacher performed an exploratory assessment of the impact of legal writing courses on briefs filed in the New York Court of Appeals.⁷² By using readability measures as a reliable, but validly suspect,⁷³ proxy for measuring the difficulty of reading comprehension, Gallacher concluded readability did not increase in legal brief writing.⁷⁴ However, as the study was exploratory in nature, the analysis was not intended to find statistical significance.⁷⁵

67. Gallacher, *supra* note 27, at 460.

68. Smith, *supra* note 15, at 19–20.

69. *Id.*

70. *But see* HENRY E. BRADY ET AL., *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* 23 (2d ed. 2010) (suggesting causal inference may not be normatively better than descriptions due to inability to perform true experiments). *See generally* GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 34 (1994) (descriptions are usually the first step to causal inference).

71. *See* Smith, *supra* note 15, at 19–20.

72. *See* Gallacher, *supra* note 27, at 463.

73. *Id.* at 457–58 (discussing definitional and measurement limitations of the Flesch Reading East test). There is a generally recognized distinction in social science between valid measures and reliable ones. I adopt Jason Seawright and David Collier’s definition of reliability: “The stability of an indicator over . . . replications of the measurement procedure. Reliability involves the magnitude of random error.” BRADY ET AL., *supra* note 70, at 347. Whereas, validity is “[t]he extent to which the scores produced by a given measurement procedure meaningfully reflect the concept being measured.” *Id.* at 337. Thus, three separate researchers returning to the briefs Gallacher used would consistently obtain the same readability scores. *See id.* However, that repetition would not mean that the measures are “valid” from the “real” concept of Plain English. *See id.* An observational study with X legal writing professors grading (or “coding in social science parlance”) may be able to reach a higher level of validity since the experts would be able to incorporate their knowledge of the concept of Plain English. *See id.* However, Y other professors probably would not reliably reach the same grading. *See* BRADY ET AL., *supra* note 70, at 337.

74. Gallacher, *supra* note 27, at 491. Readability measures are mathematical formulas which measure countable components of a sentence, such as the average number of words per sentence or syllables per words, to estimate the difficulty of comprehending the writing. Rudolf Flesch, *A New Readability Yardstick*, 32 J. APPLIED PSYCHOL. 221, 232 tbl.7 (1948).

75. Gallacher, *supra* note 27, at 491. In fact, it was beyond the scope of the study to

In another exploratory empirical study, Judith Fischer assessed 1425 issue statements measuring a number of factors.⁷⁶ First, succinctness was measured by a simple word count and the number of issues per brief.⁷⁷ The average word count in the sample for an issue statement was thirty-seven.⁷⁸ Second, clarity was studied by only qualitative methods.⁷⁹ Diction, syntax, and “lack of unity” could all create problems with clarity.⁸⁰ Third, Fischer assessed sentence structure by determining whether the issue was framed in the traditional “Whether . . .” format or was structured as a question or other declarative sentence.⁸¹ In the sample, 607 issues were framed as questions, 176 were declarative, and 641 were in the traditional “Whether . . .” format.⁸² Of the sentences starting with “whether,” 76% ended with periods, with 24% ending with question marks.⁸³ Only 5.5% of issue statements included subpoints.⁸⁴ In all, 95% were a single sentence, with approximately 5% containing multiple sentences.⁸⁵ Fourth, Fischer recorded the opening words of the issue statement, excluding articles.⁸⁶ The most common words were “whether,” conjugations of “do” and “is,” and “if” or “should.”⁸⁷ Fifth, Fisher assessed the references to parties; references could be to roles, names, or party designation.⁸⁸ She found references to names were most common, then roles, then designations in the lower court, and finally the

account for institutional and cultural factors that could have counteracted the impact of legal education in New York. *See id.* at 491–92 (describing potentially spurious variables that were not controlled in the observational study).

76. Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, LEGAL COMM. & RHETORIC, Fall 2009, at 1, 5. The study seems to incorporate a mixed methods approach, using quantitative and qualitative approaches. *See id.* at 7 (quoting and qualitatively assessing issue statements and providing quantitative results). However, the exact approach for qualitatively assessing the issue statements was not described. *Id.* at 4–5 (failing to describe qualitative methodology and implying quantitative techniques). Qualitative studies are often harder to perform correctly than quantitative analyses, and full disclosure of methods is critical to allow the possibility of replication. *See* KING ET AL., *supra* note 70, at 32 (suggesting uncertainty measures should be disclosed even in qualitative research).

77. Fischer, *supra* note 76, at 8–9.

78. *Id.* at 7.

79. *Id.* at 9. Here, it appears there was no attempt to conceptualize “clarity,” preventing clear quantitative and qualitative variables from being created. *See Judging by the Numbers*, *supra* note 41, at 8–9 (conceptualizing “story” to provide a basis for analytical framework).

80. Fischer, *supra* note 76, at 10.

81. *Id.* at 12.

82. *Id.* at 11–13.

83. *Id.* at 13.

84. *Id.*

85. Fischer, *supra* note 76, at 14.

86. *Id.* at 16.

87. *Id.* at 17 tbl.6.

88. *Id.* at 17.

designation on appeal.⁸⁹ Sixth, she collected data on whether the issue statements included facts.⁹⁰ Most states had more than half their issue statements include facts, even if discouraged by state rules.⁹¹ Lastly, Fischer included framing as the last factor for which she collected data.⁹² She broke that concept into a dichotomous variable based on whether it was open-ended or not.⁹³ Of non-open-ended questions, 68% would benefit the client by answering “yes.”⁹⁴ Although Fischer’s research design could not determine whether positive characteristics from a narrative perspective were preferred or led to more successful cases, it provides a practitioner with a perspective on what judges typically see in terms of writing style.⁹⁵

One method to determine whether judges or practitioners prefer narrative writing is to ask court employees directly. Joseph C. Merling interpreted a survey that was sent to appellate staff attorneys.⁹⁶ There was general agreement that attorneys should lead with their strongest argument.⁹⁷ Additionally, there was a strong agreement that briefs should not include legalese.⁹⁸ Additionally, the attorneys disliked long sentences, even if grammatically correct.⁹⁹ Approximately twenty-six percent of staff attorneys believed briefs were too long over half the time.¹⁰⁰ Although not the original intent of the survey, it appears there is support for the claims of the legal writing community that narrative writing is preferred.

Although survey methods directly measure preferences, the methodology rests on the assumption that judicial employees can accurately record and recollect what persuades them. Chestek designed an observational study to test the persuasiveness of narrative writing by having respondents read two briefs: one in a narrative style, and the other

89. *Id.* at 18 tbl.7.

90. Fischer, *supra* note 76, at 19.

91. *Id.* at 21–22 tbl.9.

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 24.

95. *See generally* Fischer, *supra* note 76 (analyzing briefs filed before the highest courts of six states).

96. Joseph C. Merling, *Advocacy at Its Best: The Views of Appellate Staff Attorneys*, 8 J. APP. PRAC. & PROCESS 301, 301 (2006).

97. *Id.* at 305.

98. *Id.* at 306. It is unclear which terms are considered “legalese” as that term was not defined in the survey, leaving it to each respondent to make their own conclusion. *See id.* (failing to describe whether term was defined in absence of survey instrument).

99. *Id.*

100. Merling, *supra* note 96, at 310.

not.¹⁰¹ After asking a total of ninety-five judges, clerks, staff attorneys, practitioners, and law professors to read narrative and non-narrative briefs,¹⁰² 64.2% responded on a survey that the narrative briefs were more persuasive.¹⁰³ Although there was variation on responses by the different groups of respondents,¹⁰⁴ there were not significant differences between by gender.¹⁰⁵ Although difficult to generalize to the entire United States, Chestek's survey study provides empirical support for the success of narrative writing.

However, Lance N. Long and William F. Christensen were not able to replicate that data in the judicial record.¹⁰⁶ Instead of relying on survey responses from practitioners on hypothetical briefs, they created a content-analysis¹⁰⁷ to create variables for a logistic regression analysis—a mathematical analysis which models the strength of variable relationships when the dependent variable is a dichotomous variable, or a variable that can only take two values.¹⁰⁸ Using 648 court opinions from the Supreme Court of the United States, state supreme courts, and federal circuit courts of appeals, Long and Christensen found no correlation between readability measures and success before judges.¹⁰⁹ One peculiar finding was that there was no significant variation between the readability scores for briefs.¹¹⁰ This could have impacted the logistic regression analysis, as the inferential logic requires variation in the dependent variable to draw a valid conclusion.¹¹¹ Other possible issues with the analysis include omitted variables and the backward elimination method for developing the mathematical model.¹¹² Perhaps their conclusions are

101. See *Judging by the Numbers*, *supra* note 41, at 8–9 (stating that the author wrote hypothetical briefs as “stories” or “information-based narratives” for the purposes of the study).

102. *Id.* at 17.

103. *Id.* at 19 tbl.2.

104. *Id.* at 20 tbl.4 (finding 57.6% of “readers,” 73% of “writers,” and 60% of law professors found the narrative briefs persuasive).

105. *Id.* at 21 tbl.6 (finding 64.3% of men and 64.1% of women found the narrative briefs more persuasive).

106. Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*, 12 J. APP. PRAC. & PROCESS 145, 145–46 (2011).

107. For a summary of content-analysis, see Krippendorff, *supra* note 38, at 403–04, and Hsieh & Shannon, *supra* note 38, at 1278.

108. Long & Christensen, *supra* note 106, at 155–56.

109. *Id.* at 155, 159.

110. *Id.* at 158 tbl.1.

111. KING ET AL., *supra* note 70, at 147.

112. See Long & Christensen, *supra* note 106, at 156 & n.48; see also KING ET AL., *supra* note 70, 175–76, (discussing problems of omitted variable bias, as well as the problems for scientific research when models are not based on theories developed before the data analysis); *Significant*, XKCD.COM, <https://xkcd.com/882/> (last visited Nov. 19, 2016) (illustrating general

not inconsistent with Chestek because they only relied on one dimension of narrative writing: readability.¹¹³

Overall, the legal writing community generally agrees about many of the basic elements of good writing.¹¹⁴ Some scholars take the basic elements and provide best practices advice.¹¹⁵ Others have created surveys, either to ask judges in the abstract or to test specific documents, to determine the validity of the narrative writing paradigm.¹¹⁶ Finally, other scholars perform content-analyses in an attempt to provide more validity (with less reliability) to their conclusions.¹¹⁷ It seems scholars have not used the scientific gold standard of experimental research.¹¹⁸ However, in the legal writing context, true experiments would be more difficult to implement. It is likely difficult to simulate all the variables that could impact the judge's receptivity to persuasive documents.

II. JUDGES SANCTIONING LAWYERS FOR POOR WRITING DO NOT DEFINE THE PROBLEM

In light of the growing legal writing literature, it would be reasonable to expect judges would have access to that knowledge when considering cases of bad writing. However, the scholarship has not provided guidance to courts.¹¹⁹ Judges have come to expect bad writing, and only the worst of the worst is punished in any way.¹²⁰ Thus, it seems they have not had an opportunity to apply the modern knowledge on legal writing.

problem of statistical analyses in absence of theoretical explanation).

113. See Long & Christensen, *supra* note 106, at 156 (failing to control for other dimensions of narrative writing in the logistic regression).

114. See Gallacher, *supra* note 27, at 451, 460–61.

115. See Smith, *supra* note 15, at 8.

116. *E.g.*, *Judging by the Numbers*, *supra* note 41, at 18.

117. *E.g.*, *Competing Stories*, *supra* note 28, at 106 (applying qualitative case study methodology).

118. An experimental study is what most laypersons would imagine scientists doing: a population is randomly assigned into a control group and a treatment group, and the difference between the groups is assumed to be the effect. See BRADY ET AL., *supra* note 70, at 329.

119. *E.g.*, *Sambrano v. Mabus*, 663 F.3d 879, 881 (7th Cir. 2011) (failing to cite academic research when admonishing parties for bad writing).

120. *E.g.*, *id.* at 882 (first citing *Lee v. Cook County*, 635 F.3d 969, 974 (7th Cir. 2011); then citing *United States v. Clark*, 657 F.3d 578, 585–86 (7th Cir. 2011); and then citing *Stanard v. Nygren*, 658 F.3d 792, 793 (7th Cir. 2011)) (implying injury necessary when considering incompetence). See generally Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, LEGAL COMM. & RHETORIC, Fall 2014, at 109 (providing a review of court decisions that admonish lawyers).

A. Judges Recognize Competent Writing as an Ethical Requirement

Often, judicial sanctions for incompetent writing are triggered by other rules or professional ethics violations.¹²¹ For example, the Seventh Circuit Court of Appeals chastised an attorney for poor writing and bringing a frivolous claim.¹²² The plaintiff's lawyer failed to prosecute the case, and the trial judge dismissed the action.¹²³ The lawyer appealed the decision of the trial judge to deny his *ex parte*—or in the judge's words, “secret”—motion to vacate the dismissal.¹²⁴ Judge Easterbrook described the appellate brief as “wretched.”¹²⁵ First, Judge Easterbrook complained about the brief's Summary of Argument.¹²⁶ In full, the Summary of Argument was the following:

SUMMARY OF ARGUMENT

- (1) Property interest in employment.
- (2) Due process of law.
- (3) Motion for judgment on the pleadings under FRCP Rule 12c.¹²⁷

The argument section contained more information, but also was formatted as a list.¹²⁸ The statement of jurisdiction referenced a rule that “is not a source of appellate jurisdiction.”¹²⁹ And the entire Due Process argument was the following:

Appellant has a constitutional right to procedural due process under the 5th Amendment which guarantees the right to a fair hearing before the District Court with the power to decide the case. Relevant portion of the 5th Amendment reads: “. . . *nor be deprived of life, liberty or property without due process of law*” Dismissal of appellant's discrimination complaint pursuant to District Court's Local Rule 41.1 despite appellant[‘s] physical illness incapacitating her to work was a denial of her right to due process.¹³⁰

In response, Judge Easterbrook noted, “Since [the appellant] appears to be making a strictly legal argument, the court of appeals makes an independent decision, usually called *de novo* review.”¹³¹

121. *E.g., id.*

122. *Id.* at 880–81.

123. *Id.* at 880 (citing N.D. Ill. Crim. R. 41.1).

124. *Sambrano*, 663 F.3d at 880.

125. *Id.* at 881.

126. *See id.*

127. Brief for Appellant at 8, *Sambrano v. Mabus*, 663 F.3d 879 (2011) (No. 10-3430).

128. *See id.* at 8–9.

129. *Sambrano*, 663 F.3d at 881.

130. Brief for Appellant, *supra* note 127, at 9 (omission in original).

131. *Sambrano*, 663 F.3d at 881.

Clearly, it was not an award winning brief. However, the court explicitly only threatened monetary sanctions for the lawyer's failure to file a complete record and filing a frivolous lawsuit.¹³² The lawyer was threatened with disbarment from the court of appeals for "inability to practice competently and diligently in the federal courts."¹³³ The court did not explicitly state the poorly drafted brief was the cause of the pending sanctions; in fact, the poor writing almost seemed tangential to the rules violation and the frivolous lawsuit claim.¹³⁴

Another judge awarded a lawyer a fake award styled as "the Worst Federal Pleading of the Year Award."¹³⁵ The attorney for the defendant filed an answer with which the court did not approve.¹³⁶ The answer claimed the complaint "fail[ed] to allege any facts."¹³⁷ The court criticized the phrasing of alleged affirmative defenses, and believed at least one was nonexistent.¹³⁸ The affirmative defenses in the answer were stricken, and the lawyer was required to send a letter to his client advising no fees would be collected for fixing the errors.¹³⁹ However, it appears Federal Rules of Civil Procedure (FRCP) Rule 8 provided the basis of the decision, not the inherent ability of the court to regulate attorney behavior.¹⁴⁰

Judges seem to become more creative in their opinion writing when both attorneys have turned in subpar work. In *Bradshaw v. Unity Marine Corp.*, "having received no useful guidance whatever from either party . . . [and] also out of its own sense of morbid curiosity," the judge had to interpret what the parties were talking about.¹⁴¹ One problem the court identified was that the plaintiff failed to properly invoke admiralty law.¹⁴² However, the court stated the following:

[T]he Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and it stands out much better amidst the mustard splotted about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it

132. *See id.* at 882.

133. *Id.*

134. *Id.* at 881–82.

135. *Scott v. Arrow Chevrolet, Inc.*, No. 01 C 7489, 2001 U.S. Dist. LEXIS 17097, at *1 (N.D. Ill. Oct. 19, 2001).

136. *See id.* at *2.

137. *Id.* at *3.

138. *Id.* at *4.

139. *Id.* at *6–7.

140. *See Scott*, 2001 U.S. Dist. LEXIS 17097, at *2–3.

141. 147 F. Supp. 2d 668, 672 (S.D. Tex. 2001).

142. *Id.* at 671 (citing *Debellefeuille v. Vastar Offshore, Inc.*, 139 F. Supp. 2d 821, 824 (S.D. Tex. 2001)).

and call it Florence, a pig is still a pig.¹⁴³

Ironically, the judge's response to bad writing may itself be unclear. The mixed metaphors may confuse the unsuspecting reader. In an effort to be an equal-opportunity offender, the court believed the defendant's motions were no better than the plaintiff's:

Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. . . . That is all well and good—the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the [Erie] Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie*, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie*.¹⁴⁴

In the end, the court resolved the case “[d]espite the waste of perfectly good crayon seen in both parties’ briefing (and the inexplicable odor of wet dog emanating from such).”¹⁴⁵ He was forced to conclude “Plaintiff’s lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what’s left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.”¹⁴⁶ No formal sanctions were imposed, only public humiliation.¹⁴⁷ However, the force of the public humiliation for the lawyers may be reduced in light of the judge’s later impeachment for sexual harassment and misleading investigators.¹⁴⁸

Humiliation is the weapon of choice, although some courts differ on how far into battle they will carry it. For example, Judge Urbina’s opinion was much more tame in *Capital Yacht Club v. Vessel AVIVA* than in *Bradshaw*.¹⁴⁹ After attempting to convert a FRCP Rule 52(b) motion into a Rule 49(e) motion, the judge proclaimed,

The court, however, is growing tired of counsels’ sloppy submissions. It is almost as if the parties’ counsel have together devised an entirely new legal writing style, complete with a rule favoring citation to bad law in place of citation to good law, and a wholesale rejection of the Bluebook in favor of their own not-so-uniform system of citation. Although the court finds this parallel universe of legal advocacy entertaining, it now longs for the traditional methods of representation:

143. *Id.*

144. *Id.* at 670.

145. *Id.* at 672.

146. *Bradshaw*, 147 F. Supp. 2d at 672.

147. *See id.* (ordering no sanctions).

148. H.R. 520, 111th Cong. (2009).

149. *See Capital Yacht Club v. Vessel AVIVA*, No. 04-0357, 2006 U.S. Dist. LEXIS 69416, at *6 n.5 (D.D.C. Sept. 27, 2006) (limiting colorful language about lawyer’s advocacy to one footnote).

citations to good law and utilization of the ubiquitous Bluebook.¹⁵⁰

From the text of the opinion, it is unclear the boundary over which the lawyers crossed in terms of writing style.¹⁵¹ Other lawyers would be left to reading the parties' filings themselves to discover what the judge believed was improper writing.¹⁵²

B. Judges Do Not Provide Objective Guidance for Lawyers

Some judges are clearer than others about the exact problem with the legal writing. A week earlier in *Friendship Edison Public Charter School Collegiate Campus v. Murphy*, Judge Urbina provided specific information about the defective filings.¹⁵³ As the court explains,

First, the plaintiff repeatedly refers to the defendant improperly, [referring to male defendant as District of Columbia or "she"]. Second, the court notes the defendant's failure to cite any case law in the argument portion of its motion to dismiss. Indeed, the only case law cited relates to the court's standard of review of a motion to dismiss.¹⁵⁴

Despite the justification for creating a public statement, however, in the end, no further action was taken.¹⁵⁵

Another disciplinary authority was more clear about a lawyer's deficiencies when accused of incompetence.¹⁵⁶ The attorney faced a sixty-day suspension and fined more than one thousand dollars for his appellate brief.¹⁵⁷ The attorney's argument and conclusion sections were as follows:

LAW

Section 13 of the Kentucky Constitution requires compensation for private property taken for public use. (1615) Furthermore Section two of the Kentucky Constitution prohibits injustices such as supra.

CONCLUSION

There is nothing in the record to show that the Appellant's property was destroyed because of emergency reasons and no order from the trial

150. *Id.*

151. *See id.* (failing to describe the "entirely new legal writing style").

152. *See, e.g.*, Plaintiff Motion for Reconsideration &/or Amendment of January 19, 2006 Order Granting Defendant's Motion to Dismiss at 6-7, *Capital Yacht Club v. Vessel AVIVA*, 2006 U.S. Dist. LEXIS 69416 (D.D.C. filed Sept. 27, 2006) (No. 04-0357), ECF No. 14 (quoting *Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80, 85-86 (1992)) (including block quote in substitution of rules statement).

153. *Id.*

154. *Id.* at *3 n.7

155. *Id.* at *6 (granting only a motion to dismiss).

156. *Ky. Bar Ass'n v. Brown*, 14 S.W.3d 916, 917 (Ky. 2000).

157. *Id.* at 919.

court permitting same, therefore Appellee has violated the laws of the land.¹⁵⁸

Even though the client was allegedly satisfied with the lawyer's performance, the court found the client's satisfaction lacked weight compared to the "grossly inadequate pleading".¹⁵⁹ The court described the brief as "a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."¹⁶⁰ Unlike in Illinois, intent attributes such as being "honest and trustworthy" were "completely irrelevant."¹⁶¹

Minnesota's Supreme Court has developed a different understanding of the need for sanctions for incompetent writing. In *In re Hawkins*, the lawyer was spared suspension because of his substantive legal knowledge.¹⁶² The court agreed that Hawkins violated the professional duty of competence by "the incomprehensibility of his correspondence and documentation."¹⁶³ Poor legal drafting could result in reduced public confidence in the legal system, but suspension was not necessary to protect the public from his skills.¹⁶⁴

Courts and disciplinary authorities already recognize that lawyers violate the professional duty of competence by failing to write at a particular level.¹⁶⁵ However, the bar has not been set high. Only the worst possible documents can trigger allegations of incompetence, and even then courts generally do not go beyond witty retorts or minor suspensions.¹⁶⁶ Although some attempts are made to educate the legal community about the bare minimum expectations, lawyers are generally left to divine which styles are punishable, which are frowned upon and ineffective, and those that are highly regarded.¹⁶⁷

Is there a way to bring order from chaos, and examine the unexamined assumptions?

III. ANY REFORMS TO ETHICAL WRITING SHOULD BE GROUNDED IN EMPIRICAL RESEARCH

Traditionally, U.S. law was developed by the accumulation of legal

158. *Id.* at 917.

159. *Id.* at 918.

160. *Id.* at 918–19 (quoting Kansas Bar Association's assessment in prior proceedings).

161. *Brown*, 14 S.W.3d at 919.

162. 502 N.W.2d 770, 771 (Minn. 1993).

163. *Id.*

164. *Id.*

165. *E.g.*, *Sambrano v. Mabus*, 663 F.3d 879, 882 (7th Cir. 2011).

166. *Id.*

167. *See id.* (failing to set standard).

knowledge through changes on a case-by-case basis.¹⁶⁸ The common law approach can be effective at ensuring the law remains flexible and can adapt to changes. However, what is gained in flexibility is at the expense of prior notice of likely outcomes. This is the tradition that led to a written constitution for the United States,¹⁶⁹ and the increased importance of statutory law. However, the common law still modifies statutory law, providing gap-filler rules when the statute is ambiguous, contradictory, or not grounded in public policy.¹⁷⁰

So what does that have to do with the ethical responsibilities of legal writing? Writing guidance from judges has developed in a piecemeal fashion through the common law process. It is time that clearer notice is provided to the legal community of what is competent legal writing. And by recognizing where the standards currently are, the standard can be elevated with providing legal practitioners notice. The ethical responsibilities of legal writing are currently dictated by common law accumulation of knowledge.¹⁷¹ This provides a flexible approach for judges to determine what is and is not good writing. However, judicial expectations of competent writing are significantly behind the current scholarship on legal writing.¹⁷² By utilizing the current scholarship, clearer standards can be codified in the Model Rules of Professional Responsibility to provide better notice and easier enforcement.

A. Meta-Analysis Can Find Trends in Legal Scholarship

A problem emerges: which scholarship? If lawyers will be professionally held accountable for their writing, there should be some threshold of confidence that the standards are grounded in sound logic. More importantly, it is critical that the standards for writing should not harm clients or upset delicate balances in the legal system, preferring particular parties without consciously intending to do so.

Any reform should be based on empirics.¹⁷³ Meta-analysis, or research aggregating the results from prior research, is the framework for

168. THE ROBBINS COLLECTION, SCH. OF L. U.C. BERKLEY, THE COMMON LAW AND CIVIL LAW TRADITIONS 1, <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.

169. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (discussing the goal of written constitutions to limit power of government).

170. *E.g.*, John E. Murray, Jr., *The Definitive "Battle of the Forms": Chaos Revisited*, 20 J.L. & COM., Fall 2000, at 1, 34–35 (discussing courts acknowledging drafting error in section 2-207 of U.C.C.).

171. *See supra* Part II.

172. *Cf. supra* Parts I, II (describing the competency of legal writing).

173. "Empirical" can be defined as "based on observation and evidence." BRADY ET AL., *supra* note 70, at 327.

capturing the complex knowledge of a community of scholars.¹⁷⁴ Because there is not a large enough body of empirical legal scholarship, the framework should be a qualitative-analysis to build the theory of good writing.¹⁷⁵ The goal of qualitative research is “to develop a theoretical description.”¹⁷⁶

B. Methodology for *Qualitative Meta-Analysis*

Here, the meta-analysis is used to re-evaluate the findings of prior research by conceptualizing the key concepts of good writing.¹⁷⁷ First, it is important to identify the research that will be included in the study.¹⁷⁸ Potential articles were found by searching the *Westlaw* database for journal articles published after January 1, 2000 containing the phrases “legal writing” and “good writing,” and either “survey,” “experiment,” “content-analysis,” or “statistic.”¹⁷⁹ Additionally, any original, empirical study published in *The Journal of Appellate Practice and Process*, *Legal Writing: The Journal of the Legal Writing Institute*, and *Journal of the Association of Legal Writing Directors* were included, as those journals were more likely to publish relevant articles. Articles that did not produce original, empirical research were then excluded, as were articles which were not focused on civil litigation documents within the United States.¹⁸⁰

174. Gerard E. Dallal, *Meta Analysis*, JERRY DALLAL, <http://www.jerrydallal.com/LHSP/meta.htm> (last modified May 24, 2016).

175. Rita Schreiber et al., *Qualitative Meta-Analysis*, in *COMPLETING A QUALITATIVE PROJECT: DETAILS AND DIALOGUE* 311, 311 (Janice M. Morse ed., 1997).

176. *Id.* Here, it is not likely a concern that a particular dimension of good legal writing is associated with *X* percent change of persuasiveness, but rather the question of “Does dimension *Y* matter in terms of writing competence?” Furthermore, the traditional literature review is not sufficient to achieve a qualitative meta-analysis. *See id.* at 314. A literature review is more at home with a historical analysis of a field, while a qualitative meta-analysis is the social science variant. *See generally id.* (providing a collection of essays on qualitative writing).

177. *See* Rona Campbell et al., *Evaluating Meta-Ethnography: A Synthesis of Qualitative Research on Lay Experiences of Diabetes and Diabetes Care*, 56 *SOC. SCI. & MED.* 671, 672 (2003).

178. *See id.* at 673.

179. *See, e.g.*, Mary B. Beazley, *Better Writing Better Thinking: Using Legal Writing Pedagogy in the ‘Casebook’ Classroom (Without Grading Papers)*, 10 *LEGAL WRITING* 23, 28 (2004). The requirement for “good writing” to be present was added to limit the number of potentially relevant articles. Without that condition, there are 3681 potentially relevant articles.

180. *See* Ben G. Blount, *Anthropological Linguistics*, in *CULTURE AND LANGUAGE USE* 29, 32–33 (Gunter Senft et al. eds., 2009) (discussing the Sapir-Whorf hypothesis, which claims language affects individual thinking); Campbell et al., *supra* note 177, at 673–74 (selecting studies by using questions that specified geographic scope, target of research, and a broad range of methodologies); *see also* George Orwell, *Politics and the English Language*, 13 *HORIZON* 252, 256–57, 261–62 (1946) (formulating concepts later incorporated into

The initial search in *Westlaw* returned 198 potentially relevant studies. Eight articles from the *Westlaw* search matched the criteria. One of those ten articles was removed as it was a republication of a study that was originally published prior to January 1, 2000.¹⁸¹ An additional eight articles were included from the specific journals. Although fifteen articles would be insufficient for most quantitative analyses, a sample size larger than ten can be sufficient for qualitative meta-analysis.¹⁸²

C. Results from Qualitative Meta-Analysis

Of the fifteen articles included in the meta-analysis, eight used surveys as their underlying methodology.¹⁸³ The sample includes surveys that were quantitative, qualitative, and mixed methods. One article relied on a focus group.¹⁸⁴ Five used content-analysis to derive descriptive statistics for briefs.¹⁸⁵ And finally, one used content-analysis to create variables for a logistic regression.¹⁸⁶

Across the empirical studies, a key theme developed: good writing should be concise. For example, Flammer concluded from a survey with 292 responses that the vast majority of judges preferred succinct

newspeak and doublethink); Schreiber et al., *supra* note 175, at 318 (describing social science empirical methodologies while relaxing requirement methods must be exactly equivalent in meta-analysis).

181. See Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 MICH. B.J. 326 (1994), reprinted in Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 84 MICH. B.J. 44 (2005).

182. See Campbell et al., *supra* note 177, at 673.

183. Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, 43 TEX. J. BUS. L. 593, 629 (2009); *Judging by the Numbers*, *supra* note 41, at 17; Sean Flammer, *An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 LEGAL WRITING 183, 185 (2010); Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 80 (2003); Susan McClellan & Constance Krantz, *Improving Legal Writing Courses: Perspectives from the Bar and Bench*, 8 LEGAL WRITING 201, 204 (2002); Merling, *supra* note 96, at 301; Kristen K. Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think About the way Lawyers Write*, 8 LEGAL WRITING 257, 260–61 (2002); Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1, 5 (2009).

184. Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 LEGAL WRITING 363, 376–77 (2010).

185. See *Competing Stories*, *supra* note 28, at 106; Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. APP. PRAC. & PROCESS 75, 75 (2010); Judith D. Fischer, *supra* note 76, at 4; Gallacher, *supra* note 27, at 462–63; Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, LEGAL COMM. & RHETORIC, Fall 2013, at 229, 230.

186. See Long & Christensen, *supra* note 106, at 155.

pleadings.¹⁸⁷ However, there are several dimensions to wordiness. First, there is verbosity, where multiple words substitute for the meaning of one word.¹⁸⁸ Second, citations should be minimized to avoid confusion, unlike the style of law reviews.¹⁸⁹ Finally, concise writing incorporates an element of organization, as unnecessary analysis will not make the writing concise.¹⁹⁰ Although the logistical regression of readability does not suggest that a lawyer can win solely based on a readable brief, the literature generally supports including a multidimensional concept of conciseness as an element of good writing.¹⁹¹

A secondary theme also emerged in the meta-analysis: empirical evidence tends to support including a narrative writing style within the concept of good writing. In a quasi-experimental survey, 64.2% of respondents preferred briefs written in a narrative style.¹⁹² Additionally, even complex stories can be successful in litigation.¹⁹³ Judges already have some expectations of narrative writing because many lawyers are describing litigants in their functional roles (employer, agent, etc.), rather than their litigation roles (plaintiff, appellee, etc.).¹⁹⁴

Although less expansive than the claims of best practices writers, empirical research does support their claims for using concise writing and narrative forms. Lawyers generally write better when they incorporate these elements into their own writing.

IV. GOOD LEGAL WRITING SHOULD BE CODIFIED IN ABA MODEL RULES

As a result of the meta-analysis, two dimensions of good writing have been clarified.¹⁹⁵ However, the question arises as to the best way to incorporate the findings into the legal profession. Clearly, incorporation

187. See Flammer, *supra* note 183, at 198, 204 (survey of judges).

188. See Abner & Kierstead, *supra* note 184, at 380 (focus group of lawyers); Orwell, *supra* note 180, at 264 (“If it is possible to cut a word out, always cut it out.”).

189. See Baruch, *supra* note 183, at 630 (survey of judges) (stating that “use of string cites” is one of the briefing practices that infuriates a substantial number of judges).

190. Vorenberg & McCabe, *supra* note 183, at 18–19 (survey of judges, lawyers, and clerks).

191. Long & Christensen, *supra* note 106, at 156, 161–62 (using backward elimination to eliminate variables from model while having low variance in readability scores); see, e.g., *id.* at 161 (“Finally, nothing in our study suggests that legal brief writers should not seek to write shorter, rather than longer, sentences and use shorter, rather than longer, words.”). *But see* KING ET AL., *supra* note 70, at 21, 141 (suggesting low variance on dependent variable is a problem to inference, as is ad hoc adjustments in statistical models).

192. *Judging by the Numbers*, *supra* note 41, at 19 tbl.2.

193. E.g., *Competing Stories*, *supra* note 28, at 118–19.

194. Fischer, *supra* note 76, at 18 tbl.7 (more references to names and roles than solely trial court designation or appellate court designation).

195. See *supra* Part III.

into the legal writing curriculum is a must. However, variables outside of the academy may be undermining the best efforts of legal writing experts.¹⁹⁶ There seem to be three likely alternatives for regulating the legal profession, aside from continuing the common law approach: statutory, rules of procedure, and rules of professional responsibility.

Statutory codification of the elements of good writing would not be a good fit. Legislatures have the duty to protect the welfare of its citizens. And protecting citizens from incompetent lawyers helps citizens to better assert their rights. But legislatures, lacking expertise, have delegated authority to the courts to regulate the basics rules of the legal profession.¹⁹⁷ Given the limited empirical knowledge even lawyers have about legal writing, state legislatures could not be expected to succeed creating effective, technical rules. Lawyers are gaining this expertise, and would be prime candidates to create administrative regulations for legal writing. Furthermore, it would seem unrealistic to gain the support from the legal profession for legislative changes when many of the basic understandings of the legal profession require some level of self-regulation.¹⁹⁸ Therefore, two alternatives remain: administrative codification in rules of procedure or in the rules of professional responsibility.

Some rules of procedure already include instructions for how to write or format documents.¹⁹⁹ However, these rules generally only regulate the form of the writing, not the content or presentation. For example, the FRCP Rule 8 already requires pleadings to contain “short and plain statement[s].”²⁰⁰ However, the rules of civil procedure are structured to apply different sets of rules to pleadings, discovery, and other motions. A new rule on writing would either have to be repeatedly added to these different sections, or awkwardly create a section applying to all forms of writing. And duplicate rules would need to be added to the rules of appellate procedure, bankruptcy procedure—and perhaps eventually to the rules of criminal procedure. Placing the new rule instead in the rules of professional responsibility would limit duplication, and

196. See Gallacher, *supra* note 27, at 491 (citing spurious influences on analysis).

197. *E.g.*, N.D. CENT. CODE § 27-02-09 (Repl. vol. 2016) (treating statutory rules of procedure as court rules amendable by the state supreme court); see also LEGISLATORS OCCUPATIONS 2015, NAT’L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Occupations.pdf (the percentage of legislators with legal backgrounds varies by state with a range from three to thirty percent).

198. See, *e.g.*, MODEL RULES OF PROF’L CONDUCT pmbl., para. 6 (AM. BAR ASS’N 2016) (“A lawyer . . . should help the bar regulate itself in the public interest.”).

199. *E.g.*, FED. R. CIV. P. 8(a)(1)–(2).

200. *Id.*

allow for simpler updates as knowledge progresses.

Some may point out that the FRCP Rule 12(e) allows a party to seek clarification when faced with poorly written pleadings. Requiring a party to provide clarification, some may argue, would be a sufficient check on incompetent lawyers. However, this is an insufficient remedy. First, clients cannot use the motion against their own attorney. Rule 12(e) does protect other parties from interpreting incoherent English, but the party who is hurt the most—the lawyer’s client—has no recourse. Second, its terms only apply to pleadings, not to briefs or motions or memoranda in support of a motion. This leaves a vast amount of trial writings outside the scope of Rule 12(e)’s limited protections. Finally, it requires an opposing counsel to aid the client, which would violate the principles of an adversarial system. A client should not be forced into this situation.

Almost by default then, the best alternative is placing a new rule into the rules of professional responsibility. In one location, a rule can be easily placed to apply to a broad range of trial documents, and can be easily updated to apply to other contexts if improved knowledge indicates this would be prudent. Additionally, placement in the rules of professional responsibility is better from a philosophical perspective. It seems to make more sense that good writing is not merely a requirement for filing in a court, but rather is a duty that a lawyer owes to his or her client.²⁰¹ In the end, the attorney is the agent for the client: it is the client’s voice that the lawyer is putting onto paper. The model rules also would provide the client a non-judicial remedy by allowing the client to report poor performance to the local disciplinary authority.²⁰² This approach would be also more reliable than hoping a judge is annoyed enough by the submitted writings to publicly chastise or punish the offending lawyer.

Therefore, the following language should be included in the Model Rules of Professional Responsibility:

A lawyer shall competently draft civil litigation documents. Competent drafting litigation requires a lawyer to incorporate objective elements of good writing.

Comment 1: Competent drafting is concise. Fewer words should be used when possible. Citations should be reduced to only those authorities that are necessary to include. And unnecessary analysis

201. See, e.g., *Sambrano v. Mabus*, 663 F.3d 879, 882 (7th Cir. 2011) (“Judges . . . have a duty to ensure the maintenance of professional standards by [attorneys].”).

202. This presupposes clients would be able to effectively judge quality under the proposed standards. However, since other lawyers can report the shoddy work, an aggrieved client would be better served by more options. See MODEL RULES OF PROF’L CONDUCT r. 8.3(a).

should be removed from documents.

Comment 2: When drafting briefs and motions, lawyers should write in a narrative style, focusing on the parties and underlying issues while incorporating traditional legal analysis.

Comment 3: This provision is not intended to apply in criminal cases where the defendant has Sixth Amendment rights which require different duties from lawyers.

The structure of the proposed language is derived from the current competency.²⁰³ It should be established as a separate rule to avoid complications later with diverging concepts.²⁰⁴ Hypothetically, it is possible general attorney competence could occur frequently because of a lack of access to legal research databases, while lack of legal writing competency could be caused by improper education or taking on too many cases.

Lawyers will be able to learn about the elements of good writing from the comments to the proposed rule. Derived from the qualitative meta-analysis, the elements of good writing would be objective, not vague, and derive from real-world data. Most importantly, it would provide practical guides to attorneys to improve their skills.

CONCLUSION

The legal community's understanding of legal writing has drastically changed through U.S. history. Instead of being left to the whims of various masters, legal writing experts are developing sophisticated methods and strategies for communicating complex materials. Scholars are beginning to employ empirical techniques to solve the new and unique problems within the legal writing community.

It seems these techniques have not been employed in practice though. Judges often cannot describe exactly what is wrong with bad writing, thus failing to provide useful information for lawyers to improve their skills. There is enough research to aggregate current findings to distill the elements of competent writing. Lawyers should take advantage of the new research and implement in practice.

By incorporating these standards into a new rule of professional responsibility, lawyers will be held accountable to advocate for their clients in the best way possible. Barely comprehensible documents should not be standard. Rather, as legal decisions are increasingly made

203. *Id.* at r. 1.1.

204. See Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 *GEO. J. LEGAL ETHICS* 313, 325–28, 330 (2004) (discussing problems of Model 1.14 applying to diminished capacity caused by different sources).

more reliant on written communication, the importance of ethical legal writing will be critical for the profession.