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The MSBA's new AI Standing Committee has big plans

Building a better brief the tech-wise way

FLASH BACKWARD

The future of legal tech and the art of persuasive legal writing

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From the art of debate to the psychology of persuasion, legal writing stands alone as the purest form of argument in our profession. Good legal writing is an attorney's main vehicle of advocacy. Legal writing requires commitment, clarity, choosing words that hit home, organizing them for maximum persuasion—and much more. But today's world offers a new tool: artificial intelligence. No matter what, AI will transform legal writing. In fact, it already has. But most lawyers don't know it.

Perhaps the most significant opening provided by AI is empowering legal writing *teams*. Legal writing teams capable of bridging the gap between the art of persuasive legal writing and the boundless opportunities that AI presents will deliver much-improved services to their clients and the legal system. Most importantly, these early adopters will be able to deliver a higher-quality product at a better value. Join us on a journey to where law and technology meet. Explore with us how lawyers harnessing this legal-tech revolution are making legal writing better, more accessible, and more affordable.

In the beginning

To get to the heart of legal persuasion, we must go back to the beginning. While law schools tout the Socratic Method, the heart of legal persuasion comes after Socrates—which means Aristotle. Aristotle's theory of persuasion highlights three key elements of any persuasive argument: logos, ethos, and pathos. Logos involves facts and reasoning, ethos involves a moral appeal, and pathos involves an emotional appeal.

The harmonious dance of these elements is integral to a persuasive argument because they provide a story that drives your facts. It is almost impossible to have a winning legal argument that lacks ethos and pathos. (That hasn't stopped attorneys from trying.) Arguments feel flat without these dimensions. This is why you cannot write meaningful fiction, nonfiction, or legal writing without telling a story. So if you're writing a brief and you aren't telling a story, you're losing.

As Justice Scalia advised, "Your objective in every argument... is to show yourself as worthy of trust and affection." That is why honesty, integrity, fairness, and authenticity are essential components of a persuasive pathos and ethos. To do this, you must know yourself, and as Aristotle recognized, "knowing yourself is the beginning of all wisdom." Being a great writer means having the "gift of tongues." Your authentic voice sounds like the native language of everyone who reads it—because it is the real you.

That's why clients hire lawyers to tell compelling stories based on proven themes that persuade decisionmakers to rule in their favor. Lawyers don't weave tales out of thin air; the law and themes have to emerge from the facts of the case.

But that is daunting for attorneys. It requires that we have flexible legal writing processes, and that we seek to improve our craft one day at a time. Although courts produce great legal writing, it would be a mistake to look to the judiciary to lead lawyers here. After all, as H.L. Mencken observed, "A judge is a law student who marks his own examination papers." We must instead look to those who engage themselves to improve as legal writers, and whose writing is graded by others.

Writing role models

A growth mindset is essential for legal writers. Without it, writers end up making the same mistakes repeatedly, leading to doubt, insecurity, and frustration. One way to embrace a growth mindset is to learn from other legal writers who have achieved excellence, then model their strategies and habits. We all know that athletes can review game footage all they want, but if they don't have a good coach or system, the footage won't do them much good.

Three legal coaches came top of mind for us: Bryan Garner, Ross Guberman, and Ryan McCarl.

Bryan Garner is a great source of practical guidance, examples, and exercises to help lawyers become excellent legal writers. Garner begins with Aristotle when he recommends the form "that seems obvious to most people today but was a great insight when Aristotle devised it: a beginning, a middle, and an end." Failing to build in enough time for multiple drafts leads to a lesser final product. We will say it until we are blue in the face: An unpolished final product often results from editing too early rather than not editing enough. There is no substitute for planning. Failing to plan is planning to fail. (The so-called Flowers Paradigm,[1] as interpreted and applied by Garner, is a great aid to this planning. But more on that shortly.)

Ross Guberman does a fantastic job of illustrating elements of good writing and applying them in practice. His books not only provide a strategic roadmap for formulating motions and briefs, but he also bridges the gap between legal writing and technology with his BriefCatch software. Guberman's empirical analysis of the writing from the nation's top legal voices provides an immense value to any aspiring writer, and his techniques and challenges help frame a system of growth.

Newest on the scene is Ryan McCarl, author of *Elegant Legal Writing*. McCarl is dedicated to helping attorneys elevate their writing from passable to polished—drawing on ideas from cognitive science, stylistics, and litigation strategy. If you want insights on clarity, boldness, and effective communication in legal prose, he is another go-to source.

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Better processes and systems also make legal writers happier. An often-ignored benefit of a workable and iterative legal writing system is the peace and order it brings. Augustine defined peace as the "tranquility of order." Many attorneys have experienced the tranquility that order brings by committing to a dedicated workspace. The benefits are immense. This became undeniable during the work-from-home paradigm shift that occurred during covid-19. As for at-home workspaces, studies show that by physically creating a distinct office or work area, separate from your bedroom or play areas, individuals can achieve better focus. Dedicated workspaces also develop a healthier mindset through the boundaries they create. The same principles apply to legal writing.

By separating the tasks into distinct areas, each with its own routine, writers can produce better products. The most popular application of the tranquility of order in legal writing is the Flowers Paradigm. This is a writing method that consists of four distinct stages: Madman, Architect, Carpenter, and Judge. Each stage plays a crucial role in the writing process, contributing to the overall quality and effectiveness of written communication. By breaking down every project into these four stages, you make sure that the overall structure is as consistent and as strong as possible. What legal writer hasn't felt overwhelmed by a lengthy brief that captures several interweaving ideas? These four stages allow you to compartmentalize even the most complex writing projects into digestible pieces to form a coherent final product.

1. **Madman:** Brainstorm without constraint, letting ideas flow freely. If you don't find creativity, energy, and momentum in this stage, you probably won't find it at all. This missed opportunity cascades throughout the rest of the project, compromising your final product.
2. **Architect:** Organize ideas into a coherent structure. This involves creating a framework that will guide the development of your writing. Writers arrange their research findings into headings or key points to build a logical argument or narrative. From here, your writing should fall into pre-determined areas so that you can focus on implementing the design and rewriting it—rather than reworking the core concepts.
3. **Carpenter:** Here, you can do the full draft without interruption or backtracking, executing the plan developed by the architect, with themes of your writing guiding the rest of the project. Building on this firm foundation of design, writers can seamlessly apply the law to the facts to form a cogent and focused analysis.
4. **Judge:** In this final and most critical stage, the focus shifts to editing and refining the written product with clarity, conciseness, and error-free content. Writers review their work for grammar, spelling, punctuation, logical flow, and audience relevance to deliver a polished final piece.

By reframing your writing project as an opportunity to continuously develop a better process, and by breaking potentially overwhelming tasks into manageable units, you have a writing system that serves as a reliable vehicle to arrive at the finish line. But another piece is still missing: plain language. And plain language is the fuel that gets you there.

Plain language

Legalese is the formal and often obscure language used by lawyers. As Justice Potter Stewart famously said of obscenity, it might be hard to define, but you know it when you see it.[2] Legalese undermines the parties' substantive argument. The continued use of legalese seems to stem from a superstitious fear that removing it will have terrible consequences. But the biggest problem with legalese is that it interferes with storytelling.

Fortunately, legal writers can produce documents that are clear, concise, and persuasive by: (1) omitting needless words and keeping sentences short and clear; (2) using the active voice and strong verbs; and (3) drafting for an ordinary reader. In short, by embracing positive practices in legal writing, writers necessarily and progressively root out legalese in their own writing. Although plain language doesn't automatically imbue your writing with storytelling magic like pixie dust in a fairytale, it's probably the easiest way to improve your storytelling.

We all know that legal documents are the way lawyers most often communicate with opposing

ELEMENTS OF THE FLOWERS PARADIGM

	CATEGORY	TASK	AI TOOL
MADMAN	General	Free association	NotesGPT
	MSJ exhibits, filings, pleadings, and discovery responses	Fact synthesis and analysis	Casetext
	Document Productions	Computer-assisted review	Everlaw—Document analytics
	Law	Analysis of MSJ memo	(Westlaw) Quick Check—Analyze an opponent's work
		Legal research	(Westlaw) AI-assisted research
		Litigation analytics	• Jurisdiction: (Westlaw) Jurisdictional Survey • Judge: (Westlaw) Judge Analytics • Opposing Counsel: (Westlaw) Lawyer Analytics
ARCHITECT	Architect	Outline	(Westlaw) Outline Builder
CARPENTER	Outline	Free writing	The Most Dangerous Writing App
JUDGE	Catching typos and legalese	Editing	• Reading out loud: Speechify • Text: BriefCatch
	Making it maximally readable	Style	Hemingway Editor
	Getting the law and citations right	Law	Citation analysis and legal authority check: (Westlaw) Quick Check—Check your work

counsel and the court. But no one seems to know why so many lawyers include language like "whereas" and "further your affiant sayeth naught" when much simpler modern terms exist. People don't converse that way, so avoid burdening these documents with legalese, convoluted sentences, and technical language. No one, especially judges who must digest and comprehend vast amounts of text, enjoys hard-to-read materials. Conveying your message in the simplest possible terms will go a long way toward keeping your reader oriented and engaged.

But even plain language is not enough. How are lawyers supposed to deliver the written product our clients need, want, and deserve if we are not transparent and maximally open to feedback and criticism *from our clients*? This applies whether the client is internal or external. And sometimes the best feedback is "wrong" feedback. Why? Because if it's from your client, it often tells you more about them than about your writing. This is invaluable knowledge, because even misguided feedback enables you to make your writing better—and make it better in the way that your client wants it to be better. You can always learn something from feedback. And there is always a way to harness this feedback to improve your writing and your process. Of course, because most clients are not lawyers, if they can easily read and grasp your written product, you can be confident that a judge will too.

So don't use jargon-laden legalese and call that refinement. Gratefully accept feedback from your client, whoever it is. Still, the process is not automatic. Knowing how to apply feedback or what to do with a dearth of feedback is hard. Lawyers don't need technology to apply client feedback to improve their writing. But as we explain below, AI helps with this too.

The role of AI in legal writing workflows

Lawyers could spend a lifetime talking about and testing AI tools. And an equally long time mastering each one, just in time for it to be replaced with a new product. But that would defeat the purpose of AI, which is computer-*enhanced* learning and reasoning. AI's application here takes an effective legal writing team's fundamentals and expands them in ways that would typically take much more time and effort. So let's get very practical. Below are some AI tools and a diagram describing how these tools can be used within the Flowers Paradigm:

- **BriefCatch:** A legal-editing tool that uses AI to analyze legal documents and provide instant feedback and suggestions related to grammar, style, and clarity.
- **CoCounsel:** Answers questions about your documents (with citations to sources), generates timelines, summarizes depositions and other critical documents.

- **Everlaw Document Analytics**: Allows you to gain insights and extract valuable information from documents through search-term reports, data visualizer, predictive coding, and clustering.
- **The Hemingway Editor:** Makes your writing bolder and clearer by highlighting lengthy, complex sentences, overuse of adverbs, and passive voice.
- **NotesGPT:** AI-powered tool designed for note-taking and knowledge management that summarizes videos, articles, and texts, and converts voice notes into organized summaries and tasks.
- **Speechify:** Lets you listen to any text at high speed using natural-sounding AI voices, including Gwyneth Paltrow, Snoop Dogg, and Mr. Beast.
- **The Most Dangerous Writing App:** A creative approach to overcoming writer's block that poses a sense of urgency by deleting everything you've written—*if you pause for more than 5 seconds*!
- **Westlaw's AI-Assisted Research:** Leverages artificial intelligence to allow lawyers to ask complex legal research questions in natural language and receive synthesized answers quickly.
- **Westlaw's Judge Analytics:** Summarizes data on judges, courts, damages, attorneys, law firms, and case types across various practice areas; including judge behavior, ruling patterns, citation history, ruling percentage for plaintiffs or defendants, time to issue orders, and case-type experience.
- **Westlaw's Jurisdictional Surveys:** Efficiently compiles and compares laws across U.S. jurisdictions on virtually any topic.
- **Westlaw's Lawyer Analytics:** Offers relevant data on attorneys, law firms, judges, courts, damages, and case types across most practice areas (analyzing attorney behavior, case outcomes, and citation patterns).
- **Westlaw's Outline Builder:** Allows you to easily organize your outline by dragging and dropping case titles, highlighted text, and citations.
- **Westlaw's Quick Check:** Securely analyzes legal documents to suggest highly relevant authority, recommendations based on the headings in the document, analysis of case quotes, and warnings for cited authority. It also compares multiple documents, quality checks final drafts, identifies weaknesses in opponents' documents, and confirms the accuracy and validity of legal citations.

Bridging the gap between lawyers and technology

AI is here to stay. That every news organization features one or more AI-adjacent articles right now should give even the most Luddite attorneys the hint. Embracing AI isn't a matter of just going with the flow. It requires creative applications that go beyond the routine tasks of writing and research. By breaking down barriers in traditional legal workflows, AI proves that collaboration between artificial and human intelligence can revolutionize the legal industry. But the fundamentals of legal writing remain unchanged. Even with AI, Scalia and

EVEN WITH AI, SCALIA AND GARNER'S OBSERVATION REMAINS PERTINENT: "LAWYERS POSSESS ONLY ONE TOOL TO CONVEY THEIR THOUGHTS: LANGUAGE."

Garner's observation remains pertinent: "Lawyers possess only one tool to convey their thoughts: language."

We are not encouraging lawyers to haphazardly use AI as stopgaps for their own lawyerly and ethical shortcomings, as some lawyers have. AI will not turn mediocre legal writers into great legal writers. AI will not turn ineffective legal writing teams into effective ones. AI will not allow a single legal writer, no matter how good, to do the work of an effective legal writing team.

In truth, AI will only help attorneys who understand the power of synergy between AI, human creativity, emotional intelligence, and critical thinking. Legal writers—or better yet, dedicated legal writing teams—that master the boundless opportunities of AI offer their clients an unbridled breadth of expertise. These teams are positioned to flexibly and creatively help their clients—especially small-firm and solo clients seeking legal writing services *for their own clients* without fear that the external legal writing team will poach them.

None of this is easy. But if creatively leveraging the persuasive art of legal writing and AI to make both better were easy, wouldn't it have already happened? Would you even be reading an article about it? Unfortunately, the Crosby, Stills, Nash, and Young lyric from *Southern Cross* fits the experience of many attorneys: "And we never failed to fail; it was the easiest thing to do." This is nothing new. What makes AI a game-changer is that it presents lawyers with an opportunity to use these tools to improve their own legal writing, build a legal writing team in their firm, or outsource their legal writing projects to an external team.

This all raises the question: What should lawyers looking to outsource be looking for? In our view a successful legal writing team has three components, for starters: (1) sound strategy; (2) shared goals based on high ideals; and (3) a focus on systems and processes. Of course, we don't recommend that you outsource your legal writing to someone who will try to poach your client. In our view (and in our practice), the outsourcing lawyer *is* the client—which means the end-client belongs to that lawyer.

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First, a successful legal writing team has a sound plan for every writing project. Legal writing teams have the advantage of already working collaboratively within a firm. The team members already stretch themselves by continuously improving their ability to serve internal clients (attorneys within the firm).

It is said that amateurs consider strategy, but pros focus on logistics. Legal writing teams are no exception. Legal writing logistics start with document design, because a well-structured document is the scaffolding for any persuasive legal argument. Paradoxically, the increasing complexity of civil legal cases is a benefit for legal writing teams in this important respect. Because legal writing teams are not consumed by the drudgery and minutiae of discovery and many other distractions during litigation, they are better positioned to see and experience the benefit of document design.

Psychology, like logistics, is also a key component of legal writing projects. In our experience, most lay clients face the challenges of a lawsuit with a mixture of anxiety, fear, and loathing. There is one often-ignored characteristic of all great legal writing: It aligns with and advances the client's goals, challenges, and needs. Great legal writing must be grounded in reality. And in litigation, reality hinges on the evidence. That's why part of winning the case is winning the race to the facts. So you might think that a team always does a better job in this race than a single attorney.

Unfortunately, the typical attorney experience with collaborative legal writing projects consists of a mishmash of contributors—without a clear role, a shared vision, or even continuity. Rather than have each legal writing product follow from an evolving process, typical projects are usually treated as one-off creations that don't lead to continuous improvement. After the legal writing battle is over, most attorneys march off to the next litigation battle, only looking back to tell associates 10 years on about a case they swear they remember—which, if available, would be the smoking gun in their current dispute.

Second, a successful legal writing team has shared goals based on high ideals. All good attorneys want to get a good result for their clients. Effective legal writers embrace a higher ideal: writing with integrity, credibility, and style to obtain the best-possible outcome for their clients. This all requires learning from past experiences—and overcoming a lot of resistance to the move away from legalese and traditional law firm workflows.

So identifying your goals is also crucial. The "who is my client and what are their needs?" stage must come first. Clear and realistic expectations are essential. But they need to be the right clear and realistic expectations. Simple outcome-oriented goals won't cut it. These are not motivating enough. The expectations need to include growth goals.

In our experience, these three goals (the three Cs) are the most effective drivers of superior legal writing:

1. Aiming for *clarity*;
2. Seeking feedback and constructive *criticism*; and
3. *Continuous*ly practicing and improving.

We have already addressed the first two Cs. The third C deserves emphasis here. The power of continuous improvement cannot be emphasized enough.[3] It is a vital ingredient to lasting progress and it spearheads mastery of a skill. Malcolm Gladwell's observation that it generally takes 10,000 hours to master a complex skill helps illustrate this concept. While that number is not a firm rule, it drives home a vital concept: It takes a lot of practice to be good at anything worth being good at. You may not be seeing progress every day, but when you look back a year, you will see an immense distance traveled.

Now we come to the practical challenge preventing many lawyers from becoming great legal writers: time. Aren't lawyers already spending 10,000 hours on trial skills, or client management, or other skills? What about raising a family or just living a fulfilling life?

As many of us have learned the hard way, lawyers cannot be everything to everyone. As Marcus Buckingham's research on top lawyers showed: "excellent performers were rarely well rounded. On the contrary, they were sharp." So it makes sense for lawyers to focus on their strengths. But in our experience, we can't effectively delegate something unless we have a clear idea of what that thing is. An apt analogy is breaking off a piece of a map and handing it to someone else. Without the overall context, this delegation is useless and will only create more issues for the next person. Unfortunately, attorneys often delegate something they just want to get off their plate. But this isn't delegating; it is ducking.

Artificial intelligence offers a way out of having too little time and no effective means of delegating: Legal writing teams can leverage AI to reduce the hours required to achieve mastery by simplifying complex tasks, streamlining legal research, and taking advantage of editing tools to get a final product that is better written, tighter, and more affordable. Not only can AI make "pre-writing"—research and document review—less burdensome, but AI-driven products like BriefCatch offer the expertise of the greatest legal minds to model your writing while you review. After all, some of these large language models, and other AI, have spent incalculable hours mastering the work for you. Put differently, lawyers who do not leverage AI are leaving paths to mastery untapped—to their clients' detriment.

A successful team develops systems and processes that dictate how they approach legal writing. If effective trial lawyers must tirelessly work to continuously improve their oral argument and ne-gotiation skills, legal writing teams must use AI to improve their systems and processes—and thereby consistently deliver effective written arguments.

By now it shouldn't surprise you that our plan for meeting these three Cs hinges on processes and systems. Resilience comes naturally to legal teams that double down on systems and processes to lean into challenges. Effective legal writing teams overcome self-doubt during projects because they have the confidence of knowing that their systems are robust and have been used successfully before. This preserves energy for writing. And it also gives writers the space to explore AI tools. This approach also has the added benefit of revealing that our tech challenges in writing often are not technological at all. We sometimes just need to learn some new skills, refresh some existing skills, or get back to basics.

In the end, what should lawyers looking for a legal writing team to collaborate with be looking for? In our view, they should be looking for a team that uses new tools, processes, and strategies in its daily work and workflow. They should look for a legal writing team that has developed a process of outlining, review, and feedback to deliver a persuasively effective and cost-effective final product. And they should be looking for a team that does all this without trying to poach the end-clients.

Writing is hard and good legal writing is even harder. Good legal writing requires a lot of rewriting, which takes time and effort. These are both at a premium for lawyers. AI is a gamechanger because effective legal writing teams can leverage AI tools to more consistently and affordably serve a larger pool of clients better.

Make no mistake, excellence in legal writing is also time- and cost-intensive. The everlasting seduction of persuasion-destroying legalese will always threaten to overwhelm a good story and good legal writing. And many other obstacles to effective legal writing will continue to threaten clients, courts, and the legal system. AI isn't going to turn a mediocre writer into the next Bryan Garner, Ross Guberman, or Ryan McCarl. Nor will it turn an *ad hoc* collection of lawyers into an effective legal writing team. But effective writing teams who know how to use AI tools are poised to write more, write better, and write more affordably for their clients—especially other lawyers. Not only will these legal writing teams free up time for their attorney clients to focus on the business of litigation and the business of business, but they will chart a course that will make legal writing better across the board. And this is a development all of us should embrace. ▲

NOTES

[1] Created by Dr. Betty S. Flowers, a former professor in the English Department at the University of Texas.
[2] *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).
[3] James Clear, *Continuous Improvement: How it Works and how to Master it*, *https://jamesclear.com/continuous-improvement* (last visited 8/7/2024).
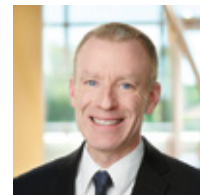
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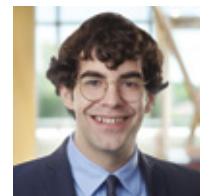
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