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A PROVISIONAL DEFINITION OF “LEGAL WRITING SCHOLARSHIP”

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Definition is always a tricky task.² Nowhere is this more true than with the phrase “legal writing scholarship.” The phrase, which is meant to describe a particular variety of academic research products, has been a point of contention among those who write this kind of scholarship (and among those who reject its legitimacy within the legal academy).

This essay, drawn from my comments at and participation in the 2021 SEALS discussion group on legal writing scholarship, explores how the phrase “legal writing scholarship” might be defined for the purpose of (1) identifying a body of literature that meets the definition and (2) identifying a community of scholars who write in the field. Although I do not intend to settle on a definition here, at the end of the essay, I propose a provisional, working definition for your consideration. That definition is meant as a starting point for future stakeholder conversations about what legal writing scholarship is and can be.

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² One rhetorical move of definition is that of “framing”—a definition makes selected aspects of the defined thing visible within a frame and, at the same time, places other characteristics outside the frame, rendering them invisible. Definitions, then, have the power of inclusion and exclusion. We should be mindful of the exclusionary consequences of definitional moves.

Why Defining Legal Writing Scholarship Is Important

Preliminarily, I offer two thoughts on why it might be important to define the phrase. First, defining legal writing scholarship will help identify what academic literature and research should influence the teaching of legal writing courses, both in law schools and, as is occurring more frequently, in undergraduate schools. In other words, identifying what constitutes “legal writing scholarship” has the potential to improve the quality of instruction in legal writing courses and the professional advancement of faculty who teach those courses.

When faculty teaching legal writing are reading legal writing scholarship, the knowledge and understanding that result from high-quality research can influence improvements in legal writing curricula. In other words, a “canon” of “legal writing” that is continuously developing and is influenced by the ongoing conversation between researchers in the field can improve teaching. And improving legal writing teaching means improving legal writing in the legal profession itself, a goal worthy of our efforts and expected of our discipline.

Second, creating definitional boundaries for legal writing scholarship will help scholars find each other and engage in a scholarly conversation about legal writing. Entering a conversation about a topic requires familiarity with what has been written about the topic. Without boundaries on the topic, it can be difficult for legal writing scholars to identify the conversations they are entering. Just as with any area of research, boundaries for legal writing scholarship will be fluid and, as the discipline matures, evolves, and develops over time, sub-categories will continue to emerge. But, having a clearer starting point for what constitutes the literature in the field will help legal writing scholars to find and talk to each other via their scholarship, building upon and integrating each other’s ideas.

Developing a Definition

My starting point for thinking about the definition of “legal writing scholarship” is law and rhetoric scholar James Boyd White’s definition of “law.” He writes that law is a species of “art by which culture and community are established, maintained, and transformed [and] has justice as its ultimate subject.”⁵ What I particularly like about this definition is the way it suggests both agency and purpose; law is not a *thing* at which one points but instead is an action, an art, that one *does*. Law represents transactions, relationships, and communications between and among people.

Professor White’s definition of law gives us some things to think about regarding a definition of legal writing scholarship. First, White’s definition of law suggests that legal writing scholarship, like law, is *communication-centered*. The phrase “legal writing” itself centers communication as the object of study in legal writing scholarship. Writing is a communicative art. Through the deployment of language, writers use inventive strategies to communicate ideas about the law through various media. As a form of communication, legal writing involves all parts of the communication model: authors and readers (senders and receivers), messages, communication channels, and environments or contexts.

But legal writing is not just communication scholarship; it is scholarship that looks at writing in and about a particular domain: the law. This means that legal writing scholarship is always and inextricably *law-connected*. That is, to fall within the definition, the scholarship must have some connection to the production, reception, circulation, or environments of legal texts.

Because legal writing scholarship involves both communication and law, it is *interdisciplinary*⁴—one must integrate

⁵ James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* 28 (1985).

⁴ “Interdisciplinary” can be defined as “integrating knowledge and methods from different disciplines, using a real synthesis of approaches.” Alexander Refsum

knowledge of both the discipline of writing and the discipline of law to produce legal writing scholarship. Legal writing scholarship, perhaps, does not occupy a single disciplinary “space” in the academy but instead sits at a disciplinary “intersection,” demanding that its writers be well-read and have expertise in multiple disciplines.

Extending this thinking a bit further, legal writing scholarship might also have the characteristics of *cross-disciplinary* scholarship; that is, legal writing scholarship views the discipline of “law” from the perspective of the discipline of “writing,” which itself is informed by research in other disciplines like rhetoric, composition, communication, and cognitive psychology.⁵ For example, when legal writing scholarship examines metaphor use in judicial opinions, the scholarship is cross-disciplinary because it is looking at judicial opinions through the lens of literary or rhetorical theory. As an initial impression, I think that the cross-disciplinarity of legal writing scholarship is that it looks at the law *from the perspective of* writing, not the other way around. But I remain open to argument on that point.

The inter- and cross-disciplinary nature of legal writing scholarship means, of course, that not only law school academics produce legal writing scholarship. Other researchers in fields like philosophy, linguistics, rhetoric, composition, and cognitive psychology can also engage in this work. Because legal writing scholarship may draw from different disciplines, those who claim to write this scholarship have the added pressure of staying abreast of developments in disciplines other than their own to ensure that a true interdisciplinary conversation is being had amongst scholars. This means, for example, that scholars working in law schools

Jensenius, *Disciplinarity: intra, cross, multi, inter, trans*, (Mar. 12, 2012), <https://www.arj.no/2012/03/12/disciplinarity-2/>.

⁵ “Cross-disciplinary” can be defined as “viewing one discipline from the perspective of another.” *Id.*

cannot assume that only law scholars write about legal writing or possess that expertise; insularity is not an option in an interdisciplinary discipline. Thus, those interested in legal writing as a focus of research have the added obligation of identifying the community of scholars who write in the field, wherever they may be, and reading what they write.

Examining a Working Definition

So where does that get us? So far, this is our working definition:

“Legal writing scholarship” is inter- and cross-disciplinary scholarship that is communication-centered and law-connected.

By definition then, legal writing scholarship is not confined to one theoretical perspective or research method. Theories from communication, rhetoric, composition, psychology, linguistics, and philosophy are obvious candidates to apply to improve our understanding of how legal writing works. Moreover, the research methods that can yield knowledge about legal writing are many—qualitative, quantitative, rhetorical, even historical methods might improve our understanding of legal writing. As scholars in an interdisciplinary space, legal writing scholars can use them all.

Thinking a bit more concretely, we might ask what topics fit within this definition. I think the range is fairly wide. A nonexclusive list of topics might include scholarship about

- how legal and other readers consume legal texts.
- how judges, lawyers, and nonlawyers write about the law.
- how legal texts persuade, influence, or accomplish other types of tasks.
- how different media (e.g., digital media) impact written messages about the law.

- how cultural, community, and environmental factors impact the production and reception of legal texts.

A final but critical component is required for a definition of legal writing scholarship: to be scholarship, legal writing scholarship must *create knowledge*. In other words, writing about legal writing, to be *scholarship*, must provide readers with insights or information that is new. These insights or information will most likely be about the production of, reception of, and communication environments for texts that communicate about the law.

A Provisional Definition for Your Consideration

In sum, I offer a provisional, working definition of legal writing scholarship for further discussion:

“Legal writing scholarship” is inter- and cross-disciplinary scholarship that is communication-centered and law-connected. It creates knowledge by offering new information or insights about the production of, reception of, and communication environments for texts that communicate about the law.⁶

⁶ There are many more open questions about the meaning of legal writing scholarship:

- Is “legal writing” really a subfield of the broader field of “legal communication”? If so, should we be working to define “legal communication scholarship”?
- How does scholarship on legal research fit into this definition of legal writing scholarship?
- How does pedagogical scholarship on the teaching of legal writing fit this definition?
- What standards should be used to evaluate the quality of legal writing scholarship? (Relatedly, is this essay legal writing scholarship? How about this roughly 1,100-word blog post I wrote: Kirsten K. Davis, *Lists as Visual Rhetorical Strategy for Brief Writing: Set-Off and Stack-Up*, App. Advoc. Blog (July 11, 2019) https://lawprofessors.typepad.com/appellate_advocacy/2019/07/lists-as-visual-rhetorical-strategy-for-brief-writing.html)
- Are there doctrinal areas in the law that are part of legal writing as a scholarly field? For example, could a First Amendment article be classified as legal writing scholarship? What characteristics would the article have to have to fall within the category?
- Is it possible that legal writing scholarship could be transdisciplinary? “Transdisciplinary” scholarship “create[s] a unity of intellectual frameworks beyond the disciplinary perspectives.” Jensenius, *supra* note 4. In other words, could legal

PROCEEDINGS

VOLUME 2

ISSUE 1

writing scholarship go beyond integrating the work of different disciplines or applying the perspectives of one discipline to another and achieve something else altogether? Could it occupy a new academic space and not sit at an intersection?