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Competent Legal Writing - A Lawyer's Professional Responsibility

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COMPETENT LEGAL WRITING—A LAWYER'S PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

The legal profession is constantly evolving to keep pace with our increasingly complex society.[1] Today, the legal profession "is larger and more diverse than ever before."[2] Despite this transformation, "the law has remained a single profession identified with a perceived common body of learning, skills and values."[3] This common body of learning,

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1. Law is constantly evolving to reflect social and technological changes in our society. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969). *See also* James Douglas, *The Distinction Between Lawyers as Advocates and as Activities; and the Role of the Law School Dean in Facilitating the Justice Mission*, 40 CLEV. ST. L. REV. 405, 409 (1992) (asserting that "[p]eople do not respect institutions that advocate beliefs too distinct from their dominant beliefs.").

In the eighteenth century, the industrial revolution resulted in rapid change to English law. The result was several new areas of commercial law, including negotiable instruments, sale of goods, secured transactions, insurance, and corporations. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 5-6 (1977). The United States's industrial revolution of the nineteenth century spurred the creation of substantial federal and state regulations, including labor laws, and food and drug regulations. In this century, the proliferation of law continues. Substantial federal regulations have been passed, including consumer protection, environmental, and federal securities laws. Many new tort rights have been created, including strict liability and the right of privacy. *See generally* Ronald A. Anderson, *Law Inventory*, 47 NOTRE DAME LAW. 879 (1972). Historically, law was primarily judicially created. Over the past century, the legislative process has grown increasingly important. *See* JAMES WILLARD HURST, DEALING WITH STATUTES (1982).

2. AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATION CONTINUUM REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 11 (1992) [hereinafter THE MACCRATE REPORT]. The legal profession has dramatically transformed, "not only in its demography, but in how lawyers practice, the variety of services they provide, the multiplying of areas of law, the differentiation of practice settings and the different methods for delivering legal services." *Id.* One trend is lawyer specialization, in other words, learning more and more about particular areas of law. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 203 (1986) ("In actual practice, the majority of lawyers are de facto specialists and so regard themselves." (footnote omitted)); THE MACCRATE REPORT, *supra* note 2, at 11 ("Against a background of great growth in law and its complexity, profound social, economic and technological change, and a societal movement toward greater specialization, we note how in virtually every practice setting the individual lawyer is compelled to concentrate in one or several areas of law . . . ."). *See also* Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203, 206 (1995) (stating "technological developments in recent years have caused an explosion in the number of legal research resources").

3. THE MACCRATE REPORT, *supra* note 2, at 11.

skills, and values constitutes the fundamental elements of competent representation.[4] Writing is one of the essential skills of competent representation.[5]

"Law is a profession of words."[6] Lawyers use words, both written and oral, in a wide array of contexts—to advise, to advocate, to elicit information, to establish legal obligations, and to effectuate legal transactions.[7] To provide competent representation, a lawyer must communicate effectively.[8] However, since Dean Langdell introduced the Socratic method, law schools have elevated oral communication skills over written communication skills.[9] Writing has suffered the status of a poor relation in the law school curriculum.[10] Nonetheless, writing is central to the practice of law.[11]

"Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted . . . ."[12] The goal of legal

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4. *See infra* notes 173-79 and accompanying text.

5. *See* THE MACCRATE REPORT, *supra* note 2, at 139 (listing communication as one of the 10 fundamental lawyering skills); Bryant G. Garth & Joanne Martin, *Law School and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 474 (1993) ("The clear winners on the hierarchy . . . are communication skills—written and oral."); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH L. REV. 35, 37 (1994) (stating that writing has become even more central to legal practice); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 249 (1996) ("Legal research and legal writing have traditionally been identified as the two most fundamental skills . . . .").

6. DAVID MELLINKOFF, LANGUAGE OF LAW vii (1963). "To be of any use, the language of the law . . . must not only express but convey thought." *Id.*

7. For examples of these contexts, see THE MACCRATE REPORT, *supra* note 2, at 172-73.

8. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9 (1979) [hereinafter LAWYER COMPETENCY]; Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 273-74 (1978); John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 18-19 (1988). Competent representation is a lawyer's professional responsibility. *See infra* notes 173-79 and accompanying text.

9. *See* Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 109-10 (1998). The Socratic method stresses oral skills; writing skills are a "trade" skill learned on the job. *Id.* at 110.

10. *See id.* at 110; Silecchia, *supra* note 5, at 247 ("The popularity of skills training has waxed and waned . . . .").

11. "Words are the most important tools of lawyers, and written words are the most common form through which lawyers effectuate some control over events." Ollivette E. Mencer, *Unclear Consequences: The Ambient Ambiguity*, 22 S.U. L. REV. 217, 218 (1995). "The current generation of lawyers is encountering a changing legal practice in which legal writing . . . plays a more central role." Rideout & Ramsfield, *supra* note 5. For example, many courts are limiting or eliminating oral arguments. *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 3 (1986); Martha F. Newcomb, *Speaking Out—Recent Rule Changes Streamline Appellate Process*, 46 R.I. B.I. 21 (Jan. 1998).

12. John D. Feerick, *Writing Like a Lawyer*, 21 FORDHAM URB. L.J. 381, 381 (1994). "The law is very much a writing profession." Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1, 27 (1992) (citing Richard D. Lee, Presentation at the Annual Meeting of the AALS (Jan. 3, 1991)). "Legal writing is at the heart of law practice." COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A.B.A., LONG-RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED

writing is to convey information to the intended audience.[13] A lawyer does not competently represent the client if poorly written legal papers can be refuted by opposing counsel or misinterpreted by the judge.[14] Nor does a lawyer competently represent the client if a contract is so poorly drafted that the contracting parties cannot understand the terms well enough to implement them.[15] Poor legal writing produces serious consequences, including wasted resources and diminished respect for lawyers and the law.[16] Additionally, it leaves lawyers open to malpractice and disciplinary proceedings.[17]

Legal writing often fails to communicate effectively.[18] The problem

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STATES 29 (1987). *See* LAWYER COMPETENCY, *supra* note 8, at 9 (listing the ability to write effectively as a fundamental skill); Garth & Martin, *supra* note 5, at 472-99 (providing surveys to illustrate that writing is considered an important lawyering skill); Geoffrey C. Hazzard, Jr., *Curriculum Structure and Faculty Structure*, 35 J. LEGAL EDUC. 326, 328 (1985) (identifying "the ability to . . . write clearly and concisely" as a basic skill).

13. "The purpose of all writing is communication." Mencer, *supra* note 11, at 228. *See infra* notes 22-23 and accompanying text. *See* ROBERT B. SMITH, THE LITERATE LAWYER: LEGAL WRITING AND ORAL ADVOCACY vii (3d ed. 1995) (citing John Dryden: "The chief aim of the writer is to be understood."). As one writer noted:

> At the core of all writing is communication. For lawyers, communication is essential for many purposes: to help a client understand his or her legal situation; to resolve legal problems; to set out rights and obligations in contracts, wills, and other legal documents; and to draft laws and regulations that cover the rules the government wants us to live by.

Feerick, *supra* note 12, at 383. For a discussion about the intended audience, see *infra* notes 38-42 and accompanying text.

14. *See* Feerick, *supra* note 12, at 383.

15. Memorializing a business agreement in writing is particularly important because often parties who must implement the terms were not involved in setting the terms. *See* Connie R. Gale, *Corporate Plain English*, 63 MICH. B.J. 919, 919 (1984) ("Corporate transactions are committed to writing, and it is important that the business people who must implement the transactions understand the written agreements.").

Mutual understanding is essential to formation and interpretation of a contract. Generally, the parole evidence rule prohibits looking beyond the four corners of the document. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1979). Statutes are subject to a similar doctrine known as the plain meaning doctrine, also known as new textualism. *See* United States v. Locke, 471 U.S. 84, 94-95 (1985); Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Unclear statutes raise similar concerns. *See* Feerick, *supra* note 12, at 383.

16. *See* TOM GOLDSTEIN & JETHRO K. LIEBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 4-5 (1991). "In the legal arena, an ambiguous communication can result in any consequence, from millions of dollars in needless expense, to loss of respect for the profession." Mencer, supra note 11, at 217. When the intended audience cannot understand the document, it is alienated. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 531 (1984-85); "Bad legal writing can result in increased legal fees for clients, detrimental reliance by citizens, thousands of hours of court resolution, loss of integrity for our legal institutions, and a disrespect for law and lawyers." Feerick, *supra* note 12, at 383-84; Mencer, *supra* note 11, at 217. "Serious legal consequences can result from miscommunication. Consequences can range from loss of money for clients, needless hours of court resolution, and disdain for (and even malpractice actions against) lawyers." *Id.* at 228.

17. *See* Feerick, *supra* note 12, at 384; Mencer, *supra* note 11, at 228. *See also infra* note 179.

18. *See infra* note 23 and accompanying text.

is not new. Complaints about legal writing span centuries.[19] The solution is simple: lawyers should improve their writing. Implementing the solution, however, is more challenging.

Advocates for better legal writing[20] have waged a long-standing war to improve legal writing. Although they have won numerous battles, many lawyers resist changing the way they write. Resistance to change has been attributed primarily to four factors.[21] First, many lawyers do not perceive a problem with their writing. Second, they take comfort in the traditions of legal writing. Third, they are not willing to bear the cost associated with change. Fourth, many lawyers lack sufficient training to change their writing effectively. Although there is truth underlying each of these reasons, they do not produce sweeping change because they overlook an overriding reason why lawyers resist change—these arguments, often, are poorly framed. First, there is disagreement about the definition of key terms like *legalese* and *plain language*. Second, criticism of legal writing is permeated with negative overtones.

To overcome this resistance and improve legal writing, the profession must mandate competent legal writing. I propose that the rules of professional responsibility expressly require competent legal writing. In addition to this express requirement, the commentary to the rules should provide guidelines and examples to delineate what constitutes competent legal writing.

In this article, I begin by defining the problem and briefly tracing the development of the war against bad legal writing. Next, I examine the reasons that lawyers resist changing the way they write. I examine how disagreement over definitions and the pervasive negative criticism of legal writing counteract valid arguments for change. Finally, I suggest the next step: If better legal writing is to become an integral part of competent representation, it must be mandated by the profession.

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19. These complaints have been chronicled in detail by others. *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 156-162 (1986); GOLDSTEIN & LIEBERMAN, *supra* note 16, at 15-18; George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 347 (1987). Among my favorites are Jeremy Bentham's complaints which include calling legal writing "excrementious matter," and "literary garbage." MELLINKOFF, *supra* note 6, at 262 (quoting from THE WORKS OF JEREMY BENTHAM 260 (Bowring ed. 1843)). Bentham believed that lawyers had mastered "the art of poisoning language in order to fleece their clients." *Id.* at 261 (quoting from THE WORKS OF JEREMY BENTHAM 260 (Bowring ed. 1843)).

20. Better legal writing advocates include academics and practicing lawyers. *See* Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 56 (1994-95). Plain language advocates are a subset of better writing advocates.

21. *See infra* Part IV.

II. DEFINING THE PROBLEM

To effectively discuss the problems with legal writing, it is necessary to establish a common understanding of the problem. There are many types of legal writing—judicial opinions, legislation, private agreements and other legal documents, and correspondence with clients or third parties. Each type of legal writing has its own substance and style; however, the fundamental goal of each writing is the same—to communicate effectively.[22] Empirical studies, however, indicate that a significant percentage of legal writing is difficult to understand.[23] Professor Mellinkoff uses the label "the language of the law" and describes it as "the customary language used by lawyers . . . . It includes distinctive words, meanings, phrases and modes of expression. It also includes certain mannerisms of composition not exclusive with the profession but prevalent enough to have formed a fixed association."[24] These results get labeled "bad legal writing."[25]

There is no precise definition of bad legal writing. Bad legal writing, among other terms, is a label used to denote ineffective legal writing, that is, writing that does not communicate effectively. Among other things, ineffective legal writing has been labeled *gobbledygook*[26] and

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22. *See supra* notes 12-13 and accompanying text. One commentator questions whether there can be any meaningful discussion about legal writing if it is defined "to encompass everything lawyers write." Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 600 (1986). He claims it "define[s] a category too heterogeneous to merit uniform treatment." *Id.* However, there are some generalizations that can be made, and these generalizations are the focus of this article.

23. *See* Benson, *supra* note 16, at 568; Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Gopen, *supra* note 19, at 333 (legal writing "is impossible to understand"). "[L]egal writing bedevils, confounds, and confuses average people and leads them to add their voices to a growing chorus of critics of the legal profession." Thomas W. Taylor, *Plain English For Army Lawyers*, 118 MIL. L. REV. 217, 217 (1987).

24. MELLINKOFF, *supra* note 6, at 3.

25. In this article, I use the term "bad legal writing" to denote legal writing that does not communicate effectively. This term has been used by the American Bar Association and many scholars in the area including Professors Feerick, Laycock, Mellinkoff, Ramsfield, Rideout, and Stark. *See* DAVID MELLINKOFF, LEGAL WRITING: SENSE & NONSENSE 44 (1982); Feerick, *supra* note 12, at 382; Douglas Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEGAL WRITING 83 (1990); Rideout & Ramsfield, *supra* note 5, at 39 n.10; Stephen Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

26. *See* David C. Elliott, *A Model Plain-Language Act*, 3 SCRIBES J. LEGAL WRITING 51, 57-59 (1992); Janice C. Redish, *The Language of the Bureaucracy, in* LITERACY FOR LIFE 151 (Richard W. Bailey & Robin Melanie Fosheim eds., 1983). The term "gobbledygook" was originally used by Louis Carroll in *Through the Looking-Glass and What Alice Found There.* Congressman Maury Maverick applied it to legal writing. *See* Reed Dickerson, *Readability Formulas and Specifications for a "Plain English" Statute, Part 2*, 64 MICH. B.J. 714, 714 (1985); Eugene C. Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A. J. 1057, 1057 (1954) ("'Lawyers' language has long been regarded as the prime example of complex, unreadable, often unintelligible English. Such phrases as 'legal technicality,' 'fine print,' 'lawyers' Mumbo-Jumbo,' etc., should be a warning to legal writers. Maury Maverick summed it up in a new word he coined himself—'gobbledygook!'").

legalese.[27] Bad legal writing encompasses a long list of problems including

> archaic lawyerly terms such as "hereinbefore," "notwithstanding," and "arguendo," legal doublets such as "null and void" and "cease and desist," compound prepositions like "in the event that" and "with reference to," general verbosity, multiple negatives, frequent qualification and exception, the corruption of common words by assigning to them purely legal meanings, dangling modifiers, long strings of nouns, poor punctuation, convoluted sentences, tortuous phrasings, and boring passages filled with passive verbs.[28]

Bad legal writing is attributed to many factors, including "[l]awyers don't know basic grammar and syntax. They can't say anything simply. They have no judgment and don't know what to include or what to leave out."[29] It has also been attributed to fear, inertia, and self interest, as well as various external factors.[30]

Professor Mellinkoff summarizes criticism of legal writing when he describes it as "wordy, unclear, pompous, and dull."[31] Legal writing has been branded the "medieval armor of lawyers."[32] It has also been called "mystical, archaic, redundant, complex, ambiguous and—just plain confusing!"[33] Advocates for change assert that legal writing "glaz[es] the

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27. *See infra* notes 95-104 and accompanying text.

28. Hyland, *supra* note 22, at 601-02 (footnotes omitted). Bad legal writing is also riddled with "passive verbs, impersonality, nominalizations, long sentences, idea-stuffed sentences, difficult words, double negatives, illogical order, poor headings, and poor typeface and graphic layout." Benson, *supra* note 16, at 531. Legal writing has also been described as including "archaisms and long, overly inclusive and convoluted sentences." Redish, *supra* note 26, at 156. *See* Stanley M. Johanson, *In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 37, 38 (1992) (anything that lawyers write with "inessential legalisms that clutter so much mediocre drafting (*such* and *said* as demonstrative adjectives, *same* as a pronoun, *aforesaid*, *whereas*, *hereinabove*, and the like).").

29. GOLDSTEIN & LIEBERMAN, *supra* note 16, at 3. Quoting a survey of 650 people, Dean Goldstein and Professor Lieberman described, legal writing as "flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon- and cliche- ridden, ponderous, weaseling, overblown, pseudointellecutal, hyperbolic, misleading, incivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy." *Id.*

30. *See infra* note 14 and accompanying text.

31. MELLINKOFF, *supra* note 6, at 24. The problem with legal writing is "its style is strange, and it cannot be understood." Benson, *supra* note 16, at 520. The use of technical language is not unique to the legal profession. *See also* Redish, *supra* note 26 (explaining similar problems with bureaucratic writing which overlaps with legal writing).

32. Benson, *supra* note 16, at 522.

33. Mencer, *supra* note 11, at 217. *See* RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 1 (3d ed. 1994).

> We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause.

Id. See also Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136 (1985).

eyes and numb[s] the minds of [the] readers."[34]

A fundamental reason for bad legal writing is that lawyers ignore the writing process.[35] Generally, when lawyers write, they are so focused on the substance they want to convey that they forget to focus on the writing process. No matter what the subject matter of the writing, a lawyer must have a comprehensive substantive understanding of that subject matter.[36] Only if the lawyer understands the relevant facts and laws can the lawyer begin to draft an appropriate writing.[37] However, a comprehensive substantive understanding of the subject matter by itself is not sufficient. The lawyer must also understand and apply the writing process. Failure to apply the steps of the writing process will often result in bad legal writing. Commonly overlooked steps in the writing process include failure to (1) identify the intended audience, (2) organize and write carefully, and (3) edit and rewrite.

Moreover, legal writing is often ineffective because it is not written for the appropriate audience. An essential part of the writing process is to determine the intended audience and then write for that audience.[38] Although this is simple to state, it is hard to implement. When writing,

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34. WYDICK, *supra* note 33, at 1.

35. Writing is a process. Although the labels may vary from writer to writer, there are steps to the writing process that include understanding the substance, identifying the audience for the document, organizing the substance, expressing the substance in writing, and editing and revising the writing. *See* SUSAN L. BRODY ET AL., LEGAL DRAFTING 23-59 (1994) (discussing the seven steps of legal drafting: (1) understand the audience, (2) gather the facts, (3) know the law, (4) classify, organize, and outline, (5) write carefully, (6) test for consequences, and (7) edit and rewrite); VEDA R. CHARROW ET AL., CLEAR & EFFECTIVE LEGAL WRITING 81-84 (2d ed. 1995) (introducing a systematic approach to legal writing comprised of three stages: pre-writing, writing, and post-writing); GOLDSTEIN & LIEBERMAN, *supra* note 16, at 42-50 (discussing the ten steps to writing: (1) develop a theory, (2) research, (3) create a rough outline, (4) reassess theory, (5) create more formal outline, (6) compose, (7) reorganize, (8) rewrite, (9) edit, and (10) edit again); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEY, AND STYLE 55-63 (2d ed. 1994) (describing four stages of writing: (1) analyzing issues and raw materials, (2) organizing materials, (3) initial drafting, and (4) rewriting several drafts); MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 354 (2d ed. 1993) (the writing "process incorporates five stages: prewriting, writing, rewriting, revising, and polishing.").

36. *See* J.K. AITHENS, THE ELEMENTS OF DRAFTING 1 (1968).

37. In some instances, legal writing is ineffective because the lawyer does not conceptually understand the subject matter well enough to communicate it to others. This, however, is a separate issue. *See* Hyland, *supra* note 22, at 621.

38. *See* BRODY ET AL., *supra* note 35, at 20 (The writer must "anticipate who will read, interpret, implement, and be governed and affected by . . . [the writing] and draft it accordingly."); BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 2-4 (2d ed. 1992).

Different writings are used by different audiences. For example, a partnership agreement is used by the partners, lawyers, and accountants. It also may be used by the estate of a deceased partner, a business seeking to acquire the partnership, or a third party supplier. *See* BRODY, RUTHERFORD, VIETZEN & DERNBACH, *supra* note 35, at 26. Legislation is used by the group the legislation is directed to govern, and if challenged by lawyers and the court. Pleadings are used by the litigants, the lawyers, and the court.

lawyers often forget to consider who will be reading the document.[39] Furthermore, lawyers seldom write for a single audience.[40] Each audience reads the writing for its own purpose; additionally, each audience has "different levels of expertise, experience, and patience."[41] Writing a document for multiple audiences is difficult, particularly when each audience has a different background and reads it for a different purpose.[42]

Some lawyers do not follow the writing process because they do not understand it or because they lack the necessary skills to implement it. Some have never learned proper grammar and punctuation.[43] However, even lawyers who understand the writing process and have sufficient skills to implement it often do not. The reason is frequently one of time. Lawyers tend to work under intense time pressures.

Revising forms and precedents, rather than drafting from scratch, is one technique lawyers use to save time. Unfortunately, this time saving devise encourages lawyers to circumvent important steps in the writing process. One frequently skipped step is the organization step.

The organization step is intended to focus the lawyer's attention on the logical sequence of presentation. When lawyers skip this step, rather than consider an alternative ordering of the provisions of a document, they copy the organization of a prior document. Although the organization may have been appropriate in the original document, it is not necessarily appropriate for the current writing. Furthermore, when lawyers rely on forms and precedents, they are much less likely to invest time examining "boilerplate" provisions—provisions that they do not perceive as transaction specific. Rather than draft new provisions, they mechanically include existing boilerplate provisions. The result is that ambiguities are often overlooked, and unnecessary, and sometimes even inappropriate provisions, are included. The final product is not tailored to the particular transaction.

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39. Even when lawyers write for other lawyers, it is not always clear that the other lawyers understand. "Modern law is complex, and a lawyer who specializes in one area of law may not be familiar with the nuances of other areas." CHARROW ET AL., *supra* note 35, at 98.

40. Every legal writing has its own audience. Some writings are simple communications to the client; here the intended audience is the client. However if the communication is written by an associate, the audience may also be the partner. Contracts are written for the clients; however, they are also written for the potentially hostile audience. For example, while initially drafted for the client, it is also drafted for the client's lawyer if the client decides she is no longer happy with the agreement. The audience of litigation papers depends on the documents. Pleadings and interrogatories are intended for the court, the lawyers and the parties to the law suit; however, motions are intended solely for the court and lawyers.

41. RAY & RAMSFIELD, *supra* note 35, at 25. *See* CHARROW ET AL., *supra* note 35, at 98-104.

42. "When language written for one audience is directed instead to another, the resulting confusion should not be surprising." Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 99 (1988).

43. *See infra* note 155 and accompanying text.

Existing forms and precedents are often replete with language "that [lawyers] would not otherwise use in ordinary communications but for the fact that they are lawyers."[44] They also often contain poor composition and grammar. Although most lawyers review and edit their writing for substantive issues, few review and edit their writing for style. Failure to implement the entire process results in the perpetuation of bad legal writing.

III. THE WAR AGAINST BAD LEGAL WRITING

The war against bad legal writing has been waged for centuries. However, over the past half century, advocates for change have won many significant battles. Federal reform began in the 1930s with the promulgation of the Federal Rules of Civil Procedure and the adoption of notice pleading. Under Rule 8, a pleading must contain "a short and plain statement" of jurisdiction, the claim, and a demand for judgment.[45] This rule replaced technical and formalistic pleading requirements. In the 1940s, the federal government attempted to make federal legislation regarding price control understandable by the businesspeople to whom it was directed.[46]

The call for reform was also trumpeted by academics. Professor Fred Rodell criticized legal writing in his article *Goodbye to Law Reviews*.[47] Professor Rudolf Flesch published two books advocating plain language.[48] An abundance of literature on plain language followed.[49] Although this literature explains the problems with most legal writing and offers solutions, scholarship, by itself, cannot solve the problem.[50]

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44. Stanley Robinson, *Drafting—Its Substance and Teaching*, 25 J. LEGAL EDUC. 514, 516 n.12 (1973).

45. FED R. CIV. P. 8(a).

46. The Office of Price Administration (OPA) attempted to impose price control during World War II; however, OPA discovered that businesspeople could not understand the regulations. OPA hired Professors Carvers and Flesch to help the agency communicate more effectively. *See generally* Dickerson, *supra* note 26.

47. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

48. *See generally* RUDOLF FLESCH, THE ART OF PLAIN TALK (1946); RUDOLF FLESCH, THE ART OF READABLE WRITING (1949).

49. See MELLINKOFF, *supra* note 6, at 455-78 for a bibliography of books on legal writing. For more recent bibliographies of books and articles on legal writing, see Gopen, *supra* note 19, at 366-80; George H. Hathaway, *Bibliography of Plain English for Lawyers*, 62 MICH. B.J. 989-993 (1983); Kimble, *supra* note 11, at 28-30. *See also Books on Plain Legal Language* (visited Oct. 1996) <http://www.web.net/~raporter/English/LegalLanguage/lawbibli.html>; *see generally* SCRIBES J. LEGAL WRITING (containing book notices in each volume).

50. *See* Solomon Bienenfeld, *Plain English in Administrative Law*, 63 MICH. B.J. 856, 857 (1984) ("Proficiency in using Plain English . . . will not come about by reading this article nor by reading all of the books and articles on the subject. It begins with a sincere, almost religious conviction of its value . . . . Eventually it will develop into a habit . . . .").

Lawyers do not learn better legal writing solely by reading about it. They must practice it.[51]

The plain language literature touts plain language as a means to provide more effective communication. According to plain language advocates, it makes legal writing more readable and understandable to its intended audience. Plain language has several definitions ranging "from the general and subjective to the precisely objective."[52] Subjective definitions include "good English;"[53] English "which an ordinary person can understand;"[54] "English expected of someone with an eighth or ninth grade education;"[55] "English that is written the way we talk;"[56] and language "written in a clear and coherent manner using words with common and everyday meanings."[57] The Plain English Handbook, recently published by the Securities and Exchange Commission, sets forth flexible "practical tips on how to create plain English documents."[58] On the other hand, the Flesch test of reading ease set forth an objective definition of plain English measured by the number of syllables in each word and the number of words in each sentence.[59]

Plain language reform was sporadic until the 1970s when the consumer movement exploded.[60] Initially, few businesses revised their consumer documents into plain language.[61] In 1973, Citibank rewrote

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51. *See* WYDICK, *supra* note 33, at 4.

52. Kimble, *supra* note 12, at 14. *See* George H. Hathaway, *The Plain English Movement in the Law—Past, Present and Future*, 64 MICH. B.J. 1236, 1238 (1985) ("[T]here are many different definitions and levels of Plain English.").

53. Hathaway, *supra* note 52, at 1238.

54. Gale, *supra* note 15, at 919.

55. RUDOLF FLESCH, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS & CONSUMERS 26 (1979).

56. EDWARD P. BAILEY, JR., WRITING CLEARLY: A CONTEMPORARY APPROACH 16 (1984).

57. N.Y. GEN. OBLIG. LAW § 5-702(a)(1) (McKinney 1989).

58. *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* (last modified Sept. 1, 1998) <http://www.sec.gov/news/handbook.htm>.

59. FLESCH, *supra* note 55, at 20-32. The Flesch Test formula provides a readability score based on a scale of zero (practically unreadable) to 100 (extremely easy to read). The minimum score for plain English is 60. This is approximately 20 words per sentence and $1^1/_2$ syllables per word. *See id.* at 24-25. A readability score of 60 translates to an 8th to 9th grade reading level. *See id.* at 26.

60. The rapid acceleration of the plain language movement is intertwined with the growth of the consumer movement. The consumer movement was a result of the industrial revolution, which gave rise to mass production and distribution. Merchants became more sophisticated and consumers were relegated to an inferior bargaining position. "During the 1970s, consumer rights groups were able to push through federal and state legislation which finally addressed their concerns for equality in the marketplace." MARGARET C. JASPER, CONSUMER RIGHTS LAW 1 (1997). For a discussion of the consumer movement, see, for example, ROBERT N. MAYER, THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE (1989).

61. Consumer documents are documents that relate primarily to personal, family, or household purposes. *See* 15 U.S.C. § 1602(h) (1994); 15 U.S.C. § 2301(3) (1994); 16 C.F.R. § 441.1(d) (1997).

its consumer loan agreements in everyday language.[62] In 1974, Sentry Life Insurance Co. and Nationwide Mutual Insurance Co. simplified the language in their insurance policies.[63] However, on the whole, companies were not rushing to revise their documents, and consumer advocates quickly realized that for change to become widespread, it had to be mandated.

Substantial legislative action followed. The federal government passed federal consumer legislation requiring plain language disclosure in a variety of circumstances.[64] One example, the Magnuson-Moss

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The consumer movement reflects a shift from concern about producers to concern about consumers. Consumer legislation is designed to provide consumers with (1) information so that they may make a meaningful choice, (2) safe products, and (3) recourse in the event of problems. *See* Mayer, supra note 59, at 66-67. Plain language is an integral part of providing consumers with information so that they may make a meaningful choice. *See id.* 116-18.

62. *See* U.S. DEPT. OF COMMERCE, OFFICE OF CONSUMER AFFAIRS, HOW PLAIN ENGLISH WORKS FOR BUSINESS: TWELVE CASE STUDIES 3 (1984) [hereinafter TWELVE CASE STUDIES]. For example, the default provision in the original consumer promissory note reads as follows:

> In the event of default in the payment of this or any other Obligation or the performance or observance of any term or covenant contained herein or in any note or other contract or agreement evidencing or relating to any Obligation or any Collateral on the Borrower's part to be performed or observed; or the undersigned Borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have the right (at its option), without demand or notice of any kind, to declare all or any part of the Obligations to be immediately due and payable, whereupon such Obligations shall become and be immediately due and payable, and the Bank shall have the right to exercise all the rights and remedies available to a secured party upon default under the Uniform Commercial Code (the "Code") in effect in New York at the time, and such other rights and remedies as may otherwise be provided by law.

Id. at 8.

The default provision in the revised consumer promissory note reads:

> **Default** I'll be in default:
>
> 1. If I don't pay an installment on time; or
> 2. If any other creditor tries by legal process to take any money of mine in your possession.
>
> You can then demand immediate payment of the balance of this note, minus the part of the **finance charge** which hasn't been earned figured by the rule of 78. You will also have other legal rights, for instance, the right to repossess, sell and apply security to the payments under this note and any other debt I may then owe you.

Id. at 10.

63. *See id.* at 61; George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 946 (1983).

64. Federal legislation includes Truth-In-Lending Act, 15 U.S.C. §§ 1601-1665(b) (1988); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1988); Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j (1988); Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1988); Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1988). The provisions of Title 15 are implemented by Regulation Z, 12

Consumer Product Warranty Act, adopted in 1975, requires warranties of consumer products to be written in "simple and readily understood language."[65] While the federal government passed significant legislation requiring plain language disclosure in consumer transactions, the enacting legislation was not always written in plain language.[66]

The federal government has also sought to make federal regulations more accessible. In 1978, President Carter issued an executive order calling for plain language in federal regulations.[67] Unfortunately, this initiative was unsuccessful.[68] More recently, President Clinton released an executive memorandum mandating plain language for all government regulations.[69]

New York was the first state to mandate plain language in consumer documents.[70] Although critics predicted this legislation would create a flood of litigation, none occurred.[71] Currently, nine states require plain language in consumer documents, and more than two-thirds of the states require it in insurance policies.[72] A number of states require plain

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C.F.R. § 226 (1991). The Federal Trade Commission also promulgated Door to Door Sales Rules, 16 C.F.R. § 429 (1997).

65. 15 U.S.C. § 2302(a). Businesses, like Home Owners Warranty Corporation, revised their warranties to comply. *See* TWELVE CASE STUDIES, *supra* note 62, at 39-45.

66. For example, The Fair Credit Reporting Act "is so poorly drafted and difficult to understand that courts are in disagreement over some fundamental questions." NATIONAL CONSUMER LAW CENTER, INC., FAIR CREDIT REPORTING ACT 33 (3d ed. 1994).

67. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978) ("Regulations shall be as simple and clear as possible."). President Reagan subsequently repealed this order. *See* 46 Fed. Reg. 12,291 (1981).

68. Fred Emery, the former head of the Office of the Federal Register, attributes the failure of President Carter's initiative to two factors: (1) the use of formulas to determine when a sentence was too long, and (2) the elimination of key information or requirements when simplifying regulations. *See* Daniel Cohen, *President Issues "Plain Language" Mandate to Federal Agencies*, 24 ADMIN. & REG. L. NEWS 3 (1998).

69. *See* Memorandum on Plain Language in Government Writing, 34 WEEKLY COMP. PRES. DOC. 1010 (1998); *Gore Announces New Executive Memorandum Mandating Plain Language For All Government Regulations*, June 1, 1998, *available in* 1998 WL 5686208. The memorandum directs all federal agencies to "(1) write any new document that tells the public how to get a benefit or comply with a requirement in plain language by October 1, 1998; (2) write all new government regulations in plain language by January 1, 1999; and, (3) revise all existing letters and notices into plain language by 2002." It also provides suggestions on how to accomplish this directive.

70. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1989). The Sullivan Law provides that every contract for $50,000 or less primarily for personal, family, or household purposes must be written in "clear and coherent manner using words with common and everyday meanings and appropriately divided and captioned." *Id.*

71. N.Y. GEN. OBLIG. LAW § 5-702(a) note (McKinney 1989).

72. State statutes that govern consumer contracts generally include CONN. GEN. STAT. ANN. §§ 42-151 to -158 (West 1987); HAW. REV. STAT. § 487A-1 (1985); ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1980 & Supp. 1991); MINN. STAT. ANN. §§ 325G.29 - .36 (West 1981 & Supp. 1992); MONT. CODE ANN. §§ 30-14-1101 to -1113 (1991); N.J. STAT. ANN. §§ 56:12-1 to -13 (West 1989); N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1989); 73 PA. STAT. ANN. §§ 2201- 2212 (WEST 1993 & SUPP. 1998); W.VA. CODE ANN. § 46A-6-109 (Michie 1996). The statutes vary in style. Some, like those in New York, are stated as a general requirement to use plain language. Others, like those in Connecticut, have adopted

language in government writings, and most states have drafting manuals that recommend plain language principles when drafting legislation.[73]

Other attempts to implement plain language include the creation of The Document Design Project, funded by The National Institute of Education, to help rewrite and redesign public documents.[74] The Judicial Conference of the United States formed a standing subcommittee to review new federal rules for plain language.[75] The Internal Revenue Service simplified federal income tax forms.[76] More recently, the Securities and Exchange Commission mandated plain language in certain public filings.[77]

The war against bad legal writing has resulted in many more accessible and understandable consumer documents, and federal and state legislation.[78] In 1977, when the Federal Communications Commission revised the Citizens' Band radio rules, it was able to reassign five employees who, prior to the revision, spent all their time answering questions explaining the rules.[79] The private sector has also benefited from consumer documents written in plain language. Clear documents have increased customer and employee understanding, enabling businesses to streamline procedures and increase productivity.[80]

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more detailed standards. For a detailed list of state statutes governing insurance contracts, see Kimble, *supra* note 11, at 32-35.

73. Kimble, *supra* note 12, at 37-38. The purpose of law is to provide rules to govern behavior. It is intended to provide certainty. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1992). In order for law, public or private, to provide certainty, each law should have only one meaning. Law, however, is not certain for two reasons. First, lawyers do not understand the substance, and therefore do not draft correctly. *See supra* note 37. *See also* GOLDSTEIN & LIEBERMAN, supra note 16, at 32-33. Second, as discussed in this article, lawyers do not communicate the substance in an accurate, clear, and precise manner.

74. The center was established in 1979. *See* Kimble, *supra* note 12, at 43.

75. *See id.* at 41.

76. *See* Alan Siegel, *Plain English: From Social Benefit to Cost Benefit*, Address Before the Town Hall of California (Nov. 30, 1982), *in* VITAL SPEECHES OF THE DAY 249, Feb. 1, 1983.

77. *See* Plain English Disclosures, Exchange Act Release No. 39,593, Fed. Sec. L. Rep. ¶ 86,003 (Jan. 28, 1998); 17 C.F.R. pts. 228, 229, 230, 274 (1998). The Securities & Exchange Commission has issued *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* (visited Oct. 1998) <http://www.sec.gov/news/handbook.htm>.

78. Vice President Gore cited an example. "[D]uring a recent storm in California, an SBA [Small Business Administration] loan applicant who had filed his own application by mail visited an SBA disaster office to confirm that he had filled out the form correctly. Because it was so clear and so easy, he was worried he had missed a page or filled out the wrong form." *Gore Announces New Executive Memorandum Mandating Plain Language for all Government Regulations*, June 1, 1998, *available in* 1998 WL 5686208.

79. *See* Joseph Kimble, *Protecting Your Writing from Law Practice*, 66 MICH. B.J. 912, 912 (1987); Siegel, *supra* note 75.

80. When consumers understand the agreement, they are more likely to comply with the terms; when they do not, courts are more likely to uphold the agreement. *See* TWELVE CASE STUDIES, *supra* note 62; preface. *See also* Siegel, *supra* note 76. For additional examples, see Kimble, *supra* note 12, at 25-26.

Legal institutions have also actively encouraged better legal writing. Many laws schools have substantially enhanced their legal writing programs.[81] Legal writing programs have expanded "from basic research and remedial writing instruction to more sophisticated training in legal analysis."[82] Legal writing courses teach that writing is a process through which students "reduce their reasoning to written form."[83] The new legal writing textbooks all stress the analytic process of writing.[84]

Continuing legal education programs have also developed legal writing seminars.[85] The Federal Judicial Center recommends judges write "in simple language understandable by the general reader."[86] The National Conference of Commissioners on Uniform State Laws revised its legislative drafting rules to emphasize better drafting.[87] Several state bar associations have established plain language committees.[88] Additionally, legal writing organizations advocate the use of plain language.[89]

Despite numerous successful battles, plain language has not spread widely beyond consumer documents and legislation. An examination of commercial contracts and litigation papers demonstrates that bad legal writing is still common in many non-consumer writings. The question is: why do lawyers resist the expansion of plain language to non-consumer writing?

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81. *See* Jo Anne Durako et al., *From Product to Process: Evolution of A Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997); Rideout & Ramsfield, *supra* note 5; Silecchia, *supra* note 5. Professor Eichhorn points out that "[e]lite law schools are less likely to have well-developed writing programs than are schools with less prestige." Eichhorn, *supra* note 9, at 122.

82. Eichhorn, *supra* note 9, at 120.

83. *Id.* at 119.

84. *See supra* notes 36-42 and accompanying text. *See also* Eichhorn, *supra* note 9, at 119.

85. *See* Kimble, *supra* note 12, at 5 (discussing law school programs). The Practicing Law Institute and ALI/ABA offer courses on drafting documents. The Association of the Bar of the City of New York does, too.

86. FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 23 (1991).

87. *Compare* Drafting Rules of Uniform or Model Acts, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS, 294-64 (1983) *with id.* at 373-81 (1982).

88. The bar associations in Michigan, California, Texas, and Missouri have formed plain language committees. The Michigan Plain Language Committee produced a video entitled *Everything You Always Wanted to Know About Legalese . . . But Were Afraid to Ask.* The Texas Plain Language Committee implemented "Legaldegook Awards" and a "Plain Language Hall of Fame." *See* George H. Hathaway, *An Overview of the Plain English Movement for Lawyers . . . Ten Years Later*, 73 MICH. B.J. 26 (1994).

89. *See* Carol M. Bast, *Lawyers Should Use Plain Language*, 69 FLA. B.J. 30, 32 (1995). In 1992, The Legal Writing Institute adopted a resolution encouraging the use of plain language. *See Plain Language Resolution Adopted*, 8 SECOND DRAFT 1 (1992). For details of the resolution, see Kimble, *supra* note 12, at 8.

IV. RESISTANCE TO CHANGE

Lawyers pay lip service to better legal writing, but most do not practice it beyond the mandates of law, most of which are consumer-oriented plain language statutes.[90] There are several reasons that lawyers resist changing the way they write. These reasons, which have been discussed in detail by others, fall into four general categories.[91] First, some lawyers do not perceive a problem with their legal writing. Second, some lawyers take comfort in the traditions of legal writing. Third, some lawyers are not willing to bear the costs associated with change. Fourth, lawyers who perceive a problem with their writing often lack sufficient training to change it effectively. There is an additional, overriding reason why lawyers resist change. Criticism of bad legal writing is poorly framed. In particular, there is disagreement over the definition of key terms, and the criticism of legal writing tends to be overly broad and excessively derogatory.

Although it is just a synonym for feedback, the term *criticism* generally is perceived as having a negative connotation. The primary goal of criticism is constructive change. Additional goals of criticism include building self-esteem, improving performance, communicating values, and stimulating growth.[92] Unfortunately, criticism often is conveyed in a manner that inhibits these goals. When criticism is not conveyed carefully it triggers a defensive response.[93] Rather than make changes, the criticized person often continues the criticized behavior.[94] Criticism tends to be ineffective because critics do not choose their words carefully. Critics tend to focus on the problems to the exclusion of the successes. They criticize generally, often leaving the criticized person feeling personally attacked. Furthermore, they do not provide particular examples and specific suggestions for change.

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90. *See* George H. Hathaway, *The Plain English Movement in the Law—A 1994 Update*, 50 J. MO. B. 19, 21 (1994).

91. *See* GOLDSTEIN & LEIBERMAN, *supra* note 16, at 18-34 (discussing 14 causes of bad writing); Benson, *supra* note 16; Gopen, *supra* note 19; Hyland, *supra* note 22; Kimble, *supra* note 12; Mencer, *supra* note 11, at 217-20; Rideout & Ramsfield, *supra* note 5, at 40-45; Taylor, *supra* note 23, at 226-34; Matthew J. Arnold, Comment, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 232-37 (1995).

92. *See* Shirley Harmon, *Giving Constructive Criticism with Aplomb, Part 1*, 23 MEDICAL LABORATORY OBSERVER 24 (1991).

93. *See id.* (referring to hostile or defensive response); Morey Stettner, *The Delicate Art of Job Criticism; Evaluation*, 141 SALES & MARKETING MGMT. 104 (1989) ("defensive reflex").

94. *See* Shirley Harmon, *Giving Constructive Criticism with Aplomb, Part II*, 23 MED. LABORATORY OBSERVER 56 (1991).

A. Defining Key Terms Differently

Disagreement over the definition of key terms inhibits change. When there is no accepted definition of key terms, arguments for change are misunderstood, discounted, or ignored. The term *legalese* is an example. Plain language advocates argue that plain language should replace legalese. However, legal writing critics define legalese as a synonym for everything that is wrong with legal writing.[95] "The term legalese is generally employed in a pejorative sense to denote verbose technical jargon and Latin phrases that obscure an otherwise straightforward text . . . . [L]egalese denotes a degenerate form of legal writing, where a document becomes distorted with formalities to the point that its message is no longer clear."[96] In other words, advocates for change use legalese as a shorthand expression for a wide array of problems with legal writing they would like to change.

Some lawyers, however, narrowly define legalese to refer to "the specialized language of the legal profession."[97] They equate legalese with legal terms of art.[98] Terms of art are necessary to insure accuracy.[99] Under this definition, legalese is an efficient tool that promotes precision and tradition.[100] To these lawyers, legalese "does not obfuscate, but instead shortens and clarifies."[101]

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95. *See* Bast, *supra* note 89, at 31 ("As used in this article, legalese means words other than 'terms of art' which are typical in legal documents but not in ordinary English."); Michael S. Friman, *Plain English Statutes*, 7 LOY. CONSUMER L. REP. 103, 103 (Spring 1995) ("The language of law, also known as legalese, lawspeak and lawyerism, has routinely evoked such praise as wordy, unclear, pompous and dull."). Some commentators have analogized "legalese" to pornography; they "know it when they see it." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring). The Legal Writing Institute resolution for plain language defines legalese as "unnecessary and no more precise than plain English." Kimble, *supra* note 12, at 8. *See supra* Part II.

96. Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 712-13 (1998).

97. Walter P. Armstrong, Jr., *In Defense of Legalese*, 3 SCRIBES J. LEGAL WRITING 33, 34 (1992) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1989)). "A [l]egal *term of art* is a technical word with a specific meaning." MELLINKOFF, *supra* note 6, at 16.

98. *See* Bast, *supra* note 89, at 31 (stating that terms of art "are those terms whose meaning is fairly well agreed to among lawyers and whose use eliminates a more lengthy phrase written in ordinary English.").

99. Some plain language advocates concede that there are some terms of art that "cannot really be reduced to common language." Johanson, *supra* note 28, at 38. *See* Benson, *supra* note 16 at 561 ("small island of true terms of art"); Kimble, *supra* note 20, at 54 ("Plain-language advocates have said repeatedly that technical terms and terms of art are sometimes necessary . . . . But technical terms and terms of art are only a small part of any legal document . . . .").

100. *See* Armstrong, *supra* note 97, at 33.

101. *Id.*

These divergent definitions of legalese inhibit change.[102] Advocates who call for the elimination of legalese do not seek to eliminate legitimate terms of art. Instead, they seek to eliminate those aspects of legal writing that make it difficult to understand. However, because of the divergent definitions, that is not what is heard. Even among advocates who call for the elimination of legalese, the term can have different meanings. What is legalese in one writing intended for one audience may be a term of art in another writing intended for another audience.[103] This lack of agreement causes many lawyers to discount the call for change as overly broad and uninformed rather than to consider whether they sometimes use terms of art inappropriately. Instead of more precisely examining the appropriate use of terms of art, lawyers and advocates stand at an impasse, wasting time labeling what is and is not legalese.[104]

Conflicting definitions of *plain language* also inhibit change. Although plain language advocates perceive plain language as good English that is easily understood by the reader,[105] some lawyers perceive it as over-simplification. A request to write in plain language is a request to "reduce everything to a 'Dick and Jane' style of writing."[106] They are concerned that plain language undermines precision. Again, there is a lack of communication. Plain language advocates do not view plain language as less precise than other legal writing.[107] On the other hand, advocates for better legal writing do not support simplistic writing, particularly not at the expense of important legal nuances.[108] Rather, they support legal writing that the intended audience can understand.[109]

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102. "On the one hand are true terms of art that cannot really be reduced to common language. . . . On the other hand are all the inessential legalisms that clutter so much mediocre drafting." Johanson, *supra* note 28, at 38. "Different individuals may give different interpretations to language, seeing it from their particular circumstance or context." Feerick, *supra* note 12, at 382. "Res judicata" is an example. It can be defined generally to refer to preclusion, and it can also be defined specifically to refer to claim preclusion. Both definitions can be correct in the appropriate context; however, the different definitions can create confusion.

103. For example, *res ipsa loquitor* would be an apporpriate term of art in legal papers; however, in a memorandum to a client, it might be considered legalese.

104. This exemplifies why it is so important to define terms carefully and to use them consistently. *See infra* notes 187-88 and accompanying text. In the future, advocates for change should more carefully define the term. An alternative may be unnecessary jargon.

105. *See supra* notes 52-59 and accompanying text.

106. Redish, *supra* note 26, at 161.

107. *See* MELLINKOFF, *supra* note 6, at 290-398 (providing examples that show that legal writing is no more precise than plain language).

108. *See* Litowitz, *supra* note 96, at 738 (recognizing that "a certain amount of legal terminology and a certain formal style of legal writing are inevitable").

109. *See* Brian A. Garner, Note, *In Praise of Simplicity but in Derogation of Simplism*, 4 SCRIBES J. LEGAL WRITING 123, 123 (1993).

However, the failure to agree on the definition of key terms impedes change.

B. The Negative Tone

An overview of the criticism of legal writing illustrates that it is poorly presented. The negative tone of the criticism inhibits reform. Criticism on legal writing tends to be overly broad and exceedingly derogatory. In fact, many advocates for better legal writing have little, if anything, positive to say about most legal writing.[110] Although much legal writing qualifies as bad legal writing, even bad legal writing can have good qualities. Critics, unfortunately, rarely acknowledge these good qualities. The critiques, instead, are sweeping condemnations of lawyers and their legal writing that do not provide specific examples of what is wrong or corrective suggestions.

In addition to being exceedingly broad and negative, criticism of legal writing also tends to be condescending. Advocates tend to dismiss or minimize concerns lawyers express about change and plain language. One critic dismissively attributes resistance to change to "habit, inertia, fear of change, the overwhelming influence of poor models, the rote use of forms, and notions of self interest (prestige and control). Not to mention lack of skill."[111] Although there may be some truth in this criticism, the presentation of the criticism does not promote change.

This negative tone of criticism permeates the entire war against bad legal writing. Criticized lawyers often are offended by this excessively negative and personal criticism and dismissive approach. It is not surprising that criticized lawyers react defensively.[112] Words are the stock and trade of a lawyer; the competent use of words, oral and written, is at the core of the profession. Criticism of a lawyer's use of words strikes at the essence of that lawyer's professional competence. Although advocates for change may deem this defensive response petty

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110. *See* Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing*, 1 SCRIBES J. OF LEGAL WRITING 25, 25 (1990) ("Lawyers have always written badly and no doubt always will."). *See supra* notes 25-33 and accompanying text.

111. Kimble, *supra* note 12, at 22. *See also* Benson, *supra* note 16, at 569 (Legalese persists because of "inertia, incompetence, status, power, cost and risk."). *See also* GOLDSTEIN & LIEBERMAN, *supra* note 16, at 18-23.

112. An example is the Legaldegook Awards bestowed by the Plain Language Committee of the State Bar of Texas. The awards draw attention to "some of the horrific writing that modern lawyers perpetrate." *The Legaldegook Awards: 1991-1992*, 3 SCRIBES J. LEGAL WRITING 107, 107 (1992). The committee does assert that its "purpose is noble, not a mean-spirited one." *Id.* at 108. However, lawyers could certainly construe the awards otherwise.

and juvenile, it is, in fact, a human response.[113] Criticism is particularly painful when it attacks a trait that the criticized person considers a strength.[114] Lawyers have expressed some reasonable concerns about changing the way they write. Rather than condescendingly dismissing these concerns, advocates for change should acknowledge them and address them more constructively.

C. Re-examining the Reasons for Resistance

1. Legal Writing Accomplishes Its Goals

One reason lawyers resist change is that they do not perceive a problem with their legal writing; it generally accomplishes its goal.[115] If it works, there is no need to fix it. Legal writing facilitates millions of transactions involving billions of dollars and lives.

Litigation-based legal writing, including pleadings, memoranda of law, and appellate briefs, is intend to permit parties to proceed through the litigation process. It generally does so. Non-litigation based legal writing, like contracts, trust and wills, and deeds, is intended to permit parties to accomplish stated goals. It generally does so.[116] Advocates for change, however, ignore the millions of successes, focusing instead on the thousands of cases that result in conflict.[117]

With respect to non-litigation-based legal writing, critics argue that legal writing need not be drafted with litigation in mind. As a practical matter, however, lawyers often draft for a hostile audience.[118] Based on experience, lawyers believe that a writing must deal with as many contingencies as they can conceive. As Justice Holmes noted, to minimize litigation, lawyers must exclude every conceivable misinterpretation an opposing lawyer seeking to pervert or to avoid the transaction might contemplate.[119] Although lawyers need to consider the possible contingencies and interpretations, the two concerns are not mutually exclusive. Lawyers can write better and still draft in contemplation of a hostile audience.

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113. A law professor need only look at the reaction of many students to poor grades (justifiable negative criticism) to see a sample of this type of defensive reaction.

114. *See generally* Harmon, *supra* note 94.

115. *See* Benson, *supra* note 16, at 553-54.

116. *See id.* at 558.

117. *See id.*

118. *See* Gopen, *supra* note 19, at 340. A *hostile audience* refers to an audience that someday may seek to challenge the substance of the writing.

119. *See* Paraiso v. United States, 207 U.S. 368, 372 (1907).

2. Comfort in Traditions

Many advocates for better legal writing disparagingly attribute lawyers' resistance to change to stubborn and blind adherence to tradition.[120] Legal writing, in fact the entire legal profession, is steeped in tradition.[121] Many lawyers take pride and comfort in the traditions of legal writing; however, critics make this sound like a bad thing. Law, similar to religion, is based in large part on faith. Traditions, or rituals, are inherited patterns of thought or action. The traditions developed to serve a particular purpose; however, traditions are slow to change. People often continue to follow traditions even though they no longer serve their original purpose.[122]

Advocates for change view many of the traditions of legal writing as outmoded; however, an examination of their writing likely would reveal that even they ascribe to some traditions.[123] Those who ascribe to various traditions of legal writing are not easily convinced of the need for change. Following tradition provides lawyers with a measure of comfort. Simply denouncing these traditions as baseless and suggesting that a lawyer renounce them is not sufficient. Traditions evolve over time; however, it is a lengthy process. Changing traditions is greatly facilitated when the appropriate governing body dictates the change.[124]

Formalistic language is a tradition commonly followed in legal writing. Although lawyers concede that formalistic language is not always necessary,[125] they continue to use it. Lawyers like formalistic language for three reasons. First, it has been judicially interpreted, so

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120. *See* Benson, *supra* note 16, at 530; Gopen, *supra* note 19, at 343-44. "[Lawyers'] livery is its language." *Id.* at 339.

121. *See* Edmund Z. Righter, *In Defense of Legalese*, 66 MICH. B.J. 92, 92 (1987) ("From time immemorial, the traditional phrase 'Now Comes the Plaintiff' has graced the beginning of virtually each and every complaint and motion that any attorney worth his salt has ever written."). The formalistic language of a notary acknowledgment is one example.

122. *See* GOLDSTEIN & LIEBERMAN, *supra* note 16, at 24-25.

123. The *traditions of legal writing*, like bad legal writing, are an amorphous concept. Many advocates for change would equate the two; however, not all traditions of legal writing are bad legal writing.

124. Religious traditions provide a useful analogy. The tradition of eating fish (no meat) on Friday was well established in the Catholic religion. Although some practicing Catholics did not observe this restriction, many did. However, after the Pope (the governing authority of the religion) removed the restriction, many more Catholics were willing to change.

125. *See id.* at 92-93 (conceding that many formalisms are obsolete). Formalistic language is still required in some circumstances. For example, a negotiable instrument must contain the magic words "payable to the order of [named payee]" or "to bearer." *See* U.C.C. § 3-109 (1991) Additionally, to waive a warranty of merchantability, the waiver must include the word "merchantability." *See* U.C.C. § 2-316.

lawyers take comfort in its certain meaning. It is "tried and true."[126] The traditional language and style is familiar and has proved successful in the past. As discussed below, the use of "tried and true" language is less expensive than writing new language.[127] Second, lawyers take pride in the elegance of the formality. The majesty of the language was designed to generate respect.[128] Third, many clients seek a measure of formality in their legal writing. Although clients have been heard to complain that legal writing is incomprehensible, they are accustomed to it. Lawyers tell story after story of clients who are uncomfortable when a legal document is written without it.[129]

On the other hand, critics tend to generally denounce formalistic language. Their broad-based criticism often fails to distinguish between required formalism, like the magic language in negotiable instruments, acceptable formalism, which is not required but does not detract from the writing, and archaic formalism, which detracts from legal writing. Failure to provide specific criticism undercuts its effectiveness. Rather than deny any value in formalistic language, critics should work to eliminate archaic formalisms from the traditions of legal writing while maintaining the appropriate formalistic language.

Furthermore, critics often extend their criticism beyond the problems with the traditions of legal writing to the lawyers who write it. These personal attacks invoke a defensive reaction, which further inhibits reform. Many have accused lawyers of clinging to bad legal writing to preserve their earning potential.[130] As one critic put it, "[l]awyers write badly because doing so promotes their economic interests."[131] Lawyers, understandably, are concerned with protecting their livelihood. One young lawyer creating a solo practice confessed that he includes some formalistic language in the contracts he writes because he wants his clients to feel that they have received value for his fees.[132] Critics have

126. As used in this article, "tried and true" means language that has an established meaning based on previous business dealings or litigation.

127. *See infra* Part IV(C)(3).

128. *See* GOLDSTEIN & LIEBERMAN, *supra* note 16, at 24-25.

129. One lawyer relates her attempt to draft a conservation easement with the conservation values stated in the grantor's own words. However, the board of directors of the land conservancy to whom the grantor wished to donate the easement was uncomfortable with this plain language in a formal legal document. *See* GOLDSTEIN & LIEBERMAN, *supra* note 16, at 24-25.

130. Plain language advocates accuse lawyers of preserving an "economic stronghold." *See* Gopen, *supra* note 19, at 343-45; Stark, *supra* note 25, at 1389.

131. Stark, *supra* note 25, at 1389.

132. This lawyer acknowledged that this formalistic language was not necessary, but he expressed concern that if he were to write his contracts without it, the client would think she could write the contract herself. In addition to the concern that he would lose business, he expressed concern that were the client to write the contract herself, she probably would not recognize all the legal ramifications.

also accused lawyers of using traditional legal language for prestige—to maintain membership in their elite club.[133] It is a "secret coding and phraseology that only lawyers can sort out."[134] One critic states that lawyers "derive a sense of comfort and identity from the language that marks them as a tribe unto themselves."[135] However, a sense of belonging is a natural human desire, and it is not exclusive to lawyers.[136]

Although some lawyers are guilty of these charges, not all of them have examined their reasons in light of these considerations.[137] Even those lawyers who are willing to acknowledge the less than ideal motivation for their actions are unlikely to respond to such a personal and vitriolic attack. Instead of criticizing the rationale for these actions, critics should focus on the particular problems.

Critics could instead provide specific examples of "tried and true" language that are not necessarily ideal, address the concerns that lawyers have about changing them, and provide better alternatives. Jury instructions are a good example. Jury instructions are essential to the litigation process. However, there is substantial evidence that juries do not always understand them.[138] Despite this evidence, some lawyers and judges resist rewriting jury instructions. A key reason for this resistance is fear. They do not want to risk being "reversed on appeal because they failed to use language already approved by the appellate court."[139] Another reason is the cost of rewriting.[140] However, rather than attacking lawyers personally, proponents for jury instruction reform have offered constructive suggestions including changes in the law to create incentives to rewrite jury instructions.[141]

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133. Legal language is "a language that can be deciphered only by initiates of the secret society." Gopen, *supra* note 19, at 334. It is a "privileged communication of initiate" in a "secret cult." Hyland, *supra* note 22, at 604.

134. Litowitz, *supra* note 96, at 713.

135. Gopen, *supra* note 19, at 339.

136. "The compulsion to communicate in a specialized language pervades much of our society." Siegel, *supra* note 76. *See* Hyland, *supra* note 22, at 604 (discussing sociological desire to belong to the fraternity). Conformity is encouraged from a young age. Very few people are willing to assume the professional risk of a potentially unpopular stand. *See infra* Part IV(C)(3)(b).

137. With respect to economic incentive, one commentator concedes that it is doubtful that most lawyers do this intentionally. *See* Arnold, *supra* note 91, at 232 n.27.

138. *See* Charrow & Charrow, *supra* note 23; Steele & Thornburg, *supra* note 42, at 79-98.

139. Steele & Thornburg, *supra* note 42, at 99.

140. "Using a pattern instruction out of a book or language quoted from an appellate case takes much less time than finding the law and then rewriting it for clarity." *Id. See infra* Part IV(C)(3). Other reasons include (1) lawyers do not accept the fact that juries do not understand the instructions, and (2) even when they do, some lawyers believe the lore that juries that don't understand will give their client the benefit of the doubt. *Id.*

141. Steele & Thornburg, *supra* note 42, at 108-109.

3. Cost of Change

Many lawyers resist changing the way they write because they are not willing to bear the costs associated with this change. There are both actual costs and potential costs involved with reforming legal writing.

a. Actual Costs

When reducing substance to writing, most lawyers do not begin with a blank page or computer screen. Instead, they seek out an appropriate form or prior transaction. Use of standard forms or precedents allows lawyers to generate documents more efficiently. Rather than draft documents from scratch, they save time by adapting existing documents. Unfortunately, the use of forms and precedents encourages lawyers to skip essential steps in the writing process and perpetuates bad legal writing.[142]

One alternative is to draft all legal writing from scratch. However, this is a time consuming, expensive process. In this cost-conscious era, neither lawyers nor their clients want to assume this added expense, particularly if the existing form is adequate. Additionally, until lawyers incorporate the steps of the writing process into their writing process, drafting from scratch will not necessarily result in better legal writing.

Another alternative is to rewrite all forms in plain language. Additionally, form books could provide more guidance as to why certain provisions are included and suggest alternatives for different situations. The Model Simplified Indenture is a good example.[143] This sample indenture provides an explanation of the provisions and alternative provisions for different situations. At a minimum, form books need to provide examples of competent legal writing, not perpetuate bad legal writing. However, this is a time consuming and costly procedure.

Advocates for legal writing reform focus on the aggregate picture. They assert that the benefits of change outweigh the costs. Documents that are tailored to the particular transaction and written for the intended audience will, in the long run, save time and money. Although most legal writing could be improved, there is a point of diminishing returns. If existing legal writing is sufficient, there is no reason to spend the time and money to make it better.[144]

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142. *See supra* Part II.

143. 38 BUS. LAWYER 741 (1983). This form was promulgated by the Section of Corporation, Banking and Business Law, American Bar Association.

144. Lawyers recognize that clients do not want to incur the additional expense of redrafting documents that work. *See supra* Part IV(C)(1)-(2). Therefore, if lawyers decide to undertake this task, they

b. Potential Costs

In addition to increased actual costs, rewriting tried and true language carries the risk of additional costs. There is the potential for litigation costs if the new language requires judicial interpretation.[145] Additionally, lawyers are concerned about their reputations and the threat of malpractice claims if the new language is not in fact better.[146]

Again, advocates for change focus on the aggregate picture. They point out that litigation costs for interpretation of language are often incurred as a result of existing legal writing.[147] Further, they point out that to date, plain language mandates have not produced the predicted flurry of litigation.[148] Although clients might prefer the rewritten language if it were already interpreted, they generally would prefer not to incur the cost associate with being the test case.[149]

In addition to the potential costs associated with client development, there are potential costs associated with professional advancement. Professor Wydick complains that "[t]oo many law students report back from their first jobs that the clear, simple style they were urged to use in school is not acceptable to the older lawyers for whom they work."[150] Advocates believe that lawyers with good legal writing skills should implement those skills. Lawyers, however, hesitate to do this because of the potential impact on their careers. Junior lawyers are not willing to risk their jobs to criticize senior lawyers' writing. Nor are they willing to risk malpractice by revising language drafted by a specialist in her area of expertise. Concerned about their professional future, lawyers

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would likely have to assume the cost. Not only would they be unable to bill a client for the time, but they would not be able to use the time for other billable work.

145. *See* William C. Prather, *In Defense of the People's Use of Three Syllable Words*, 39 ALA. LAW. 394 (1978).

146. *See supra* notes 131-32 and accompanying text.

147. *See* Kimble, *supra* note 20, at 76 (recognizing that poor legal drafting also produces unnecessary litigation).

148. "Despite dire warnings from bar associations, there was no upheaval in the business community and the courts were not clogged with litigation" Siegel, *supra* note 76. Some of the statutes appear more successful than others, and overall they seem to have improved consumer documents and the flurry of litigation never came.

149. This is a rational economic perspective. A client is willing to be a "free rider" and accept changes that will not incur additional costs; however, the client would prefer to use "tried and true" language rather than run the risk of litigation.

150. WYDICK, *supra* note 33, at 2. I received an e-mail from a recent graduate asking "Why hasn't the world adopted modern drafting?"

quickly conform to the accepted writing style.[151] As a result, bad legal writing is perpetuated.

During my years of practice,[152] I discovered that even those who were willing to assume the professional costs associated with changing legal writing often lack opportunities to implement change. Legal writing rarely is a solitary venture; most legal documents are drafted by numerous lawyers, particularly in law firms and large corporate law departments.[153] As a result, even if initially competently written, after all the lawyers have tinkered with it, the final document is often no longer well written.

I found the same to be true in negotiated transactions. Throughout the negotiation process, both sides are adding new provisions and revising existing provisions. Lawyers and clients often recognize that the writing could be improved; however, they are not willing to make an issue of it. Lawyers prefer to reserve their negotiation leverage for substantive issues. Unfortunately, this overlooks the fact that bad legal drafting can result in serious substantive consequences.

4. Insufficient Training

A final reason lawyers resist changing the way they write is they lack the skills to write differently. Many lawyers lack sufficient training in legal writing. Legal writing skills build upon basic writing skills. Elementary writing skills are ingrained early on, before students ever apply to law school.[154] Unfortunately, many lawyers lack these elementary writing skills.[155]

In recent years, the importance of writing skills has been trumpeted by the bar and many law schools.[156] While overall law schools have

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151. This was my experience when practicing law. Given the time pressure and the firm policy to adhere to their standard forms, improving legal writing was difficult in most circumstances.

152. I practiced as a corporate transactional attorney for five years.

153. *See* Gopen, *supra* note 19, at 341-43 (writing by committee); Arnold, *supra* note 91, at 236 (gang-writing). This is an example of the cliche "too many cooks spoil the broth."

154. *See* Baird, *supra* note 8; Ronald M. Pipkin, *Legal Education: The Consumer's Perspective*, 4 AM. B. FOUND. RES. J. 1161 (1976).

155. *See* Arnold, *supra* note 91, at 237. Writing skills, in general, seem to be on the decline. Kimble, *supra* note 12, at 4 (stating that writing skills are inadequate, citing the decline of verbal scores on the SATs by over 30 points since 1970). These concerns are not new. *See also* Arthur T. Vanderbilt, *A Report on Prelegal Education*, 25 N.Y.U. L. REV. 199, 213 (1950). The decline in writing skills has been attributed to the telephone and the television. Rather than writing a letter, people pick up the telephone. Rather than reading a book, people watch television.

156. *See generally* THE MACCRATE REPORT, *supra* note 2. However, it is not clear that the MacCrate report has significantly affected law school writing programs. *See* Eichhorn, *supra* note 9, at 105; Silecchia, *supra* note 5, at 262.

made great strides in improving their legal writing programs, there is ample opportunity to do more.[157] Historically, law schools have not offered sufficient writing instruction.[158] Few law schools have implemented the ABA suggestion for a writing requirement in each year.[159] Although more and more law schools are requiring an upper level writing requirement, most require only two semesters of legal writing.[160] The reason for this is often one of resource allocation.[161] It may also be attributed to the long-standing debate regarding whether law schools are trade schools or graduate schools.[162]

Instruction in the limited legal writing offerings historically has been inconsistent.[163] Very few law schools hire people with special training in writing or teaching.[164] Until recently, some law schools employed upper level students to teach legal writing.[165] Others hired practicing lawyers, who perpetuate their own legal writing style, to teach legal writing. More and more law schools have turned to full-time legal writing teachers.[166]

Furthermore, the substance covered in each legal writing class varies from instructor to instructor. Only recently have guidelines for the substance of legal writing courses been promulgated and disseminated

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157. *See* Durako et al., *supra* note 81; Rideout & Ramsfield, *supra* note 5; Silecchia, *supra* note 5.

158. Law schools do not offer more writing instruction for two reasons. First, since the introduction of the Socratic method, legal writing has been categorized as the poor relation in the law school curriculum. *See supra* text accompanying note 10. Within the limited time available in law school, there is so much else to teach. Students should learn their writing skills either before they attend law school or on the job. Second, legal writing is resource intensive. Law schools either do not have the resources or are not willing to commit them to legal writing programs. Among other resource issues is the question of who will teach this program. Often law schools must hire additional instructors as many law professors do not want to teach legal writing. *See* GOLDSTEIN & LEIBERMAN, *supra* note 16, at 7; Gopen, *supra* note 19, at 355-359.

159. LAWYER COMPETENCY, *supra* note 8, at 15 ("We recommend that law schools endeavor to provide each student at least one rigorous legal writing experience in each year of law study . . . .").

160. *See* Silecchia, *supra* note 2, at 210 n.14 (indicating that very few law schools require more than two semesters of legal writing).

161. Teaching legal writing is resource intensive, and law schools often do not have or are not willing to allocate the necessary resources. *See* Gopen, *supra* note 19, at 355-59. Anecdotal evidence indicated that many law school professors do not want to teach skills courses. *See supra* note 158.

162. For discussion of "trade school" versus "graduate school" debate, see Gary S. Laser, *Educating Professional Competence in the Twenty-First Century: Education Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 268 (1992); Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987); Silecchia, *supra* note 5, at 269-90.

163. *See* Gopen, *supra* note 19, at 348.

164. Most legal writing professors do not have any special training in teaching legal writing. This, however, is not unique to legal writing professors. Most law professors do not have any special training in teaching. This is a flaw in the system; however, it is a subject for another day.

165. In law school, my Research, Writing and Advocacy class was taught by a third-year student.

166. Unfortunately, in many law schools these positions are long-term contract positions, not tenure-track positions, which seems to reinforce the existing dichotomy between "skills" and "substantive" courses.

to law schools.[167] One of the important guidelines includes the shift of focus from the final product to the process.[168]

Despite all the improvements in legal writing instruction, on the whole, law schools undermine their attempts to train students to follow the analytic writing process they teach. Throughout law school, law students are bombarded with bad legal writing. Law students tend to emulate the writing style they read.[169] The limited law school writing instruction provided is counteracted by the multitude of poorly written judicial opinions, statutes and textbooks that law students are required to read.[170]

V. THE NEXT STEP

A. Mandating Competent Legal Writing

To encourage better legal writing, advocates should reformulate their approach to change. Rather than scathing criticism, critics should acknowledge legitimate concerns and offer constructive suggestions. Although legal writing, more often than not, achieves its goal, that does not mean it should not be improved. Law schools have made significant advances and continue to make improvements in legal writing instruction. However, to revise the traditions of legal writing and to reduce some of the costs associated with reforming legal writing, the profession needs to change the signals it sends to its members.

I propose that the profession mandate competent legal writing. The legal community is more likely to conform if competent legal writing is mandated by the profession's governing bodies—the American Bar Association (ABA) and state bar associations.[171] The logical place for

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167. *See generally* ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS (1997).

168. *See supra* note 84 and accompanying text.

169. *See* Kimble, *supra* note 12, at 11 ("To all but the most self-confident and critical-minded student, the old way of writing must somehow seem right . . . . If it goes unchallenged, most students will pick up its trappings as a dog picks up fleas, without even trying."); *see generally* Joseph Kimble & F. Georgann Wing, *Protecting Your Writing from Law School: An Open Letter to Law Students*, 65 MICH. B.J. 576 (1986).

170. *See* Stark, *supra* note 110, at 25-26 ("The authors of casebooks do not select opinions for their literary merit; if they did, they would have trouble filling a single volume. One of the great unspoken truths of the legal profession is that most judges write terribly.").

171. *See* Gopen, *supra* note 19, at 337. George Hathaway suggests that "the movement must be led by judges and officers of the state bar." Hathaway, *supra* note 90, at 21. Some state bar associations have already adopted plain language committees. *See* Joseph Kimble, Notes Toward Better Legal Writing, 75 MICH. B.J. 1072, 1074 (1996).

this mandate is in the definition of competent representation found in the rules of professional responsibility.[172]

Historically, the rules of professional responsibility were silent on the issue of competent representation. Over time, the legal profession made competent representation compulsory by including it in the rules of professional responsibility. Both the 1969 Model Code of Professional Responsibility (the "Model Code") and the 1983 Model Rules of Professional Responsibility (the "Model Rules") address the issues of competence. Canon 6 of the Model Code requires that "a lawyer should represent her client competently."[173] The disciplinary rule regarding competency prohibits a lawyer from handling a matter in which she lacks competence, or is unprepared, to handle; however, "competence" is never defined.[174] The Model Rules more prominently require competence. Model Rule 1.1 requires that "[a] lawyer shall provide competent representation to a client."[175] The Model Rule defines "competent representation" as the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[176] This definition is necessarily amorphous. What constitutes competence depends on the facts. To provide guidance, the comment to the Model Rule lists factors to consider in determining competency. Among others, these skills include communication skills, particularly legal writing skills.[177]

Although both the Model Code and the Model Rules acknowledge the importance of competence, and the commentary to the Model Rules expressly includes legal writing as a component of competence, there is little institutional guidance as to what constitutes competent legal writing. The annotation to the Model Rules provides limited additional

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172. This is a logical place for guidelines because the goal of the rules of professional responsibility is to assure "the highest standards of professional competence and ethical conduct." *Preface* to MODEL RULES OF PROFESSIONAL CONDUCT 2 (1992).

173. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1981).

174. *See id.* at DR 6-101 (1981). The Model Code is divided into ethical considerations, which are aspirational goals, and disciplinary rules, which set forth minimum standards that a lawyer is subject to disciplinary action for violating.

175. *See* MODEL RULES OF PROFESSIONAL CONDUCT 1.1 (1983) [hereinafter MODEL RULES].

176. *Id.* Although the comment provides some elaboration, the definition of "competence" is still amorphous. *See* Rocio T. Aliaga, Note, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1153 (1995) (discussing various definitions of "competence" and noting that "no generally acknowledged definition of the term exists"); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 312-13 (1997) (noting the vagueness of the definition of competence); Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1221 (1988) (noting that "the definition of competence in Rule 1.1 is troubling").

177. *See* MODEL RULES, *supra* note 175, 1.1 cmt. 2 (stating that legal skills include "the analysis of precedent, the evaluation of evidence and legal drafting").

guidance. It states that "[t]he skills required of a lawyer include the ability to draft pleadings and documents."[178] The referenced cases, however, indicate that only the most egregious circumstances constitute a violation of the standard.[179]

The current standard for competent representation with respect to legal writing is insufficient. The standard must be defined with more precision. The time has come for the profession, as an institution, to go beyond a vague aspirational standard of competent representation. The time has come to expressly require certain skills as part of competent representation, and to set forth guiding principles on attaining this competence. Unlike most plain language legislation, which applies primarily to legislation and consumer contracts, professionally mandated competent legal writing would apply to all legal writing.

This is an ambitious undertaking. One reason the competence standard in both the Model Code and the Model Rules is vague is the difficulty in creating a more concrete standard. Currently, the commentary enumerates factors to examine when evaluating competent representation; legal writing is one of these factors. Although the commentary provides a concrete list of factors, assessing them is difficult because the standards are subjective. What is understanable to one person may not be understandable to another.[180]

To implement a more concrete standard, Model Rule 1.1 should be revised to expressly list legal writing as an essential component of competent representation. Competent legal writing should be defined as legal writing that communicates information accurately, clearly, and precisely to its intended audience. Next, the commentary to Model Rule 1.1 should be revised to provide guiding principles of competent legal writing. The commentary should be designed as a checklist of factors to which lawyers should refer when tackling the legal writing process.

Because of the subjective nature of writing, the commentary should set forth guiding principles, not concrete rules. Like so many legal rules,

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178. MODEL RULES OF PROFESSIONAL CONDUCT 1.1 note (supp. 1996).

179. *See In re* Willis, 505 A.2d 50, 50 (D.C. 1985) (pleadings were "sloppy, incoherent, incomplete and misleading on their face") (quoting *In re* Crestwell, 30 B.R. 619, 620 (Bank D.D.C. 1983)); *In re* Hogan, 490 N.E.2d 1280 (Ill. 1986) (19 pleadings or briefs in which arguments and writing were "incomprehensible"); Attorney Grievance Comm'n v. Myers, 490 A.2d 231 (Md. 1985) (lawyer prepared will without attestation clause or signature lines); *In re* Hawkins, 502 N.W.2d 770 (Minn. 1993) (the disregard of local bankruptcy rules coupled with incomprehensibility of lawyer's written work is due to numerous errors in spelling, grammar, and typing.); *In re* Wallace, 518 A.2d 740, 742 (N.J. 1986) ("seriously deficient" drafting of promissory note).

180. This is particularly true because lawyers write many types of documents for many different audiences. *See supra* note 22 and accompanying text.

the principles should provide direction, but retain enough flexibility to deal with the variety of legal writing lawyers are called upon to produce.[181] In addition to stating the guiding principles, the commentary should include illustrations. Samples are particularly helpful when dealing with subjective standards.

The competent legal writing guidelines should address three general issues: 1) the substance of the document, 2) the audience of the document, and 3) effective writing skills. Some suggestions for these guidelines follow.[182]

Lawyers spend the bulk of their time addressing the substance of the document. This includes identifying the relevant issues, gathering relevant facts, and understanding the substantive law.[183] Although mastering the substance of any communication is essential, a lawyer cannot focus on it exclusively. The lawyer must also focus on the communication process.

Audience is a critical factor in communicating information.[184] A lawyer needs to identify the intended audience and write for that audience. As there often are multiple audiences, the lawyer must decide for which audience to write. The guidelines should direct the lawyer to determine the likely audiences and to write for the lowest common denominator—the audience least likely to understand the document. If a document is directed at the audience least likely to understand it, all audiences that are likely to use the document should be able to understand it.

Once the lawyer identifies the audience, the lawyer must reduce the substance to writing in a form that the intended audience is likely to understand. Better legal writing advocates offer several guidelines.[185]

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181. Some legal writing requires lawyers to expressly state particulars in order to avoid ambiguity, while other legal writing requires vagueness to keep flexibility in the event of unforeseen circumstances. *See* Gopen, *supra* note 19, at 335 ("Lawyers . . . [must] write with both precision and anti-precision.").

182. The following are preliminary thoughts on what might be included in the guidelines. The actual contents of the guidelines would require a great deal of study and should be developed by the ABA.

183. There are also fundamental lawyering skills. For more information on these skills, see THE MACCRATE REPORT, *supra* note 2, at 138-39, 141-72.

184. *See supra* notes 38-42 and accompanying text.

185. *See* David C. Elliott, *Writing Agreements in Plain Language*, 49 DISP. RESOL. J. 73 (Mar. 1994) (10 guidelines for plain language drafting); Daniel Felker & Janice Redish, GUIDELINES FOR DOCUMENT DESIGNERS (1981) (25 guidelines for clear communication); Hathaway, *supra* note 48, at 945 (10 typical elements of plain English); Kimble, *supra* note 11, at 12-14 (elements of Plain English); Carol Ann Wilson, *Be on the Cutting Edge: Learn These Seven Plain Language Principles Now!* (visited Oct. 1997) <http://wwlia.org/plainlan.htm> (describing seven plain language principles); A Plain English Handbook: How to Create Clear SEC Disclosure Documents (Aug. 1998) (Chapter 6—The Principles of Plain English; Chapter 7—Document Design) (visited Aug. 1998) <http://wwlia.org/ plainlan.htm> [hereinafter Ch. 7, Plain English]. *See generally* SCOTT BURNHAM, DRAFTING CONTRACTS (2d ed. 1993); DICKERSON, *supra* note 19; RAY & RAMSFIELD, *supra* note 35; WYDICK, *supra* note 33.

The principles to be included in the commentary would clearly be the subject of discussion of the promulgating committee. The following are a few preliminary suggestions for inclusion in these guidelines.[186]

1) *Be consistent.* Consistency in legal writing is important in both choice of language and in format, because inconsistency creates confusion. In other words, each legal writing should be internally consistent. The golden rule of drafting states that a lawyer should never change her word choice unless she intends to change her meaning.[187]

One example is the use of defined terms. Once a term is defined, only the defined term should be used. For example, in a motion for summary judgment, if the moving party is defined as 'the plaintiff' all reference in the document to the moving party should be to the plaintiff. References to the moving party by any other label, for example as the injured party or by the party's last name, may create ambiguities.

Another example is language of obligation that is commonly found in contracts and legislation. Drafting convention designates "shall" to indicate language of obligation and "may" to indicate language of authorization.[188] Every time the lawyer sets forth an obligation, she should use "shall"; every time the lawyer sets forth language of authorization, she should use "may."

Consistency is also important with respect to format. The commentary should include examples of consistent organizational styles. Additionally, the commentary should stress that regardless of the style chosen, it should be used consistently.

2) *Use the active voice when attributing action or obligation.* This is not a blanket condemnation of the passive voice. The passive voice is appropriate in some circumstances. However, in contracts and legislation, for the sake of clarity, obligations should be expressed in the active voice and specifically attributed to the obligated party. For example, it is much clearer if the contract states that "Purchaser shall pay Buyer the purchase price" rather than "Buyer shall receive the purchase price." This is also important in litigation papers. Actions should be stated in the active voice and attributed to the appropriate

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186. This is not a complete list of legal writing guidelines. To be effective, the actual guidelines must be tailored to the various types of legal writing. The final guidelines should be drafted by a committee composed of lawyers from many practice areas. In fact, separate guidelines for different types of legal writing is recommended.

187. "Never change your language unless you wish to change your meaning and always change your language if you wish to change your meaning." BURNHAM, *supra* note 185, at 228. "Do not use different words or expressions to denote the same thing." ROBERT C. DICK, LEGAL DRAFTING 82 (2d ed. 1985).

188. Although this is a valuable convention, I am not suggesting that the Model Rules require that lawyers adopt this convention. Rather, I suggest that whatever convention the lawyer chooses, he or she should adhere to it consistently.

party. For example, in the pleadings for John's claim for damages for personal injury, "Sam shot John" is much clearer than "John was shot."

3) *Avoid redundancy.* There is rarely a reason to say things more than once. Although the lawyer may think saying it twice makes it clearer, redundancy often creates ambiguity. In an attempt to deal with every contingency, lawyers often repeat a concept several times, phrasing each statement slightly differently.[189] These differences leave open the possibility that something not specifically included was intentionally omitted, or that each statement means something different.

Additionally, many redundancies that had historic relevance are no longer necessary.[190] These might also be characterized as archaic formalisms.[191] For example, the phrase "null and void" can be reduced to "void." The phrase "cease and desist" can be reduced to "stop."[192]

4) *Avoid unnecessary archaic terms.* Unnecessary archaic terms may make the writing appear impressive, but they also make it more difficult to understand. Archaic terms are very common in contracts, wills and trust, real estate deeds, and legislation. *Aforementioned* and *witnesseth* are examples of archaic terms that are unnecessary.[193]

There are, however, terms of art, that, when used appropriately, are useful drafting tools. The lawyer, however, must consider the audience before using them. If the audience is not composed of lawyers, legal terms of art may not work as effective shorthand. For example, *res ipsa loquitur* may be an appropriate term of art in litigation papers supporting a motion for judgment as a matter of law; however, it may not be appropriate in a memorandum to the client. *Per stirpes* may be appropriate in a will, but may not be appropriate in the memorandum to the client explaining the will.

5) *Eliminate unnecessary legal formality.* Certain formalities are required by the law. For example, a negotiable instrument is a negotiable instrument only if it includes the magic words, and a disclaimer of the warranty of merchantability must include the word merchantability.[194] However, formality often is not mandated.[195] If formality is included out of habit or solely to impress the client, then it should be eliminated.

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189. *See supra* note 119 and accompanying text.

190. For a discussion of the historic relevance of "null and void," see MELLINKOFF, *supra* note 6, at 358-60. For a discussion of the historic relevance of "cease and desist," see *id.* at 347-48.

191. *See* suggestion (4) below.

192. For additional redundancies that frequently appear in legal writing, see DICKERSON, *supra* note 19, at 207-08.

193. For a list of other archaic words, see *id.* at 207.

194. *See supra* note 125 and accompanying text.

195. *See supra* notes 125-27 and accompanying text.

6) *Unless you are stressing the negative, draft in the positive.* Affirmative actions are easier to understand. In particular, the lawyer should avoid double negatives, which can often create confusion.[196] For example, "Purchaser cannot opt not to purchase unless the following events occur" is difficult to parse. "Purchaser must purchase unless the following events occur" is much easier to understand.

Formatting is also important in legal writing. The format of each legal writing should contribute to its readability. Competent legal writing principles should also include guidelines promoting readable documents. For example, every document should be organized in a logical manner with appropriate headings and subheadings. The guidelines should also address logistical issues including choosing a legible typeface, reasonable margins, and line spacing. Suggestions for these guidelines might be found in the formatting guidelines put forth by various courts and the Securities and Exchange commission.[197]

B. Teaching and Enforcing Competent Legal Writing

Mandating competent legal writing as part of a lawyer's professional responsibility and establishing guidelines alone is not sufficient. The ABA and state bar associations must implement competent legal writing through training and enforcement. The initial step would be teaching lawyers the guidelines. Once lawyers learn competent legal writing, the skills must be nurtured.

Law students should learn the guidelines in law school. If the requirements are part of the Model Rules, students would likely encounter them in a professional responsibility course as well as in their legal writing classes. Ideally, guidelines would be integrated into more aspects of the law school curriculum. For example, law professors could point out good and bad examples of legal drafting and encourage students to emulate the good. Current practitioners could learn the new guidelines through mandatory continuing legal education.

Even after lawyers are taught the guidelines, assuring they know them is difficult. Testing lawyers' knowledge of the guidelines prior to admission to the bar is one mechanism. State bar examiners could insure competent legal writing ability by testing a candidate's legal

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196. *See* FLESCH, *supra* note 55, at 94-101.

197. *See* Ch. 7, Plain English, *supra* note 185; 37 C.F.R. § 201.14(a)(c) (form of copyright notice); 15 U.S.C. § 1453(a)(3)(C) (1994) (type size requirements on package labels); 15 U.S.C. § 1639(a)(1) (conspicuous type size for mortgage disclosure); SUP. CT. R. 33 (setting minimum type size and page requirements); JUD. PANEL MULTI-DIST. LITIG. R. 9(c) (requires double space and certain quality of paper).

writing skills prior to granting admission to practice. A number of state bars do this through a practice or skills component on the state bar exam.[198] The National Conference of Bar Examiners could also test knowledge of the guidelines by revising the Multistate Professional Responsibility Examination to test these guidelines.

Enforcing competent legal writing is even more difficult. To truly enforce competent legal writing, there must be a substantial cost associated with failure to comply. In other words, only when the cost of noncompliance outweighs the cost of compliance will reform really occur. I acknowledge that the competent legal writing standard is subjective and that enforcing subjective guidelines is complicated. However, our judicial system enforces subjective standards every day. For example, lawyers would quickly implement these skills if courts refused to accept litigation papers that did not satisfy the competent legal writing standard.[199] Alternatively, a compliance system could be established.

David Elliott offers a compliance mechanism in his Model Plain-Language Act. Although his Model Act provides only a general statement of how to write in plain language, he sets forth practical suggestions for enforcment.[200] These enforcement mechanisms could be adapted for enforcement of the revised Model Rules by ethics committees and state bar associations. In particular, penalties could be assessed for violations of the standard. These penalties could include paying a fine to use "gobbledygook"; and assessing liability for noncompliance.[201] Elliott's suggestions also provides judicial discretion to impose non-traditional remedies including an order to rewrite, to stop using, publishing or selling a noncomplying document, or to require that a lawyer to take a continuing legal education course.[202] These remedies could also be imposed by ethics committees of state bar associations.

Finally, the ABA and state bar associations could create safe harbors. Among other things, the ABA could provide for pre-approval of legal writing. Although this would not be helpful for legal writings drafted

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198. A number of states, including California and West Virginia, have a skills component on their bar exam.

199. Unfortunately, the judiciary system is already burdened. Judges do not want this job, and it is not clear that all of them could implement it. This also raises issues as to the ramifications if papers are not accepted. For example, would the statute of limitation continue to run while the lawyer redrafts the document?

200. *See generally* Elliott, *supra* note 26.

201. *See id.* at 55, 57-59. The standard of review to determine whether the document complies should be a "reasonable reader" standard: Did the drafter draft a document that a reasonable reader, in a similar position to the intended reader, reading the document under similar circumstances, could understand? *See id.*

202. *See id.* at 55-56.

under significant time pressure, it would be helpful for legal writings that are used multiple times, like forms.

VI. CONCLUSION

Legal writing is central to the practice of law. It is, without question, a fundamental lawyering skill. To provide competent representation, a lawyer must write competently. Regardless of the lip service paid to better legal writing, most lawyers emulate what they read, which, more often than not, includes some aspects of bad legal writing. Bad legal writing often results in ineffective communication.

I am not suggesting that existing legal writing is never competent legal writing, only that often it could be substantially improved. When mandated, plain language has substantially improved legal writing, thereby creating more accessibility. However, plain language is mandated only in consumer transactions and legislative drafting. To date, plain language has not made substantial inroads into other areas of legal writing.

To expand better legal writing, the profession must change long-standing traditions of legal writing that detract from legal writing. This is difficult, particularly as there are associated actual and potential costs. A mandate from the governing bodies of the profession is necessary if the profession seeks to change these long-standing traditions. A professional mandate for change would help to reduce many of the concerns raised by lawyers who resist change. Therefore, the ABA and state bar associations should mandate competent legal writing.

A mandate for competent legal writing alone is not sufficient. The profession must also establish guiding principles. The mandate should be included in the Model Rules, and the guidelines should be included in the commentary. Writing, however, is always subjective; therefore, these guidelines should not be hard and fast rules, but rather provide lawyers with direction and examples. The guidelines should act as a checklist for lawyers to review when undertaking legal writing. Ideally over time, lawyers will internalize these principles and apply them instinctively. Guidelines would also provide consistent standards for legal writing instruction and testing criteria for admission to practice.

Creating these guidelines is challenging; enforcing them is even more challenging. Post-admission enforcement may, in some respects, be unrealistic. However, mandated rules still have value. The promulgation of guidelines would focus lawyers' attention on legal writing, making lawyers more conscious of the problem in a non-confrontational manner. Raising awareness without triggering a defensive response is more likely to produce change.

Mandating competent legal writing is not a panacea. Even competent legal writing will not always result in effective communication. Confusion and "[l]itigation will occur with or without legalese because the essence of law is in the legal interpretation of meaning."[203] However, defining, mandating, and enforcing competent legal writing will improve legal writing and consequently improve competent representation.

203. Kimble, *supra* note 20, at 78.