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Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms

E. Joan Blum
Boston College Law School, blum@bc.edu

Kathleen E. Vinson
Suffolk University Law School, kvinson@suffolk.edu

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Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms

E. Joan Blum[1]
Kathleen Elliott Vinson[2]

Abstract

As experts in the pedagogy and substance of legal writing, full-time legal writing faculty who serve as writing consultants to law firms help fill an increasing need for training and support of lawyers. In addition to providing a direct benefit to lawyers and their firms, this practice benefits the legal academy by providing fresh ideas for teaching and scholarship. This article discusses generally the practice of legal writing consulting in law firms by full-time legal writing faculty. The article provides background in theory and practice, addressing why law firms seek outside consultants for this type of training and support and why full time legal writing faculty are appropriate writing consultants. For this, the Article draws on, among other sources, the recently published *Carnegie Study* and *Best Practices in Legal Education*. The Article then describes the "nuts and bolts" of a consulting practice, including various ways services might be configured, and asks whether realistic goals can be set and met. Finally, the article addresses ethical and other challenging issues that may arise in this type of consulting practice.

INTRODUCTION[3]

Law firms increasingly call on full-time law school legal writing faculty to serve as outside consultants to help associates improve their legal writing.[4] This practice recognizes that a legal writer's development does not end with law school graduation,[5]

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[1] Associate Professor of Legal Reasoning, Research and Writing, Boston College Law School; A.B., Harvard University; J.D., Columbia Law School.

[2] Professor of Legal Writing and Director of the Legal Practice Skills Program, Suffolk University Law School; B.A., Stonehill College; J.D., Suffolk University Law School.

[3] This Article derives from two presentations: Taking Our Expertise into the Trenches: Consulting on Writing in Practice, Legal Writing on the Move, Presentation at the 12th Biennial Conference of the Legal Writing Institute, Atlanta, GA (June 2006); Consulting on Legal Writing in Law Firms: Is it Possible to Set and Meet Realistic Goals?, Presentation Before the New England Consortium of Legal Writing Teachers, Albany Law School (June 2005). The writers thank Elizabeth DiPardo, Boston College Law School, Class of 2008, for her invaluable research assistance and Professor Andy Perlman of Suffolk University Law School and Professor Judith Bernstein Tracy of Boston College Law School for their contributions to this article. We are grateful for the support of Suffolk University Law School and the Boston College Law School Fund.

[4] Joan Ames Magat, Senior Lecturing Fellow, Duke University Law School, Survey Conducted on Legal Writing Listserve (2006) (on file with authors) (discussing consulting services provided by legal writing faculty).

[5] *See generally* Jane Bowers, *How to Improve Associates' Writing*, 34 PRACT. LAW. 35 (1988); Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick up the Pedagogical Baton*, 5

that economic pressures of law practice may curtail intensive ongoing mentoring of associates by more senior lawyers within a firm,[6] and that the expertise of full-time legal writing faculty can be tapped for significant benefit to individual lawyers and to the firm as a whole.[7] Consulting can also enrich the professional development of legal writing faculty and make them better teachers and scholars.[8]

Full-time legal writing faculty are particularly well-prepared to serve as writing teachers or coaches within law firms because they dedicate their careers to understanding the theory as well as teaching the practice of effective legal writing.[9] Moreover, the pedagogy of legal writing, based largely on modeling and coaching, translates effectively from the academic to the practice setting.[10] Thus, legal writing faculty bring to the law firm a combination of thoughtfulness about legal writing and teaching expertise that would be difficult to replicate elsewhere.

J. LEGAL WRITING INST. 143 (1999); Teresa Godwin Phelps, *Writing Strategies for Practicing Attorneys*, 23 GONZ. L. REV. 144 (1988); Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507 (2005).

[6] *See infra* notes 18–19 and accompanying text.

[7] Robert L. Clare, Jr., *Teaching Clear Legal Writing—The Practitioner's Viewpoint*, N.Y. ST. B.J., Apr. 1980, at 192, 193–94; Eichhorn, *supra* note 5, at 148 n.25.

[8] *See infra* text accompanying notes 40 through 42.

[9] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 110 (2007) [hereinafter THE CARNEGIE STUDY] (stating that the pedagogies of legal writing instruction bring together content knowledge and practical skill in very close interaction); *see also* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism in Clinical Education*, 75 MINN. L. REV. 1599, 1600 n.3 (1991) (defining the terms "theory" and "practice"); Richard K. Neumann, *Donald Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 416 (2000) (describing a conference between a legal writing teacher and a student as an example of Schon's "reflective practicum," in which an experienced professional coaches a student as the student engages in a professional task); Marc Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580 (1987) (explaining that a constant tension between theory and practice exists in modern legal education); Roy Stuckey *et al.*, BEST PRACTICES FOR LEGAL EDUCATION 165-67 (arguing that experiential legal education, involving experience, reflection, theory, and application, is a powerful tool for forming professional habits and understandings).

[10] *See* THE CARNEGIE STUDY, *supra* note 9, at 108.

In addition to providing value to associates and law firms, this type of consulting can contribute substantially to the professional development and satisfaction of legal writing faculty. Especially for mid- or late-career legal writing faculty, teaching in the practice setting can provide an important real world connection to keep them current on developments and trends in writing in law practice, as well as provide new ideas to infuse their teaching and scholarship. This ongoing connection to the world of practice may enable legal writing faculty to speak more authoritatively to students about similarities and differences between writing in law school and in practice. Other benefits to legal writing faculty include financial compensation, which can be important for members of a profession that is generally underpaid,[11] and the positive recognition that expertise in teaching in practice can bring to the faculty member, the legal writing program, and the law school.

But there are potential negatives as well. It can be difficult to balance the demands of even a small consulting practice with those of a full-time teaching position. It can also be difficult to give the legal employer what it wants—generally a "quick fix"—when legal writing faculty know from experience that for most writers improvement requires significant time and effort over the long term.[12] The problem of

[11] *See* Ass'n of Legal Writing Dirs. & Legal Writing Inst., 2007 Survey Results, at 18–19, http://www.lwionline.org/survey/surveyresults2007.pdf. (listing average salaries for legal writing faculty) (last visited Dec. 30, 2007) [hereinafter 2007 ALWD/LWI Survey]; *see, e.g.*, Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 353–56 (2001); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 560–81 (2001); Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N OF LEGAL WRITING DIRS. 108, 109 (2006); Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 942 (2006).

[12] *See* Vinson, *supra* note 5, at 509 (noting that developing effective legal writing techniques is a life-long process); *Effective Writing Requires Lifelong Commitment to Honing the Craft*, STUDENT LAW. 10 (Sept.

potentially unrealistic expectations on the part of the employer is very real: Law firms call in consultants, in part, because outsourcing the task of transforming a deficient writer into a competent one generally requires less investment of time, energy, and money on the part of the employer than intensive ongoing mentoring by supervising lawyers[13] or hiring a writing specialist to work in-house. Given unlimited time and money, most legal writing faculty could probably help most associates improve their writing substantially. But consultants operate under constraints, including the time and money the law firm is willing to devote to improving associates' writing, the time and energy the associates themselves are willing or able to devote to improving their writing, and the constraints under which the consultant operates, including the principal demand on the consultant's time: teaching law students.

Moreover, the constraints of the consulting engagement, even when the consultant is coaching one-on-one and both the associate and the firm cooperate fully, may present obstacles to giving meaningful help to an associate whose writing problems stem from problems in analysis or simply from lack of experience in the particular context in which the associate has been called upon to write.[14] A lack of cultural fit with the firm or even a failure to write in the preferred style of the supervisor may result in an associate's being

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2002) [hereinafter *Effective Writing*]; Bryan A. Garner, *A Message to Law Students: Effective Writing Takes A Lifelong Commitment*, MICH B.J., Sept. 2006, at 52.

[13] *See infra* notes 18–19 and accompanying text.

[14] Sometimes a problem that is labeled a "writing problem" may be a problem of a different kind that simply manifests itself in writing. For example, a fairly inexperienced associate called upon to draft for a particular situation in a given transaction may have a general understanding of the underlying legal analysis, but the associate's lack of experience with this type of transaction—and therefore the failure to draft in a way that elicits the approval of the supervisor—may show up as drafting or writing problem rather than something less susceptible to being labeled. *See* Louis G. Williams, *In-House Training: Maximizing Your Lawyers' Professional Potential*, K929 ALI-ABA 217 (1994) (noting that a "writing problem" is often a misnomer for a "thinking problem" because a young associates often encounter analytical and organizational issues, rather than grammar and usage problems).

labeled as having a "writing problem." [15] And lack of success by the consultant in solving the "writing problem"—whether real or perceived—presents risk to the reputation of the teacher as well as to that of the law school.

This Article discusses generally the practice of legal writing consulting in law firms by full-time legal writing faculty,[16] including whether realistic goals for teaching in the practice setting, as opposed to in law school, can be set and met. Part I of the Article provides background on why there is a role for legal writing faculty to apply their expertise by serving as writing consultants in law firms. Part II describes the nuts and bolts of a consulting practice, including various ways consulting services might be configured. Part III proposes ways to identify realistic goals for effective legal writing consulting and devise methods for achieving those goals. Part IV addresses ethical and other challenging issues that may arise in this type of consulting practice.

I. BACKGROUND

[15] An associate whose writing is grammatically correct but diverges from the supervisor's preferred style may be referred to a writing specialist. For example, the associate may write with split infinitives. Although leading grammarians find split infinitives acceptable, the use of a split infinitive may offend a supervisor, who was taught by an early teacher that split infinitives are always grammatically incorrect. *See* WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 58 (4th ed. 2000). And although the Plain English movement has made significant inroads into legal English, more ornate drafting may be preferred by a supervisor who believes that specialized legal language is more precise than ordinary English—and the failure of a junior associate to use specialized language may be seen as a lack of professional competence. *See, e.g.*, DAVID MELLINKOFF, LEGAL WRITING: SENSE & NONSENSE 1–2 (1982); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 1–4 (5th ed. 2005); Ken Bresler, *Pursuant to Partners' Directive, I Learned to Obfuscate Symposium: The Politics of Legal Writing*, 7 SCRIBES J. LEGAL WRITING 29, 30–31 (2000); Dan Seligman, *The Gobbledygook Profession: Why Do Lawyers Write So Lousily? They Think it's Good for Business*, FORBES, Sept. 7, 1998, at 174.

[16] Law school legal writing faculty teach in other professional contexts as well, including continuing education programs, government offices, and corporate legal departments. Eichorn, *supra* note 5, at 149–49; *see also* Vinson, *supra* note 5, at 547 ("Writing programs are a good example of how academia and practice can work together to help each other . . . Such a partnership provides the ancillary benefit of strong academia/law firm ties and increases the prestige of writing programs.").

Changes in the structure of law firm practice over the past several decades have made the informal apprenticeship model,[17] under which new lawyers gained professional competence by working closely on client matters with more experienced lawyers in the firm,[18] almost obsolete.[19] A senior lawyer in a private law firm is less likely than in the

[17] Here, "informal apprenticeship" is distinguished from the more formal legal apprenticeship that was part of the training of most lawyers in the United States until the latter part of the nineteenth century. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION FROM THE 1850S TO THE 1980S 4–10 (1983); David Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 KAN. L. REV. 105, 108 (2003). Today, four states allow people to sit for the bar after registered apprenticeships. CAL. BUS. & PROF. CODE § 6060 (2003); VT. R. ADMIS. BAR § 6 (2006); WASH. ADMIS. TO PRAC. R. 3 (2006); 18 VA. ADMIN. CODE § 35-10-20 (2007). Four other states allow people to sit for the bar with some law school and law office study. ALASKA STATE BAR R. 2, § 3(b) (2004); ME. BAR ADMIS. R. 10(c)(5) (2005); N.Y. CT. R. § 520.4 (2007); WYO. STAT. § 33-5-104 (2007); *see also* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L. L.J. 335, 364 n.171 (2006) (noting that graduation from an accredited law school is not the "exclusive gateway" to the practice of law); Mike Konon, *Attorney Passes Bar Without Law School*, SAN DIEGO UNION-TRIB., June 7, 1989, at B-1 (detailing an attorney's passage of the California bar after completing a law office study program); *Skipping Law School. Lincoln Did It. Why Not the Valoises?*, N.Y. TIMES, Sept. 21, 2005, at A23 (discussing the Valois family lawyers who passed the Virginia bar without attending law school).

[18] Although law school education, as opposed to apprenticeship, is by far the prevailing method of law training today, the recently published Carnegie Study notes that research about human learning has created renewed interest in the type of learning provided by apprenticeship, which is characterized by an "intimate pedagogy of modeling and coaching." THE CARNEGIE STUDY, *supra* note 9, at 25. The Carnegie Study identifies three "apprenticeships" in legal education: the "intellectual or cognitive apprenticeship," which is intellectual training focused on the academic knowledge base of the profession; the "practice-based" apprenticeship, in which students learn by taking part in simulated practice situations or live-client clinical experience; and the "apprenticeship of identity and purpose," which provides an "ethically sensitive perspective on the technical knowledge and skill" required by the practice of law. *Id.* at 27–28. While the practice-based apprenticeship is consistent with "apprenticeship" used in its ordinary sense, the first and third "apprenticeships" are apprenticeships only by analogy. The post-law school training that many lawyers traditionally received in the practice setting is a prime example of the practice-based apprenticeship. *See* Donald Schon, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231, 248 (1995). *See generally* DONALD SCHON, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN OF TEACHING AND LEARNING IN THE PROFESSIONS (1987) (arguing that professional knowledge is most effectively conveyed by observing and reflecting on what competent professionals do) [hereinafter EDUCATING THE REFLECTIVE PRACTITIONER].

[19] *See* Alberto Bernabe-Riefkohl, *Tomorrow's Law School: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137, 142 (1995) (discussing the demise of the apprenticeship model). Many lawyers over the age of fifty have a similar narrative about how close mentoring by a senior lawyer was instrumental to their becoming effective legal writers. The story generally goes as follows: "I was in my first year at the firm and Partner X asked me to write a memo on Y topic. After I turned it in, the partner came into my office to tell me that the memo needed a lot of work to make it acceptable. The partner had marked up some areas that needed to be improved and asked me for another draft by the end of the day. Over the next few days we went back and forth over a series of drafts—each time the partner either made written notes on the draft or we discussed orally deficiencies in the memo. Finally, the partner was satisfied—and actually sent the memo on to the client. I was grateful to that partner for having taken the time to teach me how to write." Anecdotal reports from more recent law graduates indicate that this experience has become relatively rare and anecdotal reports from partners indicate that the economic pressure of law practice is the

past to work closely with an associate to draft and redraft a piece of writing for a number of reasons. Although successive redrafts of a document in light of feedback from a supervisor would improve the product as well as contribute to the associate's development as a legal writer, short-term efficiency—for example, meeting a client's need for turnaround—may require that the supervisor take the project away from the associate. Also, given increased competition among law firms and the high cost of legal services of large private firms, deriving in part from high compensation levels of lawyers, law firms may find it difficult to justify to a client charging for time that includes training.

In light of these and other pressures militating against apprenticeship-type training, a law firm may expect new hires to graduate law school already proficient in many law practice skills, including the skills involved in producing specific types of legal writing an associate will be called upon to produce in practice.[20] Although law schools, in general, have increasingly incorporated practice skills into their curricula,[21] an expectation that a new law school graduate will be ready to practice law "right out of the box" is unrealistic.[22] Indeed, preparation for practice is part of the mission of most if not

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main reason why this model of training-by-coaching has gone into eclipse. Although this experience of intensive on-the-job training is less common today, informal mentoring in law firm settings remains important to success in law practice. *See* RONIT DINITZOVER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 80 (2004), *available at* http://www.abf-socio legal.org/ajd.pdf.

[20] Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 490 tbl.11 (1993) (ninety percent of hiring partners listed written communication as a skill that new attorneys should bring to the job versus developing it in practice).

[21] James H. Backham, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1, 30–31 (2007) (concluding that practical training opportunities for law students have vastly expanded over the last forty years); THE CARNEGIE STUDY, *supra* n. 9 at 96 (finding "signs that education for practice is moving closer to the center of attention in the legal academy"); STUCKEY, *supra* n. 9, at 15 (identifying movement in law schools toward better preparation of students for practice).

[22] *See* THE CARNEGIE STUDY, *supra* note 9, at 87–88; *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*,

all law schools, but law school faculties and law firms may differ widely on the appropriate nature and extent of that preparation.[23] And although some large firms conduct "boot camps" to introduce certain practice skills to new associates,[24] law firms may be reluctant to invest significant time of senior lawyers that would otherwise be profitable in providing on-going intensive training in writing.[25] In light of all these

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1992 A.B.A. SEC. OF LEGAL EDUC. & ADMIS. TO THE BAR 6–7 (Robert MacCrate ed.), *available at* http://www.abanet.org/legaled/ publications/onlinepubs/maccrate.html.

[23] *See, e.g.*, STEVENS, *supra* note 17, at 264–71 (discussing purposes of law schools, including training practitioners and producing serious scholarship); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law, A View from the Trenches*, 65 U. CIN. L. REV. 381, 381 (1997) (noting that commentators identify an "unhealthy dichotomy" between law schools, which see their role as teaching a student to "think like a lawyer", and law firms, which see the role of law schools as training students for the practice of law).

[24] For an example of intensive in-house training programs for new associates, see Howrey LLP, Howrey Bootcamp, http://www.howreybootcamp.com (last visited Feb. 1, 2008); Kirkland & Ellis LLP, Kirkland Institute, http://www.kirkland.com/sitecontent.cfm?contentID=248 (last visited Feb. 1, 2008); Ropes & Gray LLP, Associate Training, http://www.ropesgrayhiring.com/pages/practice/training.htm (last visited Feb. 1, 2008). *See also* Kristen Eliasberg, *Law Firms Teach by Example*, LAW FIRM, INC., Apr. 2006; (analyzing in-house professional development programs at various law firms); Hildebrandt Int'l, White Paper, Changing Approaches to Lawyer Training: The Latest Battleground in the Growing War for Talent, *available at* http://www.hildebrandt.com/Documents.aspx?Doc_ID=2437 (stating the most "successful lawyer development programs have on staff fulltime professionals devoted to making their programs a success") [hereinafter Hildebrandt White Paper].

[25] *See, e.g.*, SUSAN G. MANCH & MARCIA PENNINGTON SHANNON, MAXIMIZING LAW FIRM PROFITABILITY: HIRING, TRAINING, AND DEVELOPING PRODUCTIVE LAWYERS § 6.01 (2007) (noting that training programs run by firm attorneys represent an opportunity cost). Law firms' reluctance to reallocate senior associates' time for fear of decreased profit margin appears counterintuitive as law firms' profitability declines sharply when junior associates have poor writing skills. *See* Thompson West, White Paper, Research Skills for Lawyers and Law Students (2007), *available at* http://west.thomson.com/pdf/librarian/Legal_Research_white_ paper.pdf. In 2006-2007, Thomson West conducted roundtables and informal discussions with law firm and academic librarians across the United States regarding topics confronting the legal profession relating to legal research and writing. The discussions revealed that during a "day in the life" of a new associate at a law firm, the associate spends eighty percent of his time researching, writing, and drafting documents. Yet a law firm that hires a first-year associate for $160,000, plus signing bonuses, should expect to write off fifty to a hundred percent of a first-year associate's research billings. By the fifth year, associates are generally proficient in research and writing. *Id.* at 2; *see also* TOM GOLDSTEIN & JETHRO K. LIBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 4 (2d ed. 2002) (explaining that associates' poor writings skills are very costly to law firms because law firms must absorb the time of senior lawyers who are forced to revise memoranda and briefs); MANCH & SHANNON, *supra*, § 6.02 (noting that training programs can improve a firm's bottom line).

circumstances, it is appropriate for law firms to shift some of the burden of teaching, training, and support of certain skills to outside experts.[26]

In the area of legal writing skills, full-time legal writing faculty, who are experts in legal writing and its pedagogy, are logical choices to meet this need.[27] Not only does the nature of the writing process as taught in most legal writing courses "simulate real legal production quite closely"[28] but legal writing faculty are experts in pedagogy suitable for teaching practitioners—a pedagogy of modeling and coaching.[29]

In law school, students learn legal writing by doing, through teaching methods that simulate the way professionals acquire competence in practice.[30] While legal writing courses vary in structure and coverage, across the board legal writing courses require students to apply skills demonstrated in the classroom or through samples[31] in successive writing assignments on which students receive feedback from the teacher, a more experienced legal writer.[32] This experiential learning process, which affords the student multiple opportunities to practice a skill under the supervision of a more experienced

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[26] Many of the largest firms employ internal writing experts instead of using outside consultants. *See* C. Edward Good, *The "Writer-in-Residence": A New Solution to an Old Problem*, MICH. B.J., June 1995, at 568, 568–69 (discussing the benefits to a firm of having an in-house writing expert to conduct writing programs for partners and associates); *Write to the Point: Law Firms Hone Associates' Writing Skills*, LAWYERS USA, May 22, 2006 (discussing law firms varied use of outside and in-house writing consultants); Pauline Schneider, Current and Future Issues Important to Legal Education, Presentation at the Plenary Session of Ass'n Legal Writing Dirs., Denver, CO (June 16, 2007).

[27] *See* THE CARNEGIE STUDY, *supra* note 9, at 108-11 (discussing generally the pedagogy of legal writing).

[28] *Id.* at 110.

[29] *See id.* at 108.

[30] *See* RALPH J. BRILL, THE SOURCEBOOK ON LEGAL WRITING PROGRAMS 53 (1997) and n. 33, *infra* and accompanying text.

[31] *See* Judith B. Tracy, *"I See and I Remember: I Do and I Understand": Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 TOURO L. REV. 297, 316 (2005) (describing the role of samples in the critiquing and feedback process that is essential to development of the legal writer).

[32] *See generally* Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 GONZ. L. REV. 427 (2006); Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 LOY. U. CHI. L.J. 123 (2007).

practitioner of that skill, has obvious points of similarity with the informal apprenticeship process through which practicing lawyers traditionally learned their craft.[33] In addition, most legal writing teachers have expertise in one-on-one teaching through conferences with students on their papers, a teaching method that again promotes development of professional skills in a manner very similar to informal apprenticeship.[34] Thus, legal writing faculty are experts in a teaching methodology that is necessary, but increasingly unavailable in the ordinary course of law practice, for training legal writers.[35] Moreover, the depth of their substantive knowledge of their discipline, their teaching experience, and their ability to focus on teaching, rather than on representation of clients, may make legal writing faculty more effective teachers than practicing lawyers, whose principal duty must be to the client.[36]

A legal writing consultant's contribution to a firm extends beyond helping individual associates improve the quality of their writing.[37] An associate who writes more effectively after working with a consultant is more likely to be retained by the firm and thus, in addition to being in a position to serve the firm's clients more effectively, save the firm the considerable investment of time and money required to recruit and train

[33] *Compare* THE CARNEGIE STUDY, *supra* note 9, at 110 (noting that "the iterative, collaborative nature of the writing process [in legal writing courses] simulates real legal production quite closely") *with* EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 18, at 11-16 (emphasizing the development of professional expertise through reflective practice in law and other professions) and STUCKEY, *supra* n. 9 at 166 (arguing that "[o]ptimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory, and application).

[34] *See* BRILL, *supra* note 30, at 60-61 (providing a list of articles discussing conferences in detail).

[35] *See* THE CARNEGIE STUDY, *supra* note 9, at 110.

[36] MODEL RULES OF PROF'L CONDUCT 1.1–1.18 (defining the contours of the lawyer-client relationship).

[37] *See* Hildebrandt White Paper, *supra* note 27. Thomson West estimates that law firms spend a billion per year on training and professional development. Large law firms spend approximately $3,000 per lawyer per year. *Id.*

a substitute lawyer.[38] When the associate becomes more senior, he or she is likely to be a more effective supervisor of the writing of more junior lawyers within the firm because of the skills gained through the modeling and coaching process in the consulting relationship.[39] Thus, a law firm's investment in hiring a legal writing professor to work with lawyers in the firm may yield far-reaching benefits.

While as writing consultants legal writing faculty provide value to law firms and to associates in need of this type of professional development, legal writing faculty and their law schools benefit as well.[40] The experience a legal writing faculty member gains through consulting in a law firm can add to the depth of the faculty member's substantive knowledge, enhance teaching skills, and provide new ideas for teaching and scholarship. Thus, when a legal writing faculty member consults on writing in practice, the law school gains a better teacher and scholar.

Consulting can help faculty members acquire deeper expertise in their discipline. For example, as a consultant in a law firm, a faculty member is in a position to observe and experience first-hand similarities and differences between how writing is taught in law school and how it is done in practice. Reviewing documents written by associates may suggest ways that the faculty member may rethink law school assignments.[41]

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[38] *Id.*

[39] *See* MANCH & SHANNON, *supra* note 25, § 9.02[1][b].

[40] *See* Am. Ass'n of Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, *available at* http://www.aals.org/about_handbook_sgp_etch.php (noting that law professors' involvement in professional activities outside the law school may "bring fresh insights to the professor's classes and writing"). Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-flagellation*, 42 S. Tex. L. Rev. 345, 348 (2001) (discussing how practicing law professors can benefit the law school and its greater community).

[41] For example, today most lawyers use e-mail in practice; recent articles and postings to legal writing listserves reflect that some legal writing courses now touch on how to draft an e-mail appropriately. *See, e.g.*, Laurel Oates and Anne Enquist, *You've Sent Mail: Ten Tips to Take with You to Practice*, 15 No. 2 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 127 (2007). Legal writing faculty have recently

Reviewing feedback from senior lawyers on associates' writing may contribute to a deeper understanding of the expectations of the eventual audience of the faculty member's students. This, in turn, may help the faculty member reflect on the rigor of her law school assignments and expectations. Finally, the quantity and quality of feedback given by senior lawyers may prompt the faculty member to reevaluate the quality, quantity, and importance of the feedback she provides her law students.

In general, consulting in a law firm gives a legal writing faculty member the opportunity to glean from associates and partners, as well as from professional development staff, what really counts after law school regarding the quality of writing skills and the reliance of firms on the logic, precision, accuracy, and conciseness of an associate's writing. Obviously, communicating this information to students will contribute to their preparation for practice. Moreover, being in a position to communicate current knowledge of what law practice requires enhances the credibility and authority of the legal writing faculty member in the eyes of students.

In addition to these benefits, consulting in a law firm may help a legal writing faculty member improve oral communication skills and thus become a more effective classroom teacher. Consulting can also help a faculty member refine interpersonal skills: A consultant will at some point have to deal with an associate's concerns, frustrations, stress, and confusion about legal writing. Experience in dealing with these emotions on

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argued that required first-year writing courses should include exposure to transactional drafting. *See* Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 APPALACHIAN J. L. 73, 77–84 (2007) (explaining that law schools must transition from training future litigators to training "hybrid" lawyers—skilled at both litigation and transactional work); Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 82–100 (2007) (explicitly stating transactional drafting projects should be assigned in writing courses).

the part of an associate can only enhance a faculty member's skills in working with law students.

Finally, consulting may infuse legal writing faculty with new ideas for law school teaching or scholarship. For example, while in their role as consultants legal writing faculty should observe rules of client confidentiality,[42] exposure to real-world client problems may yield ideas that the faculty member may adapt to use in course assignments. Moreover, consulting may contribute to a legal writing faculty member's understanding of the theory and pedagogy of the discipline and thus provide inspiration for scholarship. Overall, when legal writing faculty work as writing consultants they become better teachers and scholars by taking what they experience in the practice setting, reflecting on it, and applying it to their primary role as an academic.

II. TYPES OF CONSULTING SERVICES

While consultants offer a wide range of services to legal employers, the most common types of services are group seminars and individual coaching. A writing consultant might be hired for a short-term period, for example, to give a one-time seminar or single coaching session, or for the long term, for example, to give ongoing seminars or hold regular office hours at the firm. The consultant's audience may be summer associates, junior associates, or supervising lawyers, or be a mixed audience of lawyers with different levels of experience.[43] The audience may be from a single practice area, for example, litigation or transactional practice, or be mixed.

A. Group Seminars

[42] *See infra* 100 and accompanying text.

[43] Eichorn, *supra* note 5, at 148–49, 165.

Group seminars are more economical for legal employers than individual coaching; however, this type of consulting service is more difficult to tailor to individual needs, just as individual feedback on student work is generally more effective than the less individually tailored teaching that occurs in large classroom settings.[44] The main risk with large group seminars is that they may be perceived as providing more value than they actually do.[45] The employer is providing something that looks like training; the consultant is speaking and demonstrating; and the lawyers are present and attentive. But are the lawyers really learning something that will improve their writing? The answer of course is sometimes yes and sometimes no, depending largely on the skill of the consultant and the commitment of the participants. Notwithstanding the drawbacks in general of large group seminars,[46] they are generally popular with employers, in part because they are economical and have public relations value.[47] In general, the more precisely a seminar is focused on clearly articulated goals, the more likely it is to produce its intended results. Three types of seminars are discussed in this section of the article: mentoring seminars for supervisors, seminars for junior lawyers, and programs for summer associates.

1. Seminar for Supervisors

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[44] THE CARNEGIE STUDY, *supra* note 9, at 109–11 (uses legal writing pedagogy as a model for transforming the way we educate students in general); Romantz, *supra* note 17, at 136–45 (contrasting modern legal writing education with Langdell's case-method of legal education); *see also* Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 270–71 (2004) (discussing the overall need for more individual conferences between law students and law professors).

[45] MANCH & SHANNON, *supra* note 25, § 9.02[1][e].

[46] *See id.* § 9.02[1][c] ("Lectures alone in legal writing may briefly stir the blood, but they are unlikely to have positive effects.").

[47] *See id.* § 7.01[4] (noting that the training offered by law firms is a valuable recruiting tool).

Perhaps the group seminar that has the potential for greatest impact on the quality of writing within a firm is the seminar for supervisors, which has the goal of training senior lawyers within the firm to mentor the writing of associates.[48] Senior lawyers generally do not have training in legal writing pedagogy; nonetheless, they must supervise and evaluate the writing of more junior lawyers. While they may be adept at editing documents to their own style, most lawyers do not have the expertise necessary to give the kind of feedback that most effectively promotes the development of a junior lawyer as an independent, confident, and successful legal writer.[49] Thus, training supervisors in giving feedback on writing has the potential to benefit a firm by creating within the firm a culture that recognizes the importance of writing, and, at the same time, creating a cadre of teachers within the firm—thereby reducing the need to hire outside consultants.[50] Indeed, a program that trains supervisors to give effective feedback on the writing of associates may be both the most substantively effective as well as the most cost-effective way to use legal writing faculty as writing consultants.[51]

A half-day seminar for supervisors might follow this model: The seminar would open with a brief talk by the consultant addressing the purpose of the seminar, the agenda for the seminar, and the theoretical underpinnings of coaching pedagogy in general and of

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[48] Eichorn, *supra* note 5, at 148–49, 165.

[49] *See* GOLDSTEIN & LIEBERMAN, *supra* note 25, at 72–73 (remarking that the "editing" process at many large law firms consists merely of a senior associate quickly cutting down or wholly rewriting a younger associate's work); Williams, *supra* note 11 (suggesting that many senior associates and junior partners frequently "set out to re-write" a younger associate's memorandum—rather than "pay[ing] attention to what is wrong with a piece" and providing effective feedback).

[50] Kristin Eliasberg, *Law Firm Training Programs Redefine What it Means to Be a Well- Rounded Lawyer*, Law Firm Inc., Mar./Apr. 2006, at 30 (discussing how partners volunteered to become writing coaches). *But see* MANCH & SHANNON, *supra* note 25, § 9.02[1][e] (mentioning that even if senior lawyers can and want to teach writing, perhaps firms should still consider hiring outside consultants because young associates may fear being evaluated during writing training sessions).

[51] Eichorn, *supra* note 5, at 148–49, 165.

written critique on writing in particular. Then, the consultant would give participants a short memorandum of law and copies of the key authorities cited in the memorandum. Participants would be asked to read and make written comments on the memorandum, using concepts addressed in the opening presentation. Then, participants would convene in small groups to discuss the participants' comments and the challenges the participants encountered in commenting on the memorandum.[52] A seminar of this kind would give senior lawyers in the workplace a model for effective coaching that they could implement in their day-to-day supervision of more junior lawyers.

Notwithstanding the benefits of training supervisors to give effective feedback, legal employers, especially private law firms, may be reluctant to adopt this model of training, largely for the reasons that have led to the demise of the informal apprenticeship model. The type of supervision that a mentoring program envisions requires the senior lawyer to assume the role of teacher as well as the role of supervisor.[53] A law firm partner may be reluctant to assume this additional role because the pressures of her immediate work may, at any given moment, eclipse the long-term benefits this type of program can bring to the firm as a whole. Moreover, senior lawyers may be reluctant to commit to the self-examination and reflection that is necessary in an effective teacher.

[52] This model is derived from a Seminar for Attorney Mentors given at Boston College Law School by Daniel Barnett, E. Joan Blum, and Jane Gionfriddo and to senior lawyers of the Massachusetts Office of the Attorney General in March 2001. This seminar was in turn based on the "Basics Workshop" developed by Daniel Barnett for legal writing and other law faculty given at several Conferences of The Legal Writing Institute and at the New Law Teachers Workshop of the Association of American Law Schools.

[53] Experienced law school legal writing faculty are experts in giving feedback on student writing in the role of teacher as well as in the role of work supervisor. *See* Gionfriddo, *supra* note 32, at 429–43. While many supervisors are adept at giving feedback from the perspective of the practitioner who, from professional experience, knows how the document should be written, they may be less adept at giving teacher-type of feedback that allows the writer to develop the writer's skills more generally. *See* Vinson, *supra* note 5, at 547 (asserting that legal writing faculty can aid supervisors to develop effective feedback techniques); *cf.* Williams, *supra* note 11 (suggesting that partners may be effective instructors for skills training courses, such as legal writing programs; however, these partners frequently need assistance developing an effective critiquing method).

Notwithstanding the barriers to adoption of these programs, however, consultants should continue to urge legal employers to adopt them because the programs have enormous potential to improve legal writing across the profession.

2. Programs for Junior Lawyers

A common type of program that firms offer through consultants is the seminar for associates.[54] By offering a program of this kind, the firm communicates to associates that writing is important; beyond that, however, a large group seminar for associates is unlikely to provide participants the same level of benefit as individual coaching.[55] This is because no matter how skilled the consultant, a group seminar can address writing at only a general level.

To meet the challenge of participants' seeing the seminar as an interruption in their workday rather than as a valuable learning experience, the consultant should use sophisticated examples and incorporate hands-on exercises to promote active learning on the part of participants.[56] Even when the consultant includes active learning components, however, associates may be reluctant to answer questions or offer solutions to problems posed by the consultant because of concerns about revealing to their peers weakness or lack of ability. To circumvent this reluctance, the consultant may require participants to

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[54] MANCH & SHANNON, *supra* note 25, § 9.02[1][b].

[55] *Id.* § 9.02[1][c] .

[56] *See* M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASS'N LEGAL WRITING DIRS. 27, 36 (2004); Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 854 (1997). The principle of active learning recognizes that "students can maximize their understanding and retention when they are active rather than passive learners." This principle readily applies to continuing education programs in the workplace. Lustbader, *supra*, at 854; *see* Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 3–4 (2003); Dorothy H. Evensen, *To Group or Not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343, 348–58 (2004). Hands-on learning also benefits both law students and young associates in practice. *See* Jacobsen, *supra*, at 36.

work on exercises in groups and provide group, rather than individual answers, or to use technology to enable participants to submit answers anonymously, for example, by using "clickers."[57]

Another challenge for the consultant is posed when the firm wants both transactional and litigation associates to attend the same group seminar, most frequently because the firm wants to save time and money. When associates see little connection between the substance of a seminar and their own work, they are likely to tune out.[58] Thus, the writing consultant should try to convince the employer to schedule two different programs so that the consultant may provide more tailored instruction.

The most effective group seminars for associates include exercises specific to the lawyers' area of practice. For example, an appropriate program for transactional lawyers could include a mini-legal drafting course, centered on a specific drafting problem.[59] A program for litigators might ask participants to comment on a sample memorandum or brief or other litigation documents. If the firm does not agree to hold separate programs

[57] A clicker system would provide the consultant with an innovative method for posing questions to his or her seminar audience. The consultant would prepare multiple-choice questions, tailored to the seminar, in advance. These questions would then be projected onto a screen. Audience members would record their answers on a handheld electronic device. The percentage of members who answer the question correctly can then be displayed to the audience. Law professors applaud the clicker system because it "preserves individual student anonymity in the classroom but gives [consultants] instant feedback on students' comprehension of the material covered." *See* Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 560–67 (2004); *see also* Gerald F. Hess, *Improving Teaching and Learning in Law School: Faculty Development Research, Principles, and Programs*, 12 WIDENER L. REV. 443, 457 (2006) (evaluating the use of clickers to improve the effectiveness of instruction); David Thompson & Syd Beckman, Using Clickers, Presentation at the Institute for Law School Teaching, Boston, MA (2007) (discussing ideas to use clickers to enhance student engagement); Deborah B. McGregor, Give Me Your Quiet, Your Boisterous, Your Visual: Reaching Out to Students' Varied Learning Styles, Presentation at the Legal Writing Institute Conference, Atlanta (June 2006) (same).

[58] MANCH & SHANNON, *supra* note 25, § 9.02[1][e].

[59] Some legal writing professors who have a background or experience only in litigation may not feel comfortable providing consulting regarding transactional practice. *Cf.* Schulze, *supra* note 40, at 92–93 (suggesting that transactional writing is not taught in the first-year curriculum, in part, due to the widely-held believe that legal writing professors are "not ideal candidates for the teaching of transactional drafting" because these professors "hail from a litigation background").

for transactional and litigation lawyers, then the program should address documents that are used in both types of practice, for example, letters, e-mails, objective memoranda, or perhaps the program could bridge the gap in part by including the drafting of a settlement agreement.

Finally, the consultant must face the challenge posed by the fact that the "buy in" of junior associates may not be automatic. New lawyers may feel that they have less to learn from a consultant who is a full-time law teacher than from the practitioners who supervise them. A very simple solution to this problem is to have a senior partner, instead of a member of the professional development staff, introduce the consultant to participants in the seminar. This imprimatur will go a long way to enhance the authority of the consultant as well as to emphasize how important legal writing is to the firm's leadership.

3. Programs for Summer Associates

While mentoring seminars for supervisors may have the most impact to improve the quality of writing at the firm by providing internal support over the long term, programs for summer associates[60] are among the most rewarding for the consultant. Because of the nature of their position, summer associates tend to be attentive and are motivated to follow the consultant's instruction and advice. Full-time legal writing faculty find summer associates generally easy to teach because they are, after all, law students.

A legal writing consultant can offer many types of summer associate programs. A common program is a two-hour presentation that reviews the basics of good legal writing

[60] Studies note that the quality of training provided to summer associates is "one of the most important factors law students assess as they make their career decisions." MANCH & SHANNON, *supra* note 25, § 7.01[4].

and addresses the similarities and differences between writing in law school and writing in law practice.[61] This type of program can be part of a more comprehensive program for summer associates that includes additional components such as a practice memo, with individual feedback and office hours for ongoing support on summer associates' writing projects. Another model is a two-session program, with the sessions a week apart. This design allows the consultant at the end of the first session to assign "homework," which can be addressed in the second session. But even a basic two-hour program should include at least one hands-on exercise to promote active learning.

Substantively, a program for summer associates can focus either on specific skills in legal writing or on specific documents that a lawyer might be called on to prepare as a matter develops. In a skills-centered seminar, the consultant can draw examples from a wide range of sources to emphasize particular characteristics of good legal writing. This flexibility is likely to make initial preparation less time-consuming than preparation for a problem-centered program. A problem-centered program, which uses a consistent set of facts as the basis for a series of documents, may, however, sustain the attention of participants more effectively than a skills-centered program, because it reinforces the inextricable connection between legal analysis, legal problem-solving, and legal writing . In this type of program, the participants might be asked to comment on or rewrite portions of several documents, including an e-mail from a summer associate to a partner, an objective memorandum, a persuasive memorandum, a client letter, and a transactional document.

B. Individual Coaching

[61] For examples of document that this type of program might address, see, e.g., MARY BARNARD RAY & BARBARA COX, BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING (1991); ELIZABETH FAJANS ET. AL, WRITING FOR LAW PRACTICE (2004); MICHAEL SMITH, ADVANCED LEGAL WRITING (2002).

Among the services an expert legal writing consultant can offer, individual coaching has the greatest potential to be effective because the consultant can tailor these services precisely to the needs of the individual lawyer.[62] Because this form of consulting has so many potential variations, the consultant and employer should agree early on the overall goals and time frame for the engagement as well as the frequency[63] and format of communication between the consultant and the associate, including whether and when the consultant will report to the employer on the progress of the lawyer being coached. The consultant and the associate should also agree, early on in the engagement, on whether the consultant will work with the associate on on-going work or on assignments developed by the consultant.[64]

Some firms ask the consultant to hold weekly office hours for associates who need help with their writing. Engaging a consultant to hold weekly office hours demonstrates that the firm has a strong commitment to improving writing skills, especially if the firm does not limit the services of the consultant to associates who have been explicitly identified as having writing problems. While the office hours approach has potential to help a large number of associates, the time commitment and inflexibility of this arrangement may be too great for some full-time law faculty. If a consultant does agree to this arrangement, the consultant should devise a method for reviewing

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[62] *Cf.* M.H. Sam Jacobson, *Providing Academic Support Without an Academic Support Program*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 241, 242 (1997) (suggesting individual instruction would aid students struggling with legal writing).

[63] MANCH & SHANNON, *supra* note 25, § 9.02[1][c] (noting that a writing program is not "worth much if it involves fewer than three sessions").

[64] *See id.* § 9.01[1][b](1) (emphasizing that good writing programs use the actual work product of the participants).

associates' work in advance of office hours so that the time spent with the individual associate can be used to the best advantage.

When a consultant is retained to work on a sustained basis with an individual lawyer, the coaching engagement ordinarily begins when the director of professional development or other representative of the firm lets the consultant know about an associate in need of coaching. The consultant should use this conversation to get as much information as possible about why the consultant is being called in. While most firms invest in coaching with the goal of retaining the associate, some may, even without acknowledging it, use the consultant as part of an exit strategy. If the consultant perceives that this is the case, the consultant may have reservations about taking on the assignment.

When a consultant is asked to coach an associate, the consultant should ask the firm whether the associate took the initiative in seeking coaching or whether the firm directed the associate to seek help after a negative review. This information will provide insight about the associate's attitude toward receiving coaching.[65] If the associate was directed to seek help, the consultant should get as much information as possible about the how the associate's supervisors characterize his or her writing problems—if possible, by communicating directly with the supervisors. Finally, the consultant should determine whether the employer sees the consulting engagement as open-ended or whether there is a set budget.[66]

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[65] If an associate was referred to the consultant after a review or because of writing problems, the consultant may need to overcome barriers to coaching caused by stigma or defensiveness.

[66] Some employers are unrealistic about the time period necessary for the consultant to have an impact on the quality of writing. As full-time legal writing faculty know from working with law students, improving writing skills does not occur overnight, but rather develops over a long-term time period, and then only with intense time, effort, motivation, and perseverance. *See* Vinson, *supra* note 5, at 509 (noting that

The consultant should use the first conversation with the associate being coached to set up the general parameters of the coaching relationship, including whether the consultant and associate will meet in person and if so where,[67] and if not, how most communication will take place.[68] In this conversation, the consultant should probe the associate's perceptions about his or her writing and about why the employer is making coaching available to the associate. Understanding these perceptions is important especially if the associate feels unfairly targeted, because in that situation the consultant will have to help the associate get past that emotion in order for the associate to make substantive progress.

In most situations, the consultant should not rely exclusively on reported assessments of the associate's writing. Rather, to enable the consultant to diagnose specific writing problems, the consultant should obtain samples of the associate's past writing. For purposes of diagnosis, the best samples are pieces of writing that supervisors have found unsatisfactory. The very best samples for this purpose are samples that show a supervisor's feedback or edits; if samples of that kind are unavailable the consultant may be able to obtain the final version of the document the associate submitted to the

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developing effective legal writing techniques is a life long process); *Effective Writing*, *supra* note 12; Garner, *supra* note 12. If the time period proposed by the employer is inadequate, the consultant should try to educate the employer to create more realistic expectations. A consultant will not always be successful in this effort and there is always the possibility that the employer will decide to work with a more tractable consultant. *See* MANCH & SHANNON, *supra* note 25, § 9.02[1][f] (noting that writing consultants must convince partners, in advance, of the true value of the writing course so that associates will be allowed to spend an adequate amount of time with the writing consultant).

[67] A consultant may have personal meetings with the associate being coached. If the consultant meets with the associate in person, the consultant and the associate have to decide whether meetings should take place in the associate's office, a law firm conference/meeting room, the consultant's office, or another mutually convenient location, such as a local coffee shop. Convenience and avoiding stigma should be taken into consideration when determining the location to meet.

[68] Although face-to-face meetings have the greatest potential for success, a combination of e-mail, fax, and telephone can allow a consultant to coach an associate without meeting the associate personally.

supervisor. In addition to helping the consultant identify specific writing problems of the associate, reviewing samples that have been worked on by supervisors also helps the consultant gain familiarity with writing preferences of the employer and, thus, puts the consultant in a position to give beneficial advice to the associate.

Alternatively, or ideally in addition to obtaining writing samples before the first individual coaching session, the consultant may ask the associate, as well as the associate's supervisors, to complete a diagnostic, an instrument specifically designed to help the consultant identify the associate's writing problems.[69] To increase the likelihood that the diagnostic will actually be completed, especially by supervisors, it should be as short as possible.

A diagnostic is effective only to the extent that it elicits sufficiently specific information about the associate's writing weaknesses to enable the associate and the consultant to formulate goals for the coaching engagement. First, the diagnostic must be user-friendly—if it is overly complicated, the associate or supervisor may simply put it in a pile of things to tackle later. An easy-to-complete diagnostic might list several common writing difficulties for the associate and supervisors to check off.[70] The list could include broad issues such as organization, analysis, synthesis, precision, clarity, brevity, grammar, and punctuation. More specific issues relating to each category can be also be listed; for example, under the category of punctuation, the diagnostic could list

[69] *See, e.g.*, Diagnostic Test for Grammar, Punctuation, and Mechanics, *in* LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING A–1–A-11 (Prof. annot. ed. 1993); Kristen B. Gerdy et al., *Expanding Our Classroom Walls: Enhancing Teaching and Learning Through Technology*, 11 LEGAL WRITING: J OF THE LEGAL WRITING INST. 263, 289 n.105 (2005).

[70] *Cf.* Lissa Griffen, *Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask*, 34 GONZAGA L. REV. 45, 60–61 (1999) (discussing a similar strength-weakness checklist in the context of an advanced legal writing course).

commas, semicolons, etc.[71] The diagnostic should also ask open-ended questions about the associate's writing—for example, about which aspects of the associate's writing are most problematic and about the relative time the associate spends on various stages of the writing process. Space should also be provided for the associate or supervisor to ask general questions or express concerns.

Overall, a diagnostic is an extremely useful tool in writing consulting. Not only does it help the consultant understand the associate's needs and goals, but completing it benefits both associate and supervisor because they are both forced to reflect on the associate's writing and identify areas that need improvement.[72] Finally, when compared with writing samples, the diagnostic can help the consultant draw conclusions about the accuracy of perceptions—of the supervisor, of the associate, and of the consultant—of the associate's writing problems.

After reviewing the associate's writing samples or diagnostic, the consultant should share with the associate the consultant's assessment of the associate's writing. A consultant will ordinarily communicate this assessment through a combination of discussion—in person, by fax, or by telephone—and written feedback on the associate's writing samples. The consultant's initial written feedback should address both positive and negative aspects of the samples reviewed.[73] In most situations, it should include a cover memo with overall comments and suggestions regarding analysis, organization,

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[71] The use of diagnostics for grammar problems is a well established practice in many law schools. *See* OATES, *supra* note 68, at A–1–A-11.

[72] Griffen, *supra* note 69, at 60 (noting that comparison of a student's evaluative checklist and a professor's feedback checklist can be a useful writing development tool).

[73] *See* Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 682 (2007); Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145, 166 (1996).

precision, and clarity and identify revision priorities to help the lawyer address her most serious writing problems.[74] The consultant might also suggest sources for further reference or explanation.[75] Finally, the initial feedback on the associate's writing samples should include some carefully explained revisions on the documents themselves in the form of rewritten sentences or even paragraphs, but the consultant should avoid revising the whole document.[76]

The consultant should also make clear at the outset whether or not she will comment on the associate's substantive analysis of the law. Legal writing faculty know from experience that what some may characterize as a writing problem may actually reflect a problem in legal analysis.[77] Thus, it is generally impossible—and inadvisable—to exclude analysis from the consultant's review. Most legal writing faculty are skilled in identifying problems in analysis, even if they cannot resolve every problem. By simply suggesting that the associate reconsider the analysis in a document the consultant may set the associate on course to improve that analysis.

After the consultant makes an initial diagnosis and provides initial feedback on the associate's writing, the consultant and the lawyer must agree on how to proceed. In some situations, the initial feedback is sufficient to set the lawyer on a good path and no further coaching is necessary. In most situations, however, ongoing coaching is needed in order to effect positive change in the associate's writing. In these situations, the associate and the consultant must decide whether the consultant will continue to coach

[74] Barnett, *supra* note 72, at 666.

[75] For examples of legal writing reference books, see ALAN DWORSKY, LITTLE BOOK ON LEGAL WRITING (2d ed. 1992); DIANA HACKER, A WRITER'S REFERENCE (6th ed. 2007); STRUNK, *supra* note 15; WYDICK, *supra* note 15.

[76] This will deter the associate from relying on the consultant as proofreader or editor.

[77] Williams, *supra* note 14.

the associate using completed writing projects or whether the consultant will coach the associate on works in progress. Analyzing with the associate completed writing projects can provide effective coaching if the associate is willing to spend the time on it notwithstanding the disincentive to re-engage with a project that is no longer current. Using a completed document gives the consultant flexibility in terms of the turnaround time for comments. The time that elapses between the drafting of the document and the consultant's review gives the associate opportunity for reflection and self-critique and thus the opportunity to develop objectivity. This approach may, however, decrease the motivation of the associate to participate in coaching in large part because of the pressures of ongoing work.

If the coaching will be based on works in progress, the associate and the consultant must decide whether those works will be the associate's ongoing work on behalf of clients or whether the consultant will give the associate assignments designed to address the associate's specific writing problems. While specifically designed assignments have significant potential for impact on the associate's writing, the pressures of ongoing work generally make this approach impractical. Instead, ordinarily the associate will send the consultant drafts of writing assignments as they arise and the consultant will use a combination of general and specific comments and suggested revisions to help the associate develop more effective writing skills. This approach motivates the associate to learn because the associate can improve writing skills while at the same time generating billable work.

III. SETTING AND MEETING GOALS

Possibly the greatest challenge the consultant faces is to work with the legal employer to establish realistic expectations of what the consultant can actually accomplish.[78] To set realistic goals, the consultant must first understand the employer's motivation for engaging the consultant. Is the employer really committed to helping its associates improve their writing skills—or is the employer merely using the consultant to accomplish a public relations objective? If the employer is indeed committed to helping its associates improve their writing, but wants to accomplish that goal through, for example, a one-time large group presentation for a hundred associates, the consultant must educate the employer about the limitations of that approach or run the risk of disappointing the employer when the employer does not see dramatic results.[79]

If the employer seeks individual coaching for an associate who has received negative feedback from supervisors on written work, the consultant can formulate goals for that engagement only if the consultant is able to gather sufficient information to determine the nature and extent of the problem that motivated the employer to engage the consultant.[80] Among other benefits described above, this information will help the consultant determine whether the problem that resulted in the request for coaching is properly characterized as a writing problem or more appropriately characterized as something else. If the consultant concludes that the associate's problem is something beyond a garden-variety writing problem, the consultant has to decide whether to work with the associate nonetheless or simply advise the employer that this associate's problems are beyond the consultant's expertise. This decision depends on the problem

[78] *See supra* note 52 and accompanying text (discussing how employers are sometimes unrealistic about the time commitment necessary for the consultant to improve the writing quality of the associates at the firm).

[79] *See supra* Section II.A. (discussing group seminars).

[80] *See supra* Section II.B.

and on the experience of the consultant. While most full-time legal writing faculty would feel competent to work with a associate on legal analysis and on general principles of legal drafting, most would not have the expertise to bring the associate up to speed on the substantive provisions required for specific complex transactions.[81] In any case, if the consultant concludes that the firm's expectations for the consulting engagement are unrealistic, the consultant should communicate that to the firm. In the more usual case, where the employer's expectations are reasonable but diffuse, clear communication about the diagnosis of the associate's writing problem and the consultant's plan for the coaching engagement will make it more likely that the employer's expectations will be satisfied.-

IV. ETHICAL ISSUES

Ethical or otherwise challenging issues can arise when a legal writing faculty member consults on writing with a legal employer.[82] Among these issues are whether, by working with an associate on client documents, the consultant is engaging in the practice of law, as well as issues that arise when, notwithstanding diligent coaching, the associate being coached is fired and feels betrayed.

As a threshold, the full-time faculty member must limit consulting activities to those that are consistent with the faculty member's responsibilities as a member of a law school faculty.[83] For purposes of law school accreditation, the "primary professional employment" of the full-time faculty member must be with the law school and "outside

[81] *See* Schulze, *supra* note 40, at 92–93 (discussing the possibility of consultants lacking transactional experience).

[82] *See generally* Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421 (2001) (examining the ethical issues that arise when law professors act as lawyers and consultants); Little, *supra.* n. 40 at 245 (2001).

[83] See notes 84-87 *infra* and accompanying text.

professional activities" must be limited to those that "relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, [and] are of service to the legal profession and the public generally. . . ."[84] In its Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities,[85] the Association of American Law Schools (AALS) recognizes that consulting benefits a law school, but only when the faculty member limits consulting activities so they do not interfere with institutional responsibilities.[86]

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[84] *See* Am. Bar Ass'n, ABA Standards for the Approval of Law Schools, Standard 402(b): Responsibilities of Full Time Faculty (2007), *available at* http://www.abanet.org/legaled/standards/20072008 Standards WebContent/Chapter%204.pdf [hereinafter ABA Standards]. Standard 402(b) states:

> A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.

Id.

Interpretation 402–4 explains:

> Regularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under this Standard. This presumption may be rebutted if the law school is able to demonstrate that the individual has a full-time commitment to teaching, research, and public service, is available to students, and is able to participate in the governance of the institution to the same extent expected of full-time faculty.

Id. Standard 404(a) requires law schools to establish policies with respect to the responsibilities of full-time faculty members with respect to teaching, research and scholarship, obligations to the law school and to the university community, obligations to the profession, and obligations to the public.

[85] Am. Ass'n of Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, *available at* http://www.aals.org/about_handbook_sgp_etch.php. The statement of good practices is not a disciplinary code but provides guidance to law professors concerning their responsibilities to among others, the law school. *Id.*

[86] Am. Ass'n of Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, *available at* http://www.aals.org/about_handbook_sgp_etch.php states that

> [s]uch involvement may help bring fresh insights to the professor's classes and writing. Excessive involvement in outside activities, however, tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations.

When a legal writing faculty member devotes time and effort to improving the writing of practicing lawyers, this serves the legal profession and the public generally and is likely to yield new insights that may be applied in teaching and scholarship.[87] Whether any faculty member's consulting interferes with institutional responsibilities must be judged on a case-by-case basis. There are no clear rules for when consulting interferes with these core responsibilities: AALS Regulations give only general guidance by stating that "professional activities outside the law school are not precluded if limited so as not to divert the faculty member from the primary interest and duty as legal educator."[88] A workable general rule may be the anecdotal "twenty percent rule," which limits outside work to one day a week.[89]

Even when consulting activities are consistent with the faculty member's institutional responsibilities, the faculty member must consider whether the consulting

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> Professors should comply with applicable laws and university regulations and policies concerning the use of university funds, personnel, and property in connection with such activities.

Id.

[87] *See supra* Section I. (discussing benefits of consulting by full-time legal writing faculty).

[88] Am. Ass'n of Law Schools, Bylaws of the Association of American Law Schools, Inc., § 6–4.2 (2004), *available at* http://www.aals.org/about_handbook_requirements.php#6. Section 6-4.2 of the AALS Executive Committee Regulations also address limits on outside professional activities:

> To determine whether outside professional activities are properly limited so as not to divert a full-time faculty member from the primary interest and duty as a legal educator, the following factors should be considered:
>
> (i) The extent to which the outside activity coincides with the full-time teacher's major fields of interest as a teacher and scholar;
>
> (ii) The character of the professional activity as a source of novel and enriching experience that can be directly utilized in the person's capacity as teacher and scholar;
>
> (iii) The degree to which the demands of the outside activity interfere with the teacher's regular presence in the law school and availability for consultation and interchange with students and colleagues; and
>
> (iv) The extent to which the outside activity may properly be characterized as public service, as distinct from the pursuit of private purposes.

Am. Ass'n of Law Schools, Executive Committee Regulations of the Association of American Law Schools, § 6–4.2 (2005), *available at* http://www.aals.org/about_handbook_regulations.php#6.

[89] See Little, *supra* n. 40 at 369 (discussing informal "twenty-percent" rule for outside work: "on average, no more than one day a week should be devoted to outside work of any kind").

engagement constitutes the practice of law and thus gives rise to the full panoply of rules relating to professional responsibility of a lawyer to a client.[90] While this question will ordinarily not arise when a consultant gives a seminar to a group of lawyers within a firm, the question may arise when, in the course of coaching an individual associate, the consultant contributes to a document that the associate is preparing in connection with the associate's representation of a particular client.[91]

While some consulting relationships arguably create attorney-client relationships between the consultant and the client of the firm,[92] the consulting relationship between a law firm and a legal writing faculty member who is hired to coach an associate should not ordinarily be analyzed in that way, but rather should be analyzed as an attorney-assistant relationship.[93] When a consultant works on a client document in the course of coaching an associate, the law firm does not simply turn the document over to the consultant and step out of the way. Rather, the contributions the consultant makes to a document should best be seen as in the nature of recommendations, which the associate, and the associate's supervisors, must decide whether to accept or reject.[94] Notwithstanding this analysis, the

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[90] *See* Hanna, *supra* note 82, at 432–44 and authorities cited. An in-depth examination of this issue is beyond the scope of this Article.

[91] Indeed, in probing the law firm's goals for a consulting engagement, the consultant may perceive that the firm has a mixed motive in retaining the consultant—to gain additional resources on a particular project as well as to coach the associate on writing. In this situation, the consultant should reach a clear understanding with the firm concerning the consultant's role.

[92] *See* Nancy J. Moore, *The Ethical Role and Responsibilities of a Lawyer-Ethicist, The Case of the Independent Counsel's Independent Counsel*, 68 FORDHAM L. REV. 771, 784 n. 88.

[93] *See Hanna*, *supra* n. 82 at 434-38 (arguing that most law faculty consulting arrangements should be considered as attorney-assistant relationships rather than as the practice of law); *cf.* GOLDSTEIN & LIEBERMAN, *supra* note 25, at 73 (arguing that hiring professional readers would not constitute a violation of attorney-client privilege or confidentiality).

[94] *See* Hanna, *supra* n. 82 at 437-48.

consultant should be aware that the law governing what constitutes the practice of law varies from jurisdiction to jurisdiction.[95] In some jurisdictions, the consultant who contributes to a document may be obligated to sign it.[96]

If the consulting engagement does constitute the practice of law, rules prescribing the ethical conduct of lawyers would apply[97] and govern the confidentiality, conflict of interest, and loyalty issues that may arise. Moreover, if the consultant is not licensed to practice in the jurisdiction where the consulting takes place, the consultant may be engaging in the unauthorized practice of law.[98] Thus, although it will generally make sense pedagogically to use ongoing work product as a vehicle for coaching, the consultant must be mindful that this practice could conceivably result in the formation of a lawyer-client relationship with the client of the firm, and could thus conceivably result in a claim of liability.

Whether the consultant is in the position of lawyer or "assistant," the consultant should take care to preserve client confidences.[99] The firm may help the consultant in this regard by having the associate redact documents to remove client-identifying

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[95] Thompson West, 50 State Statutory Survey, Professional Responsibility (2007) (providing links and references to the professional responsibility statutes of all states).

[96] *See* Margaret Graham Tebo, *Scary Parts of Ghostwriting*, ABA J., Aug. 2007, at 16, 17 (noting that in some circumstances even when an attorney is writing for another attorney, state rules require drafting attorneys to sign court documents or a notation indicating the document was prepared by them).

[97] *See generally* MODEL RULES OF PROF'L CONDUCT. Also, even if the consultant is licensed to practice in the jurisdiction where the consulting takes place, the consultant should check to see if she has paid active or inactive bar membership fees. *See* Little, *supra* n. 40 at 346-47.

[98] *Id.* R. 5.5. *But see supra* text accompanying note 93.

[99] A lawyer is required to assure that the lawyer's assistants maintain client confidences. MODEL RULES OF PROF'L CONDUCT R. 5.3. But if the consultant is a lawyer who could be held to have engaged in the practice of law, the consultant should take on this responsibility.

information or require the consultant to sign a confidentiality agreement.[100]

Moreover, even when it is unlikely that a consultant would be found to engage in the practice of law, the consultant should take care to avoid potential conflicts of interest that could result in a claim of liability, even if they are unlikely to result in actual liability.[101] First, a conflict of interest may arise because, with respect to the consulting engagement, the law firm's and client's interests may be different. Second, a conflict of interest may arise when the consultant works for several competing firms and clients of the respective firms may be competing litigants in a lawsuit or parties to the same transaction. Thus, the consultant should create some mechanism for identifying situations in which potential conflicts of interest exist and be careful to avoid those situations.[102]

The consultant should also be aware of whether the client knows that the associate is working with the consultant on a document pertaining to that client.[103] If the firm is willing to reveal that a consultant is working with the client's documents, documentation that the client is aware of the nature and scope of the consultant's services—that the consultant is not commenting or verifying the accuracy of the substantive law in a

[100] In light of the possibility that a consultant working for different firms may encounter a conflict of interest, it is probably preferable for the consultant to know the identity of the client with whose documents the consultant is working, and sign a confidentiality agreement, than to work with redacted documents.

[101] *See* MODEL RULES OF PROF'L CONDUCT 1.7.

[102] *Id.* R. 1.9.

[103] *See* Tebo, *supra* note 89, at 17 (quoting James McCauley, ethics counsel for the Virginia State Bar, as remarking that "[p]eople—clients and lawyers—want to know exactly what they're getting themselves into").

document, but rather is merely consulting on writing—may limit potential liability of the consultant.[104]

In light of these issues, some of which could lead to a claim of liability, the consultant should discuss potential ethical issues with the firm before entering into an agreement. In any event, the consultant should consider obtaining malpractice insurance to cover the consulting practice[105] and drafting a contract memorializing the understanding of the consultant and the firm that the consultant is being retained in the role of coach not lawyer.

A challenging issue of a different kind may arise when the consultant coaches an individual associate and the associate sees the consultant as an advocate as well as a coach. While the consultant is ordinarily hired by the employer, the consultant has close, often personal, contact with the associate being coached.[106] This situation may give rise to confusion on the part of the associate, who may see the consultant's loyalty as running to the associate as opposed to the employer. To avoid this, the consultant should communicate clearly with the associate concerning the duties the consultant owes to the employer and associate respectively. For example, the consultant should establish at the outset whether anyone but the consultant will see the information in the lawyer's and

[104] MODEL RULES OF PROF'L CONDUCT 1.2(c) (limitation of scope of representation must be reasonable and client must give informed consent); *see* Tebo, *supra* note 89, at 17 (recognizing that state ethic rules prohibit limiting representation unless it does not injure the client's interests).

[105] *See* Hanna, *supra* note 82, at 460–64. Most states offer professional liability insurance to professors at rates lower than rates charged to full-time attorneys. *Id.* at 460. Professors, however, may encounter difficulty obtaining insurance if they are not licensed in the jurisdiction in which they teach or are not licensed in any jurisdiction. *Id.* at 460–61. Professors working as of counsel with large law firms may be covered under the firm's insurance—It is unclear whether writing consultants would similarly be covered. *See id.* at 463.

[106] If an associate becomes dependent on the consultant and the consultant is only hired for a short-term time period, the associate may request to continue receiving the consultant's services and pay for it herself. But if the consultant's work constitutes representation of the clients of the firm, this solution may itself create ethical problems. *See supra* Section IV.

employer's diagnostics. Also, the consultant should explain precisely the consultant's reporting obligations, including whether the consultant will submit confidential progress reports to the employer or share with the employer anything the lawyer tells the consultant.

CONCLUSION

As experts in the substance and pedagogy of legal writing, full-time law school legal writing faculty can contribute to the profession by consulting in law firms and thereby fill a developing need for training and support of practicing lawyers in their writing skills. In addition to benefiting the law firm and individual associates, consulting benefits legal writing faculty, and therefore law schools, by enhancing their professional development. Apart from the substantive expertise of the consultant, the main requirement for a successful consulting relationship is communication, both with the firm that hires the consultant and with the lawyers with whom the consultant works. First and foremost, the consultant should educate the firm about the costs and potential benefits of various services to establish realistic expectations of what the consultant can accomplish in each context. A firm that insists on the lowest cost large group seminar may see results commensurate with the investment and be disappointed. A firm that gives a consultant free rein to work with an individual lawyer may be surprised at the number of non-billable hours spent by the associate as well as by the fee for the consultant's services. Finally, the consultant should set clear boundaries in the relationship with the associate and be aware of and take action to avoid potential ethical problems or liability with respect to clients on whose work the consultant participates.