

MACCRATE (IN)ACTION: THE CASE FOR ENHANCING THE UPPER-LEVEL WRITING REQUIREMENT IN LAW SCHOOLS

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Many commentators have described, and lamented, the gap between the legal academy and the practice of law. This article takes a more hopeful approach. The American Bar Association, the accrediting body for law schools, appears to have been nudging law schools toward offering, and even requiring, more and more practical legal education to teach law students how to perform the tasks they will need in order to practice in a competent manner. The article examines the 2001 amendment to the ABA Standards for Accreditation, which required, for the first time, an "additional rigorous writing experience after the first year," to see if it had the intended impact. The research presented herein concludes that the amendment had little or no effect on how law schools educate law students in practice skills and suggests that the amendment constituted a missed opportunity to move schools toward a more practical approach to legal education. However, the article proposes that the 2005 amendments to the Standards and their Interpretations have placed increased emphasis on the need for law schools to invest the upper-level writing requirement with additional "rigor."

INTRODUCTION

Imagine, for a moment, that medical schools had evolved in the same manner that law schools did evolve. Instead of a relatively brief period of learning "basic science," followed by several years of intensive, supervised training on live patients, medical students in this imagi-

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nary world would focus most of their attention throughout their education on scientific methods, theory, and discerning the origins of disease. All students would be required to engage in research attempting to discover new diseases or new treatments for known diseases or injuries, and to write a paper describing their findings and theories. Only a few students would ever get to apply their theoretical learning in "live patient clinics"—no student would be required to have such an experience while in medical school.

Would you entrust your health to a new medical school graduate?

Most of us would not. This, however, is exactly what the legal academy is expecting the consumers of legal services to accept from new law school graduates.

Many commentators have described, and lamented, the gap between the legal academy and the practice of law.¹ This article takes a more hopeful approach. It appears that the American Bar Association ("ABA"), which accredits law schools, has been attempting to nudge law schools toward offering, and even requiring, more and more practical legal education in order to teach law students how to perform the tasks they will need in practice in a competent manner. The process, however, has been excruciatingly slow.

This article will examine one recent attempt by the ABA to move schools in the direction of more practical education to see if it had the intended effect. The article examines the 2001 amendment to the ABA Standards for Accreditation, which required, for the first time, an "additional rigorous writing experience after the first year." I conclude that the amendment had little or no effect on how law schools educate law students in practice skills, and suggest that the amendment constituted a missed opportunity to move schools toward a more practical approach to legal education. I suggest further, however, that the 2005 amendments to the Standards and their Interpretations have put increased emphasis on the need for law schools to invest the upper-level writing requirement with additional "rigor."

Many commentators have suggested that a gap exists between academia and the practice of law. In 1989, the ABA's Council of the Section of Legal Education and Admissions to the Bar established The Task

1. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505 (1994); Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3 (1991); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992).

Force on Law Schools and the Profession: Narrowing the Gap. Chaired by Robert MacCrate, Esq., the Task Force began its work in May of that year and conducted a comprehensive study of the minimum requisite skills and values lawyers need to competently handle legal matters. It ultimately released, in July of 1992, a report that catalogued those necessary skills and values, and discussed how law schools do, as well as should, teach them.² The report included twenty-five recommendations specifically geared toward “[e]nhancing [p]rofessional [d]evelopment [d]uring the [l]aw [s]chool [y]ears,” including many recommendations suggesting ways in which the teaching of practical lawyering skills, including legal writing, could be enhanced.³

One of the effects of that report has been an ever-increasing focus on so-called “skills education”⁴ in law schools.⁵ Indeed, one of the rec-

2. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar ed., 1992) [hereinafter MACCRATE REPORT]. The report includes a list of ten “[f]undamental [l]awyering [s]kills” that every lawyer needs to competently represent clients. *Id.* at 138–40. The list includes such practical concepts as “[p]roblem [s]olving,” “[f]actual [i]nvestigation,” “[c]ounseling,” “[n]egotiation,” and “[o]rganization and [m]anagement of [l]egal [w]ork,” in addition to the more traditional skills of “[l]egal [a]nalysis and [r]easoning” and “[l]egal [r]esearch” that law schools historically have required students to master. *Id.*

3. *Id.* at 330–34.

4. I do not consider the term “skills education” to be derogatory in any sense. Indeed, in most professions, to be called “skillful” is a high compliment. Some in the legal academy, of course, fear that law schools which focus more on skills risk turning into mere “trade schools.” A full discussion of the tension between “practice-oriented” law schools and “academic” or “graduate school” models is beyond the scope of this article. It suffices for present purposes to acknowledge that I believe most law schools can, and should, do more to prepare law students for what they will face upon graduation. For an interesting discussion of the tension between practice and academic orientations, see Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of “Professional Schools,”* 100 DICK. L. REV. 647, 670 n.63 (1996) (suggesting that the legal world needs both “research law schools” and “professional” or “teaching law schools,” but probably more of the latter). For a contrary view, see Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, Keynote Speech to the Deans’ Workshop at the Meeting of the ABA Section of Legal Education and Admissions to the Bar (Feb. 8, 1995), in 30 WAKE FOREST L. REV. 267, 279 (1995) (suggesting with alarm that a “few, but vocal and aggressive lawyers among the practicing bar” seek to force the ABA “to recognize the practitioner’s right to require the teaching of particular skills courses and other subjects by the law schools”).

5. Michael M. Bowden, *The New Breed of Law Grad*, LAW. WKLY. USA, Apr. 5, 1999, <http://www.lawyersweeklyusa.com/nlsgsl.cfm>. See also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 144–45 (2001) (acknowledging the difficulty of ascribing motives to changes in law school curricula nationwide, but suggesting that in the first five years after the report was published, significant changes in the ABA Standards for Approval of Law Schools led to the upgrading of status of clinical faculty and the professionalization of clinical teaching); Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 22 N.Y.L.

ommendations of the MacCrate Commission was to amend Standard 301 of the Standards and Interpretations for the Approval of Law Schools to clarify that at least part of the mission of law schools was "to prepare [law graduates] to participate effectively in the legal profession."⁶ This recommendation was adopted immediately.⁷ The MacCrate Commission further recommended additional self-study⁸ and revisions to the standards,⁹ and the ABA did so, resulting in some stylistic changes at first, then some substantive revisions (effective in 1996).¹⁰ Among the substantive changes implemented in 1996 were the promulgation of a preamble that specifically identified the role of law schools in preparing students to practice law¹¹ and the addition of a requirement that law schools

SCH. J. INT'L & COMP. L. 25, 36, 38-41 (2003) (suggesting that the MacCrate Report has had a substantial and positive impact on curricula at law schools and has improved job status for clinical teachers, but suggesting that much work needs to be done to improve the teaching of several of the skills identified in the MacCrate Report).

On the other hand, some law school deans criticized the MacCrate Report. *See, e.g.*, John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 190 (1993) (criticizing the report for ignoring the cost of implementing its recommendations).

6. MACCRATE REPORT, *supra* note 2, at 330, recommendation C2.

7. At the time the MacCrate Report was released, Standard 301(a) read, "[a] law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar." AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS § 301 (1992). The following year, that Standard was amended to read, "[a] law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession." AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS § 301 (1993).

8. MACCRATE REPORT, *supra* note 2, at 331, recommendation C8.

9. MACCRATE REPORT, *supra* note 2, at 330, recommendation C3 (suggesting that the accreditation standards should be revised to recognize the importance of skills instruction in law schools) and C4 (suggesting that the interaction of core courses and skills instruction should be "revisited and clarified").

10. AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 5 (2004).

11. The new preamble stated, in relevant part:

The Standards for Approval of Law Schools of the American Bar Association are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The graduates of approved law schools can become members of the bar in all United States jurisdictions, representing all members of the public in important interests. Therefore, an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students, and the profession, it must provide an educational program that ensures that its graduates:

....

"offer to all students . . . an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving, and oral and written communication."¹² Then, in August 2001, the ABA Board of Governors adopted yet another revision to Standard 302, requiring, for the first time, "at least one additional rigorous writing experience after the first year."¹³

Part I of this Article will review the history of the 2001 amendment and how law schools around the country have responded to it. Part II reviews the amendment and analyzes what curricular changes the ABA may have anticipated that law schools would adopt in response, concluding that the amendment is likely (or at least should be viewed as) a continuation of a process through which the ABA has attempted to gradually move law schools toward more practical education. Part III will describe a survey of law schools that the author conducted during the summer of 2004 which sought to determine how law schools are now attempting to meet Standard 302. Part IV then analyzes the survey data and concludes that many law schools have responded to the amendment, not by requiring any more skills education or practice-oriented writing, but by requiring students to engage in additional academic writing, such as requiring academic papers, senior theses, or law review participation. Given the difficulties inherent in judging "rigor" in such settings, the article concludes that this response by law schools does not fairly meet the requirement of the 2001 amendment and suggests that the generally timid responses by law schools to the 2001 amendment may have been the im-

(2) receive basic education through a curriculum that develops:

....

- (ii) skills of legal analysis, reasoning, and problem solving; oral and written communication; legal research; and other fundamental skills necessary to participate effectively in the legal profession[.]

AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 17 (1996) [hereinafter 1996 STANDARDS].

12. *Id.* at 30, Standard 302(a)(2). The 1996 amendments also changed Standard 302's requirement for teaching "professional skills." Previously, it had required that a law school "offer instruction in professional skills." AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 23 (1995). In 1996 the ABA amended the standard to require schools to offer "adequate opportunities for instruction in professional skills." 1996 STANDARDS, *supra* note 11, at 30, Standard 302(a)(4).

For a fuller discussion of the history of changes to the ABA Standards resulting (at least arguably) from the MacCrate Report, see Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648, 655-59 (1996).

13. AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 24 (2001) [hereinafter 2001 STANDARDS].

petus behind the changes adopted by the ABA in 2005 to further strengthen the upper-level writing requirement. Part V concludes with several recommendations for how law schools can, at minimal cost, improve the rigor of their existing upper-level writing requirement in order to meet the 2005 interpretation adopted by the ABA.

I. THE 2001 AMENDMENT TO THE ABA ACCREDITATION STANDARDS

A. A Quick Look at the ABA Accrediting Process

In 1921, the ABA published its first statement of minimum standards for legal education and began publishing listings of law schools that complied with those standards.¹⁴ The ABA is now recognized by the U.S. Department of Education as the accrediting agency for law schools granting the basic degree; it thus establishes national standards for law schools around the country.¹⁵ In the view of the ABA, this centralized accreditation function:

obviate[s] any need for the individual state courts to evaluate law schools throughout the United States, a role better undertaken by a central body which includes persons from the judiciary, the practice of law and legal education. Ensuring a sound education is necessary to assure a qualified bar. Bar examinations alone are not sufficient to test an applicant's preparation for the practice of law. . . . The function of the ABA's Standards is to mandate that each student receive the legal training necessary to practice law competently, not merely to pass the bar examination.¹⁶

The ABA currently fulfills its accrediting function through its Council of the Section of Legal Education and Admission to the Bar. The Council recommends changes to the ABA Standards for Approval of Law Schools.¹⁷ After the ABA House of Delegates approves the standards, the ABA also performs a policing function by conducting periodic

14. AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, THE AMERICAN BAR ASSOCIATION'S ROLE IN THE LAW SCHOOL ACCREDITATION PROCESS 1 (1981).

15. *Id.* at 4.

16. *Id.* at 4-5.

17. These standards are developed by the Standards Review Committee of the Section and by the Council, which publishes the proposed standards and then conducts public hearings to receive commentary from the legal profession, the academic community, and others. Robert K. Walsh, *American Bar Association's Standards for the Accreditation of Law Schools*, 43 S. TEX. L. REV. 697, 698 (2002).

site inspections of member schools through its Accreditation Committee to insure compliance with the standards.¹⁸

Historically, the ABA Standards on teaching legal writing were more aspirational than mandatory, leaving the schools with broad discretion in how to meet the stated goals. For example, in 1973, the Standards only required law schools to “offer . . . training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy.”¹⁹ By 1983 that requirement had changed to a requirement that law schools “shall . . . offer to all law students at least one rigorous writing experience.”²⁰ That language was not substantially modified until 2001.

B. The 2001 Amendment

As of 2000, ABA Standard 302 included a broad requirement that law schools offer training in legal skills “generally regarded as necessary to effective and responsible participation in the legal profession,”²¹ as well as a more specific requirement that schools offer “at least one rigorous writing experience.”²² During the 2000–2001 academic year, the Council undertook a review of Standard 302, and proposed a change requiring all *juris doctor* candidates to *receive* “at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.”²³ In its transmittal to the ABA House of Delegates, the Council explained that the change was needed “to reflect the importance of legal writing instruction in a law school curriculum.”²⁴ The change was adopted by the House of Delegates at its meeting on August 7, 2001.²⁵

18. 2001 STANDARDS, *supra* note 13, at 80. For a good overview of the accreditation process and the interplay of the various constituencies (admitting jurisdictions, law schools, students, and the practicing bar) in that process, see generally Ramsey, *supra* note 4.

19. AM. BAR ASS’N, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE 7, Standard 302(a)(ii) (1973).

20. AM. BAR ASS’N, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE 7, Standard 302(a)(ii) (1983).

21. AM. BAR ASS’N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 40, Standard 302(a)(1) (2000) [hereinafter 2000 STANDARDS].

22. *Id.* at 40, Standard 302(a)(2).

23. 2001 STANDARDS, *supra* note 13, at 24, Standard 302(a)(2).

24. Council of the Section of Legal Education and Admissions to the Bar, *Commentary on 2000–2001 Changes to the Standards, Interpretations, and Rules* (June 2001) (on file with author).

25. Memorandum from John A. Sebert, Consultant on Legal Education to the A.B.A., to Law School Deans, University Presidents, and Others (Aug. 9, 2001) (on file with author).

It is interesting to note that the 2001 amendments changed Standard 302 from an aspirational (a requirement only that schools *offer* such education) to a mandatory requirement that law students actually *receive* such education. Prior to 2001, Standard 302 required schools only to offer four things: (a) “instruction in substantive law, values and skills,” including legal writing; (b) “at least one rigorous writing experience;” (c) “adequate opportunities for instruction in professional skills;”²⁶ and (d) live-client clinical opportunities.²⁷ The only instruction *required* by the pre-2001 Standard was in professional responsibility.²⁸ The 2001 amendment changed the balance by requiring three of these types of instruction: substantive law, legal writing (including the new requirement of an additional rigorous writing experience after the first year),²⁹ and professional responsibility.³⁰ Professional skills education and live-client clinical experiences remained in the “shall offer” category,³¹ although the 2005 amendment to Standard 302 later moved “professional skills generally regarded as necessary for effective and responsible participation in the legal profession” to the mandatory “shall require” category.³²

C. Interpretation: What Was the ABA Trying to Accomplish?

It is always difficult to determine the “intent” of any legislative body. Thus, determining what either the Council of the Section of Legal Education and Admission to the Bar, or the ABA House of Delegates, “intended” to accomplish with this amendment is somewhat speculative.³³ However, the legislative history suggests that the 2001 amendment to the Standards was part of a continuing effort by the ABA to require law schools to focus more on the practical aspects of practicing law

26. 2000 STANDARDS, *supra* note 21, at 40, Standard 302(a).

27. *Id.* at 41, Standard 302(d).

28. *Id.* at 40, Standard 302(b).

29. 2001 STANDARDS, *supra* note 13, at 24, Standard 302(a).

30. *Id.* at Standard 302(b).

31. *Id.* at 24–25, Standard 302(c).

32. AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 19, Standard 302(a)(4) (2005) [hereinafter 2005 STANDARDS].

33. This is especially true given the process by which the Standards are revised. One commentator described this process as a “consensus validation model” that involves public hearings and review before committees consisting of multiple constituency groups (legal educators, judges, and practicing attorneys) before the final version is submitted to the ABA’s House of Delegates for a vote. Walsh, *supra* note 17, at 697–98. Given the fact that input is received from so many sources and reviewed, interpreted, and acted upon at so many different levels, it is difficult to discern whose “intent” is represented by the final product.

and to reduce the perceived “gap” between academia and the practicing bar.

First, the MacCrate report itself suggests a need for additional emphasis on “skills” education;³⁴ the 2001 amendment is clearly consistent with that emphasis. Second, the sudden shift from aspirational to mandatory language³⁵ suggests a fear that at least some law schools had not been sufficiently rigorous in tending to the skills education component of the curriculum.³⁶

An ABA staff member who supported and advised the work of the Council of the Section on Legal Education and Admissions to the Bar also suggested that the intent of the amendment was to encourage additional skills education. Barry Currier, now Dean of the Concord Law School, was the Deputy Consultant on Legal Education for the ABA when Standard 302 was amended in 2001. In that role, he was the ABA staff person assigned to work with the Standards Review Committee of the Council (“SRC”), although he was not a voting member of that committee. Dean Currier has acknowledged that some members of the legal profession were complaining at that time that too many students were graduating without sufficient writing skills; thus, the amendment to the Standard was designed in part to “continue to support the claim that the Standards’ requirements did, in fact, do an adequate job of preparing law graduates to begin the practice of law.”³⁷

However, Dean Currier also suggested that at least some members of the SRC may have believed that this amendment was not particularly substantive, noting that:

34. See MACCRATE REPORT, *supra* note 2. In particular, the MacCrate Report specifically asked the ABA to “clarify” Standard 301 to “affirm that education in lawyering skills and professional values is central to the mission of law schools . . .” *Id.* at 330. Also, “[t]he interpretation of Standard 302[] should expressly recognize that students who expect to enter practice in a relatively unsupervised practice setting have a special need for opportunities to obtain skills instruction.” *Id.* See also *id.* at 233–72 (Chapter 7—Professional Development During Law School).

35. See *supra* text accompanying notes 26–32. The inclusion in 2005 of “professional skills generally regarded as necessary for effective and responsible participation in the legal profession” in the category of instruction that law schools “shall require” is further evidence that the ABA continues to press law schools toward requiring more and more practical education. See *supra* text accompanying note 32.

36. This is simply an application of the principle of statutory interpretation that postulates that a legislative body, when making a substantial change to the language of a provision, intends some change in the meaning or application of that provision. “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995).

37. E-mail from Barry Currier, Dean, Concord Law School, to author (July 28, 2005) (on file with author).

most schools were already requiring what the Standard now insisted upon. In this case, the Standard trailed, not led, this change. There were certainly a few schools that had to add an upper-level writing requirement or change around the one that they had, but most schools could easily demonstrate compliance with the changed Standard.³⁸

The question of whether the SRC “intended” to make a substantive change (toward requiring more rigorous, practical legal writing experiences) or simply intended to document and make explicit what most schools were already doing (in the form of required academic writing) may be impossible to answer. Certainly, given the fact that the SRC is composed of representatives from the academic community, the courts, and the practicing bar,³⁹ it is quite likely that various members of the committee at that time may have had different reasons for supporting the change.⁴⁰ Yet, there are several reasons to believe that the amendment was in fact an attempt to improve the legal writing abilities of students in a practical context. First, the Committee itself, in its announcement of the change, focused on the need to highlight the “importance of legal writing instruction in a law school curriculum.”⁴¹ Second, the ABA Standards have traditionally taken a laissez-faire position with regard to the core academic curriculum of law schools, leaving it to each individual school to determine what courses to offer, how they should be taught, and how students should be evaluated.⁴² Reading this new language as requiring a particular kind of evaluation (a written academic paper as opposed to an examination) would mark a new and unexplained departure from the past practice of allowing schools to decide such matters for themselves.⁴³

38. *Id.*

39. For 2005–2006, for example, the SRC consisted of thirteen members: eight deans and law school faculty members, one college president (and former law school dean), two judges, and two practicing lawyers.

40. There is also the difficulty in determining whose “intent” is being measured here. While the SRC (and the Council) can propose changes, ultimately the changes are adopted by the ABA’s House of Delegates, Walsh, *supra* note 17, at 698, which is dominated by practicing lawyers. It is therefore quite possible, or even likely, that the House of Delegates approved the change upon an entirely different basis than did the SRC or the Council.

41. See *supra* text accompanying note 24.

42. “The Standards and Interpretations reflect the general principle that law schools should be given considerable discretion to fashion their own curricula, consistent with their varied and diverse missions.” 2005 STANDARDS, *supra* note 32, at 138 (Council Statement 14—Law School Curricula (Aug. 2003)).

43. Indeed, faculty teaching the traditional academic or “casebook” courses probably do not believe that, in requiring an academic paper instead of a final examination, they have taken on the additional responsibility for providing additional “legal writing instruction.” The casebook teacher will, appropriately, place more emphasis on the substantive analysis, while the

Finally, the transmittal letter from the Council to the ABA House of Delegates suggests that the Council saw a gap in the practice-oriented side of legal education. In that letter, the Council explained why it chose to require two separate “rigorous writing experiences,” one in the first year and one more prior to graduation:

There are, of course, various ways to state an increased requirement, including simply requiring that law schools require two writing experiences rather than one. Many schools might suggest, however, that they meet such a requirement by a two-semester first-year course. Others might suggest that two senior writing seminars would meet such a standard. Neither of those schemes is satisfactory to the Council. The Council believes that a substantial writing experience in the first year is fundamental, and it believes that students will benefit from a writing experience beyond the first year. This increased requirement still leaves law schools with an appropriate amount of flexibility to design programs that fit their student bodies and missions.⁴⁴

Given the historical context in which this amendment occurred,⁴⁵ it is reasonable to conclude that the ABA, in adopting the 2001 revision to Standard 302, was attempting to require that law students receive fuller education in practical legal writing. If nothing else, the 2001 amendment was an opportunity for law schools to take another step toward meeting the needs of practicing lawyers.

How did the academy respond to this change?

III. THE SURVEY

It may be impossible to examine current law school curricula and determine what changes, if any, were made in direct response to the 2001 amendment. Part of the problem is a lack of detailed “baseline” data as

legal writing professor will also evaluate the technical aspects of writing. *See infra* text accompanying note 71.

44. Council of the Section of Legal Education and Admissions to the Bar, *supra* note 24, at 1–2.

45. *See supra* text accompanying notes 4–13 for a discussion of the incremental changes made subsequent to the publication of the MacCrate Report. Also, while it is of course difficult to prove prior intent through subsequent action, the 2005 amendments to Interpretations 302-1 and 302-2 suggest that the “additional rigorous writing experience after the first year,” 2001 STANDARDS, *supra* note 13, at 24, Standard 302(a)(2), first included in the 2001 amendment may have been intended to require additional practical writing experiences. *See infra* notes 84–89 and accompanying text.

to what writing requirements existed in 2000 or 2001.⁴⁶ Another part of the problem is that it is impossible to know whether any discernable changes were a result of the amendment to the accreditation standards or some other cause. However, it is useful to examine law school curricula several years following the 2001 amendment to discover how law schools now attempt to meet the amended standard, and then to see if these methods are in concert with the ABA's apparent purpose of requiring additional practical writing education.

To answer this question, I supplemented the annual data gathered by the Association of Legal Writing Directors and the Legal Writing Institute with data from a more specific survey of accredited schools.

A. Survey Methods

In the summer of 2004, I sent a survey to the legal writing directors at every ABA-accredited law school.⁴⁷ The survey forms requested some "demographic" information about the school and the size of the expected incoming first-year class. The survey included questions in three sections. Part I dealt with the current structure of the first-year legal writing program. Part II inquired about upper-level writing requirements, including any required legal writing courses as well as information about how each school fulfills the Standard 302 requirement for an additional rigorous writing experience after the first year. Part III dealt broadly with how various lawyering skills (generally following the ten "core" skills identified in the MacCrate Report) were addressed in the law school's curriculum.

46. The Association of Legal Writing Directors and the Legal Writing Institute (two professional organizations comprised, respectively, of directors of legal writing programs and of legal writing professors generally) jointly conduct an annual survey of legal writing programs in all American law schools ("ALWD/LWI Survey"). See Archive of ALWD/LWI Survey Reports, <http://www.alwd.org/alwdResources/surveys/surveyNDX.htm> (last visited Sept. 26, 2006). In 2001, 143 schools (eighty-two percent of all ABA-accredited schools) participated in the survey. ALWD/LWI, 2001 ALWD/LWI SURVEY REPORT. (2001), http://www.alwd.org/alwdResources/surveys/2001survey/section_5-6.pdf.

Part V of that survey asked questions about upper-level writing courses offered at each school, but only one question (number thirty-three) directly inquired into whether such courses were required and, if so, of what they consisted. *Id.* Moreover, the question was structured in such a way that schools that required several forms of upper-level writing were counted multiple times in the total of schools that require an upper-level writing experience; thus, it is not possible from this survey to obtain an unduplicated number of schools participating in the 2001 survey that had some sort of an upper-level writing requirement. *Id.*

47. For schools without legal writing program directors, I sent the survey to the assistant dean for academic affairs, with a letter requesting that the dean forward the survey to a member of the legal writing faculty if he or she could not complete the survey directly.

Parts I and III were designed to create a baseline data set for a future study as to how law schools respond to the current round of amendments to the Article III ABA standards.⁴⁸ Part II was an attempt to measure, if possible, how law schools responded to the 2001 amendment to Standard 302. This Article reports and analyzes the data gathered in Part II of my survey.

B. Survey Responses

Survey questionnaires were sent to 178 ABA-accredited law schools. Responses were received from 65 schools, a response rate of 36.5%.

Since the 65 respondents constitute a self-selected sample, I compared the sample to the total universe of ABA-accredited law schools in several ways, to determine whether I had collected a sufficiently representative sample from which to draw meaningful conclusions.⁴⁹ The criteria I used were law school size, geographic region, and “ranking.” I found that larger schools were slightly overrepresented in the sample,⁵⁰ but that the responding schools were spread out geographically in a fairly representative manner.⁵¹

48. In 2005, the ABA approved additional changes to the Standards and Interpretations. See *infra* notes 82–86 and accompanying text. I hope to repeat this survey in four years and compare the results with the baseline data I collected in 2004 to see how law schools have responded to the 2005 amendments.

49. Statisticians expect that any sample will vary to some degree from the actual population of the items being sampled. They can test, however, to determine whether the variation between the sample and the known universe of the actual population is likely due to random variations or if some other factor is at work that can explain the variation. To do this, statisticians calculate a “P-value,” which on any dimension will range from 0 (the variation is non-random) to 1 (the variation is completely random, and the sample is therefore fairly representative of the true universe). While there is no “magic line” which defines when a variation is statistically significant, statisticians generally view p-values under .10 to indicate a statistically significant variation, while higher p-values show mere random variations. See letter from Debra Hall, Senior Lecturer, Indiana University Purdue University Indianapolis, Department of Mathematical Sciences (Oct. 17, 2006) (on file with author). I asked the statistics department at Indiana University Purdue University Indianapolis (IUPUI) to calculate the p-values for the three measures of my sample described below; their findings are reported *infra* at notes 50–51 and note 53.

50. To evaluate this criterion, I ranked all ABA-approved schools from top to bottom by size of expected entering first-year class. Nearly 28% of the schools in the sample fell in the top quartile on this scale, and 52.3% of the sample was in the top half of the size rankings. The p-value for this measure (as calculated by the IUPUI statistics department) was .837, strongly suggesting that the sample was representative on the size criterion. Letter from Debra Hall, *supra* note 49.

51. To evaluate this criterion, I arbitrarily divided the country into five regions: Northeast, Southeast, Midwest, Southwest, and Mountain/Pacific. I then compared the percentage of

Finally, I compared the sample of 65 responding schools to the much-maligned *U.S. News and World Report* (“USNWR”) rankings to see if the sample was distributed through the “tiers” in relatively equal proportions.⁵² I found that 53.1% of the sample came from the top two “tiers” of the USNWR list. However, due to ranking ties and the desire for a nice round number for the “Top 100” list, the top two tiers in the USNWR ranking actually comprised 57% of the total number of ranked schools, so my sample was slightly under-inclusive of the “Top 100.”⁵³

I also compared the substantive results of my survey to a curriculum survey completed by the ABA and published in 2004. In my survey, 54 of 65 responding schools (83%) reported that an “academic paper” satisfied the school’s upper-level writing requirement. The ABA’s Section of Legal Education and Admissions to the Bar found that as of 2002, the year after the amendment to Standard 302, 87.5% of the 152 schools responding to its survey allowed the upper-division writing requirement to be satisfied by an academic paper.⁵⁴ The similarity of those numbers gave me additional confidence that the results reported by my sample reflected the larger universe of all ABA-approved schools.

In short, by these measures, the 65 schools that responded to my survey appear to comprise a fairly representative sample of the universe of all ABA-accredited schools.

C. Supplementation of the Data

Most of the questions in my survey required answers from persons with knowledge of the school’s curriculum. However, several questions

ABA-approved schools in each of those regions to the percentage of schools from each region in my sample. All regions except the Southwest fell within 1.5% of the expected number; the Southwest region was underrepresented by 3.3%. The p-value for this measure (as calculated by the IUPUI statistics department) was .701, once again strongly suggesting that the sample was representative on the region criterion. Letter from Debra Hall, *supra* note 49.

52. I do not wish, by using this method, to imply any endorsement of the accuracy or efficacy of the ranking system. I used the tiers simply as a very rough way to see if the sample contained a representative cross-section of schools as measured by this admittedly highly subjective and flawed ranking method.

53. The under-representation was most significant in the “first tier” (top 50) schools. Whereas the USNWR “top fifty” comprise 28.5% of all ranked schools, only 23.4% of my respondents were in the USNWR “top fifty,” a deficit of 5.1%. The p-value for this measure (as calculated by the IUPUI statistics department) was .228. While most statisticians would not judge this lower value to be statistically significant, it does confirm that on this criterion, the sample I collected was less representative than on the size and region criteria. Letter from Debra Hall, *supra* note 49.

54. AM. BAR ASS’N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA, 1992–2002, at 19 (2004).

asked for data ascertainable from the school's public catalogs and/or website. For example, some questions asked about graduation requirements and course offerings; this information is published by most schools on their websites. Thus, in order to gather a more complete data set, I also examined the websites of schools that did not respond to the survey to gather whatever additional data I could.

This expansion of the data set also served as a further "check" on the validity of the respondent sample. For example, one survey question asked how the majority of students fulfilled the requirement of an "additional rigorous writing experience after the first year." Of the 65 respondents, 64.6% reported that an academic paper or a law review note satisfied the requirement, while 15.4% indicated that either an academic paper or an upper-level writing course would satisfy the requirement. In reviewing the websites of the 113 non-responding schools, 66.4% of the sites revealed that academic papers satisfied this requirement, while 15.0% of the websites suggested that the requirement was satisfied by either an academic paper or an upper-level writing course. The similarity of these findings suggests yet again that the sample adequately represented the whole universe of law schools.

IV. DID THE AMENDMENT PRODUCE THE INTENDED RESULT?

A. How Are Schools Meeting the New Requirement?

Did the 2001 amendment to Standard 302 result in more schools requiring students to learn more about the kind of writing skills that practicing lawyers need? In order to answer that question, it is first necessary to determine what schools offered and required prior to the amendment, and then to compare that to what schools offer and require now.

1. Baseline

As noted above, it is difficult to ascertain what schools were doing as of the 2000–2001 school year, the last academic year before the amendment took effect. One survey, conducted in 1995, suggested that a very large majority of law schools (118 out of 125 responding schools, or 94.4%) had some sort of an upper-level writing requirement, typically satisfied through writing an academic paper for a seminar course or through faculty-supervised independent study.⁵⁵ The annual Association

55. Lissa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask*, 34 GONZ. L. REV. 45, 50 (1998).

of Legal Writing Directors/Legal Writing Institute (“ALWD/LWI”) survey from 2001 provides more current information.⁵⁶

Question 33 of the ALWD/LWI survey asked whether students at each school were required to satisfy an upper-level writing requirement “beyond the required program”⁵⁷ prior to graduation. The data reported for the 2001 survey did not directly disclose how many schools (of the 143 schools that responded) actually had such a graduation requirement. However, the chart showing the methods used by schools to fulfill the requirement listed two options: “required” and “count toward requirement.” A total of 100 schools selected at least one option in the “required” field; however, the survey was constructed so that schools could choose several options as “required.” Thus, if a school required more than one of the listed options, the total of the responses may include some duplication. It is reasonably safe to conclude, however, that no more than 100 schools, which accounted for approximately 70% of the respondent pool for that year,⁵⁸ had an upper-level writing requirement of some sort as of the 2000–2001 academic year.

The ALWD/LWI Survey data for 2000–2001 does, however, accurately report how many schools accept various forms of advanced legal writing to satisfy the upper-level writing requirement. The results are shown in Table 1, below.

56. The ALWD/LWI surveys are historically conducted in the spring of the academic year, and report requirements and status of each school’s program as of that time. Thus, the 2000–2001 was conducted in the spring of 2001, several months before the Standard 302 amendment was approved by the Council of the Section of Legal Education and Admission to the Bar in June of 2001 and by the ABA House of Delegates in August of 2001.

The ABA’s 2002 *Survey of Law School Curricula* reports the status of curricula as of 2002, the year after Standard 302 was amended, so it does not provide any data as to the state of affairs just prior to the amendment. It does report, however, how schools attempted to meet the new Standard 302 in the first year after it became effective.

57. This quote was apparently a reference to the typical first-year legal writing program required by the then-current version of Standard 302. Thus, the apparent inconsistency of being required to do more than is required can be explained as being “required” to fulfill both the basic “required program” of first-year legal writing and also a higher-level writing requirement. *But see infra* text accompanying note 63.

58. The 1995 survey conducted by Prof. Griffin estimated that 95% of schools had an upper-level writing requirement. *See supra* text accompanying note 55. Since Prof. Griffin’s methodology differs from that of the ALWD/LWI survey, it is impossible to know whether this represents an actual shift in law school curricula, or is just a function of differing methodologies.

Table 1: *Methods of Satisfying Upper Level Writing Requirement 2000–2001*⁵⁹

Type of writing	Required	Count toward requirement	Total
Advanced course (general writing skills)	6	24	30
Advanced course (survey course)	1	10	11
Drafting, general	2	22	24
Drafting, litigation	3	21	24
Drafting, legislation	2	14	16
Drafting, transactional	2	24	26
Advanced advocacy (excluding moot court)	3	34	37
Scholarly writing	50	37	87
Judicial opinion writing	2	9	11
Advanced research	7	19	26
All of the above	0	3	3
Other	22	11	33

This table shows that the most common way in which a school's "upper-level writing requirement" could be fulfilled in the base year was through scholarly writing.⁶⁰ Since no more than 100 schools in the sample had upper-level writing requirements during that year, the 87 schools in the sample that allowed students to fulfill their upper-level writing requirements through the submission of an academic paper represent approximately 87% of the schools with a writing requirement, and 60.8% of all of the schools in the sample (all 143 schools that responded).

2. Survey results

How different is the picture in the 2004–2005 academic year? Not very. Both my data, and the 2005 responses to the same ALWD/LWI survey, reveal that the situation has not changed much, if at all, as a result of the 2001 amendment. If anything, there appears to be a trend to-

59. The data in this table comes from the responses to Question 33 in the ALWD/LWI 2001 Annual Survey. ALWD/LWI, 2001 ALWD/LWI SURVEY REPORT, Part V, at 1 (2001), http://www.alwd.org/alwdResources/surveys/2001survey/section_5-6.pdf. Note that since there is no unduplicated number available showing how many schools actually had upper-level writing requirements during the 2000–2001 academic year, it is not possible to express these raw numbers in terms of any percentage.

60. The survey instrument did not define "scholarly writing." Presumably, however, this term may include taking a course that was evaluated by means of a written paper rather than a final examination or other form of testing, as well as (in some cases) participation on a law review.

ward accepting academic writing, rather than practice-oriented writing, to satisfy the upper-level writing requirement.

The ALWD/LWI Survey for 2005⁶¹ asked the very same question as the 2001 survey; the results are shown in Table 2.

Table 2: *Methods of Satisfying Upper-Level Writing Requirement 2004–2005*⁶²

Type of writing	Required	Count toward requirement	Total
Advanced course (general writing skills)	7	45	52
Advanced course (survey course)	2	21	23
Drafting, general	10	38	48
Drafting, litigation	4	38	42
Drafting, legislation	1	26	27
Drafting, transactional	1	43	44
Advanced advocacy (excluding moot court)	5	61	66
Scholarly writing	72	74	146
Judicial opinion writing	0	13	13
Advanced research	9	34	43
All of the above	*	17	17
Other	9		9

Several observations are in order here. First, in 2005, 178 schools responded to the ALWD/LWI survey, a remarkable rate of 93% of all ABA-approved law schools. Second, question 33 of that survey (from which the above information is drawn), first asked whether the school had “an upper-level writing requirement, beyond the required program, for graduation.” Of the 169 respondents who answered this question, 148 said yes and, surprisingly, 21 said no.

Given the fact that the revisions to Standard 302 had been in place for nearly four years at the time this survey was put in the field, one would have expected a unanimous response; indeed, Standard 302 now requires *every* student to have an “additional rigorous writing experience after the first year.” It is therefore unclear why twenty-one schools re-

61. The 2005 survey took place in the spring of 2005, and, therefore, it reports conditions present during the 2004–2005 school year. My survey during the summer of 2004 requested data regarding requirements for first-year law students entering in the fall of 2004, which is the same period covered by the 2005 ALWD/LWI survey.

62. The data in this table comes from the responses to Question 33 in the ALWD/LWI 2005 Annual Survey. ALWD/LWI, 2005 SURVEY RESULTS 20–21 (2005), <http://www.lwionline.org/survey/surveyresults2005.pdf>.

ported no upper-level writing requirement, other than possible confusion in the wording of the question.⁶³

Excluding the 21 respondents who cited no required upper-level writing program, it appears that approximately 48% of schools (72 of 148 respondents) *require* an academic paper in order to graduate, and that an additional 50% allow academic writing to satisfy the upper-level writing requirement. In other words, an overwhelming 98% of all respondents, or 146 of 148 schools,⁶⁴ now allow the upper-level writing requirement to be satisfied by the writing of an academic paper.⁶⁵

The data from my own survey show similar results. Since my study was conducted long after the 2001 amendment to Standard 302, I proceeded from the assumption that all schools required an additional legal writing experience after the first year. (The ALWD/LWI survey question, designed prior to the 2001 amendment and not revised since then, still asks “whether” such a requirement exists.) My survey therefore

63. For example, respondents may have been confused by the term “required program.” Some respondents may have concluded that the term “required program” included the Standard 302 requirement, and that this question was asking about writing requirements which exceeded Standard 302. It is also possible, of course, that some number of these 21 schools have not yet addressed the 2001 amendment to Standard 302.

64. The ALWD/LWI survey tool is constructed so that “required” and “counts toward requirement” are mutually exclusive choices. That is, 72 schools (48%) of respondents require an academic paper as a graduation requirement, while 74 different schools (50%) do not require such writing, but accept it as satisfying the upper-level writing requirement. ALWD/LWI, *supra* note 59, at 20.

65. Since the ALWD/LWI survey is conducted annually, it is possible to discern trends. On this question, there appears to be a definite trend towards more schools accepting academic writing as satisfying the upper-level writing requirement. A review of the ALWD/LWI annual surveys for 2002 (the first year after the upper-level writing requirement was added) through 2005 reveals the following:

Upper-Level Writing Requirement	2002	2003	2004	2005
N schools with upper-level writing requirement	126	144	143	148
N schools where academic papers satisfy requirement	101	129	130	146
% of schools where academic papers satisfy requirement	80.2%	89.6%	90.9%	98.6%
N total schools responding to survey	154	172	176	178

See generally Archive of ALWD/LWI Survey Reports, <http://www.alwd.org/alwdResources/surveys/surveyNDX.htm> (last visited Sept. 26, 2006).

It is possible that the large increase in acceptance of academic papers as an upper-level writing experience that occurred between 2002 and 2003 is the result of the significant increase in the survey response rate (18 additional schools); however, this cannot fully explain the increase of 28 schools from 2002 to 2003 that reported accepting academic papers. Similarly, the additional 16 schools that reported in 2005 that they accept academic writing is clearly unrelated to the increase of only 2 in the number of schools responding to the survey.

asked more directly about how that requirement was fulfilled by law school curricula, as reflected in Table 3, below.

Table 3 first shows (in the first two columns) the responses from the 65 schools which responded to my survey, then shows (in the middle two columns) the comparable data gathered from my review of 113 additional law school websites. The final two columns add these two data sources together to reflect how all law schools would have responded to these questions.⁶⁶

Table 3: *Upper-Level Writing Requirements 2004–2005*⁶⁷

1. How many substantial legal writing experiences are students required to complete after the first year?						
	Respondents		Non-respondents		Total	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
No response	2	3.1%	0	0.0%	2	1.1%
1	42	64.6%	84	74.3%	126	70.8%
2	19	29.2%	21	18.6%	40	22.5%
3	2	3.1%	8	7.1%	10	5.6%
TOTAL RESPONSES	65		113		178	

66. As noted earlier, the general similarity in the total percentage numbers between the “respondent” and the “non-respondent” schools gives me some comfort that the self-selected sample of 65 responding schools is indeed a representative sample.

67. KENNETH CHESTEK, SURVEY OF 65 LAW SCHOOLS (2004) (on file with author).

2. Please list the required upper-level writing experiences						
	Respondents		Non-respondents		Total	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Academic paper	54	90.0%	107	94.7%	161	93.1%
Upper-level writing course	20	33.3%	25	22.1%	45	26.0%
Advocacy course	14	23.3%	10	8.8%	24	13.9%
TOTAL RESPONSES	60		113		173	
17. How do the majority of students fulfill the "additional rigorous writing experience after the first year?"						
	Respondents		Non-respondents		Total	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
No response	2	3.1%	2	1.8%	4	2.2%
Academic paper/law review note	42	64.6%	82	72.6%	124	69.7%
Required upper-level writing course	4	6.2%	4	3.5%	8	4.5%
Both paper and a writing course	11	16.9%	23	20.4%	34	19.1%
Required advocacy course	2	3.1%	1	0.9%	3	1.7%
Other combinations of the above	4	6.2%	1	0.9%	5	2.8%
TOTAL RESPONSES	65		113		178	

These data show that, while about 28% of schools nationwide require more than one writing experience after the first year, in the vast majority of cases (93.1%) the writing requirement (either the sole requirement, or one of the two or three requirements) consists of writing an academic paper.⁶⁸ Indeed, the response to survey question 17, shown above, suggests that nationwide nearly 70% of schools require *only* an academic paper in order for a student to satisfy the upper-level writing requirement.⁶⁹

These trends are even more pronounced in the "top tier" schools. For the sake of comparison, I examined the results (both from respondents and non-respondents) for the top 25 schools as ranked by

68. This could take the form of a paper required as an evaluation method for an academic course; a stand-alone, faculty-supervised "senior thesis" written outside of the context of any particular course; or writing for a law review or law journal.

69. These findings are not surprising to Dean Currier, the Deputy Consultant on Legal Education at the time of the 2001 amendment:

My experience has been that almost all schools ask students to do something that looks a lot more like academic writing. There is nothing wrong with doing that sort of writing, of course, but it seems to me that we ought to be doing more/better to provide students with a foundation for doing the kinds of writing that they will be called on to do once they are admitted to practice.

Currier, *supra* note 37.

USNWR.⁷⁰ Of that total, 24 schools required an academic paper as a graduation requirement, and one school did not respond to that question (for a 100% response rate among schools from which data was collected). The answer to question 17 was similarly unanimous: at all 25 schools, the majority of students fulfill the requirement of an “additional rigorous writing experience after the first year” by writing one or more academic papers.⁷¹

Size apparently matters as well. When I examined the responses to question 17 from schools in the top quartile of entering class size, only 84.1% of schools reported that most students fulfill the requirement through an academic paper. These schools also reported a slightly higher incidence of requiring upper-level writing courses (27.3%, compared to the national total of 26%), as well as a higher incidence of required upper-level advocacy courses (18.2%, compared to the national average of 13.9%). This probably reflects the additional resources available to teach such courses at larger schools.

Thus, it appears that, while the 2001 amendment to Standard 302 was an attempt to continue the trend towards emphasizing skills education in law schools, the amendment had little practical effect. Both my survey and the ALWD/LWI survey suggest that in response to the amendment many schools took the “easy way out” by simply imposing a requirement that, before students graduate, they take at least one course requiring an academic paper instead of a final examination.⁷² Almost no schools elected to add a required upper-level writing course to the curriculum.⁷³

70. For 2004, the year of my study, those schools were, in alphabetical order: Boston College Law School, Boston University Law School, Brigham Young University-Clark Law School, University of California at Berkeley School of Law, University of California Los Angeles School of Law, University of Chicago School of Law, Columbia Law School, Cornell Law School, Duke University, Georgetown University Law Center, Harvard Law School, University of Iowa College of Law, The University of Michigan Law School, University of Minnesota, New York University School of Law, Northwestern University School of Law, Notre Dame Law School, University of Pennsylvania Law School, Stanford Law School, University of Texas School of Law, Vanderbilt University School of Law, University of Virginia School of Law, Wake Forest University School of Law, Washington and Lee University, and Yale University School of Law.

71. Excluding the top 25 schools from the nationwide results, 128 of 149 remaining schools for which data could be gathered (85.9%) reported that most students fulfill the upper-level writing requirement by writing one or more academic papers. This perhaps reflects the fact that schools that may consider themselves among the “elite” schools are more likely to emphasize academics over practical, “skills” type writing experiences.

72. See *supra* text accompanying note 65.

73. Question 12 of the ALWD/LWI annual survey asked schools to disclose what writing courses were required of all students. In the 2001 survey, 31 of 129 schools responding to that question (24.0%) reported requiring a third semester of legal writing in the fall. In the 2005

B. Does Academic Writing Satisfy Standard 302?

Looking at both the ALWD/LWI data and my own survey results, it seems clear that students can satisfy the new requirement of “an additional rigorous writing experience after the first year” by writing an academic paper in the large majority of schools today. Even though it is unclear whether this was what the ABA intended when it adopted the new requirement,⁷⁴ it seems unlikely that writing such papers is “rigorous” in the same way that a paper written for an upper-level legal writing course would be rigorous.

While, as Dean Currier notes, there is certainly nothing wrong with this kind of writing experience,⁷⁵ academic papers have a different purpose and a different audience than more practice-oriented writing assignments. This is because the professor evaluating such papers is evaluating students’ mastery of the subject matter of the course, not their ability to communicate effectively in writing.

I do not mean to suggest that there is not significant overlap between writing ability and demonstrating mastery of the subject matter; indeed, writing professors frequently teach students that the process of writing can actually help them think about and better understand the material they are writing about.⁷⁶ Rather, my point is that the link between writing ability and understanding substantive material is not perfect and that a student who writes an academic paper poorly yet demonstrates a good grasp of the subject matter may, and should, get a good grade for the substantive law course. Moreover, students writing academic papers for a grade in a substantive course will write in a different voice, with a different style, and in a different form, than they would for a practicing lawyer, a judge, a client, or any of the various other audiences for which a practicing lawyer might write.

The ALWD/LWI surveys also suggest that academic papers are not typically subjected to the same level of rigor as the required legal writing courses. Quantifying the level of rigor is a very difficult task, but the ALWD/LWI survey contains some data as to the rigor of the writing ex-

survey, 44 of 170 responding schools (25.9%) reported such a requirement, which is a result virtually identical to my own findings. See CHESTEK, *supra* note 67, tbl.3 question 2.

74. See *supra* text accompanying note 38.

75. See *supra* note 69.

76. See, e.g., Joseph Kimble, *On Legal Writing Programs*, 2 PERSP. 1, 2 (1994); Barbara J. Busharis and Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 307–10 (2000); Laurel Currie Oates, *Beyond Communication: Writing As a Means of Learning*, 6 LEG. WRITING 1 (2000). Legal writing professors often conclude that fuzzy writing is indicative of fuzzy thinking, and, therefore, they strive to assist students in clarifying their analysis of the subject matter in order to help clarify their written product.

perience in “doctrinal” courses (defined by the survey instrument as “a course other than clinics, seminars, or advanced writing courses”). Question 39 of the ALWD/LWI survey asks, “How much written feedback do students generally receive on assignments in doctrinal courses?” The responses to this question from the 2001 and 2005 surveys are reported in Table 4, below.

**Table 4: Amount of Feedback for Doctrinal Writing
2001–2005⁷⁷**

Amount of Feedback	2001	2005
More feedback than in the required writing program	0	0
About the same amount of feedback as in the required writing program	2	4
Somewhat less feedback than in the required writing program	54	25
Considerably less feedback than in the required writing program	*	69
Don’t know	75	67

*This was not a listed option in the 2001 survey.

There may be some bias inherent in the answers to these questions, since the ALWD/LWI surveys are generally completed by writing program directors or other faculty members in the legal writing programs. Nevertheless, the findings of the ALWD/LWI survey are entirely consistent with the findings of a 1995 survey that asked more detailed questions about the rigor of academic writing requirements. The authors of the 1995 survey found that among the schools with a required academic paper, less than a quarter required faculty/student conferences before the first draft of a paper and only about a third of the schools required such a conference after the first draft.⁷⁸

Data from my survey are consistent with the ALWD/LWI conclusion. Nearly three quarters (72.3%) of the schools responding to my survey said students were not required to submit anything but a final draft for required upper-level writing, while 63% of respondents said that supervising faculty typically do not read preliminary drafts.⁷⁹ Thus, the amount of feedback that students receive on academic papers is less than they would receive in a writing course.

This is not a criticism of the faculty teaching seminars and academic courses. Given the constraints on their time (in terms of research, teaching, and service requirements), and the potentially large number of stu-

77. The data in this table comes from the responses to Question 39 in the ALWD/LWI 2001 Annual Survey, *supra* note 46, at Part V, page 4, and the ALWD/LWI 2005 Annual Survey, *supra* note 46, at 36–37. The results are reported above in raw numbers.

78. Griffin, *supra* note 55, at 50–55.

79. CHESTEK, *supra* note 67, at Part II, questions 9 and 10.

dents who may be writing papers for academic courses, it is simply impractical for academic faculty to conduct multiple student conferences, read multiple drafts, and give the kind of detailed feedback to students that truly enables them to sharpen their writing skills.⁸⁰ Some faculty would probably resent the additional demands that providing students with a truly “rigorous writing experience” would impose on them, and many of them have no formal training in legal writing instruction.⁸¹ This is, however, a call for additional resources to be devoted to legal writing education. In 2001, the ABA recognized and re-emphasized the importance of developing the writing skills of new law graduates by requiring the “additional rigorous writing experience.” This cannot be done properly without some cost because teaching legal writing requires intensive and frequent contact between teacher and student.

The legal academy’s response to the 2001 amendment to Standard 302 missed an opportunity to incrementally implement the basic recommendations of the MacCrate Report. Arguably, the ABA agrees. In 2005, the ABA House of Delegates approved several amendments to the Standards and Interpretations. It added Interpretation 302-1 (attempting to define what “rigor” means);⁸² it amended Interpretation 302-2 (previously Interpretation 302-1) to “make[] it clear that the definition of ‘professional skills’ is broad and includes far more than traditional litigation skills;”⁸³ and it changed the language of Standard 302 as well. Where

80. For a good discussion of how to structure a sound, “rigorous” upper-level writing requirement, see generally Griffin, *supra* note 55. For a discussion of the importance of revising drafts based upon informed input from a supervisor, see Karl Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 373 (1945).

81. Griffin, *supra* note 55, at 53 (109 of 118 schools responding to a survey question reported that faculty supervising upper-level writing projects receive no formal training in teaching writing).

82. Interpretation 302-1 states as follows:

Factors to be considered in evaluating the rigor of writing instruction include: the number and nature of writing projects assigned to students; the opportunities a student has to meet with a writing instructor for purposes of individualized assessment of the student’s written products; the number of drafts that a student must produce of any writing project; and the form of assessment used by the writing instructor.

2005 STANDARDS, *supra* note 32, at 19.

83. AMERICAN BAR ASSOCIATION, COMMENTARY ON REVISIONS TO STANDARDS FOR APPROVAL OF LAW SCHOOLS 2004–2005, at 6 (2005). The revised Interpretation now reads:

Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).

Id.

Standard 302 required students to “receive . . . substantial legal writing instruction, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year,”⁸⁴ it now requires students to receive substantial instruction in writing *in a legal context*.⁸⁵

It is unclear whether the words “writing in a legal context” are intended to be in juxtaposition to the words “writing in an academic context.”⁸⁶ However, in light of the history of amendments to Standard 302 since the MacCrate Report was issued, an argument can be made that this revision was a further attempt by the ABA to nudge law schools toward education in more practice-oriented contexts.

As I suggested at the outset, there is some reason for hope. A number of schools have moved well beyond the requirement of Standard 302 for a first-year legal writing course and a second, usually academic, writing experience. Mercer University, for example, now requires nine credits of legal writing courses over the first three semesters of a law student’s career, in addition to an academic writing requirement.⁸⁷ The John Marshall Law School in Chicago has a four-semester required writing program, incorporating not just the objective and predictive writing assignments typical in most first-year curricula, but also requiring upper-level courses in appellate advocacy and contract drafting.⁸⁸ Chicago-

84. 2001 STANDARDS, *supra* note 13, at § 302(a)(2).

85. The current language of the Standard 302 reads:

- (a) A law school shall require that each student receive substantial instruction in:
- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
 - (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
 - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
 - (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
 - (5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.

2005 STANDARDS, *supra* note 32, at § 302(a).

86. The memorandum from John Sebert, the ABA’s Consultant on Legal Education, to law school deans claims that this revision merely “restates existing requirements concerning instruction in legal writing.” Memorandum from John Sebert to the Deans of ABA-Approved Law Schools (Aug. 23, 2004), *available at* <http://www.abanet.org/legaled/standards/standardsdocuments/memor302and305standards.pdf>.

87. About Mercer’s Legal Writing Program, http://www.law.mercer.edu/academics/legal_writing/about.cfm (last visited Oct. 10, 2006).

88. Lawyering Skills, <http://www.jmls.edu/academics/jd/lawyeringskills.shtml> (last visited Oct. 10, 2006).

Kent College of Law requires five semesters of legal writing courses, one of which is a required academic paper.⁸⁹

While some law schools have implemented interesting, innovative programs, such programs remain the exception rather than the rule. It is possible, however, that the schools that put additional resources into upper-level writing requirements will attract more highly-qualified students.

IV. HOW CAN SCHOOLS IMPROVE?

Requiring additional semesters (beyond the first year) of legal writing is the most obvious way for schools to satisfy the amended Standard. It is also perhaps the costliest model, since it likely requires the hiring of additional faculty. However, schools that require three or more semesters of legal writing may have an advantage in recruiting because students may view such practice-oriented education as giving them an advantage in the ever-more-competitive job market.

Realistically, however, law school resources are scarce. Thus, schools are likely to look for the least costly means to satisfy the requirements of Standard 302. Below are a few less costly suggestions about how schools might enhance the rigor of the “additional writing experience after the first year.”

A. Create a Written Standard for Student Work

The first, and probably simplest, thing that a school can do to enhance rigor is to adopt a uniform statement of what is expected from students. My survey asked schools whether they had “any stated criteria or standards for student work to meet the upper-level writing requirement.” While just over 49% of respondents said they did, a surprising 41.5% of schools responding to the survey said they had no such criteria.⁹⁰

While it is easy to suggest that, in order to assure “rigor,” a school ought to have a uniform standard as to what criteria should be used to evaluate the student’s writing, it is much more difficult to decide what those criteria should be. This is because the professors evaluating the writing will likely have differing views about what students are supposed to be learning (and, therefore, what professors must evaluate). For example, a student who uses an academic paper in a substantive course to

89. Legal Research and Writing Program, <http://www.kentlaw.edu/academics/lrw/> (last visited Oct. 10, 2006).

90. CHESTEK, *supra* note 67, at Part II, question 3. Two schools, or approximately 3% of the respondents, said they were in the process of developing such criteria.

satisfy the requirement will need to prove to the professor's satisfaction that she has mastered the substantive law; the professor evaluating the paper will likely, and properly, give far more weight to the substantive analysis, perhaps to the exclusion of the technical writing aspects (what I will call "clarity"). The legal writing professor, whose job is to teach clear legal expression, is likely to give more weight to the clarity of the writing than would the substantive law professor. This is not to say that substantive content is not important to the legal writing professor; in fact, most grading rubrics or criteria used by legal writing professors place great weight on the analysis, or argument, portion of the writing. That is, a clearly written paper that misstates the law will (and should) receive a low grade from the legal writing professor. Likewise, poor writing affects the grade given by a substantive-law professor because poor writing may obscure the writer's point to such a degree that it adversely affects the student's grade. Still, it is probably true that, if a legal writing professor and a substantive law professor each assign separate weights (out of 100 points) to substance and to clarity, the legal writing instructor will likely assign more points for clarity than the substantive law professor. Both, however, would probably assign more weight to substance than to clarity. Additionally, a professor in a live-client clinic program may have still a third, different—but entirely valid—set of criteria for grading writing in that context.

Given that, at least in some schools, upper-level writing requirements may be supervised by clinical professors, legal writing professors, or substantive law professors, it would seem that there ought to be a dialogue among these groups (and some agreement as to what the faculty as a whole values) in order to assure uniformity and rigor in the required writing experience.

The standard could be normative (*i.e.*, "of publishable quality" or some similar verbal standard), procedural (*i.e.*, by requiring multiple drafts, or requiring faculty/student conferences or other forms of faculty feedback), or a combination of the two. For example, the James E. Beasley School of Law at Temple University requires all students (since the Class of 1995) to have two upper-level writing requirements: a "serial paper" writing experience (in which the students are required to complete at least four shorter assignments and to receive comments and other feedback from faculty members) and a "research paper" (independent study supervised by faculty which requires research beyond class materials and a substantial, analytical written product).⁹¹ Written work "of

91. Jan M. Levine, *Supervising Research & Writing by Upper-Division Law Students* (Nov. 15, 2004) (unpublished materials prepared for an in-house legal education seminar, James E. Beasley School of Law, Temple University) (on file with author).

professional quality” for one of the Temple law reviews may or may not be used to satisfy either of these requirements, in the sole discretion of the supervising faculty member.⁹²

B. Provide Training for Doctrinal Faculty Who Must Evaluate Student Work

In addition to uniform standards, faculty who supervise upper-level writing experiences might benefit from a frank discussion with the legal writing faculty as to what students have learned in the first-year courses and how the legal writing faculty evaluates student writing. Similarly, it would be useful for substantive law faculty to understand what a student has been taught so that faculty members know what to look for and understand why a student may have written a paper in a particular way.

The obvious benefit of this dialogue is to foster some uniformity in grading, not only between substantive law professors but between the first-year legal writing faculty and the upper-level evaluators. Although complete uniformity is probably not possible, nor even desirable (since there is always more than one “correct” way to write any paper or brief), by speaking with a somewhat common voice, first-year and upper-level faculty can help students learn to focus on good writing generally and not writing to suit a perceived personal preference of the professor who will be evaluating the work.

In addition, through such an exchange both the legal writing professor and the substantive law professor are likely to gain useful insight into each other’s needs. Substantive law professors will gain a first-hand look at the theory of rhetoric, as well as educational theory, that supports so much of what goes on in the legal writing classroom. Legal writing professors will gain insight into what one key audience for their students, namely, the substantive law faculty, looks for in student writing. Hence, both parties to the exchange will be enriched.

C. Move Toward Writing Across the Curriculum

There is, of course, no rule that says the upper-level writing experience needs to be an academic paper. As such, another possible way to provide students with an “additional rigorous writing experience after the first year” would be to implement substantial writing components into traditional upper-level courses.⁹³

92. *Id.*

93. Numerous commentators have suggested that substantive law courses would benefit from the inclusion of writing assignments. See, e.g., Carol McCrehan Parker, *Writing*

Students taking a Business Associations course could be required to draft a partnership agreement or corporate bylaws. Students taking a course in Intellectual Property could draft a licensing agreement. Students taking Professional Responsibility might be asked to draft an ethics opinion. Students taking Evidence could draft a motion in limine and a supporting memorandum of law. The possibilities are endless. However, so long as the writing assignments count towards each student's final grade, and are guided and evaluated by faculty with as much rigor as an academic paper might be, there is no reason why this kind of practice-oriented writing could not satisfy the upper-level writing requirement.

The benefit to both the student and the substantive law professor of doing this is a fuller and deeper understanding of the substantive material.⁹⁴ A student who writes an office memo for her first-year legal writing course on an issue involving, say, intentional infliction of emotional distress is likely to ace any Torts exam question that touches upon that subject.⁹⁵ A practice-oriented writing project is a more active way of engaging the student. It forces students to see the legal doctrine in a very practical way, set among the larger picture of trial (or law firm) procedures. Such assignments can capture a student's imagination and help her picture herself as a professional, as well as force her to analyze the material in a different way so as to better understand its practical implications.

Throughout the Curriculum: Why Law Schools Need It and How to Achieve It, 76 NEB. L. REV. 561 (1997); Busharis, *supra* note 76; Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course*, 3 NEV. L.J. 32 (2002); Pamela Lysaght and Cristina Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 73 (2004).

94. Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 23 (2004) (suggesting that adopting legal writing pedagogy in substantive law courses will help students analyze the substantive material and allow substantive law professors to cover material in more depth).

95. As Dean Byron Cooper has noted:

Samuel Williston and Karl Llewellyn, probably two of the Twentieth Century's greatest commercial law teachers, found that when they got their own contracts students in later courses in commercial law, the students had forgotten what Williston and Llewellyn themselves had taught them in contracts. [] But Barbara Woodhouse has pointed out that despite students' memory lapses, they tend to remember with crystal clarity the doctrines they master for their first-year moot court arguments.

Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 51 (2002) (internal citations omitted).

CONCLUSION

The new Interpretation 302-1, as well as the revised Interpretation 302-2, have already caused many schools to re-evaluate their upper-level writing requirements. As my survey shows, such scrutiny is long overdue, since many schools do not have a well-defined concept of how to teach or assess upper-level student writing in a rigorous way. In the large majority of law schools, the upper-level writing experiences are assigned, administered, and evaluated by substantive law faculty who have no training in critiquing or evaluating the clarity of student work.

The legal writing faculty, which has the expertise needed to make this requirement a useful educational experience, can and should work with the substantive law faculty to improve the quality of the upper-level writing requirement. The schools that do this well will best serve the needs of their students and the profession.

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