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James E. Rogers
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More True Confessions of a Legal Writing Professor: The Continuing
Study of Legal Writing Should Be Deemed a Required Part of Our
Professional Responsibility

Diana J. Simon
The University of Arizona
James E. Rogers College of Law

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More True Confessions of a Legal Writing Professor: The Continuing Study of Legal Writing Should Be Deemed a Required Part of Our Professional Responsibility.

By Diana J. Simon¹

In case you are wondering, sometimes I wander outside the confines of the law school and interact with people besides my students. While this is difficult because I generally don't relate well to adults who are not students (and to be honest, sometimes I don't relate well to my students either, mostly because I am socially awkward), sometimes it's necessary. On one of these occasions, I was asked to present on the topic of legal writing to the Arizona Women Lawyers Association. I was excited to do this because I used to be a member, and I thought I would see some familiar faces. Before my topic was officially set, someone from AWLA asked someone from the State Bar of Arizona (the names of these people are not disclosed to protect their identities, and, more importantly, because I have no idea who they were) whether the topic of legal writing would count toward one CLE credit for "professional responsibility." The answer came back: No.

This answer surprised me, so I decided to do some research. While the State Bar may have its reasons for this position, I think a strong case can be made that being a competent legal writer is part of a lawyer's professional responsibility, and therefore, continuing education in this area should count toward professional responsibility credits.

Preliminarily, what is included in the definition of "professional responsibility"? It includes instruction in "legal ethics" and "professionalism."² Surely, this definition is broad enough to include learning about effective legal writing. As one legal writing professor emphasized: "Writing clearly and concisely is not only good business practice, it should also be viewed as an ethical obligation of all attorneys."³ Even if you discount what a legal writing professor has to say on the subject (because we are all hopelessly biased in favor of good legal writing),

¹ Diana J. Simon is Associate Clinical Professor of Law at the University of Arizona College of Law where she has been teaching legal writing in varying capacities for 25 years. In addition to teaching, she has written a legal style guide entitled: *THE (NOT TOO SERIOUS) GRAMMAR, PUNCTUATION, AND STYLE GUIDE TO LEGAL WRITING* (2022). The author would like to thank Molly Case for her citation assistance on this article. The views expressed herein are the author's alone and do not represent the views of anyone at Arizona Law.

² Ariz. R. Sup. Ct. 45(a)(2). *See also* ARIZ. STATE BAR, MCLE REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION 101(L) (2022) (defining professional responsibility hours to include the types of legal education outlined in Supreme Court Rule 45(a)(2), which includes ethics).

³ Wendy B. Davis, *Writing Clinic—An Attorney's Ethical Obligations Include Clear Writing*, 72-JAN N.Y. ST. B.J. 50, 50 (2000).

consider prolific author Judge Lebovits’s statement on the matter: “A lawyer’s writing must project ethos, or credibility and good moral character: candor, honesty, professionalism To evince good character, lawyers should write clearly and concisely.”⁴

This article will cover: (1) the rules of professional conduct, as they may pertain to legal writing; (2) why scholars believe that good legal writing is part of a lawyer’s professional responsibility; (3) instances where judges have admonished lawyers who have produced bad legal writing and tied effective writing into professional responsibility; (4) why poor legal writing can impact our justice system; and (5) suggestions for encouraging lawyers to continue learning about and perfecting their legal writing.

First, let’s talk about the good news. Arizona’s regulations for mandatory continuing legal education include “writing” as an activity that can satisfy an attorney’s CLE requirement.⁵ Credit may be earned for writing legal material not used in conjunction with a CLE program, but credit cannot be claimed for writing which is part of the regular practice of law or regular scope of employment.⁶ Such material must address an attorney audience and be published by a “recognized third-party publisher of legal material or a sponsor.”⁷ For 3,000 words of original material written, the author may earn 2 credit hours.⁸ Unfortunately, there is no explicit requirement that the writing be effective or competent. Also, Arizona does not require attorneys to participate in annual CLE lessons devoted exclusively or expressly to legal writing (unlike, for example, the requisite three hours that must be devoted to professional responsibility).⁹

Similarly, while the creed of professionalism to the Arizona State Bar provides that an attorney must be “courteous and civil, both in oral and written communication,” nothing is said about writing effectively or competently.¹⁰ Apparently, if you are civil and courteous, your writing can be incomprehensible.

⁴ Gerald Lebovits, *Legal Writing Ethics—Part II*, 77-DEC N.Y. ST. B.J. 64, 57 (2005).

⁵ ARIZ. STATE BAR, MCLE REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION 101(E) (2022).

⁶ *Id.* at 104(B)(4).

⁷ *Id.* I think this article would qualify except that it is fewer than 3,000 words. If I write five articles that are each 2,500 words, can I add up the words to get credit? I think so. This key question will be saved for another day and another article (that will still be somewhere under 3,000 words because I am trying to be concise).

⁸ *Id.* at 104(B)(4)(a).

⁹ Ariz. R. Sup. Ct. 45(a)(2).

¹⁰ Ariz. R. Sup. Ct. 41(c) (reciting section (b)(1) of the Creed of Professionalism).

Where might effective legal writing fall within the Arizona Rules of Professional Conduct? It seems like the two prime candidates would be the rules requiring lawyers to be competent and diligent, both of which are requirements of professional responsibility.¹¹ The Editors' Notes following these requirements, however, do not reference or seem to focus on legal writing. For example, in terms of competence, the focus is on an attorney's skill and knowledge, an attorney's preparation in terms of analyzing "the factual and legal elements of the problem," and an attorney's need to keep "abreast of changes in the law and its practice."¹² Nothing hits the nail on the head in terms of effective legal writing. The same is true of the requirement to be diligent. In the Editor's Notes on this requirement, the focus is on avoiding "offensive tactics," controlling an attorney's workload, and acting with reasonable promptness.¹³ Again, apparently diligence can be accomplished even if a lawyer is an ineffective writer.

Many scholars and experts in legal writing, however, have advocated for the idea that effective legal writing is part and parcel of a lawyer's professional responsibility.¹⁴ Legal writing expert Heidi Brown, after discussing the "rash of bad briefing"¹⁵ in both state and federal courts, suggested, among other solutions, that legal writing should be an express criterion of professional competence in State Bar CLE requirements.¹⁶ Similarly, another law professor suggested that effective legal writing should tie into competence because a lawyer cannot competently represent the client "if poorly written legal papers can be refuted by opposing counsel or misinterpreted by the judge."¹⁷ Another legal writing instructor was even more direct: "Rule 1.1 of the ABA Model Rules of Professional conduct requires an attorney to provide competent representation, and writing skills are one aspect of competence."¹⁸ And finally, a professor of law, writing for the *South Carolina Bar* magazine, began his article with the thesis that

¹¹ Ariz. Rules of Prof'l Conduct ER 1.1, 1.3.

¹² Ariz. Rules of Prof'l Conduct ER 1.1, Editor's Notes (2003 Amendment) at 6.

¹³ Ariz. Rules of Prof'l Conduct ER 1.3, Editor's Notes (2003 Amendment) at 1.

¹⁴ E.g., Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PROF. 259 (2017); Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491 (1999); Davis, *supra* note 3; Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, the Minimalist Wizard, and Other Stories*, 9 SCRIBES J. LEGAL WRITING 77 (2004); Lebovits, *supra* note 4.

¹⁵ Brown, *supra* note 14, at 262.

¹⁶ *Id.* at 295-97.

¹⁷ Cohen, *supra* note 14, at 493.

¹⁸ Davis, *supra* note 3, at 50.

Rule 1.1 of the ABA Model Rules of Professional Conduct, requiring competent representation, applies to everything a lawyer does, “including writing.”¹⁹

Many judges have also tied poor legal writing to a lack of professionalism. Sometimes, courts, commenting on poor writing, even tie their comments to the standards learned in a 1L legal writing class.²⁰ Let’s look at some “benchslaps”²¹ tied to poor legal writing. In *Gandy v. Lynx Credit*,²² the court had this to say about the lawyers’ work: “As an initial matter, the Court notes the quality of writing, or rather lack thereof, in counsel's brief. Counsel's slipshod effort is devoid of clarity and rife with spelling errors, grammatical miscues, poor formatting, and questionable quotations. Filings of this type do a disservice to both the Court and the client.”²³ Similarly, referring to the “dozens of pages of gibberish” both parties submitted in *Bradshaw v. Unity Marine Corp.*,²⁴ the court excoriated both sets of lawyers as follows: “[T]he Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions.”²⁵

But beyond these general criticisms, lawyers have faced disciplinary measures because of poor legal writing and other transgressions. For example, in *In re Disciplinary Action Against Hawkins*,²⁶ the court held that the attorney’s disregard for court rules and lack of writing skills warranted public reprimand.²⁷ The court expressly tied the lawyer’s “incomprehensibility” to a violation of Rule 1.1 of the Minnesota Rules of Professional Conduct requiring attorneys to provide competent representation.²⁸ Interestingly, although the lawyer apparently was

¹⁹ Thomas R. Haggard, *Good Writing as a Professional Responsibility*, 11-JUN S.C. LAW. 11, 11 (2000).

²⁰ *E.g.*, *Butler-Rance v. Providian Bancorp Servs., Inc.*, No. 6:06-CV-332ORL31UAM, 2007 WL 2310114, at *2 (M.D. Fla. Aug. 9, 2007) (“A first-year law student who submitted this ‘response’ for a legal writing class would likely be encouraged to rethink his or her choice of career.”); *Bank of New York v. First Millennium, Inc.*, 598 F. Supp. 2d 550, 568 (S.D.N.Y. 2009) (“[w]ith all *due* respect (I emphasize the adjective), if those lawyers had been law students and submitted these documents as a final exercise in a Pass/Fail course on Clarity in Legal Writing, their grade would not begin with a ‘P.’”), *aff’d*, 607 F.3d 905 (2d Cir. 2010).

²¹ Heidi K. Brown, *Converting Benchslaps to Backslaps*, 11 LEGAL COMM. & RHETORIC: JALWD 109 (2014).

²² No. 3:14-CV-0369-B, 2014 WL 6805501 (N.D. Tex. Dec. 3, 2014).

²³ *Id.* at *1 n.2.

²⁴ 147 F. Supp. 2d 668, 672 n.3 (S.D. Tex. 2001).

²⁵ *Id.* at 670.

²⁶ 502 N.W.2d 770 (Minn. 1993).

²⁷ *Id.* at 771-72.

²⁸ *Id.* at 771, 771 n.1. Obviously because Arizona and Minnesota have adopted the language of the ABA Model Rules, both states use the exact same wording in defining competent representation: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness,

knowledgeable on the pertinent substantive law, that subject-matter competence did not change the court's view.²⁹ The court criticized the lawyer's writing as "filled with spelling, grammatical and typographical errors that they are virtually incomprehensible."³⁰ Similarly, in *In re Shepperson*,³¹ the Supreme Court of Vermont ordered that a lawyer be suspended indefinitely until he could demonstrate he was fit to practice law.³² The lawyer had earlier agreed not to engage in the practice of law until he had completed a legal writing tutorial because his briefs were "incomprehensible" over a long period of time.³³ After that six-month program, he was to submit a ten-page legal writing sample.³⁴ Because he never completed the program, the court suspended him for no less than six months.³⁵ Finally, in *People v. Buckley*,³⁶ an Illinois court held that a defendant received unreasonable assistance of counsel in part based on "incoherent ramblings that served only to detract from defendant's claim."³⁷ Interestingly, in a dissent, the court stated that "[a]lthough I would not award high marks to this petition in a legal writing course, its poor construction did not render the counsel's representation unreasonable"³⁸

In fact, poor legal writing can impact our justice system. It goes without saying (but I'm still going to say it) that if lawyers submit well-written briefs that comply with court rules, this aids the adjudicative process because judges can "resolve the questions presented without unnecessary detours to decipher unclear arguments or correct misstatements of case law."³⁹ In contrast, poor legal writing has the opposite effect. Bad briefing: (1) unfairly shifts the burden to opposing counsel who must discern what arguments are being made; (2) unfairly shifts the burden of deciphering briefs to judges and other court personnel; (3) slows the courts' evaluative processes; and (4) disrespects "the judicial system and its

and preparation reasonably necessary for the representation. Minn. Rules of Professional Conduct 1.1; Ariz. Rules of Prof'l Conduct ER 1.1; MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021).

²⁹ *Id.* at 771.

³⁰ *Id.*

³¹ 674 A.2d 1273 (Vt. 1996).

³² *Id.* at 1273.

³³ *Id.* at 1273-74.

³⁴ *Id.* at 1274.

³⁵ *Id.* at 1274-75.

³⁶ 2018 IL App (3d) 170268-U.

³⁷ *Id.* at ¶ 29.

³⁸ *Id.* at ¶ 39 (dissenting opinion).

³⁹ *Carson v. Int'l Headquarters Pension & Beneficiaries Plan of Int'l Union of Operating Eng'rs*, No. 5:14-CV-11617, 2014 WL 4467701, at *4 n.6 (S.D. W. Va. Sept. 9, 2014).

players.”⁴⁰ In other words, clear writing is a “professional obligation because both clients and courts rely on the lawyer’s writing to elucidate the issues.”⁴¹

In case you are thinking this is all the fault of legal writing professors, including me, I beg to differ. First, no one can become an effective legal writer overnight. As one blogger so aptly stated, “[y]ou don’t need innate talent to succeed at writing, but you do need plenty of ass-in-chair. You need to hone your grammar, read constantly (when you’re not writing, that is), study great writers, and write, write, write.”⁴² And I do think the fact that legal writing is a skill that cannot be learned overnight is frustrating for many students who have entered law school having gained significant writing experience, who have earned multiple advanced degrees, and who have succeeded in challenging jobs. I tell them that it took me years and lots of practice and feedback to be an effective legal writer. And I’m still learning. They then give me that look, wondering why I am teaching them.

Second, while students get substantial feedback on their writing in law school, new practicing lawyers often do not.⁴³ This makes it difficult to continue to hone their skills.

Finally, I am not suggesting that all, or even most, lawyers write poorly. In fact, a search in Arizona for any case using the terms “incomprehensible,” “gibberish,” or “ineffective legal writing,” did not unearth a single case (but maybe my search terms were not effective). And during the twelve or so years I practiced law in Arizona, a vast majority of the briefing I read was effective and more than competent. But we all should still be required to take refresher classes to improve.

Therefore, based on what scholars and judges have to say on the subject, and the overall importance of writing in our profession, legal writing should be recognized as part of our professional responsibility, and legal writing education should count for credit toward professional responsibility CLE requirements. Alternatively, the State Bar should mandate a minimum number of credits for learning about legal writing specifically like it does for professional responsibility. Yet another option is to provide in the oath words that clarify that effective written

⁴⁰ Brown, *supra* note 14, at 289.

⁴¹ Fischer, *supra* note 14, at 96.

⁴² Linda Formichelli, *Is Writing Talent Inborn or Learned?*, THE RENEGADE WRITER BLOG (Mar. 16, 2009), <http://www.therenegadewriter.com/2009/03/16/is-writing-talent-inborn-or-learned/> [<https://web.archive.org/web/20091120013610/http://www.therenegadewriter.com/2009/03/16/is-writing-talent-inborn-or-learned/>].

⁴³ One key reason: clients do not want to pay for training time.

communication is required or include it more clearly in the definition of competence and diligence.

Effective legal writing should not be an afterthought; it is one of the keys, and maybe the most important one, to communicating with our justice system. Granted, I might be biased in favor of effective legal writing (let's face it: I am biased, but in a good way), but that does not mean I am wrong.