

Fall 10-1-2012

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Recommended Citation

Barbara P. Blumenfeld, *Rhetoric, Referential Communication, and the Novice Writer*, 9 *Legal Communication & Rhetoric: Journal of the Association of Legal Writing Directors (JALWD)* 207 (2012). Available at: https://digitalrepository.unm.edu/law_facultyscholarship/610

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Rhetoric, Referential Communication, and the Novice Writer

Barbara P. Blumenfeld*

I. Introduction

Classical rhetoric is a useful and integral part of legal writing instruction at many law schools.¹ It also forms the basis for much practice-related writing. Yet rhetoric arises from oral communications, while writing by its very definition does not have the same immediacy or ability to evaluate audience reaction. This essay, while recognizing the value of rhetoric, suggests that its use must be enhanced with a means of creating audience awareness in order to make complete its application to the teaching and practice of legal writing.

This essay begins with a very brief overview of the relationship of rhetoric to legal writing and how audience awareness is a key factor in both. That is followed by a suggestion of the novice legal writer's² knowledge and understanding of the writing process, especially the significance of audience. This overview leads to a definition of two distinct tasks that must be incorporated into the writing process: first, learning

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¹ Indeed, there is a movement to heavily integrate rhetoric as the primary focus and structure of legal writing courses. See e.g. Kristen Konrad Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 Washburn L.J. 319, 319–340 (2011); Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 Leg. Writing 521, 521–563 (2010). Further indicative of this shift is the name of the scholarly journal of the Association of Legal Writing Directors, “Legal Communication and Rhetoric.”

² The use of the term “novice legal writer” throughout this document refers to someone without extensive experience in compiling practice-related documents. Such writers are generally law students and new lawyers, or lawyers new to writing a particular type of practice related document. This author further acknowledges that there is no “typical” novice writer; however, the discussion suggests common understandings with the acknowledgment that there are exceptions and contradictions to what is described.

about and understanding specific audiences; second, learning how to implement writing that works for that audience.

Part III of this essay turns to the first task of the writer: audience awareness. It suggests that legal writers, like all writers, must incorporate interaction with audience into the writing process. This involves developing a working model of the audience as the writer writes. Performing this task implicates the writer's creativity; it also leads to internal motivation in the writing process. A brief review of the creative process of legal writing is included, demonstrating that for legal writing to be complete it must include both deliberate as well as less-conscious thinking. The less conscious aspects include creating a detailed working image of a specific audience and thus are crucial to the writer's first task of audience awareness.

The current focus of legal writing instruction and of most legal writing practitioners is more on the final tangible product than the less assessable skills involved in the first task. Part IV provides an overview of successful approaches to addressing the less definable but necessary audience referential skills that have been studied in other fields. A review of the most relevant of these leads to suggestions of how these techniques can be implemented by both teachers and practitioners with the hopeful result of creating better and more motivated legal writers.

II. Rhetoric, Legal Writing, and the Novice Legal Writer

Rhetoric is a useful tool in teaching, discussing, and implementing legal writing. Its underlying purpose—to persuade—allows direct translation of many of its techniques into the creation of a legal document. It is natural, then, that classical rhetoric forms a basis for much legal writing instruction³ as well as the writing of legal practitioners. Yet one thing that is not directly transferable from classical rhetoric is the actual method of communication: rhetoric is traditionally a form of oral communication. In written communication the audience is not as readily or immediately available to the writer, who must produce a final product without the benefit of audience feedback during the development of that product. Because classic rhetoric assumes a speaker with full audience awareness, its skills and techniques are designed to work for someone with that awareness. Thus, for rhetorical skills and techniques to be fully effective for the legal writer, that writer must also develop a full appreciation of the audience.

³ See Robbins-Tiscione, *supra* n. 1; Berger, Edwards & Pollman, *supra* n. 1.

A. Rhetoric's natural bond with legal writing

Rhetoric is the intersection of persuasion and language,⁴ so its use seems to couple naturally with legal writing.⁵ From its origin rhetoric was associated with persuasive discourse, its purpose to convince or persuade an audience to think or act in a particular way.⁶ Rhetoric defines types of arguments, as well as the means to persuade others to accept them. There are three distinct aspects of the rhetorical process that easily correspond to three key phases necessary to completion of a written legal document: discovery of information, arrangement of that information, and the style of its presentation.⁷ The legal writer follows this rhetorical process: First, the legal writer must discover and develop arguments, building them to create solid proofs based on such things as the classic deductive syllogism, analogical reasoning, etc. Then, with arguments in hand, the legal writer must arrange them, then present them. The arrangement of most legal documents follows a classical rhetorical structure,⁸ and incorporating rhetorical devices into one's writing is a basic tool of persuasion.⁹ Thus, one can immediately grasp that a study of rhetoric might be useful to the study and practice of legal writing.¹⁰

In rhetorical communication, because its purpose is to persuade, the author of the message must consider the best manner of delivering the message so as to invoke the desired reaction from the audience.¹¹ That is, rhetoric adds a contingency on audience reaction to the four elements

4 See William M. Keith & Christian O. Lundber, *The Essential Guide to Rhetoric 3* (Bedford/St. Martin's 2008).

5 Both predictive and persuasive documents involve the use of reasoning, analysis, and other rhetorical skills to persuade a particular audience that the author's conclusions are valid. The ABA's sourcebook on legal writing includes reasoning and analysis instruction, and its integration with writing, as content of a first-year legal writing course. See *Sourcebook on Legal Writing Programs* 13–48 (Eric B. Easton et al. eds., 2d ed., ABA 2006).

6 Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 16 (4th ed., Oxford U. Press 1999).

7 See generally *id.*

8 The classic rhetorical outline proceeds as follows: the Exordium (introduction that prepares the audience); the Narration (backstory or statement of facts); the Partition (Points that will be addressed); the Confirmatio (the supporting arguments); the Refutatio (refutation used when necessary and if not layered into confirming arguments); and the Preoratio (conclusion). See Keith & Lundber, *supra* n. 4, at 52–53; see also Corbett & Connors, *supra* n. 6, at 259–292. One can see how this corresponds to not only the basic format of a memorandum or brief, but also to such things as opinion letters and even to scholarly writing. This is also the classic format for judicial opinions. See Ruggero Aldisert, *Opinion Writing* 77–78 (2d ed., AuthorHouse 2009).

9 These, known as “schemes” and “tropes,” are what we most often think of when hearing the term rhetoric. They include, e.g., forms of sentence structure, organization and juxtaposition of words and phrases, and a variety of figures of speech. See generally Corbett & Connors, *supra* n. 6, at 361.

10 This pertains not just to practice-related legal writing, where one typically focuses on writing an “argument.” It also relates to other forms of legal writing, including predictive writing and scholarly writing. For example, in writing a practice-related predictive piece, one is arguing for a particular position as the most likely predictive outcome; thus, one must determine arguments to support that position, arrange them, and convey them. Similarly, in a scholarly piece, one generally has a thesis and must develop, arrange, and convey arguments supportive of that thesis.

11 See Keith & Lundber, *supra* n. 5 at 12. Thus, the practitioner is, for example, focused on invoking a decision favorable to the client.

present in all communication (message, sender, receiver, and medium).¹² Logic is a necessary corollary of classical rhetoric,¹³ in part because persuasion requires logic and logic requires persuasion.¹⁴ But this rational appeal is only one of many available means of persuasion.¹⁵ Beyond requiring an understanding and use of classical logic,¹⁶ rhetorical communication includes considerations of emotional and ethical appeal.¹⁷ These go beyond the appeal to the audience's reason and understanding to further signify the crucial nature of the relationship between author and audience. That is, "[t]o persuade an audience, a speaker needs to say the right thing to the right people in the right situation, at the right time, and with the right ethical conditions."¹⁸

As rhetoric developed, it did so in the context of live oration to an audience; it was not until the Renaissance that its principles were applied on a large scale to written work.¹⁹ A live form of communication allows the speaker to receive immediate feedback about the effect the communication is having on the audience. This immediate feedback does not exist in the context of written communication. Whereas in oral communication, even with no knowledge or understanding of the audience, one will understand from observable responses whether an argument is effective,²⁰ in written communication, one must have some idea of what might persuade an audience, so as to make judgments about the effectiveness of arguments without actual audience feedback.²¹ Hence, learning about audience in a way that will allow the writer to compensate for the missing

12 *Id.* at 11–12.

13 Corbett & Connors, *supra* n. 6 at 16; Keith & Lundber, *supra* n. 5 at 6.

14 Keith & Lundber, *supra* n. 4 at 6.

15 *Id.* at 16.

16 Corbett & Connors, *supra* n. 6 at 18.

17 For detailed discussion of these three modes of persuasion, see *id.* at 31–84.

18 These are incorporated into Aristotle's classical rhetorical triangle, which names three methods of persuasion: *logos* (logic), *ethos* (credibility), and *pathos* (emotional appeal). Keith & Lundber, *supra* n. 4 at 11; see also John D. Ramage & John C. Bean, *Writing Arguments: A Rhetoric with Readings* 152 (4th ed., Allyn and Bacon 1998), in which the authors analogize the types of persuasion to different filters used on theater spotlights:

Thus, if you switch on a *pathos* lamp (possibly through using more concrete language or vivid examples), the resulting image will engage the audience's sympathy and emotions more deeply. If you overlay an *ethos* filter (perhaps by adopting a different tone toward your audience), the projected image of the writer as a person will be subtly altered. If you switch on a *logos* lamp (by adding, say, more data for evidence), you will draw the reader's attention to the logical appeal of the argument. Depending on how you modulate the lamps and filters, you shape and color your readers' perception of the issue.

19 Corbett & Connors, *supra* n. 6 at 15–16.

20 See e.g. Colo. St. U., *Writing Guide: Audience*, <http://writing.colostate.edu/guides/processes/audmod> (accessed Mar. 9, 2012) ("When we talk to someone face-to-face, we know just who we are talking to. We automatically adjust our speech to be sure we are communicating our message").

21 "[W]riters do not get immediate feedback as speakers get from listeners (the eye contact or lack thereof, the body language, the questions, etc.). Writing is harder ... than speaking. . . . writers work 'blind.'" Ind. U. Writing Ctr., *W131 Goal 1: Think like a Writer*, comment 8, <http://www.iupui.edu/~uwc/pdf/Think%20Like%20A%20Writer.pdf> (accessed Mar. 9, 2012).

element of a live audience is crucial to the effective use of rhetoric at all stages: discovery and development of arguments, arrangement of those arguments, as well as their presentation.²² To be successful in persuasion and to use rhetoric to its fullest extent, one must understand who it is that must be persuaded, what it is that will persuade a particular audience, and the rhetorical purpose of the communication.

B. The novice legal writer and referential communication skills

The above leads to the question of how much knowledge novice legal writers might have about the audiences for whom they are writing. Many novice legal writers are afflicted with what Joseph Williams refers to as “temporary aphasia,” a condition in which they cannot write as well as they once could because they are writing about matters they do not understand for readers who do.²³ This assessment focuses on a lack of substantive subject-area knowledge, and aphasia generally refers to a lack of language abilities in the sense of an inability to produce or understand speech.²⁴ Implied in Williams’ assessment, however, is a second area in which knowledge is lacking: understanding of the needs of the reader. Indeed, some researchers find that aphasia may include the referential ability of relating to the audience, as well as verbal–linguistic communication skills.²⁵ That lack of knowledge of the audience must be addressed along with building knowledge about substance. More specifically, in actual writing instruction and practice, in addition to learning about formats, purposes and requirements of legal documents, legal writers must grasp the importance of fully understanding their audience. In addition, practitioners, especially new lawyers, must go beyond the book learning of law school to find ways of learning how the particular audience for whom they are writing might react to their written work.

The lack of understanding of the needs of the audience often results in novice writers writing for themselves (the only reader they know), or as if the reader will of course understand what is in their head (which they, as their own readers, do).²⁶ The only other audience students may

22 See Keith & Lundber, *supra* n. 4 at 11.

23 Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace* 8–9 (4th ed., Pearson Educ. 1994).

24 See Dictionary.com, *Aphasia*, <http://dictionary.reference.com/browse/aphasia> (accessed Mar. 9, 2012).

25 Kathryn L. Garrett & Cynthia Cress, PowerPoint, *Measuring Referential Communication Skills in Adults with Aphasia: Research Questions and Tool Development* (ASHA 2002) (available at <http://www.cehs.unl.edu/barkley/present/cress/measure.pdf>). One hypothesis of the authors is that “[i]ndividuals with severe aphasia may not be able to produce propositional, verbal-symbolic communication (speech or non-speech modalities) until basic referential skills emerge (either naturally or with facilitation).” *Id.*

26 Hence a frequent complaint of legal writing teachers, as well as those who employ novice legal writers, is that the authors do not explain their thinking sufficiently for the reader.

understand is the professor; the general perception a student has of a teacher is that the teacher already knows and has an answer.²⁷ Thus, rather than explain and develop an answer of one's own, the student may simply write as if the answer is already known. This approach of writing as if the audience knows the answer may continue beyond law school and affect the writing of the practitioner. As practitioners gain more experience, they begin to acquire a data base about specific audiences. Yet, even the experienced practitioner can be reminded to consciously take this knowledge into account when creating a document.

An essential skill in learning to communicate is what is known as "referential communication": writers must learn to anticipate the needs of their audience.²⁸ This is not a skill that can be acquired simply by being told about the audience any more than one can learn to write simply by being told about writing. Rather, a writer must in some way experience or empathize with the needs of the audience in order to satisfy those needs.²⁹ That is, to be effective, the writer must not only understand the basics of writing a sentence and its substance, the writer must also be able to think like the reader, anticipating both the reader's needs and the problems that the reader will have with the written work.³⁰ Just as one practices writing a document (outlining, drafting, revising) one must also practice understanding the needs of the audience.³¹

Thus, legal writers must understand not only that their communication is about presenting a solution to a problem with more than one answer—and for which there is not necessarily a "right" answer—they must also understand how the reader is likely to react to the words upon

²⁷ See e.g. Kenneth A. Bruffee, *Collaborative Learning: Higher Education, Interdependence, and the Authority of Knowledge* 67 (Johns Hopkins U. Press 1993). Bruffee notes that typical teaching in college and beyond promotes the authority of the teacher who, through lecture and recitation, provides information and answers to students. *Id.*

²⁸ Noting that we change what we say in spoken communication because we know our audience, Colorado State University's writing guide states,

Interestingly, many writers don't make the same adjustments when they write to different audiences, usually because they don't take the time to think about who will be reading what they write. But to be sure that we communicate clearly in writing, we need to adjust our message—how we say it and what information we include—by recognizing that different readers can best understand different messages.

Colo. St. U., *Developing Audience Awareness*, <http://writing.colostate.edu/guides/processes/audmod/list3.cfm> (accessed Mar. 9, 2012).

²⁹ "You need to know your audience before you start writing." Colo. St. U., *Audience Definition*, <http://writing.colostate.edu/guides/processes/audmod/pop2a.cfm> (accessed Mar. 9, 2012).

³⁰ See generally Carol Berkenkotter, *Understanding a Writer's Awareness of Audience*, 32 *College Composition & Commun.* 388, 388–99 n. 4 (1981); see also Ind. U. Writing Ctr., *W131 Goal 1: Think like a Writer, comment 3*, <http://www.iupui.edu/~uwc/pdf/Think%20Like%20A%20Writer.pdf>, (accessed Mar. 9, 2012) ("To think like a writer is to think like your reader—to put yourself in the reader's shoes so that you can write what that reader needs to read").

³¹ Experience is a crucial part of learning. See James E. Zull, *The Art of Changing the Brain* 13 (Stylus Publ. 2002). Because experience involves the senses, it amplifies the learning experience. It is thus crucial to give students opportunities to have concrete experiences to enhance the depth of their learning. *Id.* at 145–48.

the page. Teaching this understanding is the true challenge of legal writing instruction; grasping it is the challenge for every writing practitioner. That is, writers cannot be limited to considerations of style and format and substance. They cannot be limited to understanding how to find relevant law and reason through the connection of that law to a current problem. Writing must include, but cannot be limited to, the techniques for building strong arguments found in classical logic.³² All of these skills are a part of rhetoric, but the overarching element—the audience—must not be forgotten. All these skills and their implementation must be guided by the demands and needs of a specific audience that changes with each rhetorical situation and each writing task.

The challenge then is for the writer to understand and to think like that audience when written communication, unlike oral communication, does not give the writer the opportunity to see the audience's reaction. Unlike the oral communicator, the writer cannot make immediate alteration to the work in response to the audience.³³ The author's final product must have been developed in a way that responded to the audience throughout the process so that when the completed product is actually viewed by the audience, the reaction will be as anticipated. Incorporating audience reaction into the process more accurately mirrors classical, oral based rhetoric and allows for a fuller understanding of how, when, and where to use its techniques.

III. The First Key Task of the Writer: Audience Awareness

Anticipating the audience suggests a division of writing into two key tasks: (1) learning about and understanding the audience and (2) implementing writing that works for that audience. It is the second of these tasks that is often the focus of legal writing in all its complexity. Beginning in law school, students will be taught the many tools and skills necessary to produce the type of document called for by a generic audience (e.g., a generic intermediate appellate judge, a generic supervising attorney). Instruction will focus on the rhetorical skills of discovery, organization, and presentation of arguments. Discussion of the audience is often folded into instruction about creating the document itself. This focus on product is likely to carry into practice. While an effective product is the ultimate

³² These include such things as inductive and analogical reasoning, creation of syllogism, and understanding and creating complex definitional proofs.

³³ That response of audience is useful to the writing process can be seen when students present an oral argument *before* finalizing a written brief.

goal, ignoring the key component of audience can be as detrimental to that product as failing to fully research an issue or failing to be grammatically accurate.

A. Conceiving the audience

Defining an audience is not the same as placing oneself in the shoes of that audience.³⁴ Here is where rhetoric alone does not provide a solution. Whereas it touts the importance of audience, “at its foundation [rhetoric is] a model of speech.”³⁵ The elements of rhetoric (discovery and development of arguments, organization and arrangement of those arguments, and finally presentation and style), while all crucial to a final persuasive product, alone are not enough. Nor is it enough to understand a variety of generic rhetorical purposes and audiences. It is one thing to know that a judge will generally want to understand why and how the law mandates the decision the author is seeking. It is quite another for the author herself to have a feeling for the needs of the particular judge–reader and what will most likely invoke a desired response in that particular reader.

Here, the legal writer is not that different from any other writer who must take the needs of audience into consideration. Carol Berkenkotter designed a study to investigate whether experienced writers with formal training in rhetoric thought about their audiences more actively than writers without such training.³⁶ As part of that study she described the processes that writers engage in to attain audience awareness. She found that in informational and persuasive writings, experienced writers generated audience-related goals that led them to a narrative plan.³⁷ Writers from fields other than composition were more product oriented,³⁸ Berkenkotter found, but she described two significant patterns of thinking about audience that writers from all disciplines all shared. First, all formed a “rich representation of audience” that played a significant role in the development of the writer’s goals. Second, they created individual rhetorical scenarios in which they interacted with that audience representation.³⁹ She concluded that professional writers “automatically internalize

³⁴ See generally Zull, *supra* n. 31. Also notable is that advertising and marketing enterprises, groups whose purpose is to persuade, understand this well as they contemplate target audiences with focus groups and similar research techniques.

³⁵ Ind. U. Writing Ctr., *W131 Goal 1: Think like a Writer*, comment 9, [http://www.iupui.edu/~uwc/pdf/Think %20 Like%20A%20Writer.pdf](http://www.iupui.edu/~uwc/pdf/Think%20Like%20A%20Writer.pdf) (accessed Mar. 9, 2012). The author of this comment continues, “Readers don’t have an audience in the same way that speakers do. . . . The writer

cannot watch the reactions of the reader to see if he or she is ‘getting it.’ A writer has to know something of what makes writing work for both reader and writer and implement those skills and ideas” *Id.*

³⁶ See Berkenkotter, *supra* n. 30.

³⁷ *Id.* at 394.

³⁸ *Id.* at 395.

³⁹ *Id.*

their audiences: as they write, they ask themselves the questions that their readers might be expected to ask.⁴⁰

Law students and lawyers must similarly develop the skill of thinking like a writer, specifically like a legal writer who incorporates audience feedback into all stages of the rhetorical process. The writer must understand the reader enough so as to be able to think like the reader when reflecting on ideas and arguments, and when connecting them into a cohesive and effective whole. The writer must be able to act as the audience, raising questions and problems with the writing self and resolving them effectively before the document is submitted to the actual audience. Thinking like a writer requires making choices based, first, on what the writer wants to say and accomplish combined with an understanding of the audience and, second, what that audience needs to hear (read).

The writer must be able to carry on a dialog between herself and the specific audience.⁴¹ Because this cannot be done with written work in the way it is with oral communication, the writer must have a sufficient understanding of the specific audience in order to have that dialog throughout the writing process. This is very different from being told about audiences. The latter is more directive and external; in a teaching situation, how well the provided information is learned can be assessed.⁴² But understanding the mind and needs of a specific audience so as to identify with that audience sufficiently to respond to the writing as one other than the writer would is something that is less assessable, and less capable of being taught. It is a more intuitive endeavor that comes from having the general, assessable knowledge, but then takes that knowledge to a less directive and more creative level. This may seem at odds with the assessable and product-oriented nature of law school and law practice, but a better ability with a more intuitive referential communication can in the end result in a better final and assessable product.

40 *Id.* at 396.

41 *But see* Donald M. Murray, *Teaching the Other Self: The Writer's First Reader*, 33 *College Composition & Commun.* 140, 140 n. 2 (1980) (available at <http://www.jstor.org/stable/357621>). Murray discusses the writer's conversation with and focus on an "other self," as opposed to a separate audience during the writing process. *Id.* The conversation is described as "between two workmen muttering to each other at the work bench" in which the self speaks and "the other self-listens and responds." *Id.* However, this description of a conversation between two aspects of one's own mind could just as easily be describing a conversation between a writer and an other audience whom the writer well understands, has constructed, and stands in the shoes of during the writing process. *Id.*

42 For example, we can ask a test question about the difference between the perspective of a trial judge and an appellate judge. That a student has or has not learned that difference is determined and quantified. But less measurable is whether the student has an internal understanding of the needs of that audience and a particular audience's likely reaction to the work of the student.

This dovetails with other less-measurable and more-intuitive aspects of the writing process that involve its creative features. Thus, a short diversion into the creative process leading to a final, tangible product is useful here.

B. The creative process of legal writing

Like all creative processes, legal writing involves four stages of thought and action: preparation, incubation, illumination, and verification.⁴³ The sequence leads to a novel and adaptive product.⁴⁴ The entire process involves purposeful analysis, generation of ideas, and critical evaluation; it is a balance of imagination and analysis.⁴⁵

The process begins deliberately when one receives an assignment and determines facts, audience, and purpose, and begins to research and define issues. The writer also acts purposefully after a document is drafted, during the revising and editing stages. These parts of the process occur at highly aware, conscious states in which the mental processing takes a direct course from A to B, a course for which legal writing has clear guidelines (e.g., IRAC). However, between the cognitive knowledge gained in the first phase and the writing-and-revising stage in which the information gathered is substantiated into a final document are two less definable but essential steps. Both take a less structured, less direct path and involve more-spontaneous mental processing.

The first step, following the purposeful acquisition of relevant knowledge, is a period of incubation during which the mind is left to begin solving a problem, connecting the acquired information, without conscious direction, to a precise course or solution.⁴⁶ Following this incubation is a phase of illumination when the incubated material percolates to

43 Tanja Janssen & Gert Rijlaarsdam, *Observational Learning in Cultural and Arts Education; Effects on Students' Creative Processes, Products and Motivation in Creative Writing and Visual Arts* 7, <http://home.medewerker.uva.nl/t.groenendijk/bestanden/Research%20plan%20PhD%20Observerend%20leren%20bij%20CKV.pdf> (May 29, 2006); see also Paul E. Plsek, *Working Paper: Models for the Creative Process*, <http://www.directedcreativity.com/pages/WPModels.html> (accessed Mar. 9, 2012).

44 A common definition of creative is "the ability to combine novelty and usefulness in a particular social context." Patricia Cohen, *Charting Creativity: Signposts of a Hazy Territory*, N.Y. Times C1 (May 7, 2010) (available at <http://www.nytimes.com/2010/05/08/books/08creative.html>). A comparison of the creation of a legal document with this definition supports the view of legal writing as a creative process: Each document or argument a lawyer creates is unique (novel) because each case is unique, and the document must be useful for its particular rhetorical situation (e.g., convincing a judge, persuading a colleague, etc.). Thus, the legal writer must combine novelty and usefulness in a particular context. See Barbara Blumenfeld, *Legal Writing is a Creative Endeavor*, 6 N.M. Law. 8, 8 n. 3 (2011).

45 Paul E. Plsek, *Working Paper: Models for the Creative Process*, <http://www.directedcreativity.com/pages/WPModels.html> (accessed Mar. 9, 2012). Plsek notes that all models of the creative process include the common themes of purposeful analysis, imaginative idea generation and critical evaluation. *Id.*

46 See Paul Williams, Am. Inst. for Innovation Excellence, Innovation Blogroll, *What is Incubation?* <http://blog.thinkforachange.com/2008/04/29/what-is-incubation.aspx> (Apr. 29, 2008).

the surface: ideas coalesce and the writer may again consciously and with direction choose arguments and approaches or, with document in hand, begin choosing words, phrasing, etc. The material that must be connected during these less directive phases includes one's inner understanding of the audience for whom the document is being created.

These less directive processes, though at one time thought of as unconscious and hence outside the individual's control, are now seen as being within the control of the thinker.⁴⁷ It is at this time—between the initial and deliberative preparation and the final substantiation of the project—that the writer can step into the shoes of the audience and understand the needs of the audience while developing and connecting information. Although this process is not directive in the sense of having defined steps to follow for any given project, the writer can control the process, ensuring that the steps are not omitted. The writer must combine her understanding of audience with her own judgment and thinking, carrying on a dialog between the writer's presentation and the audience's understanding. This process needs to occur before the writer begins the conventional task of organizing and placing words on paper. In this, the first phase of rhetoric in which the argument is developed, it is crucial that the audience not be forgotten.

Encouraging the less definable aspects of the writing process, acknowledging that this is indeed a creative process, has the potential to better motivate and fulfill both students and practitioners by allowing them to have more self-determination and fulfillment in the creation of a final document. Studies show that “intrinsic motivation” can be a strong driving force.⁴⁸ Human beings have an “inherent tendency to seek out novelty and challenges, to extend and exercise their capacities, to explore, and to learn.”⁴⁹ This drive is often stronger than are extrinsic rewards or punishments. This is especially true in creative endeavors.⁵⁰

IV. Learning to Fully Integrate Audience into the Legal Writing Process

Unquestionably, the directional aspects of writing are more than adequately addressed in the many legal writing classrooms of most law

⁴⁷ Plsek, *supra* n. 45.

⁴⁸ See Daniel H. Pink, *Drive 3* (Riverhead Bks. 2009).

⁴⁹ *Id.* at 8 (quoting Edward Deci).

⁵⁰ See generally Pink, *supra* n. 48. This is the premise of the book. In a study of artists, researchers found that commissioned works were significantly less creative than noncommissioned ones, though both were similar in technical quality; another study of artists found that outside rewards actually hindered success. *Id.* at 42–43.

schools,⁵¹ as well as in academic and practice-related texts and articles.⁵² Similarly, the three aspects of rhetoric (logic, arrangement, style) are well covered.⁵³ And there is a wealth of information about the various legal audiences that may receive a legal writer's work.⁵⁴ What is not so prevalent is a method for allowing the novice legal writer to actually experience the needs of the audience, to stand in that audience's shoes. Yet until the writer can do so, the writer will not be able to fully carry out the task of creating a persuasive document designed for a specific audience. Because the presentation is written and the writer will not receive interactive and immediate feedback, it is essential that the writer be able to take the place of the audience during the creation of the work.

The skill of remembering that each individual audience has its own importance, and taking time to incorporate an understanding of and mental interaction with that audience into the writing of a document, is one best begun in law school. It is there, before the busy and hectic day-to-day practice of law, that students should learn how to consciously include a working creation of their audience in the creative parts of the writing process and to translate that understanding into clear communication. These are two separate tasks,⁵⁵ both of which must be well internalized into the writer's process before leaving law school so that in practice the job is not to learn about referential communication, but to perfect it. The following, then, begins by focusing on teaching this skill to law students, then ends with suggestions for how practitioners can continue to bring this awareness into their writing process.

A. Focus of current law school writing instruction

Perhaps because it is necessary, current instruction often tends to focus on assessable skills. It tends to focus on the pieces of rhetoric and writing that can be evaluated and measured as to how they meet the needs of a generic audience that is defined but perhaps not understood. It focuses on using a variety of tools to meet the needs of that generically defined audience.

⁵¹ See generally the areas of coverage for basic legal writing instruction as noted in the ABA's *Sourcebook on Legal Writing Programs*. *Sourcebook on Legal Writing Programs*, *supra* n. 5 at 5–48.

⁵² A review of the contents of most legal writing texts demonstrates a correlation to the areas of coverage noted in the ABA's *Sourcebook on Legal Writing Programs*, *supra* n. 5 at iv. Many state bars regularly include legal writing as a focus of their communications with their members. See e.g. Michigan Bar Journal's monthly column "Plain Language." St. B. of Mich., *Plain Language Chronological Index of Columns*, <http://www.michbar.org/generalinfo/plainenglish/columns.cfm> (accessed Mar. 9, 2012).

⁵³ St. B. of Mich., *supra* n.52.

⁵⁴ That is, most legal writing courses cover such topics as the appellate and trial courts as audience, the client as audience, the supervising attorney as audience, etc.

⁵⁵ Learning to understand the audience and learning to implement writing that works for that audience.

What is often missing is time spent on learning the first task of the well-rounded writer: acquiring and internalizing a true understanding of specific audiences. Time on this task allows the writer to actually construct that audience in his mind, then direct and utilize the more creative and less assessable aspects of the writing process. Doing so enables the writer to fully anticipate and respond to the needs of that particular audience during the writing process.

This is not an easy task. “As a concept, it sounds so simple: think about who will read your paper before and while you write, and adjust your paper to help your reader understand it. Compared to the theory of relativity, this concept is a piece of cake.”⁵⁶ Because school assignments result in a student’s writing for a single authority (the teacher), the writing does not do well at approximating real world writing situations that confront a writer with a variety of rhetorical situations and audiences. “School writing stifles the development of audience representation because it precludes its necessity.”⁵⁷

In a way, concern with referential communication is another form of reasoning, and reasoning is not easily taught.⁵⁸ Nor is one’s internal ability to reason assessable. Rather, what we measure is the product that results from the less measurable and more creative aspects of the writing process. Like other forms of less directive thinking, lack of success in the ability to create a working audience will evidence itself in the final written product, even though that ability is not itself easily assessable, definable, or teachable. As such, it may be ignored or simply treated as a part of the assessable skills. But though writing teachers may not be able to actually measure those processes does not mean that they cannot and should not teach them.

B. Techniques from other fields

In nonlegal writing situations, some techniques have proven to be successful in making writers more aware of their specific audiences. These techniques, summarized below, include observational learning, predictive learning, and a transactional approach to understanding audience.

⁵⁶ Colo. St. U., *Defining Audience Awareness*, <http://writing.colostate.edu/guides/processes/audmod/pop3a.cfm> (accessed Mar. 9, 2012).

⁵⁷ Berkenkotter, *supra* n. 30, at 396. It is worth noting that Berkenkotter cites the case method of law and business schools as a way to present students with realistic writing problems require them to develop strategies to meet the informational needs of the audience. *Id.* Indeed, this is done when students write a memo to a generic supervising attorney or a brief to a generic court or judge. However, I think that much more can be done to increase students’ awareness of that audience so they can approach the level of the skilled writer who actually incorporates an understanding of and a dialog with that audience into all phases of the writing process.

⁵⁸ See Zull, *supra* n. 31, at 192.

Modified or in combination, they might prove successful in enhancing the legal writer's integration of audience into the writing process.

1. Observational learning

A student observing someone actually performing a task the student is studying is engaged in observational learning. In 2001, a group of researchers at the University of Amsterdam conducted a study of the effects of observational learning on students writing argumentative texts.⁵⁹ The researchers began with the understanding that observational learning has proven to be effective with students of various ages and in various subjects, and thus wanted to determine its effectiveness in teaching writing.⁶⁰ The study involved participants at various achievement levels learning to transform argument structures into short, linear texts.⁶¹ The task was completely new for all students. Students were divided into two groups; both groups were taught relevant theory. The "applied" group of students then applied the theory in short writing tasks. The second, "observing" group, rather than actually write, applied its understanding of theory to observing those writing. Their tasks included observing models (both weak and strong) conducting the same writing task being performed by the first group, reflecting on the performance of those models, then assessing the written text produced by those models. Several such sequences were involved in the study.

The results showed that weak students benefited more from the observational learning than by those performing the actual writing tasks. The authors suggest that the observational learning allowed the students' cognitive efforts to shift from executing writing tasks to learning from the writing processes of others. Thus, they could focus on the learning task and acquire new understanding about writing. Good students benefitted not only from observational learning but also from actually performing the writing tasks.⁶² The authors suggest that the better students are able to divide their attention between the writing task and the learning task and to generate enough input for their learning by evaluating their own performances—something more difficult for the weaker student faced with a new writing task.⁶³

59 Martine A. H. Braaksma, Gert Rijlaarsdam & Huub van den Bergh, *Observational Learning and the Effects of Model–Observer Similarity*, 94 *J. of Educ. Psychol.* 405, 405–415 n. 2 (2002). Although the study participants were younger, secondary-school students, the underlying premises and conclusions of the study may have direct relevance to teaching legal writing.

60 *Id.* at 405.

61 *Id.* at 406.

62 *Id.* at 412–13.

63 *Id.* at 413.

2. Predictive learning

This technique involves teaching writers to predict the needs of the audience for whom they are writing. In 1992, Karen Schriver suggested an approach for teaching writers to anticipate readers' needs.⁶⁴ The method, called "reader-protocol teaching," is intended to address the problem of those writers who fail to consider the needs of the reader.⁶⁵ In this teaching method, the teacher offers no explicit instruction in modeling reader responses. Rather, students learn through the experience of analyzing readers' responses to various texts. Schriver's initial study hypothesized that extensive experience in interpreting reader feedback would help writers to become more aware of how readers construct text. Participants in the study were college juniors and seniors who underwent a series of ten lessons, each containing two parts: The first was a "problematic text"—one that was poorly written and would cause comprehension difficulties for the intended audience. The second part of each lesson involved a think-aloud reading by a person trying to understand the text.⁶⁶ In the first part, students would read the draft text, predict the reader's problems with the text and characterize (diagnose) those problems. In the second part the participants would use the reader's responses to the read-aloud of the text to identify additional problems, then use the reader's responses to diagnose those problems.⁶⁷

Schriver assessed the participants by coding their predictions of reader problems into one of four categories: (1) accurate predictions of problems readers actually had ("hits"); (2) failures to predict problems readers actually had ("misses"); (3) predictions that readers would have a problem when in fact they did not ("false alarms"); and (4) predictions that readers would not have a problem and, in fact, did not ("correction rejections").⁶⁸ In assessing the results of the reader-protocol method, Schriver found that when compared to her control group, the writers using the method were better able to diagnose problems from the reader's point of view, were more sensitive to problems caused by omission, and had an increased awareness of problems at the global level of the text.⁶⁹ This study suggests that a reader-protocol method helped improve writers' perceptual knowledge by teaching them to see and hear the audience as readers.⁷⁰ Moreover, the method teaches student writers to

⁶⁴ Karen A. Schriver, *Teaching Writers to Anticipate Readers' Needs: A Classroom-Evaluated Pedagogy*, 9 *Written Commun.* 179, 179–208 n. 2 (1992) (available at <http://wxc.sagepub.com/content/9/2/179>).

⁶⁵ *Id.* at 179.

⁶⁶ *Id.* at 184–85.

⁶⁷ *Id.* at 190.

⁶⁸ *Id.* at 192.

⁶⁹ *Id.* at 201.

⁷⁰ *Id.* at 204. Schriver notes that at the end of the study writers in the experimental classes made comments that they could not read their drafts anymore without "hearing 'readers in their heads' saying 'I'm confused! What do you mean by that?'" *Id.*

make explicit connections between the processes of reading and writing and to acquire a writing model of the “reader at work.”⁷¹

3. Transactional approach to understanding audience

This technique takes a practical approach, presenting a student with tactics that can be applied to specific situations in which a designated task must be performed. Following her study designed to understand the experienced writer’s awareness of audience,⁷² Berkenkotter suggests strategies for getting a writer to focus on audience. One is an audience-based heuristic that is a series of questions encouraging writers to construct a hypothetical reader, explore that reader’s attitude toward the subject of the writing, and analyze the writer’s relationship to the reader. The questions further require writers to define the specific rhetorical and stylistic choices appropriate for the image each has constructed of the audience.⁷³ Berkenkotter credits Peter Elbow, who developed approaches a writer can use to help develop and respond to different audiences.⁷⁴ These include eliciting feedback from others who might hold the same views as the audience and asking teachers to design assignments that have readers other than the teacher, thus allowing writers to adjust transactions between themselves and varying readers.⁷⁵

C. Ways to enhance the legal writer’s audience awareness

1. In the law school setting⁷⁶

Many legal writing teachers to some extent already incorporate aspects of the techniques making use of readers other than the teacher him- or herself. Having students read and evaluate briefs gives them some experience as an audience, as do peer reviews of one another’s writing. Live grading gives students some insight into how an audience is reading their paper, although in that instance, regardless of the role the teacher takes on, the student is likely to see that audience as the teacher with authority over the student’s grade. And of course, every legal writing assignment includes a specific type of audience with specific needs. Thus, legal writing

71 *Id.*

72 See Berkenkotter, *supra* n. 30.

73 *Id.* at 396–97 and appendix therein.

74 Berkenkotter, *supra* n. 30 at 397. Citing “Audience” in Peter Elbow, *Writing with Power: Techniques for Mastering the Writing Process* 177–235 (Oxford Univ. Press, 1981), Berkenkotter notes that Elbow uses a transactional approach to help writers cope with various affective problems that audiences can present.

75 *Id.* at 397.

76 Much of what is suggested in this section could also be used by larger firms that conduct training for their new associates.

instruction is already well on its way to teaching the key skill of learning to understand the audience.

One can more easily learn when one focuses on one task at a time.⁷⁷ Students should be able to more easily master all the aspects of legal writing if the tasks are separated and students are allowed to focus individually, first on learning about and understanding audience, then, separately, on learning to implement writing that works for that audience. I would encourage those tasked with developing novice legal writers to intentionally focus on the separate task of developing an internal understanding of legal audiences and incorporating this understanding into the writer's process. Studies focusing on this aspect of writing support using a variety of concepts and techniques, which in combination are translatable to teaching legal writing, and which allow a greater understanding and use of the concept of audience, to more fully develop and integrate rhetoric to its fullest extent into the legal writing process.⁷⁸

For example, borrowing from the observational model, it might be useful for novice legal writers to observe intended readers of their documents actually reading them: a judge reading a brief or an attorney reading a memo from a junior associate. To accomplish this efficiently, the teacher should find two or three similar documents of varying quality and video tape an intended reader reading the document, raising questions, etc. Tapes can be used in class or as assigned viewing outside of class.⁷⁹ Students can then assess and diagnose the problems encountered by the reader along with how they might be addressed.

Observation tapes might also be made of an experienced legal writer (attorney or similar model) actually going through the writing process or some portion of it. Of course, because this process is enormously time-consuming, the tape might need to be edited, with possible summary commentary by the author showing and explaining the substance of her approaches to various segments of the process, including how she

⁷⁷ See Tanja Janssen & Gert Rijlaarsdam, *Observational Learning in Cultural and Arts Education; Effects on Students' Creative Processes, Products and Motivation in Creative Writing and Visual Arts* 5, <http://home.medewerker.uva.nl/t.groenendijk/bestanden/Research%20plan%20PhD%20Observerend%20leren%20bij%20CKV.pdf> (May 29, 2006). In discussing the need to focus on one task at a time, the authors state the following:

Learners who perform a complex task that calls for a strong task involvement, such as writing, have to juggle with two agendas: a writing agenda (a text must be produced) and a learning to write agenda (knowledge or skills must be gained). Two roles have to be fulfilled at the same time; the role of writer and that of learner.

Id.; see also Braaksma, Rijlaarsdam & Huub van den Bergh, *supra* n. 59.

⁷⁸ See *supra* pt. IV.B.

⁷⁹ While live grading approaches this sort of observation, the difference in live grading is that rather than an actual intended audience for the document the student is observing the teacher's reactions and questions. Acknowledging that the teacher is always one audience, and that the teacher is likely well able to predict the reactions of the intended audience, the teacher may not be seen as the student as the equivalent of the actual intended audience. Rather, the student is likely searching for cues as to what can be done to improve the grade, rather than what can be done to improve the reader's response to the information.

considers audience. Such a video would allow the novice writer to observe the experienced writer struggling with the many phases of rhetoric and the writing process, asking questions and carrying on a mental dialog with the audience, based on the writer's understanding of and experience with that audience.

The predictive reader protocol is also easily adapted to legal writing instruction. Here students can read, predict, and diagnose problems in a written piece. Following the student assessment of the piece, an actual audience member can read and assess the piece.⁸⁰ This can then be compared with the student's original assessment. Incorporated into this predictive protocol could be a sequence of questions similar to those suggested by Berkenkotter that allow the writer to construct an understanding of the reader, along with the appropriate rhetorical techniques the writer will use to satisfy that audience. Responding to such a questionnaire can also be a required part of any writing assignment.

All of these suggestions have a common thread: rather than simply tell students about the types of audiences that they may encounter and write for, they allow students to actually either stand in the shoes of the audience or observe the audience in action. This brings us closer to the classical rhetorical model in which the speaker is able to receive immediate feedback from the audience and adjust the remainder of the presentation accordingly. By placing students in the role of audience the teacher can begin to give the student the ability to become the audience in the conversations that the writer carries on with herself.

Use of some or all of these techniques focuses the efforts of both teachers and students. Actually placing students in the role of audience allows the teacher to break the teaching of legal writing into two tasks: first understanding the audience, then implementing what is necessary for that audience. It also allows students to see actual models at work, not simply final products. In so doing they can assess their own approaches, comparing and contrasting and trying methods that may work for them. Finally, with a fuller understanding of audience, the pieces of rhetoric become more meaningful and more useful. Thus, for example, if one truly appreciates that the intended reader is not going to understand or accept a proffered conclusion without a fully developed argument, one is more likely to build that argument using a series of grounded syllogisms that fully prove both the relevant rules and how and why those rules apply to the case at hand in the manner asserted by the writer.

.....
⁸⁰ This may be accomplished by using observational tapes of a reader as described above.

2. In practice

Many of the above techniques are time-consuming, even for law school. They certainly do not take into account the demands of a busy law practice. Yet they are useful in developing an approach for the practitioner who wants to develop and perfect the integration of referential communication into the writing process.

The first step is to make audience awareness a conscious piece of the writing process that is incorporated into the practitioner's time management plan. Understanding the audience must be acknowledged as a separate and key task in the writing process, just as important as research or document revision. As noted above, the less directive portions of the creative process that include audience awareness, while previously seen as outside conscious control, are now known to be within the control of the conscious writer. The practitioner should consider her actual writing process and find places where a focus on audience awareness can be incorporated.

The practitioner, tasked with a legal writing assignment, should begin by acquiring as much information as possible about the specific audience that will read the document. For example, if the practitioner is writing a brief to the trial court in support of a motion, the writer should ask other practitioners what they can tell her about the specific judge who will hear the motion: (e.g., "What sort of questions does she ask at oral argument?" "What sort of arguments seem to persuade her?" "Does she like or dislike a more academic approach?" etc.) If the judge has published opinions, reading some may reveal the judge's approach to problem-solving; using the same or similar approach may be more persuasive than an approach that the author might prefer. With such information in hand, the writer must construct a working model of the audience and carry on a mental conversation with this specific audience as she develops and organizes arguments, asking questions that the particular judge might ask (e.g., "Why should I approach it this way when my usual approach would seem to be better?" "What about the policy reasons that I find so important in this type of case?" etc.). As the writer moves on to the actual drafting of the argument, she can again carry on a mental conversation in which she asks questions that the specific audience might ask (e.g., "Why are you being so cumbersome when you know I am more persuaded by succinct and direct communication?" "You know I become annoyed when attorneys seem overly aggressive in their briefs." "Why does this statement necessarily follow? I need more detail here." etc.)

In addition to constructing a rhetorical scenario, the novice legal writer can look to more seasoned practitioners with the above observa-

tional model in mind. When time permits, the novice can sit with the experienced writer to actually observe that writer working through some aspect of the writing process. The novice and seasoned practitioner can discuss and develop the ways in which awareness of a particular audience drives the practitioner's process toward the final product.

Practitioners can also practice referential communication as the audience. When reading documents written by others, practitioners should take the time to consciously examine their reaction to the document and consider how, as writer, they could have invoked a different response. Such considerations can be part of reading that the practitioner must do in the course of practice, but the practitioner could also set aside a small amount of time each month or other period to read legal documents in an area of interest as practice in constructing a rhetorical conversation between writer and reader. This practice will help to make audience awareness a more natural and routine part of the writing process.

Those who are common and frequent audiences also have a role in developing the practitioner's awareness of audience. Many judges currently participate in continuing legal education classes in an attempt to convey to the practicing bar the types of written work that they would like to receive. Such CLEs often focus on the more directive skills (style, organization, clarity of writing, etc.), which sidestep a direct focus on audience. Perhaps some of those CLEs could present a judge actually reading through a brief and reacting to it.⁸¹ This would give the CLE participants a direct picture of the audience in action. Their job would then be to create that picture for each particular audience for whom they write and to mentally create the sorts of questions and reactions that they saw in an actual audience. As in law school instruction in these skills, videos of this could be made and reused to make more efficient use of judicial time.

Conscious incorporation of audience should not add significantly to the busy attorney's schedule. The key is to include a time for referential communication in each writing task. The author must take the time to construct a mental image of the audience, then remember to converse with that audience throughout the writing process. This requires some up-front time (to construct the image), then simply remembering to ask the questions that the audience might ask periodically throughout the writing process. Even though it may not be very important in routine matters, making conscious awareness of audience part of every writing task means

81 This would not have to be a brief filed in that judge's court. This could be a brief from a different jurisdiction. The point is not to show how the judge would read and decide a case before him, but simply to show how the judge actually reads and reacts to a brief presented to him. Moreover, such a CLE could actually include a panel of judges, each reading and reacting to the same brief or to a series of briefs. This would give the practicing writer a variety of audiences from which to draw on when creating the mental image of the audience being writing for in any particular case.

that it will come naturally in the major task where it is truly needed to enhance the final product.

V. Conclusion

At its core, the rhetorical model on which legal writing is based is one of speaking, not writing, and writers do not have an audience in the way that speakers do. This does not mean that rhetoric is not a good model for writing, especially for legal writing. Yet, the writer cannot rely on rhetorical techniques alone; the audience problem must be addressed if the legal writer is to be able to take full advantage of the many tools offered by rhetoric. This can be done by creating situations in which one can actually experience the needs of typical audiences of legal writing, before moving to the task of implementing the best writing for those needs.

A writer who is content to learn about an audience from others will not be as effective as the writer who actually builds an internal understanding of that audience.⁸² If novice writers are encouraged to watch and evaluate actual audiences as well as actually experience the needs of an audience themselves, they are likely to far better understand what they need to do as writers than if someone merely tells them what to do. At the same time, this understanding allows writers a deeper engagement with the creative writing process: rather than simply writing to meet some externally defined criteria they are, for each document, allowed to become both reader and writer and define the criteria themselves. This intrinsic rather than extrinsic approach should result in greater engagement and motivation for both students and practitioners,⁸³ as well as a deeper fulfillment in the process as the writer is able to reward the creative self.

⁸² Telling one what to do is never as effective as allowing one to figure out what to do. While we retain 10% of what we read and 20% of what we hear, we retain 80% of what we personally experience. See Cuesta College Academic Support, *12 Steps for Effective Studying*, <http://academic.cuesta.edu/acasupp/as/203.HTM> (accessed Mar. 9, 2012).

⁸³ See Pink, *supra* n. 48.