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Text Work as Identity Work for Legal Writers: How Writing Texts Contribute to the Construction of a Professional Identity

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Shelley Kierstead and Erika Abner*

Introduction

Lawyers, like their counterparts in other professions, develop a professional identity that is shaped by multiple influences—positive and negative, overt and hidden—both in law school and in practice. In this article, we will begin to explore the phenomenon of “text work–identity work” for lawyers through an analysis of important legal writing literature: the textbooks from which law students and practicing lawyers may absorb information about who they are as lawyers. Text work–identity work has been described as the process of developing a professional identity, which includes adopting an authoritative stance,¹ in and through writing.² Certainly, professional identity is formed by influences in addition to the texts themselves. For example, what teachers say, and the way they use texts while teaching, almost certainly shape the influence of the texts.

In this work, we have adopted at the outset the approach and standpoint presented by Barbara Kamler and Pat Thomson in their analysis of dissertation-advice books. As described by Kamler and Thomson in an earlier work,³ the authoritative stance for doctoral

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¹ Based on our earlier work on the development of expertise in legal writing, we suggest that an authoritative stance consists of a blend of attributes—strong analytical ability, attention to detail, awareness of the nuances required by different audiences, attention to clients’ problems, and the ability to appropriately convey the nature and degree of risk. See Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 *Leg. Writing* 363, 380–84 (2010).

² See generally Barbara Kamler & Pat Thomson, *Helping Doctoral Students Write: Pedagogies for Supervision* (Routledge 2006).

students engaged in knowledge production includes the ability to understand the relevant field or fields, to make choices about literature(s), and to adopt a critical yet respectful stance to the literature, all in circumstances where the student feels uncertain and overwhelmed. Similarly, the author of another study, Norman Fairclough, argues that professional (or social) identity is only truly adopted when one finds a way to manage among the “distinctive elements . . . in the mix”⁴—in other words, the elements that make the particular field unique. Legal writing textbooks, both in and out of the academy, offer instruction on the distinctive elements of writing in practice. First-year textbooks are instrumental to the transition from layperson to professional that takes place in law school, while practitioner texts are instrumental to the transition from student to active practitioner. As law students learn the particular skills of legal analysis, which includes, in part, the ability to make choices in conditions of uncertainty and take a critical yet respectful stance, they also learn that certain analytical methods are acceptable (distinguishing cases on the facts) while other methods are less acceptable (judges can do whatever they want). Practitioners continue learning through their specific practice focus to develop a greater understanding of the complexity of legal documents. The research described in this paper addresses the issue of how a variety of textbooks acknowledge the transitions and methods by which students and practitioners can develop this authoritative stance.

Our findings on texts and the development of the authoritative stance are consistent with those described by Kamler and Thomson. They describe two quite different approaches to how text authors support the development of professional identity. They derived these approaches from research examining a series of writing guides for doctoral students employing a discourse analysis of the “self-help” literature.⁵ The first approach sets out an authoritative style together with transmission pedagogy,⁶ wherein academic writing is presented as a discrete set of technical skills that are context free. The authors describe four recognizable patterns in the doctoral advice genre: 1) an expert–novice relationship is produced and reproduced; 2) the process of writing is

³ Barbara Kamler & Pat Thomson, *The Failure Of Dissertation Advice Books: Toward Alternative Pedagogies for Doctoral Writing*, 37 *Educational Researcher* 507, 508 (2008).

⁴ Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* 183 (Routledge 2003).

⁵ Kamler & Thomson, *supra* n. 3, at 515–17.

⁶ John Dewey initially described what is now termed the transmission pedagogy: “[T]he subject-matter of education consists of bodies of information and of skills that have been worked out in the past; therefore, the chief business of the school is to transmit them to the new generation.” John Dewey, *Experience and Education* 2–3 (Macmillan 1938).

simplified to a series of linear steps; 3) writing advice is packaged as a set of overgeneralized rules; and 4) the texts are emphatic and offer a paradox of reassurance and fear by asserting certainty and rejecting complexity.⁷

The second approach is inclusive and respectful of the student and new practitioner. These books 1) offer more than one best model with a set order of chapters; 2) demystify the process that experts use; 3) provide students with the possibility of understanding the socially produced complexities of writing without simply reducing them to individual deficiencies; and 4) make visible the discourses, the relations of power, and the pressure on academic work that govern the work of doctoral study but may be unknown to students.⁸ The authors of these books recognize the experience, knowledge, and expertise of doctoral students and offer them an intelligent set of resources they can use to make decisions about their needs. They make explicit the crafting of a scholarly identity in and through text.⁹

Lawyers must develop an authoritative stance as professionals, and they develop an authoritative stance and professional identity in the course of the preparation of documents in the service of clients. This representation of the lawyer in writing may be more or less grounded in an authoritative stance, which is an amalgam of the quality of analysis, attention to detail (including grammar), awareness of audience, attention to the client's problem, and ability to appropriately convey the nature and degree of risk.¹⁰ Further, the representation of the lawyer in the world may be reflected in the tone of the document. The tone can be aggressive, conciliatory, amusing, or timid; the tone of a particular document may or may not be the result of conscious choices at the service of the client. Based on our previous research with senior lawyers, demonstrating an authoritative stance within a written document involves, among other things, the ability to understand and use authority properly, the ability to understand the "bigger picture"—that is, the context within which the written product is being created—and the opportunity to write, rewrite, and obtain feedback.¹¹ For most of the lawyers, acquiring strong writing skills was very much a part of legal identity: as one participant noted, "[T]hat is your image, and it's the image you project either to the profession, the world or whatever. And it's either one of crispness or intellectual sloppiness."¹²

7 Kamler & Thomson, *supra* n. 3, at 509–11.

8 *Id.* at 512.

9 *Id.* at 512–13.

10 See Abner & Kierstead, *supra* n. 1, at 380–84.

11 *Id.* at 382–85.

12 *Id.* at 389.

An inquiry into text work as identity work is important precisely because learning to write as a lawyer is important in the practice of law. A considerable proportion of legal work is enacted in the many different types of documents that lawyers prepare: research memoranda, letters (opinion letters, advice letters, transmittal letters, demand letters, reporting letters), court documents (pleadings, briefs or facta,¹³ affidavits, orders, settlements, releases), by-laws and other corporate documents, and formal agreements such as contracts. These documents “make something happen” in the world: they provoke a response, persuade a judge, transfer money or other property interest, create a relationship, dissolve a relationship, or tell a story. Lawyers learn to write as lawyers primarily in practice, and the types of documents they produce depend on the kinds of practice in which they are engaged. Lawyers employed in large multi-services firms may be offered in-house programs in specific types of legal writing; continuing legal education providers also provide programs at varying levels of specificity. Most lawyers learn to write on the job through observation, experience, and, with luck, feedback on their product. The lawyer’s writing, whether public or private, becomes a representation of the lawyer in the world.

Legal writing has been included as an accreditation standard for law schools in both Canada and the United States. Most law schools offer a writing program to students. In the U.S., the American Bar Association (ABA) requires accredited law schools to offer a legal research and writing program in the first year.¹⁴ In Canada, the Federation of Law Societies of Canada released its report titled *Task Force on the Canadian Common Law Degree*, proposing “a national requirement expressed in terms of competencies in basic skills, awareness of ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.”¹⁵ These competencies include skills in oral and written communication. The report’s adoption by provincial law societies will no doubt affect law schools’ curriculum decisions.

Further evidence of the importance of writing may be found in the proliferation of books about legal writing. Over the past twenty years (or so), a considerable number of books on writing in practice have been published. Some offer general advice about legal writing;¹⁶ others are

13 In Canada, a “brief” is referred to as a “factum.”

14 American Bar Association, *2010-2011 ABA Standards and Rules of Procedure for Approval of Law Schools*, Standard 302 (a) (available at http://www.americanbar.org/groups/legal_education/resources/standards.html).

15 Federation of Law Societies, *Task Force on the Canadian Common Law Degree* 809 (Federation of Law Societies 2009) (available at [http://www.flsc.ca/_documents/Common-Law-Degree-Report-C\(1\).pdf](http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf)).

16 See e.g. Richard Wydick, *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005).

specific to formal drafting,¹⁷ advocacy,¹⁸ or a variety of different documents.¹⁹ Some texts have been written by practitioners and are based on the practitioner-author's experience, with some references to case law where appropriate or to judicial preferences in advocacy writing. Specialized journals such as *Scribes*²⁰ and columns in highly regarded practitioner journals such as *Practical Lawyer*²¹ and *Practical Litigator*²² also address aspects of legal writing. As well, there has been a near-explosion of published textbooks designed for first-year research and writing courses in the United States.²³

This article will address in a preliminary way the extent to which a sample of legal writing texts for law students and practitioners recognizes and describes the impact of writing on professional identity. We suggest that legal writing textbooks, intended to guide law students and lawyers toward competent legal writing, have the potential, either implicitly or explicitly, to demonstrate how lawyers' documents and professional identities are shaped together. The work is primarily descriptive—aimed at identifying thematic messages located within the texts. The thematic messages, in turn, are linked to the broader literature about teaching and learning professional identity and the manner in which the legal community “talks to itself.” Our inquiry includes learning to write in law school and learning to write in practice.

Part I introduces literature on the legal “voice,” which is linked to the current discussion of the three apprenticeships in learning to enter the professions. We then briefly review debates about the “ethical lawyer” and legal professionalism to conclude that, regardless of the model of professionalism adopted, the development of an authoritative stance in relation to problem solving remains an essential aspect of professional identity. In Part II, we describe the rationale and methodology for the discourse analysis that we have undertaken. Part III discusses themes revealed through the document analysis, and Part IV discusses how the findings relate to the influence of texts on the development of professional identity. In brief, we found that practitioner texts are more likely to specifically

¹⁷ Ken Adams, *A Manual of Style for Contract Drafting* (2d ed., ABA 2004); Cynthia Elderkin & Julia Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (2d ed., Carswell 2005).

¹⁸ See e.g. Bryan Garner, *The Winning Brief* (2d ed., Oxford U. Press 2004).

¹⁹ See e.g. Wayne Schiess, *Writing for the Legal Audience* (Carolina Academic Press 2003).

²⁰ See generally *The Scribes Journal of Legal Writing* (West 1990 to present).

²¹ See generally *The Practical Lawyer* (ALI-ABA Committee on Continuing Professional Education 1955 to present).

²² See generally *The Practical Litigator* (ALI-ABA Committee on Continuing Professional Education 1990 to 2011).

²³ Roy Mersky, *Legal Research Versus Legal Writing within the Law School Curriculum*, 99 *Law Libr. J.* 395, 398 (2007). We speculate that the increase in first-year textbooks may be the result of the ABA requirement for first-year research and writing courses, and the elevation of legal writing instructors at some schools into the tenured faculty.

address issues of text work and professional identity than the first-year writing texts, but that practitioner texts are also more likely to describe a type of malevolent legal identity—the legal writer as obfuscator. At the law school level, engaging with questions about the development of professional identity would provide a useful source of discussion and engagement for the student around the difficult transitions from layperson to professional. At the practice level, engaging with these questions would provide a useful source of learning about the multiple layers of complexity inherent in lawyers' documents and the need for workplace supports to assist in the transition from writing in school to writing at work.

I. Voice

A. Voice in legal writing

The discussion of identity is often linked to the idea of “voice.” Many authors have written about the alienation lawyers feel when they perceive themselves to be disconnected from the writing they are doing. One author states: “[W]e can rightfully wonder about the psychological effect on lawyers of producing this artificial language all day, every day.”²⁴ Our inquiry into text work as identity work begins with a discussion of theories of voice in legal writing.

In his review of the metaphor of “voice,” Chris Rideout describes characterizations of “the voice of the law” as impersonal, general, formal, and distant.²⁵ Rideout suggests that this form of voice is most closely aligned with legal writing courses. Such formal, impersonal writing was heavily criticized through the 1980s and 1990s by expressivist writers such as Peter Elbow, whose work was designed to inject “personal” or “authentic” voice into writing.²⁶

Rideout suggests a different view of voice, premised on the idea that legal writing represents the writer—with all of her or his experience—interacting with legal discourse conventions, and specifically, with particular speech genres (for example, a legal brief prepared for a court). Within this process, the writer's professional identity is represented by his or her writing, and different degrees of particular authorial presence are contained within different documents. For example, whereas a first-year predictive legal memo would contain little authorial presence and would

²⁴ Douglas Litowitz, *Legal Writing: Its Nature, Limits and Dangers*, 49 *Mercer L. Rev.* 709, 710 (1998).

²⁵ J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 *Leg. Writing* 67, 69 (2009); see also J. Christopher Rideout & Jill Ramsfield, *Legal Writing: The View from Within*, 61 *Mercer L. Rev.* 705 (2010) (arguing for the role of identity in legal writing).

²⁶ See Peter Elbow, *Writing with Power: Techniques for Mastering the Writing Process* 292–99 (Oxford U. Press 1998).

aim primarily at engaging with the relevant legal discourse, a dissenting judicial opinion engages with legal discourse, but clearly illustrates the unique authorial presence of the dissenting judge.

There are differing theories about what voice and identity within written work mean; the question of how the writing process shapes the development of these concepts is also ripe for theoretical analysis. One recent study has begun to look at the development of first-year students' construction of professional identity as illustrated through their efforts to write an opinion letter for a writing course.²⁷ Rod MacLean describes the challenges that students experience when attempting to accommodate different aspects of "voice" (advice, legal strategy, and legal interpretation) within a written document.²⁸ MacLean concludes that "[e]xplicit attention to identity as part of the teaching of legal writing may have immediate benefits for the writing skill and for the general well-being of legal practitioners."²⁹ Rideout and Ramsfield also call for further research into legal writing and identity "partly because . . . it is through the construction of the discursal self of the writer that we as legal writing professors can understand more practically what it means for legal writers to socialize into legal discourse."³⁰ In our own research into expert performance, we found some evidence that senior lawyers connect both the writing process and product with their sense of professional identity.³¹

B. Professional identity

The academy and the profession have recently focused attention on development of a professional identity—described in the Carnegie Report³² as the apprenticeship of identity and purpose³³—in law school and beyond.³⁴ The extensive Preparation for the Professions Program³⁵ has developed and examined the concept of the three apprenticeships of learning across five professions: medicine, nursing, law, engineering, clergy, and the

²⁷ See Rod Maclean, *First-Year Law Students' Construction of Professional Identity through Writing*, 12 *Discourse Stud.* 177 (2010).

²⁸ *Id.* at 187–90.

²⁹ *Id.* at 192.

³⁰ Rideout & Ramsfield, *supra* n. 25, at 738.

³¹ Abner & Kierstead, *supra* n. 1, at 388–89.

³² William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter *Carnegie Report*].

³³ *Id.* at 132.

³⁴ See Muriel Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 *U. St. Thomas L.J.* 366 (2008); Anne Colby & William Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 *U. St. Thomas L. J.* 404 (2008); Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 *Hamline L. Rev.* 555 (2007); Neil Hamilton, *Professionalism Clearly Defined*, 18 *Prof. Law.* 4 (Winter 2008); Neil Hamilton & Lisa Brabbit, *Fostering Professionalism Through Mentoring*, 57 *J. Leg. Educ.* 102 (2007).

³⁵ See *Preparation of the Professions Program* (available at <http://www.carnegiefoundation.org/previous-work/professional-graduate-education>).

doctorate. As the researchers describe them, the three apprenticeships are as follows:

- (1) An apprenticeship of intellectual training to learn the academic knowledge base and the capacity to think in ways that are important to the profession;
- (2) A skill-based apprenticeship of practice: the craft know-how that marks expert practitioners of the domain; and
- (3) An apprenticeship to the ethical standards, social roles, and responsibilities of the profession, grounded in the profession's fundamental purposes.³⁶

For each profession, the researchers examined how each apprenticeship was taught and learned, and which apprenticeship was most prominent. In certain professions, including law, this third apprenticeship was overshadowed by the intense focus on the first apprenticeship of the intellectual: "thinking like a lawyer." The researchers concluded that, in legal education, the first apprenticeship of cognition has overshadowed the other apprenticeships and that the third apprenticeship of professional identity has been significantly marginalized.³⁷ To support student development, "legal education requires a better balance among the cognitive, practical, and ethical-social apprenticeships."³⁸

The Carnegie Report notes the importance of the pedagogy of legal writing and its capacity to unite the three apprenticeships because legal writing courses include the creation of documents, small group learning, feedback on written work, and the capacity to raise issues of simulated practice. Although the Report does not directly address text work/identity work as a concept, there are some allusions to the power of learning through writing:

Many students with whom we spoke noted the ways in which their writing courses accelerated their progress in legal reasoning in their doctrinal courses, especially seminars beyond the first year; some wanted more such linkage. In these examples, legal writing is already coming to play an important role in helping students to cement basic patterns of legal thinking; it also serves as a bridge between the learning of legal thinking and the mastery of the skills demanded in order to practice law.³⁹

³⁶ Colby & Sullivan, *supra* n. 34, at 409.

³⁸ Sullivan et al., *Carnegie Report*, *supra* n. 32, at 147.

³⁷ Sullivan et al., *Carnegie Report*, *supra* n. 32, at 145; Colby & Sullivan, *supra* n. 34, at 419–20.

³⁹ *Id.* at 108.

A robust program to develop professional identity in law school should focus at least in part on the development of an authoritative authorial voice that will survive and flourish in practice—particularly in a profession where the enduring values may be “mis-aligned” with its education.⁴⁰ Though law schools provide formative experiences, current research in other professions leads to the conclusion that writing in school and writing in practice are profoundly different. Several researchers have addressed these differences between writing at work and writing in school, described generally as differences in complexity, multi-functionality, and power relations. These studies examined the transitions for engineers,⁴¹ social workers,⁴² architects,⁴³ and government workers.⁴⁴

These studies challenge the expectation that teaching writing in law school is a fully authentic activity designed to ensure that students can “hit the ground running” as they enter practice. Instead, the academy offers a simplified form of power relations (student–professor) and limited, if any, references to the complexity and multi-functionality of legal documents. Students learn to write like lawyers within the community of practice through a complex process of observation, imitation, assistance, and mistakes. In particular, they learn to manage the tensions⁴⁵ and to understand the complexity, multi-functionality, and power relations required to prepare documents.⁴⁶

Many questions exist related to what it means to be a “good” legal professional, and how personal and professional attributes blend to create one’s legal identity. These questions are intricately related to how individuals interact within the community of practice with which they are associated. The manner in which these issues are addressed influences the way particular individuals approach the writing task and the development of an authoritative stance within that task.

C. The “ethical lawyer” debate

Part of the discussion about what it means to be a “good” legal professional is linked to debates about the ethical aspects of the lawyer’s role.

⁴⁰ See Colby & Sullivan, *supra* n. 34, at 404–06 (describing law as a “mis-aligned” field).

⁴¹ Dorothy Winsor, *Learning to Do Knowledge Work in Systems of Distributed Cognition*, 15 J. of Bus. & Tech. Comm. 5 (2001).

⁴² Catherine LeMaistre & Anthony Paré, *Learning in Two Communities: The Challenge for Universities and Workplaces*, 16 J. Workplace Learning 44 (2004).

⁴³ Patrick Dias et al., *Worlds Apart: Acting and Writing in Academic and Workplace Contexts* (Routledge 1999).

⁴⁴ Aviva Freedman & Christine Adam, *Learning to Write Professionally*, 10 J. Bus. & Tech. Comm. 395 (1996).

⁴⁵ Maclean, *supra* n. 27, at 187.

⁴⁶ See Dias et al., *supra* n. 43, at 175–77.

Increasingly, the model of lawyering that sees the lawyer as a “hired gun” whose interests are defined only by the client’s interest is being challenged by theories that reject the idea that practical and moral consequences are the sole responsibility of the client.⁴⁷ While the concept of “zealous advocacy” still figures prominently in codes of professional conduct, it is being tempered with language such as “resolutely” and “honourably,” which depicts the lawyer as more than simply a neutral partisan.⁴⁸ Some authors have suggested that a much more significant departure from the neutral partisan stance is required and that “[l]egal ethics is a life-long challenge in which lawyers must be encouraged to go beyond simply learning the rules and how to apply them; they should constantly interrogate themselves and their colleagues about the moral status of their work and practices.”⁴⁹ Others go further, suggesting that client choice should be guided by one’s own moral compass: “You should feel guilty, and we should disapprove of you, if you go ahead and argue a cause you think will do more harm than good.”⁵⁰ It is safe, we suggest, to conclude that the evolving characterization of the lawyer as an “ethical” professional is one that involves a fusion of personal and professional attributes. Trevor Farrow suggests that we are engaging in

a new discourse for lawyers and the legal profession that is seeking to become personally, politically, ethically, economically, and professionally sustainable. It is a discourse that makes meaningful space for a lawyer’s own principles, interests, and life preferences by balancing them with other important interests—including, but not dominated by, those of the client⁵¹

Our purpose in this work is not to delve into the intricacies of the components of ethical lawyering. However, we do agree with Farrow that the traditional isolation of personal from professional no longer reflects the most commonly accepted perspective on ethical lawyering. Rather, the article proceeds on the premise that personal values and experiences are

47 Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 Yale L. J. 177, 196–216 (1995).

48 Rule 4.01 (1) of Ontario’s Rules of Professional Conduct provides,
When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
Law Society of Upper Canada, Rules of Professional Conduct (Adopted by Convocation June 22, 2000) (available at <http://www.lsuc.on.ca/with.aspx?id=671>).

49 Allan C. Hutchinson, *Legal Ethics for a Fragmented Society: Between Professional and Personal*, 5 Intl. J. Leg. Profession 175, 189 (1998).

50 Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 Tex. Tech L. Rev. 1157, 1158 (1987).

51 Trevor C.W. Farrow, *Sustainable Professionalism*, 46 Osgoode Hall L. J. 51, 55 (2008).

relevant to the development of a strong professional identity as represented through written legal products. It is not necessary to identify precisely the extent to which personal characteristics affect the development of professional identity; this may well vary from person to person. Our point is simply that the connection between the two does exist, and it is reflected in the lawyer's written product.

D. Teaching professional identity

Debates also abound in relation to the most appropriate way to teach professionalism and, in particular, ethical professionalism.⁵² Some law schools have required the inclusion of ethical issues within each course; others have adopted stand-alone courses focused exclusively on ethical lawyering.⁵³ Additionally, clinical experiences are viewed as an ideal setting for students to gain an understanding of professional responsibilities and ethical issues that arise in the course of a lawyer's standard practice.⁵⁴ The value of introducing ethics and professionalism into legal writing curricula has been discussed.⁵⁵ An area deserving of additional attention within academic literature is the extent to which legal writing texts can provide guidance to students (and perhaps to teachers) about ways in which the legal writing process can assist lawyers-in-training and lawyers to develop professional identities expressed through legal writing that adopt authoritative stances in relation to the subject matter of the writing task. The purpose of this article is to consider the role that textbook content may play in this development process and to propose models that support the multiple transitions from student to practitioner.⁵⁶

II. Methodology

Discourse analysis involves "the study of language in use"⁵⁷ to uncover "important connections between saying (informing), doing (action), and being (identity)."⁵⁸ In this context, "saying" involves the written words

⁵² See e.g. Patrick Longan, *Teaching Professionalism*, 60 Mercer L. Rev. 659 (2008); David Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. Tol. L. Rev. 421 (2009).

⁵³ Farrow, *supra* n. 51, at 54.

⁵⁴ See Bridget McCormick, *Teaching Professionalism*, 75 Tenn. L. Rev. 251, 257 (2008).

⁵⁵ See e.g. Melissa H. Weresh, *Fostering a Respect for our Students, our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 Touro L. Rev. 427 (2005).

⁵⁶ Some text material is devoted exclusively to professionalism and legal writing. See e.g. Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (2d ed., Matthew Bender 2009). Our sample for review was aimed at more-generalized legal writing texts.

within the textbooks, “doing” implies the writing done in response to the textbooks, and “being” connects the sense of professional identity that develops as a result of the saying and doing. Discourse analysis is an appropriate analytic approach where, as here, the researcher is reviewing written texts to analyze the connection between the words used and the establishment of certain themes⁵⁹ and “to characterize different ways that language is used to talk about and create statements of truth about a given phenomenon.”⁶⁰ Educational researchers have employed discourse analysis since the 1970s to “make sense of the ways in which people make meaning in educational contexts.”⁶¹

In particular, constructivist discourse studies “aim at understanding the intricate way in which discourses lead to the creation and reification of certain phenomena.”⁶² In this study the phenomenon is whether and how certain legal writing texts make visible the discourses and the relations of power inherent in developing a professional identity as a legal writer.

Our analysis focused on two types of such texts: (1) those written with law students as the intended audience; and (2) those written with practicing lawyers as the intended audience. There were many texts, both for law students and practitioners, from which to choose to begin the project, so our sample of convenience is deliberately modest. We selected texts written for law students in Canada and the United States that were widely available to students within law libraries, and that are commonly listed in legal writing course syllabi.⁶³ Each of the first-year writing texts was in at least its second edition, and at the time the analysis was commenced, either the edition used or an earlier one had been accessible to students for at least six years. The titles themselves, while containing the common “writing” element, suggested a potential range in focus—synthesis, persuasion, reasoning, and analysis. The four practitioner texts

57 James Paul Gee, *An Introduction to Discourse Analysis: Theory and Method* 8 (3d ed., Routledge 2011).

58 *Id.* at 2.

59 See Kimberly Nuewendorf, *The Content Analysis Guidebook* 5–6 (Sage 2002).

60 Brian Hodges et al., *Assessment of Professionalism: Recommendations from the Ottawa 2010 Conference*, 33 *Medical Teacher* 354, 355 (2011). Critical discourse analysis has been adopted by educational researchers to focus on a wide range of issues, including, in particular, how power is reproduced and less frequently transformed. See Rebecca Rogers et al., *Critical Discourse Analysis in Education: A Review of the Literature*, 75 *Rev. Educ. Research* 365, 383 (2005).

61 Rogers et al., *supra* n. 60, at 366.

62 Nelson Phillips & Cynthia Hardy, *Discourse Analysis: Investigating Processes of Social Construction* 416 (Sage 2002).

63 The texts were the following:

(1) Louis J. Sirico, Jr. & Nancy Schulz, *Persuasive Writing for Lawyers and the Legal Profession* (2d ed., LexisNexis 2001) (hereinafter Sirico & Schulz). Since this analysis was completed, the third edition of the text has been published: Louis J. Sirico, Jr. & Nancy Schulz, *Persuasive Writing for Lawyers and the Legal Profession* (3d ed., Aspen Pub'rs 2011) (hereinafter Sirico & Schulz 2011). The current edition includes as well a chapter on storytelling and persuasion. Passages referred to in this analysis are consistent in both editions.

were chosen on the basis of popularity as represented by number of sales through on-line retailers, citation references by knowledgeable legal writers, and personal preference.⁶⁴

The analytic procedure adopted for the current work began by dividing the sample texts into the two groups—student and practitioner audiences. We then read the books, listing words and phrases that related to these research questions:

1. Do the texts include specific or implied references to a personal or professional identity–voice?
2. How do the texts position the legal writer within the community of practice?
3. How do the texts position the relationship of teacher and learner?⁶⁵

The analysis began with a pilot coding exercise. This allowed the authors⁶⁶ to identify certain categories of meaning—words and phrases that reflect key messages within the text.⁶⁷ These categories were, we found, identifiable with emergent themes: how the authors represented legal writers (positive, negative, and neutral); how the authors represented the writing tasks (goals as a writer, impediments to writing, conflating legal writing with other writing); and whether the authors referred to legal identity or legal voice. These emergent themes were then applied to a selection within each text to develop representative quotes. The quotes were analyzed both within and between each set of texts with the objective

(2) Margaret E. McCallum, Christina L. Kunz & Deborah A. Schmedemann, *Synthesis: Legal Reading, Reasoning and Writing in Canada* (2d ed., CCH Canadian 2008) This text is similar, but not identical to, Deborah A. Schmedemann and Christina L. Kunz, *Synthesis: Legal Reading, Reasoning and Writing* (3d ed., Aspen Publ'rs 2007).

(3) Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, And Style* (5th ed., Aspen Publ'rs 2005)[hereinafter Neumann]. The 6th edition of this text (Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, And Style* (6th ed., Publ'rs 2009) became available to the authors midway through the analysis. Passages referred to are consistent with the earlier edition.

(4) Laurel Currie Oates, Anne Enquist & Kelly Kunsch, *The Legal Writing Handbook: Research, Analysis, And Writing* (3d ed., Aspen Publ'rs 2002) [hereinafter Oates, Enquist & Kunsch]. The fifth edition, Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Research, Analysis, And Writing* (5th ed., Aspen Publ'rs 2010)(hereinafter Oates & Enquist 2010), published after the current analysis began, opens with an extremely helpful chapter on students' transition to law school. Many of the passages cited within the original analysis are consistent with the current edition. Pertinent differences are noted in footnotes.

64 (1) Stephen Armstrong & Timothy Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (2d ed., Practising Law Institute 2003); (2) Bryan A. Garner, *Legal Writing in Plain English* (U. of Chicago Press 2001); (3) Steven D. Stark, *Writing to Win* (Doubleday 1999); (4) Richard C. Wydick, *Plain English for Lawyers* (4th ed., Carolina Acad. Press 1998). The authors reviewed the 5th edition of *Plain English for Lawyers* as well as the 3d edition of *Thinking Like a Writer* to ensure that the passages cited herein are consistent with both editions.

65 Shelley Kierstead read and analyzed the first-year textbooks, and Erika Abner read and analyzed the practitioner books.

66 The authors of the article were also the coders described in this section.

67 See Anselm Strauss & Juliet Corbin, *Basics of Qualitative Research* 163–93 (2d ed., Sage 1998) (describing the process and providing examples of open coding).

of discovering both trends and contrasting approaches. At least ten percent of each text was coded by both authors in order to check for inter-coder reliability. We report on the emergent themes in Part III of this work, using illustrative quotations from the texts. The quotes also illustrate attention to negative cases—that is, those that did not follow certain identifiable trends.⁶⁸

We recognize that these texts represent a small sample and that we have described illustrative quotes from that sample. A different selection of first-year or practitioner texts may have yielded different representations of text as identity work. Given the importance of the first-year texts selected, however, the span of the findings would probably be consistent with the unexamined first-year texts. For the practitioner texts, a different or larger sample would probably produce findings on the continuum described below: descriptions of legal writers that span from positive (legal writers face a daunting task) to negative (legal writers are inherently flawed) representations.

We argue that the discourse in and of itself represents a conversation within the professional community and that discourse analysis provides some descriptive insights to the nature of that conversation. However, “even studies with small samples may help to identify theoretically provocative ideas that merit further exploration.”⁶⁹ The findings below introduce a number of theoretically provocative ideas.

The standards to ensure trustworthiness in discourse analysis include the following: clear documentation of sources of information used, explanation of the analysis, and the researchers’ description of any influences on their perspectives.⁷⁰ Unlike other methods of qualitative research, discourse analysis does not always permit certain strategies to ensure trustworthiness, such as triangulation, member checking, or participant involvement. We did employ the method of searching for disconfirming evidence within the texts; that is, we examined the texts closely for all instances within the coding framework and reporting both negative and positive statements. As will be seen in the findings, this approach led to a structure that supports quite different views of the professional identity learned through writing.

⁶⁸ Unearthing and discussing elements of a dataset that do not support the emerging trends is one way of enhancing the rigour of qualitative research. See Michael Quinn Patton, *Enhancing the Quality and Credibility of Qualitative Analysis*, 34:5 Health Services Res. 1189, 1191–92 (1999).

⁶⁹ Cynthia K. Russell & David M. Gregory, *Evaluation of Qualitative Research Studies*, 6 Evidence-Based Nursing 36, 37 (April 2003).

III. Findings

A. Voice

1. First-year texts

Our research suggests that some first-year legal writing texts recognize aspects of text work as identity work. Often, the recognition comes in the form of professional credibility and image projection:

- “Putting yourself in the message can often add to your credibility . . . [This] may have more applicability in letters to clients or other [non-court related] types of legal writing.”⁷¹
- “In addition to selling competence, you are selling an image.”⁷²
- “Every piece of writing you create in your role as a lawyer reflects on your professionalism As a lawyer, your writing, including the tone you use, is a big part of how you are representing your client and yourself.”⁷³

Additionally, however, the author refers to the recursive process of writing and development of an authoritative stance:

- “Learning how to write like a lawyer is the beginning of learning how to make professional decisions.”⁷⁴

Further, one of the texts reviewed seemed directly aligned with Rideout’s description of the writer as one whose life experience interacts with legal discourse conventions:

- “It may seem that focusing on the reader means that your voice, as a writer, is muffled. . . . Nonetheless, it is your analysis Your analysis inevitably will reflect your values, your creative ways of thinking about problems, and your choice of words.”⁷⁵

⁷⁰ Brian Hodges, Ayelet Kuper & Scott Reeves, *Discourse Analysis*, 337 *BMJ* 570, 571-572 (2008). The researchers’ perspectives are derived from their teaching experiences and their philosophy of teaching. Shelley Kierstead is the Director of the Legal Process course at Osgoode Hall Law School/York University and has extensive experience teaching legal writing to first-year law students as well as teaching doctrinal courses including family law. Erika Abner was a first-year legal instructor at Osgoode Hall Law School as well as an adjunct teaching legal drafting and has extensive experience teaching writing to practitioners. Both researchers approach teaching writing as a critically important transition into the community of practice. Both researchers approached all texts respectfully, recognizing that each text (and its author(s)) had made significant contributions to both their individual and the profession’s understanding of the nuances of legal writing and analysis. As we read for descriptions of professional identity rather than for writing, we were somewhat surprised and even disappointed at the unpleasant descriptions of lawyers set out in the findings section.

⁷¹ Sirico & Schulz, *supra* n. 63, at 5.

⁷² Oates, Enquist & Kunsch, *supra* n. 63, at 225.

⁷³ Oates & Enquist 2010, *supra* n. 63, at 10.

⁷⁴ Neumann, *supra* n. 63, at 67.

Reference to voice is present within these texts, with a range of representations of voice.

2. Practitioner texts

When the practitioner texts refer to voice, they present a different view of the legal writer:

Ultimately, you'll have to answer a question that your parents started helping you answer before you understood a single word: what kind of person am I? And every time you write, you'll be answering some related questions: what kind of person am I—on paper? What do I sound like? If you want to write well, you'll have to resist sounding like a machine. Or a foreign philosopher in translation. You'll have to learn to sound like yourself. It's even possible that you'll find yourself by learning to write well.⁷⁶

Even their personal experience must be banished from the written page—a clear invitation to resort to the “institutional passive” voice, which further separates writer from reader. “It could be argued” write most lawyers, never pointing out that there is an “I” doing the arguing. As a consequence, very little legal writing reveals much about the author.⁷⁷

- “In a brief, therefore, your goal is to become the judge’s alter ego—not your opponent’s most virulent enemy or your client’s most vociferous supporter.”⁷⁸
- “What matters most, in the end, is how you apply sound practices in your writing. You’ll have to use good judgment. No blackletter rule can substitute for that.”⁷⁹

The second theme that emerged from our coding process was that of characterizing the way that texts position the legal writer within the community of practice. Elements determined to fall within this thematic scope were how authors characterize the goals of legal writers; how they describe the student–young lawyer’s emerging role within the legal profession; and whether or how they describe the increasing complexity, multi-functionality, and power issues that go hand in hand with the school-to-work transitions. Of course, no bright lines demark these categories—instead, several areas overlap.

75 MacCallum, Kunz & Schmedemann, *supra* n. 63, at 91.

76 Garner, *supra* n. 64, at xviii.

77 Stark, *supra* n. 64, at 264.

78 Armstrong & Terrell, *supra* n. 64, at 274.

79 Garner, *supra* n. 64, at xiv.

B. Goals as a writer

1. First-year texts

The first-year texts tend to characterize the goals of writers as tied to an overall obligation to provide client service:

- “The better you serve the needs and expectations of your audience, the better you serve your client.”⁸⁰

Some delve into the more nuanced aspects of client service, such as persuasive advocacy:

- “When you are communicating in writing, it is important to know your job. Stick to what you need to say to accomplish your goal. . . . Make the arguments that are likely to sway the judge in your favor, and only those arguments.”⁸¹

Others introduce the additional idea of protecting oneself—presumably from liability:

- “You are including an issue statement because you want the client to know that you were listening and because you want to protect yourself.”⁸²

2. Practitioner texts

In contrast, certain practitioner texts focus on the complexity of the practitioner’s goals as a writer:

- Legal writers face two competing obligations. They must do full justice to the complexity of their subject matter, no matter how torturous or ambiguous it is. Then they must transform all that complexity into a prose so lucid, so crisp and direct, that it will satisfy readers who demand absolute clarity even when—in fact, especially when—the subject is most obscure.⁸³
- But you’ll have to be willing to embrace simplicity—while always resisting oversimplification. Of the hurdles we’ve discussed, this will be the most difficult. It will require mental candlepower and maturity.⁸⁴

⁸⁰ MacCallum, Kunz & Schmedemann, *supra* n. 63, at 91.

⁸² Oates, Enquist, & Kunsch, *supra* n. 63, at 222.

⁸¹ Sirico & Schulz, *supra* n. 63, at 19.

C. Emerging role

1. First-year texts

First-year texts address the emerging role that law students will play as they move closer to legal practice. Characterizations include reference to the reality of words as a lawyer's tool; relationship between the lawyer's role and the practice jurisdiction's Rules of Professional Conduct; and legal writing as story-telling on behalf of a client:

- “Contrary to the aphorism, a lawyer’s stock in trade is neither time nor advice. It is words: writing them, speaking them and interpreting them Words are the principal tools of lawyers and judges . . . whether we like it or not.”⁸⁵
- “Your role is determined, at least in part, by your state’s Rules of Professional Conduct.”⁸⁶
- “The fact statement tells the reader the client’s story. If the lawyer has talked only to the client, the story is told through the client’s eyes. If the lawyer has investigated the facts, the facts include information obtained from other sources.”⁸⁷
- “[A]ll people have stories. The job of being an advocate includes figuring out which stories you need to know, and which stories you need to tell.”⁸⁸

Similarly, references to the transition from school to work tend to paint a positive challenge for young writers:

- “When you write—and in every other part of the practice of law—you will be confronted continually with a range of choices about what to do. And your success as a lawyer will depend on your ability to understand the choices available and to select wisely among them. Now is a good time to start learning how.”⁸⁹
- “Finally, remember that learning to write an objective memorandum is a difficult task that can take years to master. To do a good job, you must know not only the law itself but also how attorneys and judges think and talk about the law. While we can teach you some of the standard moves, much of what you need to know can be learned

⁸³ Armstrong & Terrell, *supra* n. 64, at 3.

⁸⁴ Garner, *supra* n. 64, at xviii.

⁸⁵ Neumann, *supra* n. 63, at 53 (quoting Zachariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 Colum L. Rev. 381, 382 (1941)).

⁸⁶ Oates, Enquist & Kunsch, *supra* n. 63, at 219.

⁸⁷ MacCallum, Kunz & Schmedemann, *supra* n. 63, at 93.

⁸⁸ Sirico & Schulz 2011, *supra* n. 63, at 19.

⁸⁹ Neumann, *supra* n. 63, at 67.

only through practice. Just as it takes years to become an expert physician, musician or athlete, it takes years to become an expert attorney.”⁹⁰

2. Practitioner texts

The representations of legal writers could be placed on a continuum from positive to negative. At the positive end, legal writers were represented as engaged in the difficult activity of communicating dense complex material in such a way as to satisfy readers who demand clarity. At the other end of the continuum are the authors who describe legal writers as limited or even duplicitous: “Perhaps most damaging, however, is lawyers’ frequent use of language as a deception.”⁹¹

a. Positive representations

- “[T]hey seek advice because they face a tougher task than most writers ever confront: writing clearly and persuasively about complicated matters when the stakes are high and the readers are impatient, often irascible, and sometimes hostile.”⁹²
- “First, in law school, you discover that something non-lawyers assume to be relatively simple—‘the law’—is in fact far from it. To learn to think like a lawyer, you have to become rigorously logical, to grasp subtle distinctions, to be fanatical about precision and thoroughness. Above all, you have to tolerate complexity, perhaps even love it.”⁹³

b. Negative representations

- “To write like a lawyer, at least in traditional terms, is to choose a perspective that cheapens language and forces us to relate to a narrow world of rules, not people.”⁹⁴
- “The use of precedent also leads to repetitive writing. A system founded on precedent requires a form of logic in which rules are restated repeatedly and altered only incrementally. Because what changes most from case to case are the facts, not the laws or precedents, judicial opinions keep their discussion of facts to a minimum. In imitation, lawyers also write about rules, not facts.”⁹⁵

90 Oates, Enquist & Kunsch, *supra* n. 63, at 53.

93 *Id.* at 4.

91 Stark, *supra* n. 64, at 265.

94 Stark, *supra* n. 64, at 265.

92 Armstrong & Terrell, *supra* n. 64, at vii.

- “We learn our trade by studying reams of linguistic dreck—jargon-filled, pretentious, flatulent legal tomes that seem designed to dim any flair for language. When on the job, we read poor prose almost exclusively. It’s wordy and high-flown—oddly antique-sounding. And a little part of you may well come to believe that you must sound that way to be truly lawyerlike.”⁹⁶

D. Relationship between teacher and learner

Within our analysis, we looked at how the texts address the relationship between teacher and learner from two angles—first, the extent to which legal writing is conflated with the overall writing process, and second, the way that impediments to good legal writing are characterized.

1. Conflating legal writing

One of our “discoveries” not reflected in the quotes presented within this work is the prevalence of many lists and simplified frameworks for various writing tasks. These appear within both the first-year and practitioner texts. Additionally, there is much linear language and positioning of the teacher as expert (and, accordingly, the student as novice). The authors acknowledge that good legal writing is hard work. However, good legal writing may also be described in terms consistent with good general writing, with minimal recognition that being a proficient general writer is the entry point to becoming a proficient legal writer.

a. *First-year texts*

- “The demands of lawyerly writing come as a shock to many law students [I]f you’ve had trouble with your writing in the past, now is the time to learn to do it right.”⁹⁷
- “Legal writers (indeed, all writers who wish to be understood) should keep in mind basic principles of communication.”⁹⁸
- “Clear, concrete language and well-supported, well-organized arguments will work well with any audience.”⁹⁹

It should be noted, however, that there is some reference to the recursive relationship between thinking and writing, which suggests a less linear and more complex process:

95 *Id.* at 263–64.

96 Garner, *supra* n. 64, at xvii–xviii.

97 Neumann, *supra* n. 63, at 56

98 MacCallum, Kunz & Schmedemann, *supra* n. 63, at 90.

99 Sirico & Schulz, *supra* n. 63, at 145.

- “The writing process and the thinking process are inseparable, each stimulating and advancing the other.”¹⁰⁰

b. Practitioner texts

- “Second, in my courses, I’ve tried to include examples and maxims from the worlds of journalism, advertising, and fiction writing. Anyone who can write a good ad can probably write a good legal argument, just as any good journalist probably knows how to compose a good statement of facts in an appellate brief. My view is that good writing tends to be pretty much the same everywhere.”¹⁰¹
- “The premise of this book is that good legal writing should not differ, without good reason, from ordinary well-written English.”¹⁰²

2. Impediments to good legal writing

a. First-year texts

In assessing the impediments to good legal writing, first-year texts sometimes suggest a fairly streamlined path from writer error to poor writing. The path can stem from writer’s block and tight deadlines. A more reflective stance is also, however, presented:

- “Writer’s block happens to everybody from time to time”¹⁰³
- “In law, you are usually writing against a deadline”¹⁰⁴
- “In their eagerness to get their thoughts onto the page, even experienced writers . . . sometimes forget precisely what their goal is when they sit down to write a persuasive document.”¹⁰⁵

b. Practitioner texts

Positive descriptions of impediments acknowledge the difficulty and complexity of legal writing. The negative descriptions include references to greed (it suits lawyers’ financial interests to write poorly), fear (it is better to follow outmoded language precedents than to risk reversal), history (we’ve always written this way), and the nature of law practice (we adopt the senior practitioners’ and even judges’ writing styles without question or challenge). These texts offer a bleak picture of the community of legal writers.

Time

- “You’ll undoubtedly find that time pressures make writing and revising difficult.”¹⁰⁶

100 Neumann, *supra* n. 63, at 60.

101 Stark, *supra* n. 64, at xiv.

102 Wydick, *supra* n. 64, at 5.

103 Neumann, *supra* n. 63, at 63.

104 *Id.*

105 Sirico & Schulz, *supra* n. 63, at 115.

Greed

- There's something about the culture of the law that produces terrible writers—which is why most law students say, accurately, that they graduate as less accomplished writers than they were when they arrived at law school. In part, lawyers write badly because that promotes their economic interests.”¹⁰⁷

Epistemology

- “First, lawyers see a world dominated by precedent. It is one of the law’s timeless truths that everything is merely an extension or alteration of what has appeared before. Thus, in their briefs and legal opinions, lawyers constantly explain things in terms of the past; they reason that they are doing nothing new and only following existing precedent.”¹⁰⁸

IV. Discussion

A. Trends and contrasts

The legal writing literature is consistent with the literature on doctoral students in its limited focus on the identity work inherent in learning to write with authority under conditions of uncertainty; the social practice of writing receives relatively little attention.

Within the context of the three apprenticeships described earlier in this work, first-year writing texts provide quite strong coverage of the first apprenticeship—learning to “think like a lawyer.” Additionally, in providing samples and directions for writing particular legal documents, they provide a good foundation for students to begin engaging in the second apprenticeship of technical expertise, though the conflation of good legal writing with good writing might be seen to underplay the extent to which the development of this expertise requires hard work with a unique writing approach. Further, the texts tend to underestimate the extent to which actual work within the community of practice will affect the development of technical writing competence.

Consistent with other accounts of legal education,¹⁰⁹ the first apprenticeship does seem to overshadow the other two within the texts. Though first-year texts make some reference to professional responsibility and client service, these references are minimal compared to the coverage of legal analysis and formulas for completing legal writing tasks. There seems

106 Garner, *supra* n. 64, at xviii.

107 Stark, *supra* n. 64, at 261.

108 *Id.* at 263

to be room for attention to further linkages between personal values and interests, and how these factors work with others to shape the written products that ultimately represent the lawyer to the rest of the profession, and potentially to broader audiences. There is also, we argue, potential for the texts to adopt a more nuanced teacher–learner approach that recognizes the multi-faceted, recursive nature of the writing process.

The practitioner texts do address all of the three apprenticeships: the intellectual aspects of writing, the skills aspects of writing (generally the purpose of each book), and either implicitly or explicitly, the identity aspects of writing. Lawyers are positioned as powerful in their control over writing through their ability to confuse, to hide, to manipulate, to create clarity, or to persuade. The identity aspects of these texts also include a component of what we can only describe as the “self-loathing lawyer”: lawyer-authors who apparently find their community to be populated by a particular kind of malefactor. The texts may also promote the expert–novice relationship between author and new lawyer, based on the author’s considerable experience. Students are encouraged to embrace the authors’ views of effective legal writing, whatever it may be, as an antidote to a prevailing culture of poor writing. The message to students and lawyers is that if they do not make the effort to write well, they are implicated in the community’s indifference to good writing.

A number of interesting trends and contrasts emerge from the legal writing literature. Writer’s “voice” tends to receive a similar degree of coverage in both the first-year and practitioner texts. Contrasts emerge, however, in relation to the representation of the legal writer. The range of descriptions found within practitioner texts is not replicated in the first-year texts, which tend to quite consistently characterize the writer as a problem solver. Likewise, the negative rationales for poor legal writing found within the practitioner texts do not appear within the first-year texts. These “disconnects” seem likely to create dissonance for young professionals in still-early stages of identity development. Neither set of texts explicitly recognizes the depth of transitional issues in writing in school and writing at work.

B. Educational importance

The findings within this study are important at a number of levels. At a very basic level, they clarify that texts *do* contain both spoken and unspoken messages that have the potential to contribute to the manner in which professional identity is shaped. An awareness of these messages

provides rich potential for discussion with students and for students to engage with the identity question, including their acknowledgment of “self” as part of the writing process. The simple (yet express) articulation for students that they are entering into a new discourse community that is difficult, and at times unsettling, may decrease the extent to which many of them feel alienated from law, particularly within their first year of study. Introducing students to “templates” for legal documents such as memoranda and advice letters *after* they have become familiar with legal analysis skills and legal language more generally may allow them to recognize the connection between personal and professional written identity before they are asked to become conversant with technical document format requirements. (There is, after all, no requirement that specific kinds of legal documents be taught in the first year even if there is a requirement that legal writing be taught in the first year.) Further, recognizing legal writing as difficult work that does not necessarily flow naturally from one’s prior writing experience can be empowering to the struggling legal writer. Identifying for upper-year students the challenges of multi-functionality, complexity, and power relations that they can expect to face when transitioning into a work setting has the potential to better prepare them for their post-law school career. Students may need to understand how to manage the advice literature that minimizes or denigrates lawyers’ commitment to a professional identity that includes effective writing.

Similarly, practitioner texts could assist new lawyers by acknowledging and surfacing the transition issues from writing in school to writing at work, in particular, by identifying the multiple power relations inherent in many documents. Such texts could provide support for the complexity of learning about document rhetoric—audience, purpose, and tone—across a range of document types. Given the nature and complexity of lawyers’ writing, simplified frameworks are only marginally useful. Rather than rely primarily on the author’s individual experience (while valuable), authors could investigate and provide evidence-informed rules and guidelines. Finally, authors could provide positive representation of lawyers as problem framers and problem solvers within an ethical approach to the administration of justice and the creation of relationships.