

2024

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### Recommended Citation

Anna F. Connolly, *Context Matters for Deep Knowledge: What Cognitive Science Can Teach Us About Legal Writing*, 68 St. Louis U. L.J. (2024).

Available at: <https://scholarship.law.slu.edu/lj/vol68/iss3/8>

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**CONTEXT MATTERS FOR DEEP KNOWLEDGE: WHAT  
COGNITIVE SCIENCE CAN TEACH US ABOUT LEGAL WRITING**

ANNA F. CONNOLLY, ESQ.\*

ABSTRACT

*Many law school graduates are entering the workforce unable to write well. The legal field requires so much writing, yet law schools emphasize neither writing nor practical skills. We need not overhaul law school curricula to address the problem. Cognitive science teaches us that students internalize material when they understand the context. Without context, even the best planned lessons will remain only “shallow knowledge.” To create “deep knowledge,” we must provide context: students must know why they are writing. For example, a student asked to write a motion to dismiss the complaint has the best chance of success if they understand the story of how the parties arrived at that juncture and what lies ahead. Providing students with the story surrounding a writing assignment helps students internalize writing skills; it also imparts practical skills, leading eventually to better writers and more proficient junior lawyers.*

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## INTRODUCTION

There is a growing consensus that “we are in the midst of a [writing] crisis.”<sup>1</sup> College students, graduate students, business school students, and others go out into the work force and their employers ask: “*Why can’t my new employees write?*”<sup>2</sup> Attempts to diagnose the problem suggest a myopic focus on standardized tests, too much screen time, a growing emphasis on STEM courses,<sup>3</sup> and lack of basic instruction.<sup>4</sup> Or, perhaps, we are teaching them all wrong.<sup>5</sup>

Law students are not exempt.<sup>6</sup> Many practitioners have lamented recent law graduates’ inability to write and unpreparedness for the practice of law.<sup>7</sup> In fact, according to some, not only do “lawyers on the whole [not] write well[,] . . . [they] have no clue that they don’t write well.”<sup>8</sup> Why the skills deficit? Part of the problem may be that in the last decade, “law students have become weaker

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1. JOHN WARNER, *WHY THEY CAN’T WRITE: KILLING THE FIVE-PARAGRAPH ESSAY AND OTHER NECESSITIES* 1 (2018); *see, e.g.*, Rebecca Flanagan, *The Kids Aren’t Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135, 136 (2015) (discussing the “consensus” that “students are not developing the critical thinking, analytical reasoning, and writing skills that should be the cornerstone of their intellectual development”). Although, others would argue that nothing has changed—“students have always been poor writers.” WARNER, *supra*.

2. WARNER, *supra* note 1, at 1.

3. *See, e.g.*, Nathan Heller, *The End of the English Major*, NEW YORKER (Feb. 27, 2023), <https://www.newyorker.com/magazine/2023/03/06/the-end-of-the-english-major> [<https://perma.cc/4CFV-38CP>]; *see also* Flanagan, *supra* note 1, at 136 (discussing “continuing decline of the liberal arts and humanities in favor of more career-oriented courses and majors”).

4. *See generally* Ann Nowak, *The Struggle with Basic Writing Skills*, 25 LEGAL WRITING 117 (2021) (discussing the decline in basic writing skills among entering law students and the challenge faced by younger legal writing professors due to inadequate training in this area).

5. *See generally* WARNER, *supra* note 1, at 5-8; Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 224-25 (2007) (asserting that law school pedagogy is “mired in the past” to the detriment of lawyers and the public).

6. *See* Nowak, *supra* note 4, at 117 (arguing that “the biggest problem is that entering law students have become weaker and weaker in basic writing skills,” and an “ancillary problem” is that “many members of the younger generation of legal writing professors are at a disadvantage in trying to teach these skills because they were not properly taught the skills when they were in primary school, secondary school, and college”); Bryan A. Garner, *Why Lawyers Can’t Write*, A.B.A.J. (Mar. 1, 2013), [https://www.abajournal.com/magazine/article/why\\_lawyers\\_cant\\_write/](https://www.abajournal.com/magazine/article/why_lawyers_cant_write/) [<https://perma.cc/NV4H-MTRE>] (noting that “newly licensed lawyers” in particular don’t write well).

7. Bev Meyers, *Should Law Firms Provide Training in Legal Writing to New Lawyers? Absolutely.*, LEGAL WRITING LAUNCH (Dec. 29, 2020), <https://legalwritinglaunch.com/should-law-firms-provide-training-in-legal-writing-to-new-lawyers-absolutely/> [<https://perma.cc/T2N6-RLJD>] (“New lawyers are generally not prepared for the rigorous practice of law . . . [because] [t]hey simply do not yet have . . . practical and efficient legal writing skills . . .”); *see* Dolin, *supra* note 5, at 220-22.

8. Garner, *supra* note 6.

and weaker in basic writing skills—grammar, punctuation, and syntax—” and do not learn those skills in law school because there is “too much else to teach.”<sup>9</sup> But the problem extends beyond remedial writing skills.<sup>10</sup> Law schools simply do not emphasize the importance of good legal writing skills. Instead, schools “inundate students with poorly written, legalese-riddled opinions . . . [a]nd they offer law students little if any feedback (on substance, much less style) . . . on exams and writing assignments.”<sup>11</sup> Further, writing assignments often ask students to address an issue in a vacuum without a rich understanding of what they are writing and why.<sup>12</sup>

This article first explores the inadequate focus on legal writing in academia. The article then examines cognitive psychology research on “deep learning” and identifies how that research might enhance our teaching of legal writing. The article then suggests that legal writing faculty teach students the *legal context* for a particular writing assignment in order to foster deep learning of writing skills and practical legal skills.

### I. LEGAL WRITING: IMPORTANT BUT DÉCLASSÉ

The practice of law requires so much writing.<sup>13</sup> “[C]lear writing is crucial in legal practices because without it, cases that could be won are lost. Providing clear and concise information means there’s less chance for ambiguity, questions, and confusion when you’re trying to make yourself understood to judges, other lawyers, and clients.”<sup>14</sup> But writing is not a priority in law schools. In fact, it has “long maintained a subordinate position in the curriculums of many law schools.”<sup>15</sup> Many schools maintain only skeletal requirements for legal writing, and writing courses are often delegated to student teaching fellows or

9. Nowak, *supra* note 4, at 118.

10. Garner, *supra* note 6 (describing factors that contribute to students’ lack of writing skills, including that: writing standards have fallen in secondary and higher education, senior lawyers at law firms do not emphasize the importance of style, and students read less).

11. *Id.*

12. Cf. Mark K. Osbeck, *What is “Good Legal Writing” and Why Does It Matter?*, 4 DREXEL L. REV. 417, 417 (2012) (noting that “[t]he existing literature on legal writing contains various rules and suggestions as to how legal writers can improve their writing skills,” yet “legal writers are left without a solid conceptual framework to ground the individual rules and suggestions”).

13. In a survey conducted by the National Conference of Bar Examiners, “Written Expression,” along with “Written/Reading Comprehension” and “Critical/Analytical Thinking” were among the top five skills listed as “critical” to the practice of law. NAT’L CONF. BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE (2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> [<https://perma.cc/4BT5-2M6D>].

14. Joseph Kimble & Mark Cooney, *Why Writing Well Is Essential to Your Legal Career*, W. MICH. UNIV. COOLEY L. SCH. BLOG, <https://info.cooley.edu/blog/why-writing-well-is-essential-to-your-legal-career> [<https://perma.cc/HH4R-D6YX>].

15. Sherri Lee Keene, *Are We There Yet?: Aligning the Expectations and Realities of Gaining Competency in Legal Writing*, 53 DUQ. L. REV. 99, 99 (2015).

non-tenured instructors.<sup>16</sup> Instead, schools often use outdated “teaching methods and casebooks”<sup>17</sup> and focus on archaic topics at the expense of teaching students how to write and “practice law.”<sup>18</sup>

We might be on the verge of change. The National Conference of Bar Examiners recently overhauled the bar exam (introducing the “NextGen Bar Exam”) to “emphasize skills-based knowledge more than content memorization.”<sup>19</sup> That way, “the public can have confidence in a professional’s . . . proficiency to represent them.”<sup>20</sup> Legal Writing is one of the seven foundational skills to be tested on the NextGen Bar Exam and will likely comprise the highest number of “tasks” of any skill on the exam.<sup>21</sup>

Perhaps the NextGen Bar Exam will encourage schools to prioritize writing. Either way, we must confront the fact that many students are graduating from law school with deficient writing skills. This article proposes a potential solution—not an overhaul of law school curricula, but rather a modest shift in pedagogy: provide students with *context* for their writing assignments. When teaching students to draft a motion, teach them about the lifecycle of a litigation. If students are asked to draft a contract, they should understand why the contract is necessary and what happens if it falls apart. A mediation document? How did the parties end up in mediation? What is the goal? What happens if they can’t come to an agreement?

Teaching context will help students better internalize the writing skills required for an assignment. Research shows that context helps people retain information. Thus, by teaching students more about law practice, we are actually helping them learn to write. The result: better writers, more prepared lawyers.

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16. See, e.g., *The Professional Status Committee and Status-Related Advocacy*, LEGAL WRITING INST., <https://www.lwionline.org/resources/status-related-advocacy#Best%20Practices> [<https://perma.cc/3RP3-BW4X>] (collecting data on, among other things, legal writing faculty and their professional status and job security, faculty voting rights, compensation, and workload).

17. Dolin, *supra* note 5, at 221 (noting that “[i]t is old news that law schools currently do not adequately prepare students to practice law, even at the most minimally competent level”).

18. Meyers, *supra* note 7; David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> [<https://perma.cc/G2Z8-L4YB>] (arguing that law schools are “[a]llegic to the [p]ractical” and noting, as an example, that all law students take Contracts in law school but don’t learn “actual contracts, the sort that lawyers need to draft and file”).

19. Sarah Wood, *NextGen Bar Exam: What to Know*, U.S. NEWS (Feb. 15, 2023), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/applying/articles/next-gen-bar-exam-what-to-know> [<https://perma.cc/A3PD-PCPW>].

20. *Id.* (quoting Judith A. Gundersen, CEO and President of the National Conference of Bar Examiners).

21. NAT’L CONF. OF BAR EXAM’RS, *supra* note 13.

## II. CONTEXT MATTERS FOR DEEP KNOWLEDGE

Consider this common scenario:

The teacher presents a strong, coherent lesson in which a set of significant facts is clearly connected to a reasonable conclusion. But, at test time, the students show no understanding of the connections. Some students parrot back the conclusion, but no facts. Others spit back memorized facts, but don't see how they fit together. Though the lesson wasn't taught in a rote way, it seems like rote knowledge is what the students took in. Why do well-integrated, coherent lessons often come back to us in a less meaningful, fragmented form?<sup>22</sup>

Daniel Willingham, Professor of Psychology at University of Virginia, applies cognitive science to education and explains that students often don't remember even the most cogently presented material because the information they are learning is “shallow knowledge”; “the students understand each isolated part, but their knowledge lacks the deeper meaning that comes from understanding the relationship among the parts.”<sup>23</sup> Willingham offers the following example:

Suppose that you are teaching a . . . class unit on World War II and develop a lesson on the Japanese attack on Pearl Harbor. Many facts might be included in such a lesson: (a) Japan had aspirations to be a regional power; (b) Japan was engaged in a protracted war with China; (c) because they were at war, European countries could not protect their colonies in the South Pacific; and (d) the attack on Pearl Harbor resulted in a declaration of war on Japan by the United States. The overarching point of this lesson might be to show that the attack on Pearl Harbor was a strategic mistake for the Japanese, given their war aims.

We can see two ways that this meaningful lesson might end up as shallow knowledge in the student's mind. The student might commit to memory some or all of these four facts. But knowing these facts without understanding how they relate to one another and can be integrated to support the conclusion leaves the facts isolated; they are not without meaning, but neither are they as rich as they might be. The student has the trees, but no view of the forest.

Alternatively, the student might commit to memory the conclusion, “The attack on Pearl Harbor, although militarily a successful battle for Japan, was ultimately detrimental to its long-range war plans.” But memorizing this conclusion without understanding the reasoning behind it and knowing the supporting facts is empty. It isn't rote—the student knows Japan initiated and won a battle at the

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22. Daniel T. Willingham, *Ask the Cognitive Scientist: Students Remember . . . What They Think About*, AM. FED'N TCHRS. (2023), <https://www.aft.org/periodical/american-educator/summer-2003/ask-cognitive-scientist-students-remember-what-they-think> [<https://perma.cc/3YT7-6K7A>].

23. *Id.*

place called Pearl Harbor. But the knowledge certainly is “shallow”—it has no connections.<sup>24</sup>

So, how might we help law students move beyond shallow knowledge—memorizing facts without understanding the big picture, or, memorizing the big picture without understanding the support for it?<sup>25</sup> According to Willingham’s research, deep knowledge “is the product of *what the learner thought about* when [they] encountered the material.”<sup>26</sup> In other words, “[i]f students think about the *meaning* of material, meaning will end up in memory.”<sup>27</sup>

Legal writing assignments often look like this: students receive a fact pattern. They must read it, spot the issues, research and analyze the issues, and then draft a document—often an objective memo predicting an outcome or a court brief arguing one side of an issue. The same is true for the bar exam. The Multistate Performance Test (MPT), part of the Uniform Bar Exam, asks students to read a file (the facts of a case) and a “library” (the relevant law), and then analyze the issues and draft a particular legal document.<sup>28</sup> The NextGen Bar Exam will double down on testing analytical and writing skills.

Students approaching a legal writing assignment therefore have the facts they need, and perhaps the relevant law too. But do they have the *context* to really understand what they are writing and why? If we want to “encourage deep, meaningful knowledge,”<sup>29</sup> we must do more than provide the facts, the law, and the instructions. We must ensure that students see the forest, not just the trees. They must know *why* they are writing, and what is at stake. For example, students are often asked to write motions (to dismiss, for summary judgment, to suppress evidence) in legal writing classes. But they are rarely taught the context for a motion. What is the ultimate goal? To get to discovery? Amend the complaint? Settle a lawsuit before trial? If so, why? Any student can understand that the goal in litigation is to “win”—but the objectives are often more nuanced and complex, particularly at each stage of the process. That complexity is missing from so many legal writing curricula. Without it, deep knowledge may be elusive.

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24. *Id.*

25. *Id.*

26. *Id.* (emphasis added).

27. *Id.* (emphasis added).

28. NAT’L CONF. BAR EXAM’RS, MULTISTATE PERFORMANCE TEST, <https://www.ncbex.org/exams/mpt/preparing-mpt> [<https://perma.cc/T38Q-E7NS>].

29. Willingham, *supra* note 22.

## III. TELL A STORY

There is a robust body of scholarship on the importance of narrative and storytelling in legal writing.<sup>30</sup> “[M]ost lawyers reflexively acknowledge that it is important to tell a story to write a good facts section,” and that “the story concept is such a powerful tool of persuasion.”<sup>31</sup> “‘Tell a story’ and ‘Don’t bore your reader’” are common instructions to law students and junior lawyers.<sup>32</sup>

What if we took our own advice and *taught* more like a storyteller?

Writing assignments—including those on the bar exam—provide students with the facts and law. But students do not necessarily receive the context for the assignment—the big picture narrative that leads to “deep knowledge,” long-term skill, and better writing. What exactly is the context they are missing? A *story* about the posture of a dispute. Take litigation, for instance.<sup>33</sup> A student asked to write a motion to dismiss the complaint has the best chance of success if they understand the story of how the parties arrived at that juncture and what lies ahead. Specifically:

- When, why, and by whom was the complaint filed?
- Have there been any amendments to the complaint? Any other procedural wrinkles?
- What facts and documents can a court consider at the motion to dismiss stage? (The corollary: why is a good complaint so important?)
- What happens if they lose the motion—will there be lengthy, protracted discovery and discovery disputes; a settlement opportunity; and more motion practice, a trial, and appeals?
- What happens if they win the motion? Will the court dismiss the case with or without prejudice? Will the plaintiff appeal? Amend the complaint?

Teaching students about the lifecycle of a litigation provides a story to help them internalize both the objectives of the assignment and the skills necessary to meet those objectives. Recall that Willingham’s research tells us that “one factor . . . trumps most others in determining what is remembered: what you

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30. See, e.g., *Storytelling*, LEGAL WRITING INST., <https://www.lwionline.org/article/storytelling> [<https://perma.cc/EP5A-6V57>] (collecting articles about storytelling and narrative in Legal Writing).

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

32. *Id.* Of course, we don’t always explain how to tell a story. See *id.* at 459-60 & n.2 (collecting sources demonstrating dearth of written instruction on how to tell a story in Legal Writing).

33. This article uses litigation as an example, but the principles discussed herein also apply to transactional and other areas of law.



think about when you encounter the material.”<sup>34</sup> “If students think about the meaning of material, meaning will end up in memory.”<sup>35</sup> By designing writing instruction around the meaning of an assignment—the story of how the dispute arose and where it might end up—students are more likely to “think[] about the lesson’s goal” and “develop deep, interconnected” and long-lasting knowledge.<sup>36</sup>

Providing students with a story to help them make sense of a writing assignment helps students internalize writing skills. But it has some other nontrivial benefits as well. First, we impart practical knowledge. “[C]riticism . . . from the bench, the practicing bar, and [] educators” abounds about “law school graduates[] lack [of] practical knowledge, skill and ingenuity essential to effective performance . . . [as an] attorney.”<sup>37</sup> The more students are exposed to practical skills and knowledge throughout law school, the better.

Second, students may be better prepared for the NextGen Bar Exam.<sup>38</sup> The NextGen Bar Exam will emphasize Foundational Skills, including Legal Writing and Drafting, and may require students to draft a number of different legal documents, including: a complaint or answer, affidavits, contracts, briefs, a memorandum, client correspondence, and opinion letters.<sup>39</sup> If students are more familiar with these types of documents and how they fit into the lifecycle of a case, the better prepared they will be for the NextGen Bar Exam.

To be sure, teaching students to be better writers won’t come easy. “Writing is hard”; it is “a skill, developed through deliberate practice.”<sup>40</sup> James Shapiro, Professor of English and Comparative Literature at Columbia University, describes writing as a “pain,” “grueling,” and “draining.”<sup>41</sup> The idea that one

34. Willingham, *supra* note 22 (emphasis omitted).

35. *Id.*

36. *Id.*

37. William T. Vukowich, Comment, *The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change*, 23 CASE W. RESV. L. REV. 140, 140 (1971); see, e.g., Jordan Rothman, *Doctors Put Lawyers to Shame when it Comes to Practical Training*, ABOVE THE LAW (Oct. 3, 2018), <https://abovethelaw.com/2018/10/doctors-put-lawyers-to-shame-when-it-comes-to-practical-training/> [<https://perma.cc/478Q-N5XD>] (“It is well understood that law schools do a terrible job at training law students to be practicing attorneys.”); Segal, *supra* note 18 (“Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions . . .”).

38. Cf. Melissa Bezanson Shultz, *Professor, Please Help Me Pass the Bar Exam: #NextGenBar2026*, 71 J. LEGAL EDUC. 141, 144 (2021) (arguing that law schools should start now to prepare students for the skills tested on the NextGen Bar Exam).

39. NAT’L CONF. BAR EXAM’RS, BAR EXAM CONTENT SCOPE 4, <https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/> [<https://perma.cc/VRX3-98ZA>].

40. WARNER, *supra* note 1, at 11-12 (emphasis omitted).

41. *Id.* at 12 (quoting James Shapiro of Columbia University).

could master a skill—let alone one as difficult as writing—after a couple of courses is naïve.<sup>42</sup>

But we have an opportunity for progress: educating students about the context for their writing will help students internalize writing skills; it will also impart practical knowledge. We won't see brilliant writers emerge overnight. But this symbiosis—developing writing skills and practical knowledge concurrently—may eventually lead to better writers and more proficient junior lawyers. We will be one step closer to “shut[ting] the practical skills gap.”<sup>43</sup>

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42. Garner, *supra* note 6 (noting that Malcolm Gladwell in *Outliers* estimates that it takes at least 10,000 hours to master a skill).

43. Rachael Pikulski, *Four Ways Law Schools Can Shut the Practical Skills Gap*, BLOOMBERG LAW (Feb. 10, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-four-ways-law-schools-can-shut-the-practical-skill-gap> [<https://perma.cc/ZA97-ELGH>].

