

# PROCEEDINGS

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CLAIMING OUR PLACE AT THE TABLE OF LEGAL ACADEMIA:  
EXAMINING TYPES AND TOPICS OF LEGAL WRITING SCHOLARSHIP

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## CLAIMING OUR PLACE AT THE TABLE OF LEGAL ACADEMIA: EXAMINING TYPES AND TOPICS OF LEGAL WRITING SCHOLARSHIP

ELIZABETH E. BERENGUER<sup>1</sup>

The legal writing community is on a discipline-building mission, and one effort in discipline building occurred this summer through discussion groups at the SEALS Conference. During one of the discussion groups, the following questions (among others) were posed: (1) How might a definition of legal writing scholarship advance the discipline? (2) Might a definition limit growth of the discipline or exclude the work of some? This essay adds to that conversation.

Full disclosure: I am generally opposed to creating labels and categorizing things and people because labels limit potential and create opportunities for exclusion rather than community building. That said, I can appreciate the desire for definitions that can help people identify where they belong and what they should be doing. But the idea that we need to define legal writing scholarship seems a bit like an adolescent obsession with defining what is “in” and what is “out.” To me, it seems the question we should be asking is, “What are the contours of our discipline?”

In its inaugural issue, the *Savannah Law Review* published an entire symposium about the discipline of legal writing.<sup>2</sup> Authors Ken

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<sup>2</sup> Elizabeth B. Megale, *A Place at the Table*, 1 *Savannah L. Rev.* vii (2014).

Chestek,<sup>3</sup> Linda Edwards,<sup>4</sup> Lucy Jewel,<sup>5</sup> Teri McMurtry-Chubb,<sup>6</sup> and Chris Rideout<sup>7</sup> offered thoughtful insights about legal writing as a discipline and how those who write about it belong at the academic table. That issue would be a good place for us to look when thinking about what it is that makes legal writing a legitimate discipline within the legal academy. But, since the question of what constitutes legal writing scholarship, specifically, is on the table, let's dig in.

Defining legal writing scholarship raises two issues that are related but significantly different. One involves the type of documents that constitute “legal writing scholarship.” The other involves the topics that might constitute “legal writing scholarship.” I will address both of these in turn.

### **Types of Legal Writing Scholarship**

Generally, carving out a special definition for legal writing scholarship in terms of the type of document produced seems unnecessary and risky. The term “scholarship” is already commonly understood in legal academia as it relates to the type of document produced. Tenure standards at most institutions specifically identify acceptable document formats that conform with defined scholarship guidelines. Generally, scholarship guidelines demand that the writer engage in a rigorous process of research and writing that results in a work product, typically an article or essay, that is footnoted with citations to other sources and that contributes meaningfully to the “conversation.” An article is lengthier and more heavily footnoted

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<sup>3</sup> Kenneth D. Chestek, *The Life of the Law Has Not Been Logic: It Has Been Story*, 1 Savannah Law. Rev. 21 (2014).

<sup>4</sup> Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 Savannah L. Rev. 1 (2014).

<sup>5</sup> Lucille A. Jewel, *The Doctrine of Legal Writing - Book Review of Linda H. Edward's Readings in Persuasion: Briefs That Changed the World*, 1 Savannah L. Rev. 45 (2014).

<sup>6</sup> Teri A. McMurtry-Chubb, *Toward a Disciplinary Pedagogy for Legal Education*, 1 Savannah L. Rev. 69 (2014).

<sup>7</sup> J. Christopher Rideout, *Knowing What We Already Know: On the Doctrine of Legal Writing*, 1 Savannah L. Rev. 103 (2014).

than an essay, but both should clearly identify a thesis and defend that thesis. The final written product should demonstrate that the writer is well-informed on the topic, has read the works of other scholars in the field, and has critically considered the nuances of how the thesis intersects with the existing body of scholarship.

The discussion at SEALS suggested an interest in expanding the definition of scholarship to include shorter and more practical pieces that are written based on our experiences in the classroom or in practice. These shorter practical pieces are valuable to legal writing professors and practitioners who read them and apply what they learn to their everyday work. Additionally, there are a variety of publication outlets, like blogs, bar publications, and practice journals, so publication is typically easier and less stressful than publishing in a traditional law review or journal.

That some desire to characterize these pieces as scholarship is understandable. They are not terribly difficult or time-consuming to write; they are a quick and easy publication to add to a resume; they are helpful to professors and practitioners; and they might even be cited. Significantly, these pieces may be the only type of writing that some legal writing professors can accomplish considering status issues, lack of support for scholarship, and the overwhelming teaching loads at many institutions. Characterizing these shorter, practical pieces as scholarship would allow those who are not writing traditional articles and essays to be recognized as scholars.

Undoubtedly, these shorter practical pieces add value to our discipline. Take this essay, for example; I certainly would not have written it if I did not hope to contribute meaningfully to building the discipline. It even has a few footnotes! But it is not scholarship because it is not rigorously and thoroughly researched, and it is far too short. It is simply a discipline-building essay that offers my perspective on the questions posed, based on more than a decade of experience teaching legal writing, researching, and producing

scholarship. Although this piece occupies a valuable place in our discipline, it does not belong in the category of legal scholarship.

We gain nothing for our profession by labeling these shorter, practical pieces as scholarship. In fact, we harm our discipline when we create artificial barriers highlighting the differences between legal writing and the rest of legal academia. Legal scholarship is itself a genre of writing. It must conform to certain expectations, including rigor, length, and citations. We do not have the power to change the norms of legal scholarship by fiat, nor should we try to claim such power. Doing so only marginalizes us and justifies the negative stereotypes that legal writing professors are not “real” law professors. If we seek legitimacy and acceptance in academia, then creating a definition of scholarship only marginalizes us more if that definition includes writings that do not match the definition of scholarship in the broader academic community.

Respecting the norms of scholarship is no different than teaching our students about the different genres of legal writing in practice: a contract is not a brief, an opinion letter is not legislation, and a motion is not an order. As legal writing professors, we know that not all documents are created equally, and we should not try to force legal academia to accept short, less rigorous practical pieces as legal scholarship.

Acknowledging what scholarship is does not arbitrarily or artificially marginalize those who are not writing scholarship; the fact that they are not writing scholarship simply means that their writing falls into some other category. Scholarship is just one of many valuable genres of academic writing that an academic may choose to pursue. For these reasons, I would urge us as a discipline to refrain from attempting to change the definition of “legal scholarship” to capture documents that do not conform to the longstanding norms of scholarship.

### **Topics for Legal Writing Scholarship**

Turning to the second question, should we label which topics count as legal writing scholarship? Here again, we run the risk of unnecessarily alienating ourselves and highlighting ways in which we should not belong in legal academia; further, we risk harming our own community by excluding the valuable contributions of scholars within our discipline. No other discipline within legal academia defines or delineates the subject matter of “legal scholarship.” There is no “torts scholarship” or “contracts scholarship.” There is no arbiter of what belongs in any artificial category of scholarship because doctrinal categories do not exist.

The categories that do exist are ones like normative legal scholarship or reformist legal scholarship, to name just two. Critical theories also exist, like critical race theory or critical feminist theory. But none of these categories are specific to any particular doctrine, nor should they be. The categories speak to the various theoretical frameworks that might guide a particular analysis in a piece of scholarly writing. They might help an author find a voice, a point of view, or a lens through which to examine an issue. These categories are not specific to any doctrine, though. In fact, a variety of topics might be relevant to the legal writing discipline: pedagogy, learning theory, cognitive psychology, rhetoric, literature, and so on, just like a variety of topics might be relevant to the disciplines of torts, contracts, or criminal law.

### **Building a Discipline through Scholarship**

As far as building our discipline, engaging more legal writing professors in the process of scholarly writing is essential. To thrive as a discipline, we must build a community of thinkers who regularly engage in the rigorous process of scholarly writing. The topic of any given article is almost beside the point. That is not to say that scholarship on topics central to our discipline are not important; they absolutely are. But scholarly writing on any topic is valuable to

building the discipline because, when we produce scholarship, we embrace our responsibilities as members of the academic community to engage deeply with and contribute meaningfully to an existing body of scholarship.

Writing scholarship is transformative. The process changes how we think about the world around us, so it will necessarily change how we engage with each other on all topics, not just those we are studying through our scholarship. Our conversations with each other will be more nuanced and meaningful because our brains will have opened in ways that simply are not possible absent the scholarly writing process. Writing scholarship also makes us better professors because it enriches the way we think about teaching, develops our empathy for students who struggle with legal writing, and challenges our ways of thinking about the world. When we write scholarship, we walk our talk and demonstrate for our students that we ask hard things of ourselves, not just of them.

In answer to the scholarship questions posed above, I would revise them to ask, “How do we build our discipline by developing an active and diverse scholarly community?” I would caution us not to draw hard lines that create barriers to entry, while we also preserve longstanding norms defining “legal scholarship.” This calls for mentoring nascent scholars, supporting experienced scholars by reading and citing their work, and advocating for better status and pay at institutions where the workload is too heavy to support writers who are pursuing a scholarly agenda.

The rigorous scholarship written by those within our community demonstrates that we are scholars, and we belong in academia. And all of our scholarship belongs to our community.