Legal Writing

Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills

by Christine M. Venter*

I. INTRODUCTION

As lawyers, we pride ourselves on our analytical skills, structured thought process, and insights that derive from close reading of texts. Yet, how much actual class time do legal writing faculty and faculty teaching doctrinal subjects spend deliberately and constructively imparting these same skills to their students? The initial reaction to this question might be to dismiss it, as many legal writing faculty are convinced that they spend at least an adequate amount of time discussing and fostering the analytical process. A closer examination of one's actual classroom practice might reveal a different story. For example, a professor who taught a writing intensive class at a large public midwestern university claimed to talk to her students about analysis and writing "all the time," but actually spent very little time (less than ten percent of each class) explicitly teaching her students the

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thinking and writing skills necessary to the discipline.[1] Moreover, in another writing study conducted at a private university, some teachers had difficulty responding to questions about what kinds of thinking and analytical skills their writing assignments and courses in general were designed to inculcate in their students.[2] Why this disconnect?

Many legal writing teachers speak glibly about training their students to think like lawyers, but have not necessarily tailored their pedagogy to meet that goal. If teachers are not clear and explicit in how they go about teaching students analytical skills, they cannot necessarily expect students to become experts in analysis. While it is true that over the course of their law school careers, most students will develop legal analytical skills through exposure to the law and by means of the Socratic method; teachers can do better. Lawyers pride themselves on precision. This Article argues that legal writing faculty should take a more direct approach to thinking, by fostering students' metacognition skills. Teachers need to develop precise and overt strategies, based on taxonomies, to teach students analytical skills and enable them to master the skills of thinking and writing like lawyers.

II. THE CURRENT PARADIGM AND LEGAL WRITING "LIKE A LAWYER"

Since the findings of the MacCrate Report,[3] the prevailing wisdom has been that analysis is a primary skill that students must acquire, and

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1. The study was conducted by Stuart Greene as part of a study about how students learn to write in specific disciplines. Greene tape recorded and sat in on all of the lectures in a writing intensive class. The Author transcribed the tapes of the subject's lectures and assisted Greene in the development of an article. The tapes and transcripts are on file with Stuart Greene, Associate Dean, College of Arts and Letters, University of Notre Dame.

2. This study was a separate study conducted by Stuart Greene with the assistance of the Author and others. The researchers read students' papers and tried to identify the types of thinking that they saw being manifested in the papers, based on a coding system structured, in part, on Bloom's taxonomy. The researchers then interviewed the professors who assigned the papers to determine the assignment's goals. The researchers also interviewed the student authors to determine if they were clear on the assignment's goals and the types of thinking that the assignment was designed to inculcate. In many cases, both the professor assigning the paper and the student completing the assignment were unclear about the goals of the assignment. Generally, the most successful papers were those in which the student and the professor were clear about the goals and parameters of the assignments, and the student responded to those goals appropriately. The data and documents are on file with Stuart Greene, Associate Dean, College of Arts and Letters, University of Notre Dame.

3. Robert MacCrate, AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

law schools must teach.[4] As Christopher Rideout and Jill Ramsfield have noted, "[A] critical function of law school is to teach legal analysis and argument. . . ."[5] Yet, precisely how legal writing teachers are to teach analysis and precisely how students learn to "do" analysis, remains somewhat mysterious, both to faculty and, more importantly, to students themselves.

Legal writing seems to provide a prime opportunity for students to develop the skill of analysis—thinking and writing like a lawyer. The opportunity to read and write in the discipline, to be specific about methodology, to craft goal-oriented assignments,[6] to practice new pedagogies,[7] to reach all students because of smaller class sizes and conferencing, to allow students to work through the "process" rather than focusing on the product[8]—in short, to put into practice the new legal rhetoric[9]—all these possibilities are open in legal writing. Moreover, legal writing teachers can share their findings with others in the field by publishing in journals dedicated to legal writing issues.[10]

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4. The MacCrate Report identified fourteen "fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter." One of these was "developing analytical skills." *See* MacCrate, *supra* note 3, at 7.

5. Christopher Rideout & Jill Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 55 (1994).

6. Laurel Currie Oates suggests that not all types of writing promote learning. The situation where learning is most likely to occur is "(1) when the process of meaning making is subject to pressure, to converging constraints and options, or to conflict among goals, and (2) when the writer turns his or her attention to managing or negotiating . . . problematic cognitive and rhetorical situation[s]." Legal writing assignments should be drafted with these goals in mind. Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 J. LEGAL WRITING INST. 1, 14 (2000).

7. Rideout & Ramsfield, *supra* note 5, at 69-70.

8. Terry Phelps compared the paradigm shift in legal writing to that which took place in composition studies in the 1970s. The shift signified a sea change—shifting the focus from the product of writing to the process of writing. *See* Teresa Godwin Phelps, *The New Legal Rhetoric,* 40 S.W. L.J. 1089 (1986).

9. Jo Anne Durako reports that the New Legal Rhetoric is the prevailing pedagogy in many, if not most, legal writing classrooms. *See* Jo Ann Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997). The New Legal Rhetoric focuses on the process of how students learn to write, rather than the product. It involves an emphasis on drafting and revising, responding in a "formative" rather than a "summative" manner, seeing writing as a process, and other techniques. The New Legal Rhetoric has borrowed techniques from composition theorists and cognitivists, all of which has led to a paradigm shift in the teaching of writing. *See generally* Phelps, *supra* note 8, at 1089.

10. See, for example, the Journal of the Legal Writing Institute and the Journal of Legal Education. Also, law reviews on occasion dedicate an issue to legal writing.

Yet, legal writing faculty have struggled to reach a consensus on how best to teach analysis, or even if they should teach it explicitly at all.[11]

If questioned about how they teach analysis, many legal writing faculty might respond that they teach it using "CREAC" (Conclusion, Rule, Explanation, Application, and Conclusion), "CRAC" (Conclusion, Rule, Application, and Conclusion), "IRAC" (Issue, Rule, Application, and Conclusion), or any one of the acronyms used to describe the organizational formula that legal writing faculty instruct students to follow when writing office memoranda. This process involves extrapolating rules from cases and applying them to the facts of the case at hand. While these approaches have proven to be extremely helpful in providing students with a way in which to structure their writing and analytical process, they become too formulaic and too limited to allow for analytical skills to fully develop. CREAC does not explain to students how to do analysis, it merely provides an organizational formula for writing up that analysis.

Formulas like CREAC, while useful, often ultimately prove to be too reductionist to be entirely useful in teaching students the skill or art of analysis. CREAC tends to encourage formalism, rather than creative thinking. This tendency is evidenced by the fact that many students who struggle to cultivate their legal writing skills bemoan the fact that legal writing does not allow for creativity. These students fail to see that CREAC is merely a tool for writing up their analysis and response to problems, and that they can be creative in their responses to those problems and in the arguments they make.[12]

As Kevin Smith has noted, "Most students . . . do not participate in a systemic and in-depth study of each method's operation, potential uses, and conceptual bases."[13] Because most students see CREAC and its ilk as a formula they can plug in to write a memo, they fail to see the big picture of what is required for sound, lawyerly analysis. Students then fail to understand that "legal reasoning is a dynamic, iterative process

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11. Mary Kate Kearney and Mary Beth Beazley have suggested that we can integrate the Socratic method with the instruction of writing by having students create legal documents in response to the teacher's questions, allowing each student to receive personal feedback from the teacher, and holding conferences in which students get feedback, which they then use to revise their work. *See* Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process,* 64 TEMPLE L. REV. 885, 887 (1991).

12. Jill Ramsfield has noted that students complain that their creative impulses are stifled by the constricts of legal writing. *See generally* Rideout & Ramsfield, *supra* note 5.

13. Kevin H. Smith, *Practical Jurisprudence: Deconstructing the Art and Science of Thinking Like a Lawyer,* 29 U. MEM. L. REV. 1, 2 (1998).

which must be adapted to the needs of a particular legal problem."[14] They also fail to understand that "legal reasoning involves the structured manipulation and utilization of information, not the information itself."[15]

In the rush to professionalize the discipline of legal writing and show skeptics that there is a "content" to the subject and that writing can be taught, perhaps the pendulum has swung too far in favor of "content driven learning."[16] Perhaps, in focusing on content like CREAC and Bluebook citations, legal writing faculty have neglected legal analysis and thinking. The faculty may have inadvertently become "content-centered teachers [who] believe that merely providing exposure to the ideas of the discipline will cause students' thinking to evolve naturally over time."[17] Some legal writing faculty may even believe that "the capacity to think is innate and that, therefore, spending valuable class time promoting changes in thinking seems unnecessary or even misguided."[18] Legal writing faculty need to turn away from this "banking" approach to education[19] and return to a more instrumental view of teaching thinking and writing. Faculty need to explicitly teach students thinking strategies and make the students conscious of their cognitive processes. Faculty also need to continue to explore how their students' thought processes shape their students' writing and vice versa.[20]

Legal writing teachers need to move to a more explicit methodology when teaching analysis; a methodology that goes beyond providing

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14. *Id.*

15. *Id.* This problem is not unique to legal writing. Darcy Haag Granello encountered similar problems in teaching psychology students how to write a literature review in that discipline. *See* Darcy Haag Granello, *Promoting Cognitive Complexity in Graduate Written Work: Using Bloom's Taxonomy as a Pedagogical Tool to Improve Literature Reviews,* 40 COUNSELOR EDUCATION & SUPERVISION 292 (2001).

16. WILBERT J. MCKEACHIE, MCKEACHIE'S TEACHING TIPS: STRATEGIES, RESEARCH AND THEORY FOR COLLEGE AND UNIVERSITY TEACHERS 284 (D.C. Heath & Co., 11th ed. 2002).

17. *Id.* at 284.

18. *Id.*

19. Paolo Freire critiqued what he termed the "banking" approach to education where students passively take in information given to them by the teacher and do not actively participate in, or take responsibility for, their own learning. *See* PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED 58 (Myra Bergman Ramos trans., Continuum, 1989).

20. Phillip Kissam explores this idea of epistemic as opposed to instrumental writing in *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987). Kissam suggests that when using the epistemic method, the writer contributes to the development of the subject matter. Writing is an act of constructing knowledge. In instrumental writing, by contrast, the writer is concerned only with the product, and not at all with how the act of writing and thought might influence the development of the subject matter.

students with models of effective analysis, such as CREAC. Providing samples of "effective" or "good analysis,"[21] while useful in some instances, does not necessarily encourage students to see the big picture. Analysis is a particular way of thinking about problems, drawing information from various sources, analogizing fact patterns, extrapolating rules, synthesizing and strategizing, and making predictions, no matter what the circumstances. Providing students with samples encourages them to see problems as discrete, and content or information specific.

Further, legal writing teachers need to continue to think about the relationship between the way their students think and the way their students write. The assumption is that if one teaches writing effectively, using all the new and developing pedagogies, one must be teaching analysis effectively.[22] In making this assumption, teachers have apparently neglected to fully probe the relationship between writing and thinking. Teachers know that writing and thinking are interrelated, and that "[w]hen our students write memos and briefs, they are doing more than just telling us what they know. They are also learning how to think like lawyers."[23] It would behoove teachers to probe the relationship between writing and thinking (analysis) so that teachers can more effectively teach their students the analytical skills required for the effective practice of law. Currently, legal writing teachers have not resolved the issue of the best way to teach their students and have them manifest in their writing the skill of "thinking like a lawyer."

III. WHAT DOES "THINKING LIKE A LAWYER" MEAN?

Thinking like a lawyer is one of those axioms, so readily tossed around, that the precise meaning is not always clear. Whatever its content, it is clearly an art that students come to law school with the expectation of learning. Students "go to a great school not so much for knowledge as for arts or habits . . . ."[24] The art of thinking in a peculiarly legal way is a skill essential to successfully entering the

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21. Even if teachers provide samples or models, students may not necessarily understand what makes the samples or models effective. They might also have trouble emulating the documents, or they may begin to think that only one correct method exists in response to an assignment.

22. This assumption is quite ironic, given that many legal writing teachers weigh analysis very heavily in their grading process. By doing so, they are, in effect, grading students on something that teachers are not explicitly teaching the students, although teachers do model it for the students to some degree.

23. Oates, *supra* note 6, at 1.

24. James J. Brown, *Honing the Legal Mind: The Classroom Experience*, 12 STETSON L. REV. 653, 668 (1983) (quoting Dean Monrad G. Paulsen).

discourse of law. Robert Keeton described the art of thinking like a lawyer as "a general skill of understanding—one that is essential to develop in some minimum degree before any bridges can be crossed between knowing law and using it in addressing a problem."[25]

To determine what is meant by "thinking like a lawyer," one must first consider what it is that lawyers do. In other words, to provide the phrase with content, one must look at the context. Students must understand the conventions and practices of the law and how these are used by lawyers in a variety of contexts before the students can claim to be able to think like lawyers. While true expertise in thinking like a lawyer can come only through exposure to the multiple facets of practice, it would be impossible to reproduce what lawyers do during the classroom experience. Students must be socialized into the discourse and practices of law through as much exposure as possible to the process of the law.

While lawyers' roles are often multifaceted, one important role is that of problem solver. Kurt M. Saunders and Linda Levine suggest that "[t]hinking like a lawyer means, to a large extent, thinking rhetorically within a problem solving context."[26] To be able to think rhetorically, students must understand that they need to select an appropriate mode of response from those available, which is dependent on the context, audience, relations, limits, constraints, and values of the parties to whom the lawyer is beholden. Thinking rhetorically is thus a conscious act that does not depend on impulse, but at its core, represents a thorough, thoughtful strategy.[27] Lawyers must often choose whether to appeal to logos, pathos, or ethos. Lawyers must present "[l]ogical arguments that rely on deductive applications of rules to facts and the analogizing of precedents."[28]

Lawyers are not only problem solvers. Depending on the context, lawyers "report" the rules established by case law to senior partners in the form of memos, act as analysts in trying to predict how the court will rule, and are strategists, advocates, mediators, and evaluators. This suggests that students will be able to take the skills they are given and

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25. Robert Keeton, *Teaching and Testing for Competence in Law Schools,* 40 MD. L. REV. 203, 211 (1981).

26. Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 125 (1994).

27. James Boyd White discusses the role of rhetorical thinking in law in his chapter, *Rhetoric and Law: The Arts of Cultural and Communal Life*, *in* THE RHETORIC OF THE HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS 200 (John S. Nelson et al. eds. 1987).

28. Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor,* 43 J. LEGAL EDUC. 108, 112 (1993).

apply those skills to any situation or problem that the students are confronted with in practice. For students to accomplish this type of application, they must have developed analytical skills that they can employ appropriately in response to various and changing demands imposed upon them by clients, other counsel, and judges.

IV. WHAT ARE TEACHERS' GOALS FOR THEIR STUDENTS?

The MacCrate report envisioned the law student entering the profession of law as "a well trained generalist."[29] Many legal writing teachers would interpret this as having their students enter the profession as competent, skilled, and thoughtful lawyers, capable of formulating and communicating complex ideas in an effective way to the appropriate audience. Insofar as it is possible, teachers want their students to be experts, not novices. The difference between an expert and a novice is that experts are efficient and precise about problem solving and, in addition, have developed domain-specific patterns of thought.[30] Experts are able to function in this way because they are able to classify problems appropriately and because they have internalized the conventions of their discourse,[31] or as Gary Blasi suggests, they have acquired a "large repertoire of knowledge in schematic form."[32] Once information has been sorted into schema, it can be stored in long-term memory. Experts classify problems efficiently because they process them through a series of schemata, which allows them to see connections between ideas.

Novices are often unable to distinguish or identify the category within which a specific piece of information falls. For example, novices often summarize the applicable law without analyzing it, or they analyze it in a superficial way. Novices do not know how to process the information, they only know they have to report it in some way.[33] Novices also struggle to accord priority to information. Paula Lustbader notes that "[w]ithout such schemata, a novice . . . will be unable to use her knowledge effectively because she will not know the structure of the

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29. MacCrate Report, *supra* note 3.

30. Paula Lustbader, *Themes in Academic Support for Law Schools: Construction Sites, Building Types and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students,* 33 WILLAMETTE L. REV. 315, 326 (1997).

31. *Id.*

32. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory,* 45 J. LEGAL EDUC. 313, 343 (1995).

33. *See* Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development,* 1 J. LEGAL WRITING 1, 18-24 (1991) (noting that this was a common problem).

discourse, the order in which to present ideas, when to emphasize different concepts, and what information she needs to make explicit versus what information is understood implicitly."[34] Novices need to learn the more global application and thinking strategies of experts and emulate their higher order thinking.

Legal writing teachers want their students to master the conventions and genres of their discourse and to enter the legal community confident of their skills. In short, teachers want their students not just to be people who have managed to pass a legal writing course, but to demonstrate, as Linda Berger puts it, that they are capable of "construction of thought rather than the construction of a document."[35] Seeing connections between ideas, and taking ownership of concepts is a critical step in construction of thought.

In fact, legal writing teachers want their students to be legal authors, not just writers. Stuart Greene defines authorship as "the critical thinking skills that students use in their efforts to contribute knowledge . . ., knowledge that is not necessarily found in source texts but is nonetheless carefully linked to the texts [students] read."[36] This act of authorship is akin to "constructing" or synthesizing and applying the law to the myriad facts the students will encounter every day as lawyers. The goal of teachers is for their students to learn how to construct the law for themselves. To become an author thus requires "learning that involves the creation of entirely new knowledge structures or the restructuring of old ones."[37]

In constructing the law, students must describe and synthesize the law, apply legal rules, analogize and distinguish, create arguments, use authority appropriately, and persuade their audience.[38] Students must enter and engage in the ongoing conversation of the law, but as Terry Phelps states, they can only do so when they have found their "professional and personal voices."[39] To be able to find their voices, students must be made aware that they need to engage in ongoing conversations of the law; they must be given strategies to enable them to process, analyze, and synthesize information. Once their thinking process has

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34. Lustbader, *supra* note 30, at 327.

35. Linda Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING 57, 61 (2000).

36. Stuart Greene, *Making Sense of My Own Ideas: The Problems of Authorship in a Beginning Writing Classroom,* 12 WRITTEN COMMUNICATION 186, 187 (1995).

37. Oates, *supra* note 6, at 18 (citing Gary M. Schumacher & Jane Gradwohl Nash, *Conceptionalizing and Meaning Change Due to Writing*, 25 RES. IN THE TEACHING OF ENG. 67 (1992)).

38. Rideout & Ramsfield, *supra* note 5, at 55.

39. Phelps, *supra* note 8, at 1102.

been structured or scaffolded appropriately, the students will more easily be able to enter the discourse of law.

V. THE CASE AND SOCRATIC METHODS AND THINKING LIKE A LAWYER

Paula Lustbader suggests that the transition from novice to expert is an evolutionary one that occurs when students have acquired sufficient content knowledge, judgment in problem solving, experience, and have built schemata to help them respond appropriately to different problems.[40] The Socratic method is the generally accepted method used by law schools to teach analysis. By asking a series of probing questions to ostensibly break concepts down, teachers of the law hope to foster students' critical and analytical thinking.[41]

The Socratic method is a corollary to the case method, pioneered by Christopher Langdell in 1870. The latter is predicated on using cases to ascertain the principles and strictures of the law and, in combination with the Socratic method, involves quizzing students about the rulings, reasoning, policies, and principles found in the cases in order to explicate them to the class as a whole. The case method is widely recognized as the prevailing pedagogy in American law schools.[42] Although Langdell originally perceived it as helping to teach students analytical skills as well as the rules of law,[43] it has been criticized as failing to meet both objectives.[44]

Students tend to memorize portions of the cases so that they can respond when called upon. They do not necessarily see the relationship between parts of the law, or how the elements or rules of a given case interrelate with the law as a whole. Moreover, they fail to see the purpose of the methodology. Kurt Saunders and Linda Levine have pointed out that one of the major criticisms of the case method "centers on its failure to teach analytical skills explicitly. . . ."[45] Students tend to focus on black letter rules and rely on memorization, rather than

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40. Lustbader, *supra* note 30, at 326.

41. For an overview of the Socratic method, see Richard K. Neumann, *A Preliminary Inquiry into the Art of Critique,* 40 HASTINGS L.J. 725, 728-39 (1989).

42. *Id.*

43. Supporters of the Socratic and case methods claim that students obtain a better understanding of legal issues and the process of analysis when they are forced to think through answers themselves. *See* Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process,* 64 TEMPLE L. REV. 885, 887 (1991). *See also* Irvin C. Rutter, *Designing and Teaching the First-Degree Law Curriculum,* 37 U. CIN. L. REV. 9, 26 (1968).

44. Frank R. Strong, *The Pedagogic Training of a Law Faculty,* 25 J. LEGAL EDUC. 226, 235-36 (1973).

45. Saunders & Levine, *supra* note 26, at 129.

trying to see connections and the legal framework as a whole. In part, this failure of students to understand, appreciate, and respond to the methodology can be attributed to legal professors' failure to be explicit about the goals and purpose of their methodology, and their failure to clarify the connections and interrelatedness. As a result, "students are often well into their [legal] education before they understand the operation of the legal method,"[46] and even more disturbing, their analytical skills have not been sharpened in a way that will prepare them to enter the practice of law thinking like lawyers.

VI. EXPOSURE TO THE DISCIPLINE—READING LIKE A LAWYER

As part of the case method, law students are required to read thousands of cases. Thus, by the time they graduate from law school, most law students could be said to have "read the law"—to borrow the Oxbridge phrase. Not only have they read extensively, students have written several legal writing assignments, briefs, exam answers, and in the course of reading and writing, have acquired some comprehension about how lawyers reason, analyze, think, and write. The preliminary findings of Greene's, as yet unfinished, longitudinal study of how students learn to write in their discipline suggests that some, but not all, students may acquire the art of writing and thinking in their discipline by dint of exposure to discipline specific articles and by writing appropriate assignments designed to develop the skills valued by the discipline.[47] Most first year law classes, with the exception of legal writing and research, require few or no written assignments, but do require students to read voluminous numbers of cases and textbooks. Thus, reading in the discipline should ostensibly develop at least some students' knowledge and skills by exposing them to the analysis of the law found in cases and textbooks. However, to assume that requiring students to read the law will develop their analytical skills ignores the fact that not all readers read and process information in appropriate ways, not all students are equally insightful, and not all are able to glean the discipline's methodology from merely reading.

Researchers have determined differences between proficient and non-proficient legal readers, experts and novices, in the way that the

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46. *Id.* at 130.

47. *See* Greene, *supra* note 2. However, it is only the more talented students who are capable of this—many students become discouraged because they do not know what it means to write in their discipline, or what their professor wants, and why, when assigning written work to students.

proficient readers process and store the information.[48] Researchers have also noted that proficient readers in all disciplines "decode" text, make predictions, ask questions in their minds as they read, are thoughtful about their reading, and most importantly, think about ways to organize what they are learning and apply it to new situations.[49] This last skill is one of the most important in law.

As Ruth Ann McKinney has noted, reading is a way of constructing knowledge, and proficient readers actually *make* meaning by and through their interactions with the text.[50] According to the New Rhetoric, what a reader understands and retains from the text and context depends upon the reader's prior knowledge of similar texts and contexts.[51] The reader must be able to understand how what she is reading relates and connects to what she has read previously. McKinney points out that "[m]erely adequate reading—reading for flat information—just won't do."[52] Yet, this is precisely the type of reading practiced by many law students, who confront huge volumes of reading each day and who live in terror of being called on in class and being required to provide detailed information about cases for the class. It is no wonder, then, that these students come to see reading as all about "flat information."[53] McKinney calls on law students to challenge assumptions, find patterns, and generate new ideas as they are reading.[54] While her point is well taken, students need to be taught and specifically instructed to do this. The patterns inherent in the law are not automatically clear to them. Connections often need to be laid out and made explicit before students begin to acknowledge them.

Moreover, this methodology and the need to develop schemata to process the information needs to be explicitly taught to many students. While exposure to reading the law might ultimately develop students' analytical skills over a period of time, it is not a very efficient way to accomplish this goal. The method of exposure to reading the law also risks leaving behind those less proficient readers who do not grasp the

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48. Dorothy H. Deegan, *Exploring Specific Differences Among Novices Reading in a Specific Domain: The Case of Law,* 30 READING RES. Q. 154 (1995); Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis,* 22 READING RES. Q. 407 (1987).

49. JEFFREY D. WILHELM, IMPROVING COMPREHENSION WITH THINK-ALOUD STRATEGIES 29 (Scholastic 2001).

50. RUTH ANN MCKINNEY, READING LIKE A LAWYER 52 (Carolina Press 2005).

51. *See generally* JANET EMIG, THE WEB OF MEANING: ESSAYS ON WRITING, TEACHING, LEARNING AND THINKING (Dixie Goswami & Maureen Butler eds., Boynton/Cook 1983).

52. MCKINNEY, *supra* note 50, at 53.

53. *Id.*

54. *Id.*

"exposure to the discipline" methodology, and who continue to read for information only.

VII. NOVICES AND EXPERTS—THE THINKING/WRITING RELATIONSHIP

The process of writing is usually the process whereby lawyers' reasoning becomes apparent to students. This process is not unique to law. In response to a writing study conducted at the University of Hawaii, Manoa,[55] about the relationship between writing and thinking, one student responded "as you write you have these epiphanies."[56] The student was referring to seeing connections, linking ideas, and making sense of concepts while in the process of writing—connections that the student had been unable to make until the actual writing process. These situations exemplify the epistemic view of writing where writing comes to be no longer a product of thought, but becomes an integral part of thought.[57] While many writers have experienced the same phenomenon, it would be useful to establish when, how, and why one has these epiphanies, and even more useful if teachers could teach students how to consciously stimulate, recognize, and control these epiphanies. By focusing on the thinking process, for instance, how information is retained, stored, and linked, as well as how connections are formed, teachers can best teach their students how to think like lawyers and then, perhaps, write like lawyers.

How then do students become capable of this kind of learning, thinking, and authorship? They can only do so if they become autonomous learners, or what McKeachie describes as strategic or self-regulated learners.[58] To become this type of learner, research has shown that students need an organized knowledge base and a set of strategies for acquiring, integrating, and even creating new knowledge.[59] Students need, as McKeachie states, "goal-directed approaches and methods of thought that help students build bridges between what they already know or have experienced and what they are trying to

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55. Thomas Hilger, Edna Lardizabal Hussey & Monica Stitt-Bergh, *As You're Writing, You Have These Epiphanies: What College Students Say About Writing and Learning in Their Majors,* 16 WRITTEN COMMUNICATION 317 (1999).

56. *Id.* at 342.

57. *See* Kissam, *supra* note 20. Jill Ramsfield and Christopher Rideout note that the process perspective takes one step toward healing this enforced separation of language from the writer, by incorporating thinking into the writing process—legal analysis and argumentation become integral parts of the act of writing, viewed as a whole. *See* Rideout & Ramsfield, *supra* note 5, at 55.

58. MCKEACHIE, *supra* note 16, at 275.

59. *Id.* at 277.

learn."[60] They need to be able to "take ownership of their own learning."[61]

I am suggesting that legal writing teachers need to refocus their attention on specifically teaching analysis by providing students with schemata or scaffolds to enable them to structure and process their thoughts effectively. One way teachers might do this is by making students more explicitly conscious of their thought process in the act of writing. While much of the focus of this Article is directed towards legal writing faculty, doctrinal faculty might also rethink their techniques for teaching analysis. By using Bloom's taxonomy, which identifies the levels of cognitive thinking, and teaching the taxonomy explicitly to students, faculty can foster deep and thorough analysis in students' writing. However, faculty need not restrict themselves to Bloom's taxonomy. Bloom's taxonomy is a starting place—albeit a useful one. Faculty can decide for themselves which precise skills they are trying to inculcate in the students and then craft a taxonomy or heuristic based on the students' needs. Faculty can add to and expand upon Bloom's taxonomy as the need arises. However, faculty must fully understand and clearly explain to the students what exactly the faculty wants the students to learn, how the skills interrelate, and how to classify and process information.

VIII. WHY TAXONOMIES?

Embarking on a project to teach thinking "without adopting a systematic approach to the task" would be foolhardy.[62] Taxonomies help provide this kind of approach. A taxonomy is merely a system of classification which lays ideas out in an orderly fashion. Bloom's taxonomy is particularly useful because it has been successfully applied and adapted in various educational settings.[63] It forces teachers to set forth their goals for their students, defines and classifies educational objectives, and relates assignments and classroom activities to these objectives. It also provides a mechanism for teachers to assess whether students are meeting the objectives, and if not, where the students are falling short.

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60. *Id.*

61. Oates, *supra* note 6, at 3 (citing THE JOURNAL BOOK 19 (Toby Fulwiler ed., 1987)).

62. MCKEACHIE, *supra* note 16, at 285.

63. See for example Darcy Haag Granello, *supra* note 15, who applied it to teach students how to write literature reviews, and Nicholas Athanassiou who used it to teach management skills to business students. Nicholas Athanassiou, Jeanne M. McNett & Carol Harvey, *Critical Thinking in the Management Classroom: Bloom's Taxonomy as a Learning Tool*, 27 J. MANAGEMENT EDUC. 533, 539 (2003).

Another crucial and attractive feature of Bloom's taxonomy is that it identifies in a hierarchical manner the various developmental stages of cognitive development, and thus allows teachers to "scaffold" student's thinking by building on each level in an increasingly complex way.

Cognitive and educational psychologists suggest that "scaffolding" is an appropriate method to support cognitive development, particularly cognitive development of a skill that students will need to incorporate and use over the course of their professional lives.[64] Scaffolding has been described as "an instruction device that provides individual students with intellectual support so they can function at the cutting edge of their cognitive development."[65] Scaffolding, as Athanassiou explains, is "teaching that provides support to allow the learner to learn for himself or herself."[66] It is the kind of teaching that is instructive, rather than prescriptive. While there may be several appropriate devices to provide such scaffolding, this Article suggests that Bloom's taxonomy, or any taxonomy that has been carefully thought through and designed to develop appropriate analytical skills that enable students to see connections between ideas, may be particularly appropriate for teaching legal analysis and writing skills. Any taxonomy used should lay out a hierarchy of thinking goals and skills that students must develop, master, and build on before reaching more sophisticated complex higher order skills.

IX. COGNITION, METACOGNITION, AND BLOOM'S TAXONOMY

A. *Cognition*

Cognitivists subscribe to the theory that learning best takes place when data is selected, processed, transformed into meaningful information, and stored in memory.[67] For this process to take place, the information must be stored in long-term memory, as opposed to short-term memory.[68] To process and store information efficiently, the brain attempts to place the information within an existing knowledge

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64. BENJAMIN BLOOM, M.D. ENGELHART, F.J. FURST, W.H. HILL, & D.R. KRATHWOHL, TAXONOMY OF EDUCATIONAL OBJECTIVES: COGNITIVE DOMAIN (New York, McKay, 1956). *See also* Athanassiou, *supra* note 63.

65. Athanassiou, *supra* note 63, at 539.

66. *Id.*

67. Much of our knowledge about schemata and cognition comes from Piaget's theories of intellectual development. *See* David Moshman & Bridget A. Franks, *Intellectual Development: Formal Operations and Reflective Judgment in* ELAINE P. MAIMON ET AL., THINKING, REASONING AND WRITING 9, 13 (New York 1989).

68. *Id.*

structure.[69] This process attempts to make meaning from the information and is known as the "information-processing approach."[70] According to Piaget, the brain functions efficiently by placing or "assimilating" information into an existing, coherent system or "schema."[71] If this assimilation is not possible, because the information is new and does not fit comfortably into an established schema, we are forced to "accommodate" the new information by modifying the existing schema, or by creating a new one.[72]

In creating new schemata, Paula Lustbader notes that students begin to recognize the relationships among concepts and begin to develop domain specific patterns of thought.[73] Lustbader states, "Mastery of these thought patterns distinguishes a novice from an expert in a particular domain."[74] The advantage of mastering thought patterns is that, as experts, the students can process, store, and utilize information in a more thorough and efficient way, as well as see connections and distinctions between various forms of information. Leamson and others have suggested "that underlying brain structures change to support enduring learning when students think about the course material in more meaningful ways."[75] The seminal work of composition theorists Linda Flower and John Hayes has also verified that significant learning takes place when a writer places the "topic within a network of knowledge or schema, which allows him or her to cluster and organize his or her ideas and to see interrelationships among various aspects of the represented ideas with other knowledge that the writer may have."[76]

B. Metacognition

Metacognition involves the conscious art of thinking about one's own thinking strategies. As Pamela Lysaght and Cristina Lockwood have noted, "The premise is if students understand how they learn, they will be able to employ effective study methods."[77] By doing so, students will

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69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. Lustbader, *supra* note 30, at 326.
74. *Id.*
75. Leamson cited in MCKEACHIE, *supra* note 16, at 285.
76. Oates, *supra* note 6, at 12-13 (citing Linda Flower & John R. Hayes, *Images, Plans, and Prose: The Representation of Meaning in Writing*, 1 WRITTEN COMM. 122, 136-42 (1984)).
77. Pamela Lysaght & Cristina D. Lockwood, *Writing Across the Law School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING

become more actively involved in the learning process, and the manner in which the information they receive is stored and becomes part of a schema.[78] Particularly when what they learn is contextual, students can recognize what schema the information fits within, what its interrelationships with existing schema are, and the purpose, role, and function of the information. Students can thus become more active and autonomous learners by being made consciously aware of their own thought processes.

C. Bloom's Taxonomy

Bloom's taxonomy is a model originally designed by Benjamin Bloom and his colleagues to improve an instructor's ability to teach thinking.[79] Bloom's general approach to education theory has been described as "mastery learning," which involves the student taking responsibility for what he learns and also presupposes that a student is capable of learning the same material, provided that he is given appropriate instruction and sufficient time to learn.[80] The taxonomy has been widely documented as supporting student mastery of learning and as an assessment tool to measure student competency and knowledge acquisition.[81] The taxonomy has been utilized successfully across disciplines.[82]

The taxonomy outlines six hierarchical positions of cognitive complexity, ordered from the least to the most complex: Knowledge, Comprehension, Application, Analysis, Synthesis and Evaluation.[83] Bloom anticipated that each level of the system would build on the successful completion of the previous levels.[84] At the bottom of the spectrum, Bloom considered Knowledge and Comprehension to be lower level thinking skills.[85] At the other end of the spectrum, where students demonstrate mastery of Analysis, Synthesis, and Evaluation, students are considered to be performing at the highest levels of the cognitive function.[86] All these skills, but particularly the higher level ones, are

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DIRECTORS 73, 89 (2004).

78. *Id.* at 85, 94.

79. MCKEACHIE, *supra* note 16, at 285.

80. *See generally* THOMAS R. GUSKEY, IMPLEMENTING MASTERY LEARNING (2d ed., Wadsworth Publ'g Co. 1997).

81. Granello, *supra* note 15.

82. *See* MCKEACHIE, *supra* note 16; Granello, *supra* note 15; Atthanassiou, *supra* note 63.

83. Granello, *supra* note 15.

84. MCKEACHIE, *supra* note 16, at 285.

85. *See generally* BLOOM, *supra* note 64.

86. *Id.*

integral to successful legal writing. Also, all of them are recursive and not merely hierarchical.

X. USING TAXONOMIES TO TEACH EFFECTIVE THINKING AND WRITING

Susannah Brietz Monta and her colleagues in the English Department at the University of Wisconsin have found it crucial for students, in order to become successful writers, to understand precisely the requirements and parameters of an assignment.[87] In other words, before beginning to write, students must know exactly what types of skills they are being called upon to exhibit in response to the assignment; for example, analysis, argument and persuasion, comparing and contrasting. Brietz Monta also identified other crucial factors related to the rhetorical situation that once students were compelled to consciously take into account, positively influenced their writing skills. Combining these factors into a hierarchical pyramid loosely based on the USDA's food pyramid, Brietz Monta created the composition pyramid—a visual depiction of how students should approach a writing project. The fundamental block of the pyramid that must be considered before any of the other factors is the assignment's requirements, nature, and scope—what it is that the person responding is being called upon to do.[88]

The reason that the assignment is so crucial is that the assignment acts as a visual cue to students for what type of thinking is required. If the assignment seems only to demand "knowledge telling,"—reporting the facts of the case or the ruling without the student being required to contribute any of her ideas—then it is unlikely to facilitate learning.[89] For an assignment to facilitate learning, it must demand more from students than just the retelling or the documenting of specific information.[90] The assignment must require students to take existing knowledge and transform it in some way by adding the students' own insights and analysis, seeing connections and relationships between ideas, and drawing analogies and distinctions.[91] Additionally, students must also

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87. Susannah Brietz Monta details this information at a University of Wisconsin website. Susanna Brietz Monta, *A User's Guide to the Composition Pyramid, available at* http://mendota.english.wisc.edu/~WAC/page.jsp?id=23&c_type=category&c-id=18.

88. *Id.*

89. *See* Oates, *supra* note 6, at 21. For more information, see a study conducted by Ann M. Penrose reported in *To Write or Not to Write: Effect of Task and Task Interpretation on Learning Through Writing,* 9 WRITTEN COMM. 465 (1992).

90. *Id.*

91. Greene, *supra* note 2.

view the task that they are called on to perform as a knowledge transforming task.[92]

In legal writing, the act of writing an office memo should be viewed as a knowledge transforming task, but all too often it is not because students are unclear about precisely what is being required of them. Because parts of the memo, such as describing the facts of the case and describing the fact patterns and holdings of similar cases, seem to be knowledge telling tasks, rather than knowledge transforming tasks, students mistakenly think that memo writing is formulaic—merely plugging in the facts, CREAC/IRAC, and the student is finished. Students need to be taught more precise thinking strategies for each part of the memo, so they come to see the memo as knowledge transforming and begin to see themselves as legal authors who contribute to the ongoing development of the law.

Breaking down the memo requirements into specific schemata and being more precise about the requirements of each part would be useful in fostering more precise thinking and writing on the part of students. Legal writing instructors often tend to use "genre based" teaching—teaching the format of the memo, how to write the facts objectively, and how to CREAC—instead of focusing on the thinking skills required. Explicitly stating the cognitive skills required in memo writing and providing students with schemata in the form of Bloom's taxonomy (or an appropriate taxonomy specifically and thoughtfully designed by a particular teacher) to "scaffold" those cognitive skills may assist students in beginning to think like lawyers. Also, if the teachers are aware of the various cognitive steps required and have taught them to the students, it will be easier to identify where the students' thought processes are incomplete or erroneous. The teachers' responses to the students' writing can thus be tailored and targeted to specific errors and will help to form and shape the students' development as legal thinkers.

XI. COGNITIVE OBJECTIVES

In order for students to master the higher levels of cognitive development, they must first establish the lower levels. The manner in which Bloom's taxonomy may be applied to teaching students how to write an office memo is illustrated below.

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92. Oates uses this phrase to describe the types of assignments that facilitate learning. *See* Oates, *supra* note 6, at 21.

A. Knowledge, Comprehension, and Application in Bloom's Taxonomy

1. Knowledge. As a logical progression in a predictive memo assignment, students start off with the facts presented by the client or assignment. Students must know the facts. In other words, they must be able to bring to mind the appropriate information. Even if the students do not yet know which facts are legally significant, the students must know the client's basic story. This part of the memo may, at first, seem like knowledge telling— requiring students merely to report the facts—as opposed to requiring them to process the facts and overlay them with any of their own interpretation. However, choosing which facts to include requires more than knowledge telling. Students should only include facts that are legally significant and required for the reader to make contextual, chronological sense of the client's story. To accomplish this task successfully, students must not only demonstrate Knowledge, but also the next level of the taxonomy, Comprehension.

2. Comprehension. Comprehension requires students to demonstrate an awareness of what the material means, for example, correctly identifying the legally significant facts. Students must show an understanding that the client's particular problems fall into a recognizable area of law, for example, torts or contracts. Students must then take appropriate measures to find the applicable law pertaining to the client's situation and must come up with the relevant statute(s) and case law. Students must be able to read and comprehend the law. They must extrapolate the "rule" from the statute and the holdings and rationales from the cases. These types of tasks do not rise to the level of knowledge transformation, but are necessary as a background and context to explain to the reader what is at issue. They are also necessary for the students, who can then progress to the more cognitively complex tasks.

3. Application. Once the students have completed these tasks, they may then progress to Application. Application has been defined by Nicholas Athanassiou as "the use of data, theories and principles to answer a question."[93] In legal writing, the data and principles are the rules, holdings, and principles established by the statutes and case law. Applying these rules and holdings from the law to the client's facts shows whether the students can determine which facts are legally

93. Athanassiou, *supra* note 63, at 536.

significant, which cases are relevant, and which principles, rules, holdings, and rationales should be applied. Athanassiou suggests that at this level, the students should be able to demonstrate classification, development, modification, and organization.[94] In the legal writing universe, this level means that the students should be on their way to analogizing and distinguishing cases, in addition to applying the law to the facts. It is at this point that the students' thinking may begin to break down, as it is here and in the next few steps of the taxonomy that students are required to make connections and see the interrelatedness among the various schemata.

B. Analysis and Synthesis

According to Bloom,[95] Analysis is properly understood as breaking down the material into its constituent parts so that the organizational structure may be understood.[96] To perform this task, students must demonstrate understanding of the material, its content, and its structure.[97] For the typical formalistic legal writing students, CREAC and IRAC would come into play at this juncture. Analysis, however, requires not only a formal mastery of the genre, but as Bloom noted,[98] an understanding on the part of students how all of the pieces fit together.[99] The students must, therefore, show mastery over hierarchy of authority and how cases interrelate and fit together. The students must be able to see connections. Here, the writing of the memo becomes a truly knowledge transforming task. In Synthesis, the students recombine the parts to form a new entity. At this level of thinking, students should be able to create new patterns and structures based on a scheme for classifying information.

The final and highest level of cognitive development is Evaluation, which "shows the ability to judge the value of material for a given purpose, based on definite criteria and rationale."[100] This level includes "decision making and selection" and contains elements of all the other categories. For example, Synthesis is critical to Evaluation. For the legal writer, this type of thinking would be exemplified in the Brief Answer and the Conclusion and Recommendation sections. Here the students would demonstrate a mastery of the subject matter, the

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94. *Id.*
95. *See generally* BLOOM, *supra* note 64.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See generally* Athanassiou, *supra* note 63.

objectives and purpose of the memo, and the complex interrelationship of law and particular facts that enable a lawyer to make a prediction about whether a client has a claim. Here, the students also show definitively whether they have mastered the skill of thinking like lawyers. Having outlined the facts and law, applied the relevant parts of the law to the particular context, analyzed the implications, and synthesized all of the information into a manageable form for the reader that is "genre appropriate," the students would then make a recommendation to the supervising attorney about whether and how to proceed with the case. Connecting all of these elements requires the creation of new knowledge structures and the modification of old ones. All these skills are routinely used by lawyers, who, as Oates reminds us, act as reporters, analysts, evaluators, and strategists.[101] By requiring these skills, legal writing instructors are requiring our students to think like lawyers and become fledgling experts as opposed to novices.

Legal writing professors must, therefore, teach students these skills and can best teach these skills by using "goal-directed approaches and methods of thought that help students build bridges between what they already know and have experienced and what they are trying to learn."[102] McKeachie suggests that these strategies can be used to "help build meaning in such a way that new information becomes part of an organized knowledge base that can be accessed in the future for recall, application, or problem solving."[103] If teachers want their students to enter the profession prepared to exercise lawyer-like skills, teachers must help students establish a cognitive schema for the development of these skills.

XII. CONCLUSION

Getting students to acknowledge legal writing as a "knowledge transforming task"[104] will not be easy. To accomplish this task, legal writing teachers must make it a manageable one. However, they cannot assign students such a task without giving them strategies to assist with the process. Teachers need to better understand the behaviors that constitute critical thinking, as well as the types of thinking required by various lawyerly tasks, to explicitly teach these behaviors to students.

Joseph Williams has pointed out that learning to write and think is not just a matter of cognitive growth, but also of socialization into a

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101. Oates, *supra* note 6, at 22.
102. MCKEACHIE, *supra* note 16, at 277.
103. *Id.*
104. Oates, *supra* note 6, at 22.

discourse.[105] Law students have to move from their former discourses into a new one, a transition that is not always smooth. The transition also takes time. To expect students to become "experts" in the space of one year, given the limited number of knowledge transforming assignments that one can reasonably expect the students to undertake in that time period, is unrealistic. Teachers must give the students what they need: "continued and repeated guidance from experts so that they can acculturate surely and steadily."[106] If law schools do not provide enough time and opportunity for students to become accustomed to this new discourse through a preliminary legal writing course and later master it through advanced legal writing courses, legal writing faculty risk relying on the profession to teach students what they should have learned in law school. By giving students the opportunity to practice being members of the legal community in law school, they are much more likely to enter the profession as competent professionals; a goal identified by the MacCrate report and surely the goal of every caring law teacher.

Using Bloom's taxonomy illustrates to students the complexity of their task. By disclosing to students that the skills of Synthesis and Evaluation are higher cognitive thinking skills, students will not expect to be experts from the outset. They will, moreover, take their task seriously, realizing that the kind of analysis required of them is challenging and requires more than a cursory review of the cases. Students are juggling complex information, rules, interpretations, and applications while trying to process, synthesize, and evaluate them in a logical way for the reader. Reminding students of these complex cognitive tasks and encouraging them to focus on their thinking skills prior to their writing skills will start students off on the right foot.

Refocusing attention on thinking as opposed to writing has a number of meaningful implications. It requires legal writing teachers to develop specific strategies to teach students to pay attention to their own thinking and identify where that might be breaking down. It also requires teachers to develop thoughtful, realistic assignments with specific learning goals in mind. Furthermore, teachers must respond differently to their students' papers. Instead of writing summative comments, teachers need to try and identify where their students' thought processes have broken down, and respond to those in a formative way. Effectively teaching thinking requires teachers, as well as their students, to do some serious thinking about what exactly they

105. Williams, *supra* note 33, at 24-30.
106. Rideout & Ramsfield, *supra* note 5, at 77.

are doing when they write. Teachers need to prove equal to the task if they want to effectively teach their students to write like lawyers.