Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context

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New Rhetoric believes that writing is a process for constructing thought, not just the "skin" that covers thought.[1] The process of making meaning is messy, slow, tentative, full of starts and stops, a complex network of language, purposes, plans, options, and constraints.[2] Its outcome is uncertain: "Composition requires choosing all along the way, and you can't choose if there are no perceived alternatives . . . ."[3]

The rhetoric of legal discourse believes that writing is a process for constructing belief, not knowledge.[4] The process of making arguments is clear, orderly, linear, objective, and rational. Its outcome is "highly predictable: the lawyer is always right and his adversary is always wrong. . . . If the argument is effective, . . . [i]t 'follows' like the night follows the day."[5]

In contrast to the methodical march of legal discourse, New Rhetoric charts an uncertain course: when you leave home, you will not know your route, your destination, or your time of arrival.[6] Nonetheless, New Rhetoric promises teachers and students a powerful alternative for embarking on legal discourse, a disorienting and open-ended back-and-forth exploration that can help law students develop the habits of mature legal readers and writers. This explora-

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I owe special thanks to the good readers who read and responded to earlier versions of this article; to Ilene Durst, who introduced me to the work of Erika Lindemann and Mina Shaughnessy; and to Rick Ghan, who provided helpful research assistance.

1. See Ann E. Berthoff, The Making of Meaning: Metaphors, Models, and Maxims for Writing Teachers 69 (Montclair, 1981).
2. This description is drawn primarily from the following: Janet Emig, The Web of Meaning: Essays on Writing, Teaching, Learning and Thinking 4 (Upper Montclair, 1983); Maxine Hairston, The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing, 33 C. Comp. & Comm. 76, 85 (1982); Linda Flower, The Construction of Negotiated Meaning: A Social Cognitive Theory of Writing (Carbondale, 1994).
3. Berthoff, *supra* note 1, at 75.
4. Sanford Levinson, What Do Lawyers Know (And What Do They Do with Their Knowledge)? 58 S. Cal. L. Rev. 441, 455 (1985).
5. Gerald Wetlaufer, Rhetoric and Its Denial in Legal Discourse, 76 Va. L. Rev. 1545, 1558–59 (1990).
6. Nina Schwartz, Conversations with the Social Text, *in* Reclaiming Pedagogy: The Rhetoric of the Classroom, eds. Patricia Donahue & Ellen Quandahl, 60, 63–64 (Carbondale, 1989).

tion requires the reader and writer within each student's head to engage in a reflective conversation with one another and with what they read and write. During the conversation, the student-as-reader-and-writer continually negotiates meaning through a series of transactions. Through transactions between reader and writer; prior texts and this text; the individual and the context; first drafts and next drafts; this word and another; purposes, plans, and goals; constraints, conventions, and options, writing constructs thought and thought constructs writing.[7] Only for so long as both the student-as-reader and the student-as-writer remain willing to reflect and respond can the conversation continue.[8] Only for so long as the conversation continues can the reader and writer negotiate conflicts and make choices to reach the tentative resolution of second thoughts.[9] By using the ebb and flow of reader and writer, text and context for reflection and response, law students can experience the emergence of meaning and judgment over time.[10]

I. New Rhetoric and the Law School Setting

New Rhetoric began in theory about the nature of writing and the relationship between thought and language. The rhetorical theory was supported by the results of research describing the writing processes of experts. Backed by theory and research, New Rhetoric teachers began to focus their teaching on what writers "do" rather than on what writers "know," believing that what writers do is how they come to know.[11]

A. New Rhetoric Theory

In the New Rhetoric, writing is a process for creating knowledge, not merely a means for communicating it.[12] In the New Rhetoric, reading is a

7. Thus, dialectical processing is not only a cause of but also the result of reflective thought. See Marlene Scardamalia & Carl Bereiter, Development of Dialectical Processes in Composition, *in* Literacy, Language, and Learning, eds. David R. Olson et al., 307, 327 (New York, 1985).

8. See Chris M. Anson, Response Styles and Ways of Knowing, *in* Writing and Response: Theory, Practice, and Research, ed. Chris M. Anson, 332, 338 (Urbana, 1989) [hereinafter Writing and Response].

9. Linda Flower has suggested that rather than the relatively undirected process of conversation, the construction of meaning should be viewed as the more goal-directed process of negotiation. See Flower, *supra* note 2, at 65–75.

10. Although the teaching practices suggested here were developed for use in a legal writing course, they can be used in any course that incorporates legal reading and legal writing. For suggestions on teaching legal reading and legal writing throughout law school, see Philip C. Kissam, Thinking (by Writing) About Legal Writing, 40 Vand. L. Rev. 135 (1987); Leigh Hunt Greenshaw, "To Say What the Law Is": Learning the Practice of Legal Rhetoric, 29 Val. U. L. Rev. 861 (1995); Peter Dewitz, Reading Law: Three Suggestions for Legal Education, 27 U. Tol. L. Rev. 657 (1996); Carol McCrehan Parker, Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It, 76 Neb. L. Rev. 561 (1997).

11. The field that became known as composition studies "was transformed when theorists, researchers, and teachers of writing began trying to find out what actually happens when people write. . . . The goal has been to replace a prescriptive pedagogy (select a subject, formulate a thesis, outline, write, proofread) with a descriptive discipline whose members study and teach 'process not product.'" James A. Reither, Writing and Knowing: Toward Redefining the Writing Process, 47 C. Eng. 620 (1985), *reprinted in* The Writing Teacher's Sourcebook, 3d ed., eds. Gary Tate et al., 162, 162 (New York, 1994) [hereinafter Sourcebook].

12. Berthoff, *supra* note 1, at 68–69.

process for constructing meaning, not just an Easter egg hunt to find it.[13] As a rhetorical theory, New Rhetoric thus goes beyond the "process" approach. Its linchpin is not that writing should be taught as a process but instead that the process should be used to make meaning.

Other rhetorical theories located thought and knowledge somewhere outside of or before "writing." "Writing" was not the weaving of thought and knowledge through language, but the clothing of thought and knowledge in language.[14] For New Rhetoricians, however, "knowledge is not simply a static entity available for retrieval. Truth is dynamic and dialectical, the result of a process involving the interaction of opposing elements." Knowledge and truth are created *by* the process, rather than existing *outside* the process. The elements of the communication process—writer, audience, reality, language—"do not simply provide a convenient way of talking about rhetoric. They form the elements that go into the very shaping of knowledge."[15]

This knowledge-shaping process is complicated—an active "putting together" of meaning between reader, writer, and text, all of which are embedded in context and language.[16] In contrast, the traditional model of reading and writing was a straightforward act of decoding: the writer began with a main idea, the reader found and followed it, and both could agree on the point of the piece.[17] Although the knowledge-shaping process is more complex and demanding, it opens up reading and writing and makes them less forbidding. By acknowledging that neither reading nor writing begins in clarity, New Rhetoric assures students that the confusion is not in them, but in the process. At the beginning, reading and writing do and should confuse things.[18] Not until we are forced to reread and rewrite what we have read and what we have written do we come to any clear understanding.[19]

Despite their initial agreement that reading and writing construct meaning, New Rhetoricians began to disagree about whether the site for that

13. The construction of meaning depends not only on the reader's knowledge and experience. "[W]hen readers construct meaning, they do so in the context of a discourse situation, which includes the writer of the original text, other readers, the rhetorical context for reading, and the history of the discourse." Christina Haas & Linda Flower, Rhetorical Reading Strategies and the Construction of Meaning, 39 C. Comp. & Comm. 167 (1988).

14. See Emig, *supra* note 2, at 4.

15. James A. Berlin, Contemporary Composition: The Major Pedagogical Theories, 44 C. Eng. 765 (1982), *reprinted in* Sourcebook, *supra* note 11, at 9, 17. Other rhetorical theories located truth elsewhere: classical rhetoric "in the rational operation of the mind," positivist rhetoric "in the correct perception of sense impressions," and neo-Platonic rhetoric "within the individual, attainable only through an internal apprehension." *Id.*

16. See Anthony R. Petrosky, From Story to Essay: Reading and Writing, 33 C. Comp. & Comm. 19, 22 (1982); David Bartholomae & Anthony R. Petrosky, Facts, Artifacts and Counterfacts: Theory and Method for a Reading and Writing Course 12, 15 (Upper Montclair, 1986).

17. Many students prefer this more straightforward view: they "expect knowledge or information to be given to them rather than taking an active role in obtaining or shaping that knowledge." Katharine Ronald, The Self and the Other in the Process of Composing: Implications for Integrating the Acts of Reading and Writing, *in* Convergences: Transactions in Reading and Writing, ed. Bruce T. Petersen, 231, 235–36 (Urbana, 1986) [hereinafter Convergences].

18. See Bartholomae & Petrosky, *supra* note 16, at 21; Schwartz, *supra* note 6, at 62–63.

19. See Bartholomae & Petrosky, *supra* note 16, at 19, 21.

construction is primarily within the individual or primarily within a social context. Their disagreement started in cognitive science, which had determined that people naturally learn language and acquire thought patterns to organize and interpret their experience, but that interaction with society modifies a person's thought patterns and language use.[20] As cognitive research indicated a more profound influence by social processes, New Rhetoric divided into two groups. One group views writing as primarily inner-directed, the other as primarily outer-directed. "Inner-directed theorists seek to discover writing processes that are so fundamental as to be universal."[21] Outer-directed theorists believe that "thinking and language use can never occur free of a social context that conditions them"[22] and that knowledge therefore is a "social construction."[23]

Flowing from their theoretical differences, the two groups' research interests also differ: the inner-directed school observes the composition and cognition processes of individual writers; the outer-directed school analyzes the conventions of particular discourse communities.[24] Each school has criticized the other's theory, research, and practice.[25] The theory and research of the inner-directed group, which set out to study and describe writing processes, can be transformed into trying to prove that a universal "good" writing process

20. See Patricia Bizzell, Cognition, Convention, and Certainty: What We Need to Know About Writing, 3 PRE/TEXT 213, 214–15 (1982).

21. *Id.* at 215.

22. *Id.* at 217.

23. James A. Berlin, Rhetoric and Reality: Writing Instruction in American Colleges, 1900–1985, 175–76 (Carbondale, 1987). Rather than an outgrowth of New Rhetoric, social construction can be viewed as a countertheory. One author describes the beginning of New Rhetoric research in the early 1970s as a turning point in composition theory. At that point, the field turned away from "questions of value and the figure of the writer in a social context of writing to questions of process and the figure of the writer as an individual psychology." David Bartholomae, Writing with Teachers: A Conversation with Peter Elbow, 46 C. Comp. & Comm. 62, 68–69 (1995). The "displacement of the social and . . . celebration of the individual," Bartholomae writes, runs through all the subsequent strains of composition theory, research, and curriculum development. *Id.*

Some recent theories appear to draw on insights from both schools. For example, Linda Flower has suggested a "pedagogy of literate action" that would bring together the social, cognitive, and rhetorical strands and focus on the writer "as an agent within a social and rhetorical context." Flower writes that a literate action is "a socially embedded, socially shaped practice," and at the same time "an individual constructive act that embeds practices and conventions within its own personally meaningful, goal-directed use of literacy," and, because it is both social and individual, "a site of conflict among multiple goals, alternative goods, and opposing shoulds [that] calls for negotiation among unavoidable constraints, options, and alternatives." Literate Action, in Composition in the Twenty-first Century: Crisis and Change, eds. Lynn Z. Bloom et al., 249 (Carbondale, 1996) [hereinafter Composition in 21st Century].

24. See Bizzell, *supra* note 20, at 218. The inner-directed composition research used scientific research patterns and practices; Bizzell proposed instead a rhetorical analysis of discourse community practice, noting that then-recent developments in philosophy, literary criticism, and composition agreed on the centrality of discourse or interpretive communities. See *id.* at 239.

25. See, e.g., Lester Faigley, Competing Theories of Process: A Critique and a Proposal, 48 C. Eng. 527 (1986).

exists[26] and that it can be taught as "a lockstep series of stages that students MUST go through in a predetermined and rigid fashion."[27] The outer-directed school, which set out to study and describe discourse conventions, can be transformed into trying to institutionalize "the way we do things here"[28] or to label students as "insiders or outsiders, as people who either have the requisite values, knowledge, and skills to belong, or lack these necessary qualifications."[29]

Although the divide between the inner-directed and outer-directed schools was the widest, college composition theory also divided along lines drawn by different views of which elements in the composition process were the most important.[30] Expressivists emphasized the writer's personal expression through language;[31] rhetoricians were most interested in the transaction between reader and writer through language; the journalistic approach sought a correspondence of language with reality; formalists emphasized formal language traits in the text; the epistemic perspective emphasized transactions between the writer, language, and reality;[32] and social construction emphasized the context for writing through collaborative writing techniques[33] and immersion within simulated or real discourse communities.[34]

B. The Research

According to its proponents, New Rhetoric not only was philosophically attractive but also was supported by research into writers' composing processes.[35] By the 1980s, research was said to have verified what the theorists had

26. Bizzell, *supra* note 20, at 234–35; see also Steven Schreiner, A Portrait of the Student as a Young Writer: Re-evaluating Emig and the Process Movement, 48 C. Comp. & Comm. 86, 87 (1997).

27. Anne Ruggles Gere, Narratives of Composition Studies, 3 Legal Writing 51, 54 (1997).

28. Jessie C. Grearson, Teaching the Transitions, 4 Legal Writing 57, 70 (1998).

29. Marilyn M. Cooper, Why Are We Talking About Discourse Communities? Or, Foundationalism Rears Its Ugly Head Once More, *in* Writing as Social Action, eds. Marilyn M. Cooper & Michael Holzman, 202, 204–05 (Portsmouth, N.H., 1989).

30. These categories are derived from Kenneth Dowst, The Epistemic Approach: Writing, Knowing, and Learning, *in* Eight Approaches to Teaching Composition, eds. Timothy R. Donovan & Ben W. McClelland, 65, 66–69 (Urbana, 1980) [hereinafter Eight Approaches]; and Richard Fulkerson, Four Philosophies of Composition, 30 C. Comp. & Comm. 343 (1979), *reprinted in* Sourcebook, *supra* note 11, at 3, 3–6.

31. The expressivist perspective is associated with concepts such as writing without teachers and "free" writing. See, e.g., Peter Elbow, Writing Without Teachers (New York, 1973).

32. The epistemic and expressivist perspectives often intertwine, particularly in the strategies proposed for invention. For example, prewriting is presented as "a journey of discovery through language to discover one's thoughts and feelings," Emig, *supra* note 2, at 18, or as a way that writing can lead to "something else," thoughts the writer never knew were in the writer's head, Berthoff, *supra* note 1, at 38.

33. Lisa Ede & Andrea Lunsford, Let Them Write—Together, 1 Rhetoric Rev. 150 (1983), *reprinted in* The St. Martin's Guide to Teaching Writing, 2d ed., eds. Robert Connors & Cheryl Glenn, 427 (New York, 1992).

34. Cf. Cooper, *supra* note 29, at 205.

35. The "meaning-making" view of writing appeals to those who view reading and writing as ways to live, not just as ways to make a living. Such teachers fall within what Janet Emig calls a "tacit tradition" that includes the beliefs that the "learner/writer . . . is an active construer of meaning in her transactions with experience"; "that almost all persons can write and want to

taken as an article of faith: "writing creates situations in which students can learn to think."[36]

1. The Composing Process

The early composition research led to a common finding: for the expert writers studied, the writing process is exploratory, recursive, reflective, and responsive. Specifically, the research indicated that "writing is an act of discovery" for many expert writers; they do not know what they want to say when they begin to write, and their meaning develops intuitively as they continue.[37] Second, the writing process is not a smooth linear progression from beginning to end, but instead is "messy, recursive, convoluted, and uneven."[38] Progress is unsteady and can be very slow.[39] Neither is writing a methodical movement from small to large or from large to small: writers "as frequently work from wholes to parts as from parts to wholes" and they leap back and forth between local concerns about words and global concerns about the shape of the total piece.[40] Finally, experts reflect on their emerging text and respond to individual, textual, and social context: the writing process differs by author as well as by purpose, format, and audience, and it changes depending on what problems arise in a particular text.[41]

As a result of the research, new models of the composing process charted cognitive activities, rather than stages of production, and arranged these activities as a recursive hierarchy.[42] Thus, rather than a linear step-by-step

write; that not writing or not wanting to write is unnatural; that, if either occurs, something major has been subverted in a mind, in a life." The Tacit Tradition: The Inevitability of a Multi-Disciplinary Approach to Writing Research, *in* Reinventing the Rhetorical Tradition, eds. Aviva Freedman & Ian Pringle, 9, 17 (Conway, Ark., 1980) [hereinafter Reinventing].

The first composing process research was published by Janet Emig, The Composing Processes of Twelfth Graders (Urbana, 1971). Emig's research is viewed as the "single most influential piece" of composing process research because its method, assumptions, and conclusions influenced all subsequent research. See, e.g, Stephen M. North, The Making of Knowledge in Composition: Portrait of an Emerging Field 197 (Upper Montclair, 1987).

Beginning with Emig's work, composition research borrowed the use of thinking-aloud protocols and cued-recall techniques from cognitive psychology. Unlike examination of a writer's notes and drafts, protocols in which the writer thinks aloud while writing "bring[] us suddenly closer to the act of writing and yield a rich if unsifted body of data about the development of meaning." Linda Flower & John R. Hayes, Images, Plans, and Prose: The Representation of Meaning in Writing, 1 Written Comm. 120, 123 (1984). Protocol analysis has been controversial both because it tends to affect what is being observed and because it can lead to self-fulfilling prophecy when the researcher and the subject share expert knowledge, as when English teachers are the subjects of the protocols. See Bizzell, *supra* note 20, at 235.

36. Elaine P. Maimon et al., Thinking, Reading, and Writing 3 (New York, 1989).

37. Hairston, *supra* note 2, at 85.

38. *Id.*

39. Emig, *supra* note 2, at 141.

40. *Id.* at 140.

41. *Id.*

42. The best-known cognitive process model does not specify any natural order of proceeding through the composing process but rather tries to identify the subprocesses that are included at some point. See Linda Flower & John R. Hayes, A Cognitive Process Theory of Writing, 32 C. Comp. & Comm. 365 (1981). This model has been criticized for containing "the same

evolution of a written product, the cognitive process model depicted "elementary mental processes" which in turn were composed of subprocesses in a hierarchical structure.[43] In this model, the writer moves recursively and opportunistically from one subprocess to another as the writer "attends to" one concern or another.[44]

As composition research continued, its findings heightened and broadened the role of "planning" and "revising." Researchers found that expert planning occurs not only at the beginning of a writing project and not only as a way to think about *what* to say. Instead, planning continues throughout the writing project as experts monitor and map both their text and their goals.[45] The plans themselves are an "object for reflection and open to review, revision, and consolidation."[46] Planning recurs because the expert stops to monitor the writing, to engage in "the purposeful act of representing current meaning to oneself."[47] Planning occurs "in *response* to a social and rhetorical context, on a problem that develops *during* the act of writing"; equipped with greater knowledge of available plans and the willingness to monitor and change, experts can and do respond strategically.[48]

Similarly, for the experts studied, revision occurs not only at the end of a writing project and not only as a way to think about *how* to say what you planned to say. Like expert planning, experts say revision is constant, recursive, reflective, and responsive.[49] In retrospective interviews, professional writ-

writing activities" as linear models and for its treatment of writing "as a set of containers into which we pour meaning." Bizzell, *supra* note 20, at 220–32.

The cognitive process models have been criticized for other reasons. First, they are based primarily on observations of professional writers, and, as the authors of one article suggested, "[t]he contribution of writing to thought is quite possibly a contribution enjoyed only by the highly literate few." Scardamalia & Bereiter, *supra* note 7, at 309. In addition, because of the research methods used, no models have accounted for pretextual revision, that is, revision that takes place before there are words on paper. See Stephen P. Witte, Revising, Composing Theory, and Research Design, *in* The Acquisition of Written Language: Response and Revision, ed. Sarah Warshauer Freedman, 250, 263–64 (Norwood, N.J., 1985) [hereinafter Acquisition].

43. See Flower & Hayes, *supra* note 42, at 367–68.

44. See Nancy I. Sommers, The Need for Theory in Composition Research, 30 C. Comp. & Comm. 46, 47 (1979). Researchers found that individual writers differ in their uses of the subprocesses and that use of the subprocesses differs depending on the task. See Arthur N. Applebee, Writing and Reasoning, 54 Rev. Educ. Res. 577, 582–83 (1984).

45. The researchers cast doubt on three popular planning images: the "blind-leap scenario" from "unpremeditated knowledge to text"; the "step-by-step march of ideas into words"; and the easy flow of "freewriting oneself from prose to thought." Flower & Hayes, *supra* note 35, at 156–57.

46. Linda Flower et al., Planning in Writing: The Cognition of a Constructive Process, Technical Report No. 34, 50, Center for the Study of Writing (Berkeley, 1989), *reprinted in* A Rhetoric of Doing: Essays on Written Discourse in Honor of James L. Kinneavy, eds. Stephen P. Witte et al., 181 (Carbondale, 1992).

47. Flower & Hayes, *supra* note 35, at 124.

48. Flower et al., *supra* note 46, at 48–51.

49. Like other studies of the composing process, revision studies have been criticized for assuming that the process can best be understood by comparing expert revision with amateur revision. Witte, *supra* note 42, at 255.

Unlike the contemporaneous read-aloud or think-aloud protocols used in reading and composing studies, most revision studies have been based on retrospective interviews with

ers described revision as composed of significant recurring activities, with different levels of attention and a different agenda for each cycle.[50] Even though this description coincides with more traditional views of revision,[51] it differs in its depiction of the writer's continuing willingness to view the whole writing as up for review and to make changes at all levels.[52] Like planning, revision recurs throughout the writing project because the expert is better able to monitor and reflect: experienced writers imagine a reader who is "partially a reflection of themselves and functions as a critical and productive collaborator—a collaborator who has yet to love their work."[53] By imagining this reader, the experts can stand outside their writing to "re-view" it. Like planning, revision occurs in response to a social and rhetorical context; experts adjust the extent and manner of revision to their purpose, format, audience, medium, genre, length of task, length of text, and familiarity with the subject, audience, and purpose.[54]

2. Connections Between Reading and Writing

Seeing a similar constructive process, some writing teachers turned to reading. In addition to a constructive view of reading itself,[55] theorists proposed and some research supported a transactional relationship between

writers, see Nancy Sommers, Revision Strategies of Student Writers and Experienced Adult Writers, 31 C. Comp. & Comm. 378 (1980), or on physical evidence of the effects of revising, Lester Faigley & Stephen P. Witte, Analyzing Revision, 32 C. Comp. & Comm. 400 (1981).

50. Because first drafts are usually exploratory, expert revision aims first to find the form or shape of the argument. During later cycles of revision, experts may be more concerned with style but do not forget about form. Sommers, *supra* note 49, at 386–87. Another study found that compared with students, experts revised more while writing a first draft, made more meaning changes between the first and second draft, and made more surface changes between the second and third draft. Faigley & Witte, *supra* note 49, at 407–09.

51. Witte notes that although many professional writers speak of revision as important, necessary, and recursive, they also usually "depict revising as something writers do *after producing some written product*," a description that reinforces the traditional, linear view of composing. Witte, *supra* note 42, at 254–55.

52. Even though most expert writers' changes occur at the sentence level, experienced writers make changes at all levels and use a wider range of revision techniques. Sommers, *supra* note 49, at 386–87. Although the experts in a subsequent study made fewer changes than students, they made more changes in meaning. Faigley & Witte, *supra* note 49, at 407–09.

Thus, the most notable difference between expert and student revisers has been described as "the willingness to write multiple drafts and to make major changes while composing." Most student revision is "meaning-preserving," suggesting that students believe that "the meaning to be communicated is already there." In contrast, professional writers use revision "as part of the ongoing process of invention—that is, as a technique for *producing* meaning." Bartholomae & Petrosky, *supra* note 16, at 167 (footnote omitted).

53. Sommers, *supra* note 49, at 385.

54. Faigley & Witte, *supra* note 49, at 410–11.

55. New Rhetoric composition theory and critical literary theory rarely acknowledge each other, but critical literary theory and the outer-directed school of composition theory share the concept that "[o]ur reading and our writing alike are made up, constructed, by the intersection of models, paradigms, sign systems, and conventions mediated by our culture." David Kaufer & Gary Waller, To Write Is to Read Is to Write, Right? *in* Writing and Reading Differently: Deconstruction and the Teaching of Composition and Literature, eds. G. Douglas Atkins & Michael L. Johnson, 66, 67–68 (Lawrence, 1985).

reading and writing.[56] Research showed a moderate general correlation between reading and writing achievement; the transfer of some values, behaviors, and lessons from one process to the other; and the integration of each process in the successful performance of the other.[57]

The most striking parallel was the finding that both better readers and better writers are more able to suspend judgment, to reflect on current meaning, and to respond to the context within which they read and write.[58] Expert readers "formulat[e] better questions and solutions about the unfolding text and continually monitor[] their success or failure in constructing meaning in or from print."[59] Because of this reflective quality, better readers and writers learn more from experience and add to their ways of understanding new reading and writing.[60] The attention that experts give to monitoring and reflection is mirrored by the attention they pay to rhetorical context. While student readers focus mostly on "knowledge-getting," expert readers construct a rhetorical situation, trying to imagine a real author with a specific purpose, the context within which the writing occurred, and the actual effects on the audience.[61] While student writers concentrate on "knowledge-telling," conveying content and information, expert writers work within a rhetorical framework that includes "imagining audience response, acknowledging context and setting their own purposeful goals."[62]

3. Expert-Novice Research

As cognitive research supported the New Rhetoric view of reading and writing, composition teachers and theorists became interested in other kinds of cognitive research.[63] One result was the split between the inner-directed and the outer-directed schools, which derived in part from cognitive research into the effects of individual experience and social context on learning and thinking.

56. See, e.g, Robert E. Probst, Transactional Theory and Response, *in* Writing and Response, *supra* note 8, at 68, 74–75; Marilyn S. Sternglass, Introduction, *in* Convergences, *supra* note 17, at 1. In theory, a transaction differs from an interaction because it is a "dynamic process" in which all the elements in the transaction are transformed. Louise M. Rosenblatt, Viewpoints: Transaction Versus Interaction—A Terminological Rescue Operation, 19 Research in the Teaching of English 96, 100–01 (1985).

57. See Robert J. Tierney & Margie Leys, What Is the Value of Connecting Reading and Writing? *in* Convergences, *supra* note 17, at 15, 17–26; Sternglass, *supra* note 56, at 1 (quoting an early draft by Bruce Petersen).

58. June Cannell Birnbaum, Reflective Thought: The Connection Between Reading and Writing, *in* Convergences, *supra* note 17, at 30, 31. Reflective behavior is used here in the sense of monitoring current meaning and adjusting goals, ideas, plans, or strategies when it appears the reader or writer was mistaken; it is the ability to think about a process in process. See Ronald, *supra* note 17, at 234.

59. Birnbaum, *supra* note 58, at 30.

60. *Id.*

61. See Haas & Flower, *supra* note 13, at 176–78.

62. *Id.* at 182 (quoting Carl Bereiter & Marlene Scardamalia, Cognitive Coping Strategies and the Problem of Inert Knowledge, *in* Learning and Thinking Skills: Research and Open Questions, eds. Susan Chipman et al., 65 (Hillsdale, 1985)).

63. Maimon et al., *supra* note 36, at 161; see also Kurt M. Saunders & Linda Levine, Learning to Think Like a Lawyer, 29 U.S.F. L. Rev. 121, 142 (1994).

Both schools agreed, however, on an important finding from the cognitive research into problem-solving: that is, that the patterns we impose on what we see as we "compose" are formed from prior transactions, whether those transactions are individually or socially situated.[64] Problem-solving research seeks to better understand how people learn to solve problems within a particular domain (such as law, for example) by focusing on the differences between expert and novice behavior in that domain. The research attempts to discern both *what* and *how* knowledge: that is, *what* experts in the field know that is different from what novices know and *how* experts in the field do things differently from novices.

The major finding of expert-novice research is that "expertise consists mainly of the acquisition of a large repertoire of knowledge in schematic form."[65] That is, as a learner moves from novice to expert, gaining both knowledge and experience, the learner develops patterns or frameworks called schemas to integrate and structure that knowledge and experience.[66] Although *what* makes a person an expert is very specific to the field in which she is an expert, the differences in *how* experts and novices act have been found to be similar across various fields. Across the board, experts show greater use of stored schemas and self-reflective techniques, and they draw on a broader range of strategies appropriate to their domain. That is, novices learn and recall terms, structures, and rules, but do not know how to organize and apply the knowledge, while experts can use stored schemas to solve problems. "Novice thinking is elemental and structured around concrete pieces of knowledge in a domain, while expert thinking is global and relates to abstract, higher order principles and procedures."[67] Finally, experts more carefully monitor and evaluate how they are doing as they move through a problem and make changes that improve their problem-solving performance.

Seen from this perspective, much of the composing process research can be seen as expert-novice research into *how* expert writers write. From this perspective, the research has left the gap of *what* expert writers know, a gap that the social construction school has already identified.[68] Like expert-novice research in general, New Rhetoric research assumes that experts do things the

64. Much expert-novice theory is based on Piaget's theory of intellectual development. "Piaget proposed that knowledge is highly organized, that learning involves assimilation of new experience to one's previous knowledge, and that intellectual development is not a passive incorporation of information but an active construction on the part of the knower." David Moshman & Bridget A. Franks, Intellectual Development: Formal Operations and Reflective Judgment, *in* Maimon et al., *supra* note 36, at 9, 13. The central tenet of Piaget's position, which he called constructivism, is "that individuals construct their own knowledge during the course of interaction with the environment. Each new scheme is constructed through the coordination of earlier schemes. Such coordinations take place when the environment presents challenges that cannot be resolved using available schemes." *Id.* at 12.

65. Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313, 342–43 (1995).

66. See Saunders & Levine, *supra* note 63, at 140–41.

67. See Blasi, *supra* note 65, at 348.

68. See Bizzell, *supra* note 20, at 231 (the cognitive process model describes the form of the composing process, but not the content, which is knowledge of the conventions of discourse communities).

right way and that if only novices were to use those expert processes, they would become better readers, writers, and thinkers.[69] If those assumptions are true, teachers should focus on helping students reflect on and respond to what they read and write.[70]

C. Using New Rhetoric in Law School

To sum up before going on, New Rhetoric started with a theory that writing was a process for the making of meaning. Research into the composing process supported that view and formed the basis for a cognitive process approach to teaching writing. The process approach subdivided into two schools: one of them believed that individual processes were the most important to the making of meaning, and the other believed that social processes were the most important. Cutting across these two schools were differing perspectives on the nature of writers and writing.

Some New Rhetoric theory, teaching approaches, and perspectives have been applied in law school settings. James Boyd White was one of the first to talk and write about legal reading and legal writing as processes for constructing meaning.[71] Beginning in the mid-1980s, the process approach was introduced in legal scholarship generally and to the legal writing community in particular.[72] That New Rhetoric theory and teaching approaches would be embraced by anyone who teaches in a law school is in some ways remarkable. For one thing, the kind of written composition rhetoric now common in college classrooms is much less privileged in law school classrooms, one of the few places left where students still arguably engage in oral rhetoric.[73] Second, the heart of New Rhetoric theory directly contradicts much of the rhetoric of law. In the rhetoric of advocacy and judicial opinion, the lawyer and the judge are committed to "the closure of controversies" and "the one right (or best) answer to questions and the one true (or best) meaning of texts."[74] Third, even if New Rhetoric makes sense for personal expressive writing, it is easy to

69. For example, Hairston writes that the most interesting results from the research are the "profound differences" between expert and novice behavior, suggesting and assuming that "[t]his kind of information enables us to construct a tentative profile of the writing behaviors of effective writers." Hairston, *supra* note 2, at 86.

70. As noted earlier, the use of reflective techniques is an important indicator of better readers and writers. More generally, self-monitoring and reflective change are signs of a "good learner." See Paul T. Wangerin, Learning Strategies for Law Students, 52 Alb. L. Rev. 471, 477 (1988).

71. See The Legal Imagination: Studies in the Nature of Legal Thought and Expression (Boston, 1973); Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be, 18 U. Mich. J.L. Ref. 251, 252–53 (1985); Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 40–44 (Madison, 1985).

72. Process approaches to legal writing were introduced at the Legal Writing Institute's first biennial conference in 1984. See J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35, 53 (1994).

73. In nearly all college curricula, composition rhetoric has replaced oral rhetoric. See Robert J. Connors, Teaching and Learning as a Man, 58 C. Eng. 137, 142 (1996).

74. Wetlaufer, *supra* note 5, at 1551–52.

identify differences in purpose, audience, and conventions that make some of its approaches less appropriate for some kinds of legal writing.[75]

On the other hand, a theory of reading and writing as knowledge-producing coincides with other views of the lawyer's job and the law school's role. A lawyer is supposed to generate alternatives about what the language of the law means and about whether particular facts satisfy its requirements. The lawyer's creation and testing of alternatives will be foreclosed if closure and certainty arrive too soon. Moreover, if generating alternatives is a necessary part of learning to read, think, and write critically, it must also be a necessary part of any legal education.

Furthermore, New Rhetoric's focus on transactional relationships between reading and writing seems particularly appropriate for adaptation to law school. Because law students think and write almost exclusively about what they have read, making connections between legal reading and legal writing is unavoidable, if largely unnoticed. Similarly, the expert-novice research spurred by New Rhetoric may provide guidance for teachers of legal reading and legal writing. This research suggests, for example, that law students may more quickly become more expert as legal readers if their teachers base some of their instruction on expert behavior.[76] Expert-novice research also indicates that even though expertise itself "seems not to travel well,"[77] certain aspects of expert behavior, that is, *how* experts do things, may be similar across disciplines.[78] The findings of New Rhetoric research into *how* expert writers write may describe generally *how* expert legal writers write.

In addition to areas where adaptation seems appropriate, New Rhetoric has identified large gaps for research in legal discourse. Although legal reading processes have been studied, little research has focused on legal writing processes.[79] Even less has been done to describe the content of expert legal writer knowledge, from the research processes they use, to the schemas and scripts they build, to the discourse conventions they follow. If "[w]riting, reading and inquiry are collaborative, social acts,"[80] the student as legal reader

75. The cognitive process approach starts too late for law school because it begins with invention. Beginning with invention assumes that the student has all the knowledge she will need within herself and that all she needs are the techniques to express it. The beginning law student has little such knowledge, and so teaching legal writing should begin with the processes of reading and inquiry common to lawyers.

    Similarly, social construction focuses on the conventions of discourse communities. But discourse communities are knowledge communities. Thus, even though a student must learn the conventions of a particular discourse community to be viewed as an "insider," he must first acquire its common knowledge. For law students, that common knowledge comes from reading the law.

76. See, e.g., Saunders & Levine, *supra* note 63, at 142.

77. Joseph M. Williams, On the Maturing of Legal Writers: Two Models of Growth and Development, 1 Legal Writing 1, 13 (1991).

78. See Blasi, *supra* note 65, at 354.

79. Legal writing teachers "fervently believe that learning legal reading and writing involves the acquisition of unique cognitive processes and skills," but they "cannot point to formal empirical evidence verifying the uniqueness." James F. Stratman, The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects, 60 Rev. Educ. Res. 153, 210 (1990).

80. Reither, *supra* note 11, at 166.

and legal writer will need to know more about the social processes that both influence and constrain the lawyer's writing process and the lawyer's written product.[81]

After New Rhetoric became standard in college composition scholarship, the field was said to have entered the "first stages of a paradigm shift," a movement away from the then "current-traditional" product theory of teaching writing to a more process-centered theory.[82] Since then, critics have attacked on theoretical and practical grounds. On theoretical grounds, social constructionists claim that the early New Rhetoric mistook the individual writer for an artist and free agent rather than recognizing her as a culturally situated and constrained being.[83] On practical grounds, critics claim that although cognitive process and social construction started at different points, they ended up in the same place: current-traditional rhetoric. For the process approach, the criticism is that it described only a set of tactics rather than growing out of a fully developed rhetorical theory, and thus it was simply made to fit into the current-traditional mode.[84] For the social construction approach, the criticism is that its emphasis on forms, conventions, and correctness can become indistinguishable from current-traditional rhetoric's focus on the product rather than any of the processes used to compose it.[85]

Given a natural time lag, the teaching of legal reading and legal writing appears to be on the same path.[86] Almost all legal writing scholarship now

81. Jessie Grearson advocates that legal writing teachers not only introduce students to the conventions of the legal writing community but also discuss the usefulness of those conventions, encourage students to reflect on and understand the other writing communities to which they belong, and help students learn "how to manage moves into other, future discourse communities and writing situations." Grearson, *supra* note 28, at 74–77.

82. Hairston, *supra* note 2, at 77.

83. See Lad Tobin, How the Writing Process Was Born—and Other Conversion Narratives, *in* Taking Stock: The Writing Process Movement in the '90s, eds. Lad Tobin & Thomas Newkirk, 7 (Portsmouth, N.H., 1994).

84. See Sharon Crowley, Around 1971: Current-Traditional Rhetoric and Process Models of Composing, *in* Composition in 21st Century, *supra* note 23, at 64. Other criticisms have focused on the gap between theory and teaching; see, e.g., Janet Gebhart Auten, A Rhetoric of Teacher Commentary: The Complexity of Response to Student Writing, 4 Focuses 3, 3 (1991); Donald C. Stewart, Some History Lessons for Composition Teachers, *in* The Writing Teacher's Sourcebook, 2d ed., eds. Gary Tate *et* al., 16 (New York, 1988); Erika Lindemann, Three Views of English 101, 57 C. Eng. 287, 290 (1995). With the writing process movement now open to criticism, a new gap between theory and practice has emerged. Thus, despite the recent criticisms, writing process teaching techniques are "embraced by huge numbers of classroom teachers." Tobin, *supra* note 83, at 7.

85. Tobin, *supra* note 83, at 6.

86. For legal writing teachers, New Rhetoric offers an appealing description of what we teach. See, e.g., Stratman, *supra* note 79, at 153. New Rhetoric also promises practical benefits: it implies that other, less time-consuming practices may be more productive than multiple individual writing conferences and detailed marking of papers. See Hairston, *supra* note 2, at 79–80; Jill J. Ramsfield, Legal Writing in the Twenty-first Century: A Sharper Image, 2 Legal Writing 1, 7–8 & n.64 (1996). Moreover, as an "outsider" theory, New Rhetoric may attract teachers who are outsiders in a doctrinal world and teachers who are interested in restoring power and voice to students. See Grearson, *supra* note 28, at 63. In a different way, the outer-directed theory of social construction attracts outsiders: it "sounds prestigious and . . . keeps the power and influence within the discipline" rather than sharing it with students. *Id.* at 73.

focuses on some outgrowth of New Rhetoric,[87] and social construction has gained much recent support.[88] Yet the movement of New Rhetoric into law school is incomplete and open to criticism. On practical grounds, it is likely that the product approach still prevails in the places where the papers are graded,[89] in part because it is the more familiar and straightforward way that papers have always been graded.[90] On theoretical grounds, as we leaped from product to process to social construction, it is likely that some of us missed the best part of New Rhetoric: the theory that reading and writing could be used to construct meaning and the use of the subsequent research to inform and enrich our teaching. What follows is an initial attempt to more fully apply New Rhetoric theory and research to the teaching of legal reading and legal writing.

II. Generating Thought

By generating an ebb and flow of reader and writer within the student's head, New Rhetoric offers a way to engage students in "the dialogue that is at the heart of all composing: a writer is in dialogue with his various selves and with his audience."[91] At times, the "inside reader's eye" predominates as the

87. See, e.g., Kissam, *supra* note 10, at 151–70; Teresa Godwin Phelps, The New Legal Rhetoric, 40 Sw. L.J. 1089, 1094 (1986); Williams, *supra* note 77, at 9; Bari R. Burke, Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context, 52 Mont. L. Rev. 373, 397 (1991); Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process, 64 Temp. L. Rev. 885, 888 (1991); Rideout & Ramsfield, supra note 72, at 51–61; Jo Anne Durako et al., From Product to Process: Evolution of a Legal Writing Program, 58 U. Pitt. L. Rev. 719 (1997).

88. See Williams, *supra* note 77, at 23–30; Rideout & Ramsfield, *supra* note 72, at 56–61. The logical extension of social construction may be that legal reasoning and writing can best be learned not in the legal writing classroom but in the law office. See Brook K. Baker, Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning, 36 Ariz. L. Rev. 287 (1994).

89. That the process approach has been widely adopted is implied by the finding that rewrites are used to some extent in 79 percent of legal writing courses. See Ramsfield, *supra* note 86, at 6–7. But dividing the production of a paper into linear stages and assigning a student to edit and proofread what both student and teacher treated as a final draft is not the multiple-draft, meaning-making process suggested by New Rhetoric.

    In addition, if the textbooks are accurate indicators of teaching practices, the theory and practice of teaching legal writing still diverge. See, e.g., James R. Elkins, What Kind of Story Is Legal Writing? 20 Legal Stud. F. 95 (1996); Lorne Sossin, Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own, 29 New Eng. L. Rev. 883, 892 (1995); Stratman, *supra* note 79, at 198.

90. Some teachers may view their focus on an effective final product as more compatible with their responsibility to prepare law students for law practice. In law practice, writing will be valued not for how well it reflects reality or allows personal expression or produces knowledge, but only for how well it achieves its purpose with its intended audience. See, e.g., James F. Stratman, Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols, 1 Legal Writing 35 (1991). Finally, "if the rhetoricians often get the best of the abstract arguments, the traditionalists can still point to savage overwork as an occupational reality for many writing teachers." In those circumstances, the long New Rhetoric process of reflection and response may simply be unworkable for the teacher. Robert J. Connors, The Rhetoric of Mechanical Correctness, *in* Only Connect: Uniting Reading and Writing, ed. Thomas Newkirk, 53 (Upper Montclair, 1986) [hereinafter Only Connect]..

91. Berthoff, *supra* note 1, at 72.

student reads texts to interpret the information with which to work.[92] At times, the "inside writer's eye" predominates as the student explores his readings and develops thoughts, ideas, plans, and goals as well as when he monitors his writing to see if it meets his purposes.[93] The "outside reader's eye" predominates when the focus shifts to reviewing the emerging text to see whether it meets the purposes of an outside reader, and the "outside writer's eye" is used when the writer concentrates on having an intended effect on an outside reader.

The remainder of this article describes selected teaching practices within this reader-writer loop. Their overall goal is to encourage students to view their early readings and writings as tentative drafts that are open to change; to build in pauses when the student-as-reader or the student-as-writer can reflect on current meaning, goals, and plans; and to give students contextually based rhetorical choices to move forward.

A. Reading Reflectively: The Expert Process[94]

In the New Rhetoric view of reading as constructive or transactional, the reader builds meaning from a text using information provided by the author and knowledge and experience that the reader already possesses. Under the New Rhetoric view, what the reader perceives, understands, and remembers depends not only on the text and its context but also on the reader's prior knowledge of and experience with similar texts and similar contexts.[95] Because the beginning legal reader has little prior acquaintance with either the typical legal text or the legal context,[96] expert-novice theory suggests that law school teachers should introduce students to both the *what* and the *how* knowledge of expert case reading.

92. Donald M. Murray uses the term "inner reader" to denote the "other self" who reacts to what the writer writes and to what the reader reads. Teaching the Other Self: The Writer's First Reader, 33 C. Comp. & Comm. 140 (1982).

93. Murray also suggests a distinction between "internal revision," what writers do "to discover and develop what they have to say, beginning with the reading of the completed first draft," and "external revision," what writers do to communicate what they have to say to an external audience. Donald M. Murray, Internal Revision: A Process of Discovery, *in* Research on Composing: Points of Departure, eds. Charles R. Cooper & Lee Odell, 86, 91 (Urbana, 1978). This view describes a progression not unlike more traditional models; it also is similar to Linda Flower's distinction between "writer-based" and "reader-based" prose and to other researchers' descriptions of different levels of revision or their distinctions between "low-road" and "high-road" strategies. See Witte, *supra* note 42, at 257–58 (citing Linda Flower, Writer-Based Prose: A Cognitive Basis for Problems in Writing, 41 C. Eng. 19 (1979)).

94. By reading and writing reflectively, I mean that students should "reflect" by continuously monitoring their current understanding of what they are reading, writing, researching, or thinking. Ann E. Berthoff calls this the "continuing audit of meaning" and credits I. A. Richards for the concept. Rhetoric as Hermeneutic, 42 C. Comp. & Comm. 279, 281 (1991) (citing I. A. Richards, How to Read a Page 204, 217 (Boston, 1942)).

95. See, e.g., Emig, *supra* note 2, at 160; Sam Watson Jr., Polanyi and the Contexts of Composing, *in* Reinventing, *supra* note 35, at 19, 21.

96. The rhetorical context includes a purpose, or the "something waiting to be done" through discourse; an audience capable of being influenced by and of interpreting the discourse; and the constraints on decisions and actions by that audience. See Greenshaw, *supra* note 10, at 875–77.

According to studies of expert and novice legal reading, the differences between experts and novices fall into three categories.[97] First, experts pay more attention to context, both the context within which they are reading and the context within which the case was decided. The context within which they are reading provides expert readers with a concrete purpose that is reflected in the way they read. Experienced readers have difficulty reading without a purpose, and they will construct one if none is provided.[98] In addition to situating themselves within a context, expert legal readers seek clues to the context out of which the opinion emerged, first overviewing the case for topic, decision, and length and checking jurisdiction, level of court, and date.[99]

Second, expert legal readers use their superior knowledge of text structure and conventions to read more flexibly and efficiently, varying both the order of their reading and the time allotted to different sections. The expert first seeks background information—what court decided the case (citation); what the case is about (the summary and headnotes); who won (the decision at the end). Because the expert knows typical case structures, the expert knows where to find these things. After an overview for context, the expert reads the whole case, but the expert spends more time overviewing, reading the first page and the facts to picture what happened, and rereading the most important parts. Without knowledge of case structure and conventions, students read judicial opinions inflexibly, from beginning to end and at the same rate of speed and attention.[100]

Third, experts use certain reading strategies more frequently. Reading strategies can be classified into three general categories:[101] summarizing strategies, in which the reader summarizes, paraphrases, or retells what is being

97. The legal reading studies include Mary A. Lundeberg, Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis, 22 Reading Res. Q. 407 (1987); Dorothy H. Deegan, Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law, 30 Reading Res. Q. 154 (1995); Laurel Currie Oates, Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs, 83 Iowa L. Rev. 139 (1997); James F. Stratman, Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs, 17 Discourse Processes 1 (1994). Another article describes law school applications of reading techniques derived from other disciplines. See Elizabeth Fajans & Mary R. Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 Cornell L. Rev. 163 (1993).

98. See, e.g., Oates, *supra* note 97, at 150–51; Stratman, *supra* note 79, at 213–15; Explorations into Law School Literacy, 15 Professions Educ. Researcher Q. 2, 4–6 (1994). For similar results in more general studies of expert and novice readers, see Haas & Flower, *supra* note 13, at 178.

99. Lundeberg, *supra* note 97, at 412–14.

100. Dewitz, *supra* note 10, at 669–70.

101. Haas and Flower sorted the comments made during their read-aloud protocols into three categories: content strategies, such as questioning, summarizing, or paraphrasing what the text "is about"; function/feature strategies, such as identifying conventional functions or features of texts; and rhetorical reading strategies, such as trying to account for the author's purpose, context, and effect. Haas & Flower, *supra* note 13, at 174–81. Deegan categorized the comments made in her think-aloud protocols as problematizing strategies, such as problem posing and problem solving; default strategies, such as paraphrasing, summarizing, or drawing conclusions; and rhetorical strategies, such as contextualizing or evaluating the text. Deegan, *supra* note 97, at 160–61.

read; reflective strategies,[102] in which the reader monitors her understanding of the text by asking questions, making predictions, and hypothesizing, moving both forward and backward as she reads; and rhetorical strategies, in which the reader goes beyond the text and interjects her own comments and evaluation, imagining a full rhetorical context.[103] Of these strategies, experts use more "rhetorical" strategies than novices; that is, they place the opinion into a particular context, they synthesize the parts of the opinion with each other and the opinion itself with other opinions, and they evaluate the opinion.[104] Novices are more likely to use "summarizing" strategies, that is, strategies that try to get at what the text "is about" such as paraphrasing or keeping track.[105] Compared with poorer students, stronger student readers spend more time engaged in "reflective" strategies, monitoring their understanding and interpretation of the text as they read.[106]

Together, studies of expert-novice legal reading suggest that law students should be introduced to a context-driven reading process as well as encouraged to use more reflective and rhetorical reading strategies.[107] Applying these findings, I begin the first semester of legal writing with an overview of the legal context and the roles played by the authorities and the authors that the students will be reading. Then I describe the structure of typical cases and how experts use that structure to read cases more flexibly. Finally, I describe reading strategies and explain which strategies are used more often by experts and by advanced student readers. To show the structure of a typical judicial opinion, I use a short case, highlight its structure, and read it aloud, describing my thinking as I go so that the reading serves as one model of expert case reading.[108]

102. Deegan calls these problematizing strategies, but they appear to measure how aware the students were of the need to monitor their understanding and how effective they were in doing so. See Deegan, *supra* note 97, at 160.

103. See Dewitz, *supra* note 10, at 659–60; see also Haas & Flower, *supra* note 13, at 176 for more description of rhetorical reading strategies.

104. See Lundeberg, *supra* note 97, at 412; Stratman, *supra* note 79, at 174.

105. See Lundeberg, *supra* note 97, at 412–15.

106. See Deegan, *supra* note 97, at 163. Deegan classified comments that begin with "questions, hypotheses, or confusions and [are] negotiated to satisfactory or unsatisfactory ends" as "problematizing" strategies and found that high-performing students spent about 60 percent of their time engaged in such strategies while low-performing students spent about 40 percent of their time using such strategies. Oates classified comments that question or interpret the text as "connotative" and found that 47 percent of the statements made by the high-performing students could be classified as connotative. One of the low-performing students had an even higher percentage (59%) of connotative statements, but Oates noted that the student lacked basic reading skills and that his use of expert reading strategies was uneven because they were inconsistent with his goal. See Oates, *supra* note 97, at 158.

Greater use of both rhetorical and reflective strategies also has been found in studies of expert or experienced readers in other fields. See Birnbaum, *supra* note 58, at 30.

107. Students who had been instructed and guided through practice in expert reading processes and strategies showed gains in separating relevant from irrelevant facts, understanding of the facts and holding, stating the rule and rationale, and applying the case to a hypothetical case. Lundeberg, *supra* note 97, at 417–29. Cf. Haas & Flower, *supra* note 13, at 182.

108. I literally highlight the structure using an overhead projector. The students have copies of the case so that they can see the structure and follow the model case reading.

After the model, I have students read and brief a case. In addition to defining key terms and describing underlying legal concepts, the assignment memo tells them about their client, who has a problem that the case may address. Reading to solve a client's problem gives students a purpose for their reading.[109] The assignment memo also requires them to write a brief prediction of what is likely to happen to their client before they begin to read.[110] As students read the case, I ask them to answer these questions:[111]

- After overviewing the case for context, predict what is going to happen. What is going to be the issue? How is the court going to decide? What will be the basis for deciding?
- After reading the opening section describing the proceedings and the facts, "picture"—write or draw—what happened in the case and what happened in the trial court.
- As you read, keep track of whether your predictions are correct or incorrect. When did you know? If incorrect, what is the issue, the decision, the basis now?
- After reading, do the parts of the case fit together? Does the case fit into what you already know?
- Did the court do the right thing? Why? How?
- How would it change the meaning if you put the facts, the issue, the basis for the decision another way?[112]

I ask students to write their short, informal, fragmentary answers to these questions *as* they read, not *after* they read. The answers go on one page of a notebook so that on the facing page the students can write a traditional case brief, following the structure of a typical court opinion. This system has immediate benefits: students who follow the questions follow the expert case reading process, and students who answer the questions practice reflective and rhetorical reading strategies. As for long-term benefits, by linking their reading with their writing, students begin to see that their interpretations emerge from a continuing transaction between reader and writer and text.

B. Writing Reflectively: The Reflective Journal

To actively construct meaning from his reading and writing, the student must start and continue a conversation. As an aid to conversation, I require

109. Stratman suggests that the reason why so few novices in the Lundeberg study engaged in synthesis and evaluation is that the novices were simply unfamiliar with the purposes for which cases are read. Stratman, *supra* note 79, at 215. Other studies have indicated that the "alignment" or perspective the reader is given will influence what and how much they recall. See Robert J. Tierney & P. David Pearson, Toward a Composing Model of Reading, 60 Language Arts 568, 572–76 (1983).

110. Writing before reading to improve reading is suggested in Stratman, *supra* note 79, at 215.

111. These questions are derived from the guidelines that Lundeberg developed and tested in her study. See Lundeberg, *supra* note 97, at 430–31, *reprinted in* Dewitz, *supra* note 10, at 669–70. For a textbook example that models the expert case reading process, see Laurel Currie Oates et al., The Legal Writing Handbook: Analysis, Research, and Writing, 2d ed., 98–100, 188–95 (New York, 1998).

112. Asking the question "How does it change the meaning if I put it this way?" is the principal method of critical inquiry. Berthoff, *supra* note 1, at 72.

students to keep a reflective journal. There the student reader first engages with what he reads by writing about it and then engages with what he writes by reading it. The journal forces a physical dialog between its facing pages, with one page containing first thoughts and the other page requiring second thoughts.[113] The physical dialog encourages an actual dialog between the student-as-reader and the student-as-writer, allowing the student to conduct the "continuing audit of meaning" that is necessary for critical reading and writing.

By encouraging such an audit, the journal helps develop the habits of mature readers and writers. Journal assignments underscore the tentativeness of first readings and first writings because they are necessarily subject to second thoughts on every facing page. Journal assignments build in pauses, during which the student can check her current understanding, monitor her progress, and decide what to do next. Journal assignments explicitly link reading and writing, thus offering students "the chance to practice interpreting in such a way that whatever is learned about reading is something learned about writing."[114]

The journal begins with the case reading and briefing sequence already described. For each subsequent assignment, the student receives information about a client with a legal problem and is assigned to research and write about the probable outcome. Each assignment begins with an entry in which the students respond first to the task itself. Their response follows a grid similar to that used for case reading.[115]

- After overviewing the client's problem, predict what is going to happen. What is going to be the issue? How will it be decided? What will be the basis for deciding?
- After reading the file closely, write or draw a "picture" of what happened to your client.
- As you read (or research or write), keep track of whether your initial predictions are correct or incorrect. When did you know? How did you know? If incorrect, what is the issue, your prediction, the basis for your prediction now?
- Do the pieces of your client's problem fit together? Does your predicted outcome fit into what you already know?
- Is your predicted outcome the right one? Why? How? For whom?
- How could you change the outcome by putting the facts, the issue, the rules another way?

113. Ann Berthoff is the designer of the dialectical or double-entry notebook. See *id.* at 45. An explanation of the dialectical notebook process, written for student use, can be found in Peter Elbow & Pat Belanoff, A Community of Writers: A Workshop Course in Writing 425–29 (New York, 1989).

114. Berthoff, *supra* note 1, at 45.

115. Because the students continue to respond to their reading of another author's writing or their own, the reflective-reader questions make sense throughout the journal assignments. This set of questions thus is designed to correspond with the kinds of reading strategies used most by experts and better students: that is, they are primarily reflective and rhetorical questions.

For most journal assignments, I ask the student to first read and respond to the previous assignment before moving on. At work in the journal assignments is a spiraling conversation among the readings, the student reader, the journal writings, the student writer.[116] Unlike the usual reading or writing assignment, the reflective journal forces students to engage more deeply with the writing of other authors and then with their own writing. When it works, the reflective journal builds in the habit of pausing to monitor current understanding and to plan for the future. When it works, the reflective journal helps students "read like a writer" so that, over time, they will know better how to "write for a reader."

C. Planning in Writing: The Zero Draft

Traditional methods of teaching students to plan their writing changed under New Rhetoric.[117] In current-traditional rhetoric, invention received little attention: the writing process began with an outline of thoughts that had already been generated. A richer conception of planning as a way to generate thought emerged from New Rhetoric.

Expressivist teachers popularized brainstorming and gave a name to freewriting—"private, nonstop writing where you write about whatever you want to write about or put down whatever comes to mind" as a way of getting the "chaos in your head" onto a piece of paper.[118] Freewriting was a "means of making way for some process or capacity" that already existed within the writer. Like browsing through a used bookstore, freewriting allowed you to find valuable volumes that you did not even know existed.

Cognitive process researchers also opened up planning. They determined that planning did not begin and end with an outline, but instead that it included both goals and content, that it required monitoring and deciding throughout the work, and that it allowed writers to switch back and forth between strategies as things changed.[119] The research identified basic planning strategies that experts used opportunistically: expert writers sometimes used freewriting as a discovery tool or as a short-term planning mechanism; sometimes they used script- or schema-driven planning, following an already developed organizational format suitable for the subject; sometimes they used knowledge-driven planning, following the structure of their research or the authorities they had read; and when the other strategies were not sufficient, they used constructive planning, a more complex, reflective, recursive, and strategic process.[120]

116. Although I use the journal primarily to connect students' reading and writing, introspective journal writing can give law students a way to connect their learning to themselves. See James R. Elkins, Writing Our Lives: Making Introspective Writing a Part of Legal Education, 29 Willamette L. Rev. 45 (1993).

117. Even critics who say that the process approach was not a paradigm shift acknowledge that it changed the way composition teachers teach planning. See Crowley, *supra* note 84, at 70–72.

118. Elbow & Belanoff, *supra* note 113, at 9, 17.

119. Flower et al., *supra* note 46, at 47–48.

120. *Id.* at 4–5.

Drawing on these strands from New Rhetoric, I encourage students to use one or more of these strategies as initial steps. The first option, a zero draft, falls somewhere between freewriting and a knowledge-driven or narrative draft.[121] By getting "something down on paper" in a zero draft, the writer has produced something that she can revise. A zero draft helps the writer begin writing at a time when she is unlikely to be able to form the complex concepts required to create an integrated network of large and small ideas.[122] At that point, "if no one minds, it is a lot easier to just list the parts," either as a narrative of the writer's own discovery process or as a survey of the data in front of the writer using the internal structure of an already existing text.[123]

After they have completed some reading and research, all of which they have written about in their reflective journals, I ask students to start with a list. For five or ten minutes, they list everything they can think of that pertains to their writing assignment: facts, rules, ideas from cases, thoughts about issues, arguments, and ways to approach the assignment. Then I draw a line down the center of the board and tell them to assume that they will need at least two big blocks of material. What could those blocks be called? Do they need more than two big blocks? If so, I add them. Then I ask for items from their lists, and we tentatively assign them to blocks. This process leads to more blocks and to outside-the-block lists of questions, goals, and plans. Once we have finished placing most items into blocks, we decide, tentatively, how many chunks each block could contain and what those chunks could be called.[124] Our "block" and "chunk" outline is concretely tentative; its physical appearance is so sketchy and messy that students rarely treat it as anything but a place to start.

As this tentative blocking indicates, the zero draft is not formless; its form is merely simple and familiar.[125] Even in zero drafting, some thought of purpose and audience and format will intrude. But the real audience for a zero draft is the writer herself; the writing is used to discover what the writer may have to say rather than to conform to what the reader wants.[126] Only after the student

121. The term "zero draft" seems to encourage students to explore because it conveys the message that the draft is not graded and that it is not even a first draft. I first saw the term in Fajans & Falk, *supra* note 97, at 183, 203 (citing Jill N. Burkland & Bruce T. Petersen, An Integrative Approach to Research: Theory and Practice, *in* Convergences, *supra* note 17, at 189, 199).

122. Flower, *supra* note 93, at 27.

123. *Id.* at 27–28. Even if a narrative listing does not meet the needs of the eventual reader, it apparently helps the writer recall, recount, and reflect. The author cites an experiment in which 100 New Yorkers were asked to tell researchers the layout of their apartments; 97 percent responded with a tour instead of a map, indicating that listing is an effective strategy for recalling information without repeating it. *Id.* at 28–29 (citing Charlotte Linde & William Labov, Spatial Networks as a Site for the Study of Language and Thought, 51 Language 924 (1975)).

124. The terms and the process are suggested in Erika Lindemann, A Rhetoric for Writing Teachers, 3d ed., 132–35 (New York, 1995).

125. I ask students to try to keep related ideas together and to try to use paragraph structure to show separation between ideas, but I assure them that these tasks can be the next step rather than the first step.

126. Merron Chorny, A Context for Writing, *in* Reinventing, *supra* note 35, at 1, 5. Flower calls this record of the weaving of thought written by a writer to himself and for himself "writer-based prose." Flower, *supra* note 93, at 19.

has worked out an initial understanding of what she thinks can she begin to worry about reaching a particular audience for a particular reason using a particular format.

In other words, although the zero draft is not free, it should not cost the writer very much. Because he is in the midst of an initial experiment, the writer should be allowed to test his interpretation, organization, argument, evaluation; the student should feel free to take chances and to make mistakes. The teacher can guide the experiment, but should not take over. Reading a zero draft and expecting to find a finished product will be disheartening, but reading a zero draft as a vessel for discovery allows the teacher to be hopeful and helpful. When zero drafts are narrative summaries of the facts, the student's research, or the history of a case, they serve useful purposes. Summary or history drafts get the need to summarize out of the way, help students reflect on what they have read by seeing it in their own words, and give teachers a basis for suggesting next steps. By the end of a zero draft, the student often reaches the start of the next draft.[127]

An alternative to the zero draft is a working draft based on a preexisting heuristic, script, or schema.[128] Although these structures organize the draft, their more important role is to help the writer generate thought. Heuristics, for example, are techniques for educated guessing that "were originally conceived of as generative techniques, useful . . . for exploring a subject." Such structures are dangerous: teachers must present them as ways to work through and understand a problem rather than "as formats for presenting information that the writer is assumed to already understand."[129] Nonetheless, because they do represent common thought processes, a schema or a script can help a writer work her way through such a process and see the relationships between its parts.[130] For example, I show students a working draft framework that is based on a common schema, an IRAC divided into mini-iracs for each element of a major rule, and a common script, the standard types of arguments that lawyers make; the script is embedded within each mini-irac. If used correctly, the framework can be a heuristic that generates thought rather than a paradigm that presents thought because it asks questions at each step. Can the plaintiff show a duty? What is the definition of a duty? Where does the definition come from? How has the definition been supported and applied?

127. See Flower, *supra* note 93, at 34–37.

128. This planning strategy can succeed when the writer knows a script or schema that is appropriate to the task and when the schema is specified in adequate detail to guide the drafting of the text. Flower et al., *supra* note 46, at 6.

129. Applebee, *supra* note 44, at 582. A collection of heuristics is found in Lindemann, *supra* note 124, at 114–21.

130. A schema is a structure that organizes information hierarchically, but the information is not necessarily in order. In contrast, a script organizes information in order, by time or move or category, but it is not necessarily hierarchical. See e.g., Oates et al., *supra* note 111, at 132–50. Later, after thought has been generated and rethought, such structures can be used for a very different purpose, providing a map of a conventional structure that an outside reader may expect. See, e.g., Richard K. Neumann Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style, 3d ed., 89–91 (New York, 1998) (paradigm for structuring proof); Linda Holdeman Edwards, Legal Writing: Process, Analysis, and Organization 85–88 (Boston, 1996) (paradigm for legal analysis).

What factual arguments can you make? What analogous case arguments can you make? What policy arguments can you make?

Teacher comments on zero drafts and working drafts should be fellow-writer comments, similar to those a lawyer might make on a colleague's early draft. On such a draft, the reading lawyer would make comments and pose questions in the margins, mark sections that seemed poorly thought out or unnecessary, respond positively or negatively to particular statements, suggest a different organization or a shift in perspective. Comments on zero and working drafts should be the same. They are best made in the margins, next to and in response to particular sections of text. Rather than providing an overall evaluation of an early pause in a work-in-progress, the teacher should help the student monitor her current understanding and decide what to do next. The teacher should read the draft for what it is, a tentative first thought, and as who she is, a helpful fellow writer who can suggest ways to generate second thoughts.

III. Having Second Thoughts

Because revision was the end of the line in the linear model, it was treated as "no more than an afterthought."[131] New Rhetoric suggested that revision could be used instead to generate second thoughts.[132] The New Rhetoric view of revision is sophisticated and complicated; it recognizes that more revision is not necessarily better revision[133] and that revision sometimes makes writing worse.[134] Because revision is therefore risky, pauses and other readers should be built into the writing schedule to give students "[t]he most powerful resources for good revision . . . [,] time and new eyes."[135]

A. Reading Reflectively: The First Readers

To revise, the writer must read her own text. Such reading is difficult and painful: the writer must be able to read at different distances and for different audiences.[136] In addition, every writer is reading "the text I intended to write, the text I am writing, and the text I hope yet to write."[137]

Assigning a progression of drafts means that students will do some reading and responding to their previous drafts, but the review may be minimal.

131. Sommers, *supra* note 49, at 379.

132. See Maimon et al., *supra* note 36, at 3.

133. See Faigley & Witte, *supra* note 49, at 410–11.

134. See Nancy Sommers, Between the Drafts, 43 C. Comp. & Comm. 23, 26 (1992); Faigley & Witte, *supra* note 49, at 411 (citing Sondra Perl, Understanding Composing, 31 C. Comp. & Comm. 363 (1980)).

135. Elbow & Belanoff, *supra* note 113, at 175.

136. See Lynn Quitman Troyka, Closeness to Text: A Delineation of Reading Processes as They Affect Composing, *in* Only Connect, *supra* note 90, at 187, 194–95. The writer must be able to read from a great distance to determine her "meaning"; at a middle range for form, organization, and style; and at a close range for words and letters. Troyka writes that operating simultaneously at different ranges is not the same as doing first one thing and then another. *Id.*

137. Donald M. Murray, Reading While Writing, *in* Only Connect, *supra* note 90, at 251.

Asking students to respond in writing to their previous drafts can prompt a more active conversation with the writer's previous thoughts.[138] With that goal, I ask students to read and respond to their drafts on their drafts, by writing questions, comments, and suggestions in the margins. Similar to the facing pages of the reflective journal, writing in the margins requires the student to monitor her writing, creates a physical dialog between text and margin that underscores the tentativeness of the text, and records a transaction between the student's writing and reading.

In addition to the margin responses, I ask students to use their journals to keep a reflective log of their developing thought-in-writing. As drafts are written and shared or written and turned in, I require students to pause and respond to a new set of summarizing, reflective, and rhetorical questions:

- Write a quick "picture" of what happened as you drafted or re-drafted this piece.
- Have your predictions changed? Why? When? How?
- Which of your writing plans have been working well?
- Which of your writing plans have been working poorly?
- What are your goals for the next draft?
- How can you change the outcome by doing something another way?[139]

The margin and reflective journal responses help students monitor and reflect on their developing thoughts. To help students find form for those thoughts, I reintroduce blocking. Unlike outlining, which starts with form, "blocking" starts with writing; while a formal outline may meet readerly demands, blocking may be more compatible with writerly needs. The process starts with the writer's thought-in-writing and imposes order because categories and classifications can be seen when the writing is read. For blocking, I ask students to save the full text of their draft, make a copy, and then, on the copy, eliminate everything but the one sentence of each paragraph that could become a topic or thesis sentence.[140] Using the resulting sentence summary, students decide for their own papers: How many blocks of material do I need? What should those blocks be called? What is the purpose of each block? What paragraphs go into which block? What blocks should be broken into smaller chunks? How big should each chunk be? How can I develop each chunk? What order of blocks and chunks makes sense?

To provide another "first reader" for zero or working drafts, I schedule writing conferences to talk about both the students' first reading of their drafts and my own. Instead of a postmortem writing conference after a paper

138. Elbow & Belanoff, *supra* note 113, at 166.

139. Other writing teachers have suggested that students should describe the process of their writing, their problems, and their tentative solutions in a "writer's memo" or a "private memo" that is handed in with a draft. See Jeffrey Sommers, The Writer's Memo: Collaboration, Response, and Development, *in* Writing and Response, *supra* note 8, at 174; Kearney & Beazley, *supra* note 87, at 894-95.

140. Word-processing programs may aid revision by diminishing some risks, such as the risk of forever losing only the good parts of a draft. Elbow & Belanoff, *supra* note 113, at 438.

has been graded, a between-the-drafts writing conference on a living work-in-progress can be immediately and concretely useful.[141] I listen to the writer's summary of where he has been and his plans for where he is going, and then I suggest, question, prod, push, and provide alternatives. In between-the-drafts conference, I try to act as a supportive fellow writer who can offer strategies, techniques, and explanations that grow out of my experience writing in the same field.[142]

B. Reading and Writing Together: The Peer Writing Group

Other readers for the students' early drafts are found among their peers. Before reading and responding to each other's current work, they read and respond to good and bad samples of prior students' earlier work. In these situations, they are involved in reconstructing or shaping the writing decisions made by other student writers and they are "participants, as both readers and writers, in a discussion which has as its focus reading-and-writing-in-progress."[143]

After students have done some drafting themselves, they can gain insights and options for the next draft by reconstructing the process through which another student writer created a similar final product. At that point, a student sample provides examples of the rhetorical problems faced by similar writers of similar papers and of the decision-making processes and choices made by the writers.[144] This use of samples does not give students a model to mimic; instead, students come away with a parallel experience, the decision-making process that another student writer went through to produce a similar text.

After students have reviewed similar finished writings, I form peer writing groups so they can review each other's current work in progress. Between-the-drafts peer writing groups work because they provide "new eyes": it is easier to

141. For the autopsy analogy, see Thomas A. Carnicelli, The Writing Conference: A One-to-One Conversation, *in* Eight Approaches, *supra* note 50, at 101, 102–03.

142. Donald M. Murray describes a progression in his writing conference roles as his students move through a project. In prewriting conferences, he helps students generate thoughts. As their drafts develop, he becomes "a bit removed, a fellow writer who shares his own writing problems, his own search for meaning and form." Finally, he becomes "more the reader, more interested in the language, in clarity. I have begun to detach myself from the writer and from the piece of writing . . . ." The Listening Eye: Reflections on the Writing Conference, 41 C. Eng. 13, 17 (1979).

Brooke K. Horvath suggests that in the role of "more experienced writer, the instructor [can offer] techniques, tricks of the trade, that the student can add to her repertoire." The Components of Written Response: A Practical Synthesis of Current Views, 2 Rhetoric Rev. 136 (1984), *reprinted in* Sourcebook, *supra* note 11, at 207, 212–13. See also Terri LeClercq, The Premature Deaths of Writing Instructors, 3 Integrated Legal Res. 4, 14 (1991); Kearney & Beazley, *supra* note 87, at 898–99.

143. Bartholomae & Petrosky, *supra* note 16, at 93.

144. In a persuasive brief-writing course, for example, we use two student-written briefs, one from each party to the dispute. The students work in groups to discuss the decisions made by the brief writers. The questions focus first on how and why the writers chose one of several possible organizational structures; then on how and why the writers chose to use particular authorities, to present the authority in particular ways, to make particular kinds of arguments, and to provide differing levels of support for those arguments; then on why and how the writers chose particular kinds of emphasis and phrasing; and finally on why and how the writers chose particular ways of describing the facts.

find form and to discover good and bad writing decisions in the work of others.[145] In addition, these groups help students develop as readers and writers by letting them experience the collaboration of reader and writer to monitor, diagnose, and fix problems at a time when collaboration can still help.[146] In the groups, the students are asked to act as fellow writers and to focus on "reseeing, rethinking, or changing the bones," helping their peer writers find form and develop content.[147]

Students bring their current early draft to the peer writing workshop.[148] Before they exchange papers with their assigned peers, I ask each author to reread his own draft quickly and to write his most pressing questions or doubts or problems on the back of one page. After the exchange, the peer writer is asked to focus first on the author's concerns and then to read the draft. As she reads, the peer writer jots down questions or problems or comments in the margins as they occur to her. The peer writer does a thumbnail after-the-fact outline, or if the draft is too early for that, the peer writer is asked to try to "block" and "chunk" the draft. Then the peer writer responds to written questions about organization and content.[149] Finally, the peer writers meet to discuss specific suggestions for improvement: What other organizational structure might be used? What would help to fully develop this point? How can this argument be supported? What relationship or link might be added here?

Peer writer responses are different from teacher responses to a work in progress. In contrast to teacher responses, peer responses are more focused, more specific, and more directive.[150] Peer reader-writers have "the advantage of immediacy in time and space"; they can explain face to face and immediately; they can explain faster and more completely by speaking than they can in writing. Moreover, students appear to respond to a draft in process by trying

145. More generally, writing groups may help prepare law students for the often collaborative nature of writing in the legal profession. See Burke, *supra* note 87, at 404–06.

146. There is some evidence that peer response works better between the drafts than after a finished product has been turned in and graded. In a study of peer response, one group was markedly uncooperative and found the peer meetings to be unhelpful. Anne Ruggles Gere & Ralph S. Stevens, The Language of Writing Groups: How Oral Response Shapes Revision, *in Acquisition*, *supra note 42, at 85, 98–99. The authors speculated that "any further* treatment [by the peers] was bound to seem anticlimactic" because the students in that group had done all their writing in one draft, which had already been graded by the teacher by the time the groups met. *Id.*

147. Elbow & Belanoff, *supra* note 113, at 167.

148. Because these drafts are ungraded, some students will bring in "better" drafts than others. If a student brings in a draft that shows some level of effort, he is allowed to participate. One characteristic of an early draft is that it is difficult to evaluate; something that looks awful may be a wonderful start for a particular student. So I cannot form groups with students of the same or different "achievement" levels; instead I match them by their apparent level of effort and by their apparent level of interest in working with their peers. If students work well together, I often keep them together for the rest of the semester. Although I call them peer writing and peer reading "groups," they are usually pairs for logistical convenience.

149. I give students a written guide with specific questions to answer and room for the written answers. Although the peer reader gives the peer writer both oral and written feedback, I keep a copy of the written answers, mostly to assure that students remain thoughtful and tactful in their comments.

150. Gere & Stevens, *supra* note 146, at 85.

to help the writer form "an actual text" while teachers appear to respond by trying to help the writer form "an ideal text."[151]

Through reading and response, the student has paused between the drafts to tap into the ebb and flow of being both a reader and a writer and of reflecting on emerging texts within a context of fellow writers. The student-as-writer has stopped to read and monitor his current meaning, heard fellow-writer responses from his teacher and his peers, and charted his next thoughts. The student-as-reader has read and monitored the texts of other students and responded to them as a writer. In the process, students may read and write their way to second thoughts.

IV. Before the Last Draft

First thoughts and second thoughts are for the writer. But the last draft is for the reader, and in legal writing the purpose of the last draft is to persuade that reader to believe something or to do something. To be able to have such an effect on an audience, a student writer must work through not only what she has to say but also how it can best be heard by those she wants to affect. That is, she must be able to imagine, and to cultivate within herself, the kind of reader her writing will encounter.[152] Earlier in the reader-writer loop, both student and teacher were readers in good faith who read to understand; they tried to help the writer find meaning and form; they suggested, questioned, encouraged; and they offered the benefit of the doubt. Now, as outside readers, both student and teacher must act more like the "stranger who reads . . . with a lawyer's eyes, searching for flaws." Earlier the reader and the writer within the student's head were equal negotiators; now the reader is "a buyer in a buyer's market."[153]

A. Reading Critically: The Peer Reading Group

Without some basis for imagining and some practice imagining that they are reading and writing within the law, students cannot make appropriate rhetorical choices.[154] Before becoming an outside reader, the student must first be able to imagine such a reader. To imagine a legal audience, law students should figuratively walk around within such an audience: watch as lawyers, judges, legislators work; listen to clients' problems; read the stories told by those who work in, or who are caught within, the law. A basis for imagining can be provided in various ways. Practitioner journals and bar

151. *Id.* at 102–03. Students unconsciously assume a rhetorical purpose, that is, that the writing was designed to have an influence or an effect on an audience. Teachers tend to assume a more pedagogical purpose, that the writing is an exercise meant to train students in the use of certain rhetorical forms. *Id.*

152. One goal of college writing courses has been to teach students to read their own work objectively, to "decenter" from their own thoughts on paper, so that they can change it from writer-based to reader-based prose. See Ronald, *supra* note 17, at 231, 234.

153. Mina P. Shaughnessy, Errors & Expectations: A Guide for the Teacher of Basic Writing 7, 12 (New York, 1977).

154. See Irvin C. Rutter, Law, Language, and Thinking Like a Lawyer, 61 U. Cin. L. Rev. 1303, 1307–10 (1993) for concrete examples of how visualization can help students see gaps in what they have written.

association newsletters and magazines carry stories about legal practice; fiction and nonfiction trace the process of lawsuits and are filled with narratives of clients, defendants, victims, lawyers, and judges. Students can collect and use "reader protocols" from lawyers, law clerks, and judges to better understand how these real-world audiences read legal memos and briefs.[155] Students can conduct sophisticated analyses of their potential legal audiences.[156]

Equipped with a basis for imagining a legal audience, students should practice reading as such an audience. Throughout the semester, my students and I look at whatever we are then reading and talk about its effect on us as novice and expert legal readers. In addition to interpreting what the writing "means," we look at how its structure, tone, style, and word choices affect our interpretations. In particular, we identify organizational cues, discuss why they are helpful to us as readers, and in what situations they might be more or less necessary. We decide whether particular words and phrases in particular documents are more or less helpful in achieving the writer's purpose. These brief experiences as outside legal readers help students see that writing choices make a difference to outside readers.

Later, in peer reading groups, my students take on the outside-reader role for each other's work. They are asked, for example, to read another student's memo as a supervisor, another student's brief as a judge or a responding attorney, another student's client letter as a client.[157] Their instructions ask them to respond to the work as a particular kind of outside reader rather than to evaluate how good the paper might be.[158] After responding in writing, the students talk with each other about their responses.[159] Through the peer

155. See Stratman, *supra* note 90, at 47.

156. Such analyses would determine (1) audience attributes, that is, what the audience knows about the subject, what the audience needs from the writing, what the audience believes about the topic or the writer, and what power or status the audience has; (2) assessment criteria, that is, what criteria an audience like the one imagined would use to judge the writing; and (3) rhetorical strategies, that is, what ways of presenting the topic would meet the imagined criteria and allow the writer to achieve her intended effect. See Richard Beach & JoAnne Liebman-Kleine, The Writing/Reading Relationship: Becoming One's Own Best Reader, *in* Convergences, *supra* note 17, at 64, 65–70. The authors outline a series of specific activities for teaching audience analysis. *Id.* at 74–81.

157. I separate peer writing from peer reading from peer editing to emphasize to students that each activity is a different way to read and respond.

158. See Carol Batker & Charles Moran, The Reader in the Writing Class, *in* Only Connect, *supra* note 90, at 198, 205. Batker and Moran suggest that reader-response questions help students see how readers' experiences can produce different interpretations and thus can improve writers' abilities to analyze their audiences. *Id.* After experience with legal writing groups, Bari Burke concluded that "reader-based feedback" works better than feedback based on abstract criteria, especially when the reader-based feedback focuses on the relationship between the writer's intentions and the effect of the text on the reader. See Burke, *supra* note 87, at 407–09.

159. Some composition teachers advocate peer read-aloud sessions where the readers read other students' papers aloud, talking about their comprehension and other problems as they read See Beach & Liebman-Kleine, *supra* note 156, at 80. Others advocate writer read-aloud sessions where the writers read their papers aloud and the peers respond with written and oral comments. See Birnbaum, *supra* note 58, at 43–44. Having to ask questions helps the student-as-reader form better questions when she reads her own work; having to answer questions helps the student-as-writer learn how to make and to justify her choices.

reading groups, the peer reader gains experience "objectifying" a written document, an experience that can help the student view her own paper as not her own. The peer writer receives response from an actual reader and can even ask questions of that reader.[160] In before-the-last-draft writing conferences, I provide another outside reader's response to the student's work.[161]

B. Writing Critically: Response to Other Readings

After practice reading as an outside reader, the students practice writing for such a reader. Thus, after reader response and discussion, the peers work together to revise one or two sections of their papers in response to the reader's suggestions. In this way, the writer practices how to respond to a writing suggestion and learns immediately whether his response is effective. During the before-the-last-draft writing conference, I also help the student writer revise in response to a few of my outside-reader suggestions.

In addition to specific suggestions from outside readers who have actually read their individual papers, the students also practice writing in response to more general outside-reader suggestions. Because outside legal readers expect logical relationships to be explicitly marked and expect conventional rule and argument patterns to be observed, I ask students to determine whether their not-yet-final drafts meet these general expectations. That is, I ask the students to find or to write thesis sentences for every paragraph, to string the sentences together, and then to write "through" them with transitions and connectors. I ask students to use the now-connected sentences to write a new thesis paragraph. They can then evaluate the thesis's relationship to the rest of the paper as well as the logical links between the parts of the paper. This exercise helps students develop the convention of "explicitly marking the logical and rhetorical relationships between sentences, paragraphs, and larger units of composition."[162] I also ask students to compare the structure of the paragraphs in their not-yet-final draft to suggested paradigms for establishing legal rules and supporting legal proofs. This exercise helps students observe the conventional patterns "between concrete and abstract statements" and "between cases and generalizations" or at least to determine that they are not doing so.[163] As for sentence structures and word choices, we read, discuss, and revise good and bad examples taken from professional and student samples. Such hands-on review and revision is the only way students can acquire the judgment about sentence structure and word choices that comes "not from the study of vocabulary lists but from having been a steady reader of the kind of writing people do [in law school]."[164]

160. See Burke, *supra* note 87, at 404–05.

161. In these conferences I try to read and respond as an "average legal reader." Some reader-response theorists suggest that the writing conference should be used to "read[] through a student's writing and, as we read, describ[e] as best we can what is happening to us—becoming, in short, a real-life, talking and responding reader." Barker & Moran, *supra* note 158, at 205.

162. Shaughnessy, *supra* note 153, at 240.

163. *Id.*

164. *Id.* at 188.

Finally, I ask students to pause before the last draft and to use their journals to summarize, reflect, and respond. Through reading and response, the student-as-writer has stopped to read and monitor his efforts to reach an audience, heard outside-reader responses from his teacher and his peers, and charted his next draft for the reader he expects to encounter. The student-as-reader has read and monitored the texts of other students and responded to them as a reader. In the process, students may read and write their way to rhetorical effectiveness.

* * * * *

This article suggests an ebb and flow of reader and writer, text and context drawn from New Rhetoric theory, research, and teaching practices. Looking back, my conclusion seems self-evident: students will become better legal readers and writers if they are encouraged to construct second thoughts out of first thoughts, over time, through reflection, and in context. But if I had known that it would be my conclusion when I started, I wouldn't have had to write this.[165]

165. See Donald M. Murray, The Feel of Writing—and Teaching Writing, *in* Reinventing, *supra* note 35, at 67, 68.