TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 21 | Number 3 Article 6

December 2014

Increased Importance of Legal Writing in the Era of "The Vanishing Trial"

Edward D. Re

Increased Importance of Legal Writing in the Era of "The Vanishing Trial"

Cover Page Footnote
21-3

INCREASED IMPORTANCE OF LEGAL WRITING IN THE ERA OF "THE VANISHING TRIAL"*

*Edward D. Re***

I. INTRODUCTION

Notwithstanding the obvious importance of the ability to write well for success both in law school and in the practice of law, legal writing courses in American legal education are of comparatively recent origin. As of 1950, with few exceptions, most law schools did not offer courses on legal writing. Indeed, a pioneer book containing cases and materials on "legal composition" did not appear until 1951. This early course book, entitled *Cook on Legal Drafting*, reprinted portions of an article written in 1887, which defined the "art of legal composition" as "all documents which are either expressly intended to be, or which frequently become the subject of legal

---

** Chief Judge Emeritus, United States Court of International Trade; Distinguished Professor of Law Emeritus, St. John's University School of Law. Chief Judge Re, a Member Emeritus of the Board of Higher Education of the City of New York, served as Chairman of the Foreign Claims Settlement Commission of the United States, by appointments of Presidents Kennedy and Johnson, and as Secretary of State for Educational and Cultural Affairs, with jurisdiction over the Fulbright Program, by appointment of President Johnson. In 1968 he was appointed a Judge of the United States Customs Court by President Johnson, and in 1977 was named Chief Judge by President Carter. On November 1, 1980 he became the first Chief Judge of the United States Court of International Trade. The recipient of over twenty honorary degrees, he is a Colonel in the U.S. Air Force Judge Advocate General's Department (ret.) Reserve. He is the author of RE & RE ON REMEDIES, 6th ed. 2005, and RE & RE ON BRIEF WRITING AND ORAL ARGUMENT, 9th ed. 2005.

interpretation."[1]

Beyond writing or drafting rules, regulations, statutes, and pleadings, legal writing, as commonly understood today, encompasses a wide array of written compositions and legal documents such as, contracts, wills, deeds, pleadings, memoranda, trial and appellate briefs, motion papers, judicial opinions, and a quantity of letters necessary and useful in the practice of law.

II. SURVEY OF LEGAL WRITING TEXTS

In order to properly evaluate the status of legal writing in legal education, it is necessary to examine representative texts intended for use in legal writing courses. In 1985, in a most instructive article entitled *Legal Writing: An Evaluation of the Textbook Literature*, Professor Kathleen M. Carrick and Professor Donald J. Dunn began by stating, "Legal writing instruction in American law schools has been subjected to neglect, half-hearted attention, and inadequate attempts at improvement."[2] In that insightful survey, Professors Carrick and Dunn discuss the emergence of legal writing as part of the American law school curriculum. In addition, they survey the leading textbooks that have influenced law schools in structuring and restructuring their legal writing programs, and include helpful book reviews that evaluate some of the more recent additions to what Professors Carrick and

[1] Æ J.G. MacKay, *Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting*, 3 L.Q. Rev. 326 (1887), *reprinted in* ROBERT COOK, LEGAL DRAFTING (16th rev. ed. 1951).

[2] Kathleen M. Carrick & Donald J. Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, 30 N.Y.L. SCH. L. REV. 645 (1985).

Dunn call the "plethora of books designed to respond to criticism about the poor writing skills of law students."[3] The conclusion that "no single text is entirely effective for every type of course, even though ample literature is being produced on the subject,"[4] is probably as true today as it was in 1985.

The first group of texts may be described as focusing on practical matters, and tends to stress basic standards and guidelines.[5] Strict adherence to bold letter rules is advocated.[6] Other books of this genre focus on specific types of legal writing such as the writing of contracts.[7] Clarity is noted as one of the most important elements when writing contracts.

The next group is intended for use in the standard, first-year law school legal writing course. These books concentrate heavily on the important rules of grammar and set forth general writing guidelines.[8] These texts are based on the premise that law students are usually not good writers to begin with and therefore it is necessary to teach basic writing skills before legal writing can be taught. Abstract language and passive construction often used by attorneys is criticized harshly.[9] One author believes that this type of writing can be confusing and can cause legal documents to be

---

[3] *Id.* at 645.

[4] *Id.*

[5] JOHN C. DERNBACH & RICHARD V. SINGLETON, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD (1981).

[6] *Id.* at 27 (illustrating the importance of the adherence to and the interpretation of *stare decisis* and precedent).

[7] *See, e.g.*, CARL FELSENFELD & ALAN SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH (1981).

[8] *See, e.g.*, GERTRUDE BLOCK, EFFECTIVE LEGAL WRITING (1986).

[9] *Id.* at 31-32.

unnecessarily "wordy."[10] Although not mentioned specifically, this useful critical analysis is an argument in support of the basic principles of accuracy, brevity, and clarity.[11]

One basic legal writing text suggests that no special vocabulary should be created or utilized by lawyers.[12] This teaching method urges "self-revision," and focuses on the importance of re-writing. The author sets forth the "writing needs" of the attorney, and includes precision, attention to detail, and clarity.

Professor Weihofen authored a helpful legal writing text entitled *Legal Writing Style.*[13] This book discusses the fundamental principles of legal writing and stresses precision, simplicity, forcefulness, and organization as a means of achieving clear, strong writing.

A more recent line of books has undertaken a critical analysis of current legal writing practices. David Mellinkoff, who in 1963 published an outstanding work entitled *The Language of the Law,*[14] in a more recent book uses the term "lawsick" to refer to wordy, pompous and confusing language often used by attorneys.[15] In this latest book, Mellinkoff recommends that in order to cure this problem, writers must adhere to the rule of brevity by cutting out

---

[10] *Id.*

[11] *See* EDWARD D. RE, BRIEF WRITING AND ORAL ARGUMENT 43 (1951) [hereinafter RE, BRIEF WRITING]; EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 3-8 (9th ed. 2005) [hereinafter RE & RE, BRIEF WRITING].

[12] *See* GEORGE D. GOPEN, WRITING FROM A LEGAL PERSPECTIVE (1981).

[13] HENRY WEIHOFEN, LEGAL WRITING STYLE (1980).

[14] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963).

[15] DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE (1982).

unnecessary words whenever possible.[16]

Another author, Michael Fontham, questions academic teaching practices in several areas of legal writing.[17] For example, Fontham criticizes *The Bluebook: A Uniform System of Citation* and advocates a greater emphasis on simplicity in communication. He also believes that too much time is spent on research and not enough on writing, and points out that extensive research is useless without good written presentation.

Several additional books have joined the available legal writing texts. One book uses an extensive study of legal analysis to assist students in learning good legal writing.[18] This book is different from most other writing texts because of its effort to entertain and engage the reader with many references to students and their problems. The author advocates a writer-centered approach to legal writing.

Another book by Diana Pratt entitled *Legal Writing: A Systematic Approach*,[19] uses case law analysis as its main tool in teaching legal writing. The author encourages students to chart fact patterns in the brief writing process, and includes, as a "sign of the times," a chapter on legal writing in negotiation. Like many other authors, Pratt also advocates the traditional ABC's of legal writing, that is, "Accuracy," "Brevity," and "Clarity," without necessarily

---

[16] *Id.* at 126-44 ("Don't say the same thing twice inadvertently. Rewrite. Rewrite. Rewrite.").

[17] MICHAEL R. FONTHAM, WRITTEN AND ORAL ADVOCACY (1985).

[18] RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE (2d ed. 1994).

[19] DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH (2d ed. 1993).

using those words. The author encourages students to be certain that they "take out all unnecessary words," and throughout the book, refers to the need to be clear and the importance of the re-writing process.[20] Indeed, in a lecture to United States appellate judges on appellate opinion writing, the author of this article stated that there is no "good legal writing, but only good legal rewriting."[21]

In addition to proposed newer methods and techniques in teaching legal writing, it is important to note the repeated importance of the fundamental requirements of accuracy, brevity, and clarity. Although these concepts are not always specifically listed as accuracy, brevity, and clarity, they are usually presented by the use of one or more synonyms such as, precision, conciseness, and clearness. For example, whereas Professor Pratt encourages students to "take out all unnecessary words" and stresses the need to be clear, Professor Weihofen emphasizes that legal writing be "precise, concise, simple, and clear."[22]

III. IMPORTANCE OF LEGAL WRITING

It would hardly seem necessary to prove the importance of the art of communication in the law. Whether written or oral, words and language are the means of all communication. The relationship between law and language has caused scholars to observe that the law is a profession of words, and that words, in their proper order, are the

---

[20] *See* Edward D. Re, *Demands of the Legal Writing Process,* N.Y. ST. B.J., 20, 24, (1984) ("[F]or most mortals there is no good legal writing, but only good *rewriting.*").

[21] *See* Edward D. Re, Appellate Opinion Writing (March 11-14, 1975), *in* EDUCATION AND TRAINING SERIES (published by the Federal Judicial Center).

[22] *See* WEIHOFEN, *supra* note 13, at 110.

raw materials of the law.[23] Hence, the effective use of words and language is an indispensable skill for success, not only in law school, but also more importantly, in the practice of law.[24] As stated by Professor Zechariah Chafee Jr., a law professor of exceptional perception and talent, "Words are the principal tools of lawyers and judges, whether we like it or not."[25]

In spite of the obvious importance of legal writing in the study of law, it is nonetheless crucial to instill in law students a keen awareness of the necessity to acquire communication skills.[26] Immediately upon admission to law school, law students must be made to realize that their success in the law, in large measure, depends upon their ability to speak and write well.[27] This awareness cannot be taken for granted. Whether because of ignorance or overconfidence, it cannot be assumed that students are aware of the importance of words, language, and the ability to write well. In a discussion of the role and qualities of all law teachers, it was stated that law teachers "must elevate the student's awareness of the

---

[23] Roy Kimberly Snell, *A Plea for a Comprehensive Governmental Liability Statute*, 74 KY. L.J. 521, 545 (1986). Snell states that words are the lawyer's basic tools. *Id.* *See also* Martin A. Feigenbaum, *Can Retreads Be as Good as New?: Reflections on the Value of Law as a Second Career,* 40 U. MIAMI L. REV. 397 (1985). Feigenbaum refers to words as the lawyers "set of tools." *Id.* at 405. MELLINKOFF, *supra* note 14, at vii ("The law is a profession of words.").

[24] *See* Marijane Camilleri, *Lessons in Law From Literature: A Look at the Movements and a Peer at Her Jury,* 39 CATH. U. L. REV. 557, 580-81 (1960); Robert W. Gordon, *The Independence of Lawyers,* 68 B.U. L. REV. 1, 10 (1988).

[25] Zechoriah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 382 (1941), *reprinted in* EDWARD D. RE, FREEDOM'S PROPHET 35 (1981).

[26] *See* Philip C. Kissam, *Thinking (By Writing) About Legal Writing,* 40 VAND. L. REV. 135, 136-37 (1987).

[27] *See* Edward D. Re, *The 1976 Jeffords Lecture: The Law Professor and the Administration of Justice*, 23 N.Y.L. SCH. L. REV. 1, 16 (1977).

importance of legal writing."[28]

IV. LEGAL WRITING COURSES

After years of what may be termed "teaching experimentation," legal writing courses have become established in the American law school curriculum. Because of the close relationship between research and writing, some courses have been offered under the title of "Legal Writing and Research" or "Legal Research and Writing."

From an examination of the available current teaching materials and course descriptions, it is fair to say that, apart from the personal preferences of teachers, certain common elements are discernable. Experience indicates that Professor Chafee Jr. was right when he said teachers teach best what they know best. Apart from the differences of emphasis and method, all courses, including legal writing, should prepare students in the writing needs of the profession. Hence, all law school courses must prepare law students for their role as authors of the many documents that are necessary and are used in the practice of law.

The importance of inculcating an awareness of the value of words and language in the study of law cannot be overemphasized. Reference has been made to the indispensable foundation of all good writing, that is, knowledge of words, language, and English grammar, since legal writing has much in common with all writing. Nevertheless, it must be stressed that legal writing courses have a

[28] *Id.* at 16.

special purpose in the law school curriculum. They are neither supplementary nor peripheral, but are essential in the preparation and training of law students for the practice of law. For the legal writer, such as the author of a memorandum of law or an appellate brief, legal writing is more than a mere composition. The author of a legal document must be skilled in the art of writing as well as legal research, legal reasoning and analysis, the ethics of the legal profession, and the responsibility of the advocate as an "officer of the court."

The legal writing process involves the finding and use of research materials. In particular, the process includes the selection, analysis, organization, and communication of research. As may be noted, only the last of these processes, the communication process, involves writing, or the committing of thought to writing.

By virtue of the essential differences between writing in general and legal writing, an effort must be made to stress the demands of the legal writing process. Indeed, legal writers know from experience that, often, what required the greatest effort and time was the thought, which preceded the actual writing of the legal composition.[29]

V. PURPOSE AND AUDIENCE OF THE LEGAL WRITING

To give focus and perspective to the composition, all authors must answer, in their minds, of course, two preliminary questions: First, *why* do we write, and second, to *whom* do we write?

[29] *See* Re, *supra* note 20, at 20.

Differently stated, the author must think of the purpose of the legal composition and the audience for whom it is written.[30] No one should start to write any legal writing without first giving specific thought to the purpose and audience of the composition.

These preliminary considerations determine whether the writing is necessary, its focus, form, length, and level of usage. Hence, the advice is offered to all authors in general, and law students and lawyers in particular, not to commence writing unless it is first determined *why* and to whom one is writing, and precisely *what* one wishes to accomplish by writing. For example, is the document intended to be an objective presentation of the facts or the law, or is it intended to persuade the reader to adopt or accept a particular view of the facts or the law? Is the lawyer writing an informal opinion letter to a client who is considering a certain course of action, or is counsel about to prepare an appellate brief urging an appellate court to affirm or reverse a judgment or order on appeal? Because of the difference in purpose and audience, the legal writing will be different in form, content, and matter of presentation. Furthermore, if counsel is preparing a brief for submission to a court, it is necessary to examine the rules of the court that may determine the form, length, and other requirements of the document.

VI. THE DEMANDS OF THE LEGAL WRITING PROCESS

All teachers of writing, as well as legal writing, will offer advice such as, "think before you write," "know why you write,"

[30] *Id.*

"know to whom you write,"[31] and "clear writing requires clear thinking." However, it is necessary to stress that the legal writing process has additional demands. Legal writing has restraints or constraints that do not permit free literary reign or flights of fancy. Legal writers do not write on a canvas of the great outdoors, but rather on a limited space with specifically defined boundaries beyond which they cannot trespass.

Lawyers cannot take liberties with the text, which consists of the facts and the law. Legal writing implies an accuracy that distinguishes it from other forms of literary composition. This important additional element is the crux of professional responsibility. It not only distinguishes legal writing from other forms of writing but also highlights its importance in the training of the lawyer. Hence, it is clear that legal writing is not only more than writing in general but also indispensable in the training of lawyers for the practice of law.

Many years of experience in legal writing, including the reading of hundreds of documents, memoranda, and briefs, have reaffirmed an earlier conviction that legal writing can be learned and can be taught. Regardless of preference, favored areas of treatment, or method of presentation, certain requirements or demands of the legal writing process should form the underpinning of legal writing courses worthy of retention or inclusion in the American law school curriculum.

None of the principles and suggestions that follow are

[31] *See* RE, BRIEF WRITING, *supra* note 11, at 3.

intended to detract from the importance of providing special assistance to students who require remedial help in the general ability to read and write. Furthermore, since it has always been stressed that legal writing is built upon a foundation of good English, only praise and encouragement is extended to professors who teach rules of grammar, sentence structure, and good English to all those students who need such instruction. Therefore, remedial English instruction is encouraged for all students who require instruction in English composition and grammar.

The following requirements or demands of the legal writing process are stressed because they not only teach legal writing but also instill indispensable legal skills required by the competent lawyer. Although presented in summary fashion, the reader will readily note that the requirements of the legal writing process deal with knowledge and skills, without which lawyers cannot competently practice their profession. These indispensable legal skills include legal research, the analysis and distinguishing of cases, the interpretation of statutes, the identifying of legal issues, the effective presentation of facts, and the application of judicial precedents. Hence, in teaching and inculcating these skills, legal writing professors teach more than "writing"; they teach important aspects of law, both substantive and procedural. Broadly speaking, legal writing includes the Thinking Process, the Learning Process, the Planning Process, and the Writing Process.[32]

[32] *See* Re, *supra* note 20, at 20-23.

VII. THE THINKING PROCESS

Reference has been made to the thinking process in the discussion of the importance of purpose and audience in legal composition. The thinking process and the learning process precede the actual writing process. The writer should determine beforehand whether the proposed document is intended to introduce the reader to the subject, or is intended to supplement the knowledge of the reader. Background information, which may be indispensable in an introductory document, could detract from a document addressed to a reader who is already familiar with the facts and the law. For the informed reader, one ought to proceed directly to a discussion of the specific issue or issues under consideration.

A writer's presentation will also depend upon whether the document is intended to inform or persuade. For instance, the purpose of an office memorandum of law may be to provide an accurate and objective answer to a specific legal question posed by a client or by a member of a law firm.[33] A brief submitted to a court, however, is a partisan document. Its purpose is to persuade the court to reach a favorable decision. Not only must hostile authority be distinguished, but also the issue and the facts must be stated in a manner that will highlight the equities of the client's case. Furthermore, a copy of the document submitted to the court must also be submitted to opposing counsel.

Another factor to keep in mind is the *audience* for whom the document is written since it will determine the level of usage as well

[33] *See* RE, BRIEF WRITING, *supra* note 11, at 37-41.

as the tone and form of the document. Level of usage refers to the choice of words and the sophistication of discussion. In documents addressed to non-lawyers, the legal writer should avoid using legal terms of art. Legal terms of art or phrases such as "recognizance," "certiorari," "dictum," "stare decisis," or "res ipsa loquitur" are appropriate in communication between lawyers and judges. However, when communicating with non-lawyers, the author must devote the time and effort needed to make the document clear and understandable to persons not familiar with legal terminology or phrases of art.

Finally, a legal document should be consistent with the dignity of the audience and appropriate to the occasion. For example, an appellate brief is a formal document respectfully submitted to a panel of distinguished judges. Therefore, counsel should submit a document, which reflects professional competence, as well as respect for the courts and the administration of justice.[34]

VIII. THE LEARNING PROCESS

No knowledge, however thorough, of the art of legal composition will compensate for a lack of knowledge of the facts and the law, which are the subject matter of the document. The legal author has a professional responsibility to become thoroughly familiar with the facts and the law because without this indispensable knowledge, the lawyer cannot write an effective document.

In addition to a mastery of the facts, the writer must research

[34] *See id.* at 94-95.

and learn the applicable law. Competent legal authorship presupposes proper training in the use of legal research materials. It requires the ability to identify the legal issue, discern the governing principles of law, and apply those principles to the facts of the case. It would seem clear that only after the facts have been established and the law analyzed, the author could be concerned with matters of eloquence and style. Moreover, counsel must be aware of the ethical considerations that do not permit misstatements of law and fact.[35]

IX. THE PLANNING PROCESS

Having learned all the relevant law and facts, the writer must proceed to select the relevant research materials and organize them in a manner that will promote understanding. The writer must begin planning how to prepare and write the proposed document.

The planning process is facilitated by the preparation of a thorough *outline*. During the preparation of a preliminary detailed outline, the author need not be concerned with brevity. The initial outline should contain everything that may be pertinent.[36] Once the initial outline is complete, the author can begin revising and reorganizing, eliminating nonessential matter. Since the final document should be no longer than absolutely necessary, selectivity is key in the planning process.[37]

---

[35] *See id.* at 12-13 (counsel, professional responsibility). *See also* Edward D. Re, *Professionalism for the Legal Profession,* 11 FED. CIR. B.J. 691-93 (2001-02).

[36] *See* Re, *supra* note 20, at 22.

[37] *See id.*

X. THE COMMUNICATING OR WRITING PROCESS

The outline of legal writing is the basis of the legal writer's initial or "rough draft." However, improving that draft into a final document is a time-consuming task. All experienced writers know that writing is hard work, and that a clear sentence is no accident. Hardly ever do sentences come out right the first time they are written. A legal document, essentially, is a presentation based upon research materials. The style of the presentation depends upon the form and language used by the author to meet the particular need. The form may be determined by procedural rules or applicable rules of the court, which must be examined before the writing commences.

Although there may be no single style that is best suited for a particular legal writing, examples of good legal writing do have certain characteristics. The question that must be answered is whether the document accomplishes the purpose for which it was written.

In legal writing, the most important characteristics are said to be accuracy, brevity and clarity.[38] In any legal document, the importance of accuracy cannot be overstated; it must be the writer's first concern, and if necessary, style may suffer for the sake of accuracy. Legal writers, however, should be careful not to becloud their ideas with qualifying words or phrases. In the words of Justice Cardozo, "There is an accuracy that defeats itself by the over emphasis of detail. . . . The sentence may be so overcrowded with all its possible qualifications that it will tumble down by its own

[38] *See* RE, BRIEF WRITING, *supra* note 11, at 3-8.

weight."[39] The deletion of unnecessary qualifying phrases will enable the reader to comprehend more easily the information being conveyed.

Furthermore, the elimination of unnecessary qualifying phrases will also help the writer achieve brevity. Brevity in writing is not to be equated simply with the length of a document. It is a flexible standard of conciseness in relation to the complexity of the subject presented. Although everything germane must be included, there must be an economy of words. The legal writer must develop the ability to summarize the facts and the law without distorting the true picture. In legal writing, authors cannot choose the escape of writing a long letter or memorandum because they did not have time to write a short one.

In addition to being accurate and brief, good legal writing is distinctive for its clarity. Legal documents must be clear if they are to serve their intended purpose. Clarity requires selecting the words, which will instill in the mind of the reader the exact thought that the writer wishes to convey. The precise use of words enhances both the clarity and effectiveness of a lawyer's writing.

Clarity of legal writing is often needlessly undermined by inattention to basic rules of grammar and punctuation. The diligent author, who takes the time to read and reread what has been written, is able to avoid ambiguity and correct errors that may seriously harm the clarity and effectiveness of the document.

[39] BENJAMIN N. CARDOZO, LAW AND LITERATURE 7 (1930).

XI. THE INCREASED IMPORTANCE OF LEGAL WRITING IN THE ERA OF "THE VANISHING TRIAL"

In 1951, in the Preface to the First Edition of a manual on *Brief Writing and Oral Argument*, the author of this article, fully aware of the importance of the ability to speak and write well for members of the legal profession, stated that the purpose of the book was to provide law students and lawyers with a "standing introduction to legal writing and oral arguments."[40] As stated in that textbook, intended primarily for law students and members of the legal profession, "words and language are the very heart of their work." It would have been hard to believe that words and writing could ever have been any more important than they were. Yet, a recent development in the practice of law has increased by dramatic proportions the importance of legal documents submitted to a court. This recent development is the result of what has been referred to as the "vanishing trial."

The words "vanishing trial" refer to the trend that, notwithstanding the great increase of cases filed in court, fewer cases ever "go to trial." Hence, the importance of legal writing has increased because now, cases are decided *not after* trial, but "on papers submitted" to the court.

In a recently published report, it was stated that "[a]s U.S. suits multiply, few ever go to trial."[41] An article in the *New York*

---

[40] RE, BRIEF WRITING, *supra* note 11.

[41] Adam Liptak, *U.S. Suits Multiply, But Few Ever Get to Trial, Study Says,* N.Y. TIMES, Dec. 14, 2003, §1, at 1; Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (prepared for a symposium on the Vanishing Trial prepared by the Litigation Section of the American Bar Association, San Francisco,

Times, based upon a recent study, revealed that most cases are disposed of in court "on papers submitted."[42] The study also found that "in 1962 . . . 11.5% of all civil cases in federal court went to trial. . . . By [2002], that number had dropped to 1.8%. . . . And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too."[43]

Although all books on the subject of legal writing refer to the importance of legal writing in the practice of law and in the legal profession, it could not have been foreseen that in a comparatively short period of time, the trial is becoming more "uncommon."

Some scholars have referred to this recent trend of the "vanishing trial" as the "passing of the common law adversarial system."[44] In addition, lawyers and judges have referred to this trend as a reflection of a "growing antagonism to trials by lawyers and judges who consider them costly and risky."[45]

Although, in recent years law schools have devoted more attention to the teaching of legal writing and offer more courses on legal writing, the implications of this professional shift in the legal profession have not yet become fully understood. One important consequence that should be obvious is that legal writing courses must now devote greater attention, not only to the appellate brief and appellate oral argument, but also to the drafting of various documents that are essential in trial preparation. Thus, the pleadings and all of

---

Ca., December 13-14, 2003).

[42] Liptak, *supra* note 41. *See also* RE & RE, BRIEF WRITING, *supra* note 11, at 2-9.

[43] Liptak, *supra* note 41.

[44] *Id.*

[45] *Id.*

the "papers," that is, documents or materials submitted to the court when a case is filed, assume a greater importance in an era where cases are decided on "papers submitted to the court."

Hence, the papers submitted to the court, in addition to the pleadings in the case, should include documents that facilitate the trial such as, the trial memorandum for the court, the memorandum of law for the court, and motion papers on disputed questions of law that are likely to arise during the trial. These documents are of the greatest value and importance when a case that is filed will be decided on the "papers submitted" and *not* after a trial.

This era of deciding cases on "papers submitted to the court" also highlights the ethical and professional responsibilities of the advocate. For example, in a trial brief or memorandum, in which counsel states that certain witnesses will be called at the trial and will give certain testimony, the statements of counsel must be accurate and cannot misstate or mislead the court as to the evidence that will be introduced at trial. This responsibility demonstrates the lawyer's role in adhering to the professional standard of ethics required of the lawyer, who is not only an advocate but also an "officer of the court."[46]

After the presentation of the general principles of effective legal writing and the demands of the legal writing process, lawyers must now be fully aware of the "vanishing trial" and the importance of documents pertaining to the trial of cases. Perhaps most important, is the ethical responsibility of the advocate to adhere to a

[46] *See* RE, BRIEF WRITING, *supra* note 11, at 12-13, 54-57; Re, *supra* note 35, at 682-

clear presentation of the legal, ethical, and professional duties of the lawyer as an officer of the court. Counsel must constantly bear in mind that although the litigation process may be adversarial, legal and ethical standards of professional responsibility must be foremost in the minds of lawyers representing clients before the court.

XII. CONCLUSION

The large number of competent legal writing teachers and the abundance of recent teaching materials are all indicative of the progress that has been made in acknowledging the value and importance of legal writing instruction in law schools. Since legal writing courses are well established, it is no longer necessary to plead for their inclusion in the law school curriculum. The fact that the courses are not merely "elective," but are required courses, serves the additional purpose of making students aware of their importance. Nonetheless, it must be emphasized that the teaching of legal writing is more than the teaching of words, language, and rules of grammar. It also includes inculcation of professional values, skills, and responsibilities as members of a learned profession.

Dean Roscoe Pound, in 1950, in his fifty-first year of teaching law, made some extraordinary perceptive comments on law professors and law teaching.[47] Dean Pound noted that, "under the conditions of practice in [the modern industrial] society," "the apprentice system of preparation for the bar ceased . . . to do the work

703; *see also id.* at 691-95 (lawyers as officers of the court).

[47] Roscoe Pound, *Some Comments on Law Teachers and Law Teachings*, 3 J. LEGAL EDUC. 519 (1951).

of handing down effectively the tradition of a profession as distinct from a money-making calling."[48] Speaking as a law teacher, Dean Pound concluded the thought by stating: "I fear we law teachers have not found, nor even tried very hard to find, how to do this part of the task which has devolved upon us."[49]

Surely, much has happened, and genuine efforts for improvement have been made since Dean Pound's 1950 speech, although the concern expressed by Dean Pound in "handing down effectively the tradition of a profession" is of primary importance in the inculcation of ethical norms and professional values, it is also applicable to all of the skills that are essential for the competent practice of law.

In view of the importance of legal writing, it is clear that there is need for courses whose purpose is to inculcate principles and skills indispensable for lawyers in the practice of their profession. In teaching the legal documents necessary in the practice of law, these courses would serve the function formerly performed by the experienced lawyer-mentor, and would be the modern masters or magisters of the present method of teaching law.

All law school professors, regardless of the subject taught ought to ask themselves whether they are helping to prepare students for a profession whose function is the rendering of valuable legal services. When the service component of the practice of law is fully appreciated, a new and enhanced value will be placed upon the role

---

[48] *Id.* at 520.

[49] *Id.*

of all of those professors who strive to teach and inculcate effective writing as an indispensable skill and responsibility in the practice of law. Beyond the obvious necessity of teaching professional skills and responsibility, legal writing offers a splendid beginning in teaching the needs of the modern lawyer truly qualified to render not only the services of advocate but also the services of counselor, peacemaker, and problem solver.[50]

[50] *See* Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 685-98 (1982); Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 S.D. L. REV. 501, 508-13 (1985); Edward D. Re, *The Lawyer as Counselor and Peacemaker*, 77 ST. JOHN'S L. REV. 515, 515-21 (2003).