

## **JALWD**

### **Twenty Years of Exploring New Frontiers in Legal Writing Doctrine**

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#### **I. Introduction**

In 2004, the Association of Legal Writing Directors (ALWD) published the first volume of *The Journal of the Association of Legal Writing Directors (JALWD)*<sup>1</sup> as a mission-driven, ongoing periodical publication.<sup>2</sup> I was honored to write the Foreword for that volume.<sup>3</sup> The Foreword was titled *The Next Frontier: Exploring the Substance of Legal Writing*, and it introduced the legal writing world to ALWD's new journal and explained its daring mission: to publish articles that explore and expand the substantive doctrine of legal writing.<sup>4</sup> In this essay, I will briefly revisit the unique nature of *JALWD*'s mission, will explain how and why that mission was chosen, and will explore how the journal's execution of its mission over the last twenty years has had a profound impact on the development of legal writing scholarship and on the growth and maturity of legal writing as a discipline within the general legal academy.

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<sup>1</sup> *JALWD* changed its name to *Legal Communication & Rhetoric: JALWD* in 2011, beginning with volume eight. See Joan Ames Magat & Ruth Anne Robbins, *Preface*, 8 *LEGAL COMM. & RHETORIC* vi (2008). For the sake of ease, I will refer to the journal as *JALWD* throughout this essay.

<sup>2</sup> For reasons that will be explained later, see *infra* section II, the 2004 volume of *J. ALWD* was actually numbered volume two.

<sup>3</sup> Michael R. Smith, *Foreword, The Next Frontier: Exploring the Substance of Legal Writing*, 2 *J. ALWD* 1 (2004).

<sup>4</sup> See generally *id.*

## II. The creation of *JALWD*

The creation of *JALWD* as an ongoing periodical publication occurred in two important steps. First, in 2002, under the leadership of then-President Pamela Lysaght, ALWD published the first volume of *JALWD* as a Proceedings edition that contained articles based on presentations at the Association's 2001 Biennial Conference held at University of Minnesota Law School.<sup>5</sup> The editors of that first volume were Professor Lysaght, Bradley G. Clary, and Amy E. Sloan.<sup>6</sup> Then, after the publication of the first volume of *JALWD*, Professor Sloan, as the newly-elected ALWD President, and the ALWD Board of Directors decided to explore the idea of establishing *JALWD* as an ongoing periodical publication. At that point, still in 2002, the Board appointed an Editorial Committee to prepare a proposal setting out the potential journal's mission, policies, and procedures.<sup>7</sup> The members of that Editorial Committee consisted of me, Linda L. Berger, M. H. Sam Jacobson, and Danielle Istl.<sup>8</sup> I was asked to lead the effort of crafting a mission for the journal that would both set it apart from other legal writing periodicals and significantly advance the development of legal writing as a respected discipline.<sup>9</sup> That effort led to *JALWD*'s original—and enduring—mission. Before I explain that mission, however, I must first describe the scholarly environment in which it was created.

## III. The status of scholarship by legal writing professors in 2002

In 2002, several circumstances in the legal academy conspired to send the message that legal writing as a field of study lacked substance worthy of serious academic exploration. I wrote extensively about these circumstances in my Foreword to the 2004 volume of *JALWD*.<sup>10</sup> I will briefly summarize these circumstances here.

First, as of 2002, many law schools staffed their legal writing courses with part-time employees or teaching professionals with no scholarship expectations, which limited the incentive and the ability of these

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<sup>5</sup> See generally *Erasing Lines: Integrating the Law School Curriculum—Proceedings from the 2001 ALWD Conference*, 1 J. ALWD 1 (Pam Lysaght, Bradley G. Clary & Amy E. Sloan eds., 2002) [hereinafter *Erasing Lines*]; see also Smith, *supra* note 3, at 2 n.1, 5 n.9.

<sup>6</sup> See generally *Erasing Lines*, *supra* note 5.

<sup>7</sup> See Linda Berger, *Preface*, 2 J. ALWD vii, viii (2004).

<sup>8</sup> *Id.*

<sup>9</sup> See Magat & Robbins, *supra* note 1, at x.

<sup>10</sup> See Smith, *supra* note 3, at 22–26.

legal writing professionals to produce scholarship of any kind.<sup>11</sup> Second, many law schools did not value scholarship on legal writing and strongly encouraged those legal writing teachers who did publish to write scholarship in other, more traditional doctrinal areas.<sup>12</sup> Third, the large majority of legal writing teachers who did publish articles on legal writing focused not on expanding legal writing doctrine, but on the politics of legal writing within the academy, legal writing program design, or legal writing pedagogy.<sup>13</sup> Fourth, those legal writing teachers who did publish pieces on substantive legal writing mainly focused on anecdotal lawyering advice or topics of general English composition.<sup>14</sup> As I said, these circumstances created and perpetuated the perception within the legal academy and the legal profession that legal writing as a discipline lacked potential for learned exploration and was devoid of profound substance that could engage the attention of serious scholars.

It was within this scholarship culture, and with attention to it, that *JALWD*'s first Editorial Committee crafted the *Journal*'s mission. The mission was designed in significant part to address the underwhelming reputation of scholarship on the substance of legal writing. As I wrote in my Foreword, “[One] goal of this Journal is to encourage scholarship on substantive legal writing doctrine and, in doing so, to demonstrate in dramatic fashion that legal writing has substance worthy of academic exploration.”<sup>15</sup>

#### IV. The mission of *JALWD*

The mission of *JALWD* is to advance the study of professional legal writing and to become an active resource and a forum for conversation between the legal practitioner and the legal writing scholar. The Journal is dedicated to encouraging and publishing scholarship (1) focusing on the substance of legal writing, (2) grounded in legal doctrine, empirical research, or interdisciplinary theory; and (3) accessible and helpful to all “doers” of legal writing: attorneys, judges, law students, and legal academicians.<sup>16</sup>

<sup>11</sup> See *id.* at 22.

<sup>12</sup> See *id.* at 22–23, 22 n.82.

<sup>13</sup> See *id.* at 22–24.

<sup>14</sup> See *id.* at 18, 24.

<sup>15</sup> *Id.* at 24.

<sup>16</sup> Association of Legal Writing Directors, *copyright page*, 2 J. ALWD ii, ii (2004). This original statement of *JALWD*'s mission can still be seen on *JALWD*'s webpage. ASS'N OF LEGAL WRITING DIRS., Legal Communication & Rhetoric: *JALWD*, <https://www.alwd.org/aboutlcr> (last visited Feb. 26, 2023).

This mission statement identifies three bedrock characteristics of the scholarship the Journal has sought to attract and publish. The first and third bedrock characteristics call for *scholarship on the substance of legal writing accessible and helpful to all “do-ers” of legal writing*. My Foreword to the inaugural volume identified five categories of legal writing scholarship: (1) Scholarship on Program Design and the Administration of Legal Writing Programs; (2) Scholarship on Legal Writing Pedagogy; (3) Scholarship on Legal Writing as a Profession; (4) Scholarship on Legal Writing Scholarship; and (5) Scholarship on the Substance of Legal Writing.<sup>17</sup> While all of these categories of scholarship have been important to the advancement of legal writing, surveys at the time of *JALWD*'s creation indicated that legal writing scholars were spending a disproportionate amount of time and energy publishing works within the first four categories and relatively little time and energy on the fifth category: scholarship that explores the nature of effective legal writing in practice.<sup>18</sup> This phenomenon had two unfortunate consequences. First, as previously mentioned, by collectively ignoring a deep exploration of the topic, the legal writing profession had sent the harmful message within the legal academy that legal writing—unlike torts, criminal law, constitutional law and other traditional law school subjects—lacked substance that would support serious scholarship. Second, legal writing professionals had spent most of their scholarly effort talking amongst themselves. The audience of the first four categories of legal writing scholarship is other legal writing teachers (and maybe law school administration generally). The irony was palpable: while legal writing is a quintessential practical skill, legal writing experts were spending relatively little effort producing scholarship targeted to the practitioners of the skill. *JALWD*'s mission was designed to address these areas of concern by encouraging the best minds in our discipline to explore the true nature of effective legal writing (broadly defined) and to share this understanding with the practitioners of the craft.

The second bedrock characteristic of *JALWD*'s targeted scholarship calls for works *grounded in legal doctrine, empirical research, or interdisciplinary theory*. As I discussed earlier, at the time of *JALWD*'s creation, the scholarship that was being produced on substantive legal writing was predominantly anecdotal and was not based on underlying theory or empirical research. The anecdotal nature of this scholarship again set it apart from the scholarship that was produced by non-legal writing law faculty and which was historically valued by the legal academy. Not

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<sup>17</sup> See Smith, *supra* note 3, at 5–8.

<sup>18</sup> *Id.* at 22–23.

surprisingly, this phenomenon also contributed to the inferior perception of legal writing as an area of study. *JALWD*'s mission sought to address this problem as well by calling on contributors to go beyond anecdote and to explore the essence of effective legal writing from the standpoints of interdisciplinary theory and/or empirical data.

## V. The execution of *JALWD*'s mission

Despite leadership and staffing changes in *JALWD*'s editorial board over the years, *JALWD* as a publication has remained faithful to its original mission. The *Journal* has continued to focus primarily on articles that explore legal writing doctrine. As a consequence, it has been a reliable and "active resource and a forum for conversation between the legal practitioner and the legal writing scholar."<sup>19</sup>

The *Journal* has also maintained its commitment to publish scholarship that is based on serious research rather than anecdote or informal advice. The *Journal* regularly publishes articles that analyze effective legal writing and advocacy based on an in-depth look at legal doctrine. *JALWD* has particularly made a name for itself by publishing articles that apply interdisciplinary theory to the practice of legal writing. The following is a chronological list of representative examples of interdisciplinary articles on legal writing doctrine that have appeared in *JALWD* since its inception. I have made no effort to include all the *Journal*'s interdisciplinary scholarship in this list. The listed items merely reflect the wide variety of disciplines that have served as the basis for these types of articles:

Doctrinal Scholarship Based on Metaphor Theory—Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).

Doctrinal Scholarship Based on Principles of Typography and Document Design—Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

Doctrinal Scholarship Based on Classical Rhetoric Theory—Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ALWD 5 (2006).

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 19 Association of Legal Writing Directors, *supra* note 16, at ii.

- Doctrinal Scholarship Based on Economics Theory and Evolutionary Psychology—Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ALWD 32 (2008).
- Doctrinal Scholarship Based on Cognitive Linguistics Theory—Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 Legal Comm. & Rhetoric 1 (2011).
- Doctrinal Scholarship Based on Music Theory—Ian Gallacher, *The Count's Dilemma: Or, Harmony and Dissonance in Legal Language*, 9 Legal Comm & Rhetoric 1 (2012).
- Doctrinal Scholarship Based on Narrative Theory and Applied Storytelling—J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 Legal Comm. & Rhetoric 67 (2013).
- Doctrinal Scholarship Based on Working-Memory Theory and Psycholinguistics—Andrew M. Carter, *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers*, 11 Legal Comm. & Rhetoric 31 (2014).
- Doctrinal Scholarship Based on Principles of Electronic Communication—Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1 (2015).
- Doctrinal Scholarship Based on Visual Rhetoric Theory—Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 Legal Comm. & Rhetoric 107 (2016).
- Doctrinal Scholarship Based on Cognitive Categorization Theory—Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 Legal Comm. & Rhetoric 39 (2016).
- Doctrinal Scholarship Based on Linguistics and Probability Lexicon—Joe Fore, "A Court Would Likely (60-75%) Find . . .": *Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 Legal Comm. & Rhetoric 49 (2019).
- Doctrinal Scholarship Based on Principles of Tone in Literary Theory—Lisa Eichhorn, *Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions*, 18 Legal Comm. & Rhetoric 1 (2021).

Doctrinal Scholarship Based on Principles of Grammar and Psycholinguistics—Jacob M. Carpenter, *The Problems, and Positives, of Passives: Exploring Why Controlling Passive Voice and Nominalizations Is About More Than Preference and Style*, 19 *Legal Comm. & Rhetoric* 95 (2022).

Also, in keeping with its stated mission, *JALWD* has published substantive legal writing articles based on the authors' original empirical research. Here are a few examples from over the years:

Judith D. Fischer, *Got Issues? An Empirical Study about Framing Them*, 6 *J. ALWD* 1 (2009).

Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 *J. ALWD* 1 (2010).

Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 *Legal Comm & Rhetoric* 99 (2012).

Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias*, 14 *Legal Comm & Rhetoric* 1 (2017).

As one can see from the above illustrations, *JALWD* over the last twenty years has stayed true to its original mission. First, the Journal predominantly publishes articles that expand knowledge on legal writing in practice. Second, these articles go beyond informal advice and ground their instruction on comprehensive legal research, respected interdisciplinary theory, and/or original empirical data. Third, and perhaps most importantly, these articles are written in a style that is “accessible and helpful to all ‘doers’ of legal writing: attorneys, judges, law students, and legal academicians.”<sup>20</sup>

## VI. *JALWD*'s legacy and its contribution to the maturity of legal writing as a substantive discipline

Legal writing as a discipline has matured greatly over the last twenty years, and *JALWD* has played a big role in this maturation process. Operating as both a resource and a model, as both an outlet and an exemplar, *JALWD* has helped usher in an era of tremendous expansion of substantive legal writing doctrine. Following the lead set by *JALWD*, many legal writing scholars today are publishing groundbreaking pieces on substantive legal writing topics, and this valued scholarship is being

20 *Id.*

published in peer-edited legal writing journals as well as in traditional law reviews.

The expansion of legal writing doctrine based on interdisciplinary theory has also found its way into textbooks. Consider, for example, the following interdisciplinary legal writing textbooks now on the market:

Linda L. Berger & Kathryn M. Stanchi, *Legal Persuasion: A Rhetorical Approach to the Science* (2018).

Catherine Cameron & Lance Long, *The Science Behind the Art of Legal Writing* (2d ed. 2019).

Linda H. Edwards, *Readings in Persuasion: Briefs that Changed the World* (2012).

Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (2016).

Brian L. Porto, *Rhetoric, Persuasion, and Modern Legal Writing: The Pen Is Mightier* (2020).

Ruth Anne Robbins, Steve Johansen & Ken Chestek, *Your Client's Story: Persuasive Legal Writing* (2d ed. 2018).

Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (3d ed. 2012).

Kristen Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (2d ed. 2016).

The legal writing profession has also seen in recent years the creation and organization of events and conferences that focus predominantly on substantive legal writing topics from interdisciplinary perspectives. Here are just a few examples:

Applied Legal Storytelling Conferences—“Applied Legal Storytelling (AppLS) examines the use of stories, storytelling, or narrative elements in law practice, legal education, and the law. . . . The Applied Legal Storytelling Conference brings together academics, judges, other lawmakers, practitioners, and any other type of legal storyteller. The conference has previously convened in 2007 (London), 2009 (Portland), 2011 (Denver), 2013 (London), 2015 (Seattle), 2017 (Washington D.C.), 2019 (Boulder), and 2021 (Virtual/Mercer).”<sup>21</sup>

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<sup>21</sup> LEGAL WRITING INSTITUTE, *Ninth Applied Legal Storytelling Conference*, LWI, <https://www.lwionline.org/conferences/ninth-applied-legal-storytelling-conference> (last visited Mar. 19, 2023).

The Feminist Judgments Project—“The United States Feminist Judgments Project is part of a global collaboration of hundreds of feminist law professors who reimagine and rewrite key judicial decisions from a feminist perspective.”<sup>22</sup>

West Coast Rhetoric Scholarship Workshop—“This workshop is aimed at gathering and encouraging a critical mass of people who enjoy collaborating with or at least talking to one another about law and rhetoric scholarship, broadly defined. . . . This annual scholarship exchange is organized by an informal consortium of professors from UNLV, the University of Washington, and Stanford (Jeanne Merino).”<sup>23</sup>

The “Psychology of Persuasion” Conference hosted by the University of Wyoming College of Law on September 18, 2015.

The “Impact of Cognitive Bias on Persuasion and Writing Strategies” Symposium hosted by Brooklyn Law School on March 1, 2013.

The “Using Metaphor in Legal Analysis and Communication” Symposium hosted by the Mercer University Law Review on November 10, 2006.

Law review articles, books, and scholarly events: the serious exploration and expansion of the substance of legal writing is today a respected and robust area of legal scholarship. *JALWD*, which introduced its unique and visionary mission in 2004, has contributed substantially to this growth and to the general maturation of legal writing as a legal discipline. I look forward to the next twenty years, as *JALWD* continues to lead the exploration of new frontiers in legal writing doctrine.

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<sup>22</sup> UNLV WILLIAM S. BOYD SCHOOL OF LAW, *The U.S. Feminist Judgments Project*, UNLV, <https://law.unlv.edu/us-feminist-judgments> (last visited Mar. 19, 2023).

<sup>23</sup> UNLV WILLIAM S. BOYD SCHOOL OF LAW, *West Coast Rhetoric*, UNLV, <https://law.unlv.edu/event/west-coast-rhetoric-0> (last visited Mar. 19, 2023).