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# TEACHING THE NEGLECTED ART OF PERSUASIVE WRITING

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SUZANNE EHRENBURG\*

## I INTRODUCTION: THE PERSUASIVE WRITING GAP AND ITS ORIGINS

For decades, legal educators and practitioners in both Australia and the United States have debated what the respective roles of legal doctrine and legal skills should be within the law school curriculum.<sup>1</sup> In Australia, this debate came to the fore with the publication of the Pearce Report in 1987.<sup>2</sup> The Report criticised the existing system of legal education for its focus on merely transmitting legal doctrine to students, and its failure to provide students with training in legal skills such as writing, research and advocacy or to provide them with a foundation in legal theory.<sup>3</sup> At the time, the majority of writing done by Australian law students was academic in nature. Law school faculty and administrators largely believed that skills education was not the province of a research university<sup>4</sup> and that students should

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<sup>1</sup> See Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' (Report, Commonwealth Tertiary Education Commission, 1987) ('*Pearce Report*'); Craig McInnis and Simon Marginson, *Australian Law Schools After the 1987 Pearce Report* (Australian Government Publication Service, 1994) ('*McInnis-Marginson Report*'); Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537; Paul D Carrington, *Training for the Public Professions of the Law* (Association of American Law Schools, 1971); Task Force on Law Schools and the Profession, 'Legal Education and Professional Development – An Educational Continuum' (Report, American Bar Association, July 1992) ('*MacCrate Report*'); Committee on the Professional Educational Continuum, 'Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary' (Report, American Bar Association, 20 March 2013) ('*Twenty Years After MacCrate*').

<sup>2</sup> Pearce Report, above n 1.

<sup>3</sup> Ibid.

<sup>4</sup> See Dean Bell and Penelope Pether, 'Re/Writing Skills Training in Law Schools – Legal Literacy Revisited' (1998) 9 *Legal Education Review* 113, 140: '...many law faculties have placed the issue of legal literacy and written language skills in the

learn practice skills instead by attending a post-graduate practical training course or by articling.<sup>5</sup>

A similar attitude prevailed in the majority of US law schools until the 1980s.<sup>6</sup> Only then did US law schools begin to take the discipline of legal writing seriously and to develop courses focusing exclusively on researching and writing practice-oriented documents such as office memoranda, client advice letters and persuasive briefs (written submission to trial and appellate courts).<sup>7</sup> In 1992, the American Bar Association issued the MacCrate Report, which brought wide attention to some remaining inadequacies in the skills training provided by US law schools.<sup>8</sup> In response to this Report and another highly influential study of US legal education, the 2007 Carnegie Report,<sup>9</sup> US law faculties have shown ‘an energized commitment ... to review and revise their curriculum to produce practice ready professionals’.<sup>10</sup>

Similarly, in the 30 years since the Pearce Report was published, and partially in response to that Report, a significant number of Australian law schools now devote more attention to teaching generic and legal skills, theory and ethics.<sup>11</sup> Many Australian law schools, particularly those established after the publication of the Report, ‘have moved to embrace the teaching of legal skills with an enthusiasm that few could have foreseen prior to 1987, or indeed, in the immediate aftermath of that Report’.<sup>12</sup>

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too-hard basket – something which will go away when the world returns to the academic “Golden Age” of elite . . . universities.’ See also, *ibid.*

<sup>5</sup> See Ross Nankivell, ‘Legal Education in Australia’ (1993) 72 *Oregon Law Review* 983, 987. In the US, there is no required post-graduate practical legal training program and all practice skills are subsumed within the JD curriculum.

<sup>6</sup> See Maureen J Arrigo, ‘Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs’ (1997) 70 *Temple Law Review* 117, 137-8; Emily Grant, ‘Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession’ (2003) 27 *Vermont Law Review* 371, 376-7.

<sup>7</sup> Grant, above n 6, 376-7. As of 1992, all US law schools accredited by the American Bar Association offered some form of legal writing instruction: J Christopher Rideout and Jill J Ramsfield, ‘Legal Writing: A Revised View’ (1994) 69 *Washington Law Review* 35, 36.

<sup>8</sup> The MacCrate Report identified the following ten fundamental skills as essential to the law school curriculum: problem solving; legal analysis and reasoning; legal research; factual investigation; communication (oral and written); counseling clients; negotiation; understanding litigation and alternative dispute resolution procedures; organisation and management of legal work; and recognising and resolving ethical dilemmas: MacCrate Report, above n 1, 138, 140.

<sup>9</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007).

<sup>10</sup> Catherine L Carpenter, *A Survey of Law School Curricula: 2002-2010* (American Bar Association, 2012) section VII. Some of the curricular enhancements and innovations adopted include expanded clinical and externship opportunities, greater emphasis on writing across the curriculum, and development of legal problem solving workshops and intensive simulation courses: Twenty Years After MacCrate, above n 1, 22-3.

<sup>11</sup> Keyes and Johnstone, above n 1, 549.

<sup>12</sup> Andrew Lynch, ‘Packing Them in the Aisles: Making Use of Moots as Part of Course Delivery’ (1999) 10 *Legal Education Review* 83, 83-4.

Australian legal educators have recognised that legal skills generally — and legal writing skills in particular — are inextricably intertwined with and inevitably enhance the acquisition of substantive legal knowledge.<sup>13</sup> Legal research, writing and analysis now are components of the required curriculum at almost all Australian law schools.<sup>14</sup> Indeed, the Australian Learning and Teaching Council's Threshold Learning Outcomes for the Bachelor of Laws degree specifically identify legal reasoning, research and communication skills among those required learning outcomes.<sup>15</sup> Moreover, several Australian textbooks addressing legal writing, as well as a variety of other practice skills, have been published.<sup>16</sup>

In Australian law schools, the trio of legal writing, research and analysis skills are frequently taught in tandem with substantive law subjects, so that skills and substance 'feed off each other while achieving their own objectives and learning outcomes'.<sup>17</sup>

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<sup>13</sup> See Anne Hewitt and Kellie Toole, 'The Practical Knowledge Conundrum: What Practical Knowledge Should Be Included in a Law School Curriculum and How Can It Be Taught?' (2013) 25 *New Zealand Universities Law Review* 980, 991: 'The situated nature of cognition means that endeavours that deliberately engage students in activities to jointly develop theoretical and practical knowledge are likely to be more successful in developing useable and robust knowledge.'; Bobette Wolski, 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19 *Legal Education Review* 41, 63 ('*Beyond Mooting*'): 'The learning of relevant skills [in the context of substantive law] can encourage students to adopt a deep approach to theoretical learning and so enhance their learning of substantive law.'; Bell and Pether, above n 4, 116.

<sup>14</sup> Statements in this article about the current nature and extent of legal writing instruction in Australian law schools are supported by a selective, not systematic, review of curricula, and upon anecdotal observations of several Australian legal educators with expertise in skills training, interviewed by the author from December 2015 – June 2017: Brendan Griggs and Samantha Kontra of Flinders University Law School; Chantal Morton of University of Melbourne Law School; Nichola Corbett-Jarvis of James Cook University Law School; and Alex Steele of University of New South Wales Law School ('*Interviews with Australian Skills Training Faculty*'). Notes of interviews available from author.

<sup>15</sup> Sally Kift, Mark Israel and Rachael Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010) <<http://www.cald.asn.au/media/uploads/KiftetalLTASStandardsStatement2010%20TLOs%20LLB.pdf>> ('*ALTC Threshold Learning Outcomes Report*'). Specifically, the Threshold Learning Outcomes state that graduates of the Bachelor of Laws 'will be able to ... apply legal reasoning and research to generate appropriate responses to legal issues,' TLO 3; 'demonstrate the intellectual and practical skills needed to identify, research, evaluate and synthesise relevant factual, legal and policy issues,' TLO 4; and 'communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences,' TLO 5. See also *ibid.*

<sup>16</sup> See Nichola Corbett-Jarvis and Brendan Grigg, *Effective Legal Writing: A Practical Approach* (LexisNexis, 2<sup>nd</sup> ed, 2016); Enid Campbell, Richard Fox and Melissa de Zwart, *Students' Guide to Legal Writing, Law Exams and Self-Assessment* (Federation Press, 3<sup>rd</sup> ed, 2010); Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills: Developing Your Clinical Technique* (Oxford University Press, 4<sup>th</sup> ed, 2014).

<sup>17</sup> Bobette Wolski, 'Why, How, and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287, 289 ('*Why, How, and What to Practice*'), quoting Duncan Bentley,

Alternatively, these skills may be taught as discrete subjects or units independent of any specific substantive law subject.<sup>18</sup>

But one gap in the Australian law school curriculum stills exists. The focus of most legal writing instruction is on drafting documents such as the opinion and advice, which describe the law and predict how it will likely apply in the client's case, or drafting transactional documents, rather than documents designed to persuade a judge.<sup>19</sup>

That persuasive writing is largely absent from the Australian legal writing curriculum is not surprising. In Australia, as in the rest of the British Commonwealth, oral argument rather than written argument has historically been the primary means by which lawyers persuade judges at both the trial and appellate levels.<sup>20</sup>

The United States, in contrast, has a long history of written argument dating back to the 19th century.<sup>21</sup> Lawyers in the US routinely prepare written arguments when they file substantive motions in trial court (eg a motion to dismiss a complaint).<sup>22</sup> And they submit arguments when appealing a case to either an intermediate appellate court or the Supreme Court.<sup>23</sup> In fact, in some cases, an

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'Mooting in an Undergraduate Tax Program' (1996) 7 *Legal Education Review* 97, 104. Incorporating skills training across the 'whole-of-curriculum' is an approach consistent with the intent of the drafters of the TLOs for law: Anna Huggins, 'Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law' (2015) 38 *University of New South Wales Law Journal* 264, 283. 'Graduates' acquisition of the TLOs will most likely be facilitated in a structured and integrated, whole-of-curriculum approach through learning, teaching and assessment': ALTC Threshold Learning Outcomes Report above n 15, 9.

<sup>18</sup> Wolski, above n 17.

<sup>19</sup> Interviews with Australian Skills Training Faculty, above n 14.

<sup>20</sup> Suzanne Ehrenberg, 'Embracing the Writing-Centered Legal Process' (2004) 89 *Iowa Law Review* 1159, 1161-2, 1166-70.

<sup>21</sup> *Ibid* 1161-2, 1165.

<sup>22</sup> Although the Federal Rules of Civil Procedure do not expressly require the submission of a brief in support of trial court motions, they do require that every motion specify the grounds and the relief or order sought 'with particularity': *Federal Rules of Civil Procedure* (2017) r 7(b)(1)(B). Many federal trial courts have responded to this language by adopting a local rule that requires the movant to submit a brief or memorandum in support of the motion at the time it is made or shortly thereafter: Charles Alan Wright et al, *Federal Practice and Procedure* (Thomson West, 4<sup>th</sup> ed, 2017) § 1192.

<sup>23</sup> The significance of this document in the appellate litigation process is evidenced by its length, as well as the elaborate rules governing its form and content. For example, the Federal Rules of Appellate Procedure specify that a brief must include not only an argument, but also a table of contents, table of authorities, statement of issues, statement of the case, statement of facts, jurisdictional statement and corporate disclosure: *Federal Rules of Appellate Procedure* (2016) r 28(a). Moreover, the rules provide detailed requirements pertaining to the brief's cover, binding, paper size, line spacing, margins, typeface and style: *Federal Rules of Appellate Procedure* (2016) rr 32(a)(1)-(6). The substantive portion of the brief may run as long as 30 pages: *Federal Rules of Appellate Procedure* (2016) r 32(a)(7). Briefs filed in the United States Supreme Court are subject to even more rigorous formal requirements, see *Rules of the Supreme Court of the United States* (2013) rr 24, 33(1)(a)-(f), and may run as long as 60 pages, see r 33(1)(g).

appeal may be decided solely on the basis of the written briefs, without any oral argument whatsoever.<sup>24</sup>

Because persuasive writing to the court is such a critical component of legal practice in the US, the vast majority of US law schools require at least one course devoted primarily to written advocacy.<sup>25</sup> In addition, many law schools also offer either a required or an elective course in advanced appellate advocacy.<sup>26</sup> Numerous textbooks, moreover, have been authored on the subject of brief writing.<sup>27</sup>

Conversely, so long as oral argument was the primary mode of communication in Australian courts, there was no need for such writing courses in Australian law schools. But over the past three decades, written submissions to the court have become an increasingly important aspect of Australian legal practice as well.<sup>28</sup> Currently, all appellate courts require some type of written submission prior to oral argument.<sup>29</sup> Thus, written advocacy no longer '[plays] the part of the poor second cousin to oral advocacy ...'.<sup>30</sup>

<sup>24</sup> The Federal Rules of Appellate Procedure currently permit disposition of an appeal without oral argument where '1) the appeal is frivolous; 2) the dispositive . . . issues have been recently authoritatively decided; or 3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument': *Federal Rules of Appellate Procedure* (2016) r 34.

<sup>25</sup> George Mader and Marci Rosenthal, 'Report of the Annual Legal Writing Survey' (Report, Association of Legal Writing Directors and Legal Writing Institute, 2014) 13 <<http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf>>. According to this survey, 70 per cent of the 177 respondent law schools teach appellate brief-writing, and 38 per cent teach trial-level brief-writing, in a required course. In 82 per cent of the respondent law schools that required course is taught in the second semester of the first year: at 9.

<sup>26</sup> 54 per cent of respondent law schools offer an upper-level elective writing course in Advanced Advocacy: *ibid* 25.

<sup>27</sup> See, eg, Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (Wolters Kluwer, 4<sup>th</sup> ed, 2014); Michael R Fontham and Michael Vitiello, *Persuasive Written and Oral Advocacy: In Trial and Appellate Courts* (Wolters Kluwer, 3<sup>rd</sup> ed, 2013); Bryan A Garner, *The Winning Brief* (Oxford University Press, 3<sup>rd</sup> ed, 2014); Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (Oxford University Press, 2<sup>nd</sup> ed, 2014); Noah A Messing, *The Art of Advocacy* (Wolters Kluwer, 2013).

<sup>28</sup> Troy Simpson, 'The Art of Written Persuasion: The Rise of Written Persuasion' on *LLRX.com* (30 May 2008) <<http://www.llrx.com/columns/persuasion1.htm>>. In 1982, the Australian High Court took the first step toward incorporating written argument into the appellate process by requiring parties to submit a written outline of their main arguments before oral submissions. Two years later, the High Court required parties to also submit a written list of authorities. And in 1987, the written outline requirement was expanded to require more detailed submissions encompassing all main arguments. By the mid-1990s, comprehensive written argument became a standard requirement in all High Court cases. A decade later, in 2005, the High Court began deciding some applications for leave or special leave to appeal exclusively on the basis of written submissions, thus giving even greater weight to such submissions.

<sup>29</sup> Jennifer Davies, 'Effective and Persuasive Written Advocacy: Conducting a Commercial Trial – Handy Guide' (Paper presented at the Victorian Bar CLE, 7 August 2013) <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-davies/davies-j-20130807>>.

<sup>30</sup> *Ibid*.

Former High Court Justice Michael Kirby has observed that in adopting a written argument requirement, 'the courts have changed, probably forever, the precise skills of advocacy that they enlist'.<sup>31</sup> However, according to former High Court Chief Justice Anthony Mason, the written documents with which Australian advocates are most familiar, the opinion and advice, offer an insufficient 'introduction to the formulation of persuasive argument in writing'.<sup>32</sup>

Australian law schools, for the most part, have not responded to this change by offering courses in persuasive writing or otherwise incorporating persuasive writing into the curriculum.<sup>33</sup> Advanced skills-based courses, such as Appellate Advocacy, 'are generally limited-enrolment courses that are offered intermittently and can be taken by only a small percentage of the school's students'.<sup>34</sup> In the majority of Australian law schools, the only exposure students have to written appellate advocacy is through participation in intramural, national or international mooted competitions, which are generally offered as an extra-curricular activity run by students.<sup>35</sup> Under this

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<sup>31</sup> Michael Kirby, 'Appellate Advocacy – New Challenges' (Speech delivered at the Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006), quoted in Simpson, above n 28.

<sup>32</sup> A F Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 *Australian Law Journal* 537, 540-1.

<sup>33</sup> Interviews with Australian Skills Training Faculty, above n 14. Moreover, the existing Australian textbooks related to legal writing, see above n 16, either do not address the subject of persuasive writing or contain only a cursory discussion of written submissions.

<sup>34</sup> Wolski, above n 17, 290.

<sup>35</sup> See eg, University of New South Wales, *Mooting* <<http://www.law.unsw.edu.au/current-students/lawinaction/mooting>>; Melbourne University Law Students' Society, *First Year Mooting* <[http://mulss.com/competitions/first\\_year\\_mooting](http://mulss.com/competitions/first_year_mooting)>; Melbourne University Law Students' Society, *Mooting* <<http://mulss.com/competitions/mooting>>; Melbourne University Law Students' Society, *External Competitions* <[http://mulss.com/competitions/external\\_competitions](http://mulss.com/competitions/external_competitions)>; Sydney University Law Society, *Competitions Handbook and General Information* <<http://www.suls.org.au/competitions-handbook-and-general-information/>>.

However, at Sydney, students participating in international mooted competitions receive a unit of academic credit: University of Sydney, *Information for Students* <[http://sydney.edu.au/law/scil/for\\_students/#mooting](http://sydney.edu.au/law/scil/for_students/#mooting)>. The University of Newcastle Law School offers a faculty-taught course, 'Competitive Mooting,' for students who compete as members of Newcastle Law School teams in national or international legal skills competitions: University of Newcastle, *LAWS6097: Competitive Mooting* <<https://www.newcastle.edu.au/course/LAWS6097>>. A written submission to an appellate court is a course requirement in the 'Competitive Mooting' course. Bond University Law School is, to my knowledge, the only Australian law school offering an elective course to all undergraduate students, 'Trial Advocacy', that teaches persuasive writing to a court: Bond University, *LAWS13-455: Trial Advocacy* <<https://bond.edu.au/subject/laws13-455-trial-advocacy>>. See also Joel Butler and Rachel Mansted, 'The Student as Apprentice: Bridging the Gap Between Education, Skills and Practice' (2008) 1 *Journal of the Australasian Law Teachers Association* 287 (describing a 'Mooting, Appellate Advocacy and Legal Practice' elective introduced and taught at Bond in 2007). Additionally, a written appellate argument is a required component of Bond's multi-year skills training program, which is integrated with substantive law courses. See generally Wolski, above n 13.

model, too few students are exposed to mooting,<sup>36</sup> and those who do participate do not receive the formative feedback on their written arguments necessary to develop effective persuasive writing skills.<sup>37</sup> A number of Australian law schools have incorporated mooting as a skills training component of doctrinal course such as constitutional law or tax law.<sup>38</sup> However, these mooting experiences require, at most, only a written summary of argument, rather than a fully developed written submission.<sup>39</sup>

This article argues that adding persuasive writing to the practice skills already taught in Australian law schools would fill a significant gap in the curriculum by preparing law students to successfully advocate for their clients in writing, as well as orally. Section II of the article posits that teaching persuasive writing to all law students, as a discipline distinct from other types of legal writing, provides multiple benefits. Persuasive writing instruction not only teaches students to effectively advance an argument in writing, but it enhances their analytical skills and their understanding of substantive law. Section III of the article describes the pedagogical objectives and content of an effective persuasive writing course, emphasising the aspects of the course that are unique to persuasive writing. In Section IV, the article concludes that the financial investment required by intensive persuasive writing instruction is eminently worthwhile, but recognises that it may not be feasible for many Australian law schools to implement the US model for such instruction, given their funding challenges. Nevertheless, instructional costs can be minimised by effectively integrating persuasive writing into substantive law courses or by using adjunct instructors to teach a discrete course in persuasive writing.

## II THE CASE FOR TEACHING PERSUASIVE WRITING

As discussed above, the primary justification for teaching persuasive writing in Australian law schools is to inculcate in students the advocacy skills necessary for them to function successfully in the new legal environment, where ‘written submissions are the first, and perhaps the primary, tool of persuasion’.<sup>40</sup> Although many of the

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<sup>36</sup> Wolski, above n 13, 64.

<sup>37</sup> Wolski, above n 13, 58, 65. Professor Wolski observed that in her experience with mooting at Bond University, students were given little, if any, feedback on the written summary of their arguments. Not surprisingly, then, students devoted only cursory attention to their written summaries ‘and perceived them to be incidental to their main performance – the oral presentation’: at 58.

<sup>38</sup> See Lynch, above n 12; Paula Gerber and Melissa Castan, ‘Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law’ (2012) 62 *Journal of Legal Education* 298; Bentley, above n 17.

<sup>39</sup> See Lynch, above n 12; Wolski, above n 13.

<sup>40</sup> Wolski, above n 13, 59. It should be noted that Australian legal practitioners and judges are becoming more aware of the need for instructional materials on the subject of persuasive writing in Australian courts. Although I am not aware of any books devoted exclusively to this subject, numerous articles and at least one book chapter have addressed written submissions. See, eg, Davies, above n 29; Kirby,



skills required to produce an effective written submission may be taught through legal writing experiences offered elsewhere in the curriculum, these experiences do not teach specific techniques for advocating a position in writing.

To be sure, a good written legal argument possesses many of the same qualities as a good piece of legal writing generally. It has a clear organisational structure. It employs correct grammar, punctuation and spelling. It expresses ideas clearly, using plain English, and expresses them concisely, but in sufficient detail to reveal their underlying logic. These are all qualities that make the document easily understandable to the reader.

Where that reader is a judge, organisational and textual clarity assume even greater importance than they would, for example, in an inter-office memo written by one attorney to another or in an advice letter from an attorney to a client. If the judge cannot easily absorb the content of a legal argument, then he or she cannot be persuaded by it.

As Judge Jennifer Davies of the Federal Court of Australia observed: 'Written work that is dense, impenetrable, lacking cohesion or badly structured will rarely be useful and may be counter productive. A valuable opportunity to persuade will have been wasted, sometimes irredeemably.'<sup>41</sup>

Chief Justice Mason expressed a similar view, when he noted that written submissions tended to be either too lengthy or to provide insufficient support for their contentions.<sup>42</sup> The end result, he concluded, is that 'persuasion, which is the object of all presentation, seems to have been overlooked'.<sup>43</sup>

Because the ultimate goal of any written argument is to persuade, it must not only possess the qualities of clarity and conciseness that we expect of any good legal document; it must also employ writing strategies that are distinct to persuasive writing. The most successful written arguments do more than simply describe the relevant legal principles and explain why, in applying those principles to the case facts, the judge should decide the case in favour of the arguing party.

The best written submissions motivate the judge on a much deeper level by employing policy arguments and narrative techniques that appeal to the judge's emotions, and by establishing the author's

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above n 31; Troy Simpson, 'Persuading Judges in Writing: Tips for Lawyers (And How Technology Can Help)' on *LLRX.com* (31 October 2007) <<https://www.llrx.com/2007/10/persuading-judges-in-writing-tips-for-lawyers-and-how-technology-can-help/>>; Margaret McMurdo, 'Written Submissions' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 166; Richard Chesterman, 'Written Submissions – Perspectives from the Bar, the Bench and Beyond' (Paper presented at CPD Seminar, 6 June 2013) <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1656&Itemid=35](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1656&Itemid=35)>; Ronald Sackville, 'Appellate Advocacy' (1996) 15 *Australian Bar Review* 99, 103-4; David Jackson, 'Appellate Advocacy' (1991) 8 *Australian Bar Review* 245, 252-3; Mason, above n 32, 540-1.

<sup>41</sup> Davies, above n 29.

<sup>42</sup> Mason, above n 32, 541.

<sup>43</sup> *Ibid.*

credibility. Additionally, they present the relevant law and facts in an accurate manner, but one still designed to emphasise legal principles and facts favourable to the arguing party. Finally, the ideal written submission effectively rebuts opposing arguments, but in a manner that does not draw excessive attention to those arguments.

These strategies of written persuasion, along with techniques for clearly organising and designing legal arguments, form the cornerstone of a class on persuasive writing. Such skills are not typically taught in legal writing courses devoted to inter-office memos and client opinion letters. Hence, a course focused on written persuasion is necessary to teach law students the skills particular to that form of legal communication, skills that will enable them to produce effective written submissions to a court.

The value of this learning, however, is not confined to the realm of litigation. The advocacy skills students learn in writing an argument to an appellate court have broad application to almost any kind of writing law students or lawyers do. Virtually all legal writing (other than legal drafting) has a persuasive aspect. Whether one is writing an academic essay, an advice letter to a client, or comments on proposed legislation, one is taking a position and trying to persuade the reader that the position is valid. The position must be substantiated with a logical argument. Learning how to construct a logical argument in writing, therefore, is valuable regardless of what type of law a student ultimately practices, or indeed whether a student intends to practice law at all. Even for those Australian undergraduate law students who regard their legal education as simply a springboard to employment in another field, persuasive writing instruction can provide them with advocacy skills that are valuable in business, government, politics and many other areas.

A final benefit of a persuasive writing course is that it enhances students' analytical skills as well as their understanding of the substantive law about which they are writing. Legal writing of any type can enhance one's comprehension of the substantive law that is its subject.<sup>44</sup> But persuasive writing is a particularly potent vehicle for mastering legal doctrine as well as critical thinking skills.<sup>45</sup>

Persuasive writing demands a level of analytical rigour that may not be expected in other modes of legal writing because the stakes involved are so high. It requires the advocate to support every legal contention with relevant legal principles, facts and policy and to eschew facile conclusions. Moreover, it calls for the advocate to anticipate and rebut plausible counter-arguments — something students frequently overlook in writing academic essays, client advice letters or written submissions regarding legislation. Indeed, drafting a written argument and preparing to present that argument orally before a judge 'is one of the best forms of deep and experiential learning available to law students'.<sup>46</sup>

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<sup>44</sup> See above n 17.

<sup>45</sup> See Gerber and Castan, above n 38; Bentley, above n 17.

<sup>46</sup> Gerber and Castan, above n 38, 301.

### III THE PEDAGOGICAL OBJECTIVES AND CONTENT OF A PERSUASIVE WRITING COURSE

In US law schools, persuasive writing is typically taught in the second semester of the first year in a required course.<sup>47</sup> The course may focus on writing a trial-level brief (eg a brief in support of a motion for summary judgment), writing an appellate brief or a combination of the two.<sup>48</sup>

A persuasive writing course has many learning objectives, some of which go beyond the nuts and bolts of drafting a written submission. Students are expected to not only become familiar with the required format and content of trial and appellate briefs, but to understand the respective roles played by trial and appellate courts in the legal system; to understand the role of procedural posture in writing trial-level briefs; and to learn relevant rules of appellate procedure (including grounds for appeal and standards of appellate review).

The core of the course, however, focuses on the actual process of persuasive writing. In this regard, the course aims to teach students: 1) to understand the roles of reason, emotion and ethics in advocacy and to employ each effectively; 2) to describe the law and facts persuasively through effective use of emphasis and de-emphasis; 3) to soundly rebut counter-arguments; and 4) to organise and format a brief for clarity and persuasiveness.

The four sub-sections below describe the specific course content related to each of these objectives.<sup>49</sup> This discussion is intended to not only highlight the unique character of a persuasive writing course, but to generate ideas for how such a course might be taught in an Australian law school.

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<sup>47</sup> Mader and Rosenthal, above n 25, 9.

<sup>48</sup> The Chicago-Kent Legal Writing Program takes the latter approach. First, students write a trial-level brief on behalf of one party in a case involving constitutional or statutory analysis and receive written feedback on it. Then, they write an appellate brief on the same issue, but representing the opposing party.

This approach serves several pedagogical purposes. It gives students an opportunity to learn the formal and substantive conventions associated with both trial-level and appellate briefs. It also enables them to make a first effort at writing a persuasive brief, receive substantive, organisational and stylistic feedback and then incorporate that feedback into another brief written on the same topic. Finally, by writing briefs on both sides of the issue, they gain a deeper understanding of the competing arguments than they would acquire if they only represented one party.

<sup>49</sup> In the interest of brevity, this overview of persuasive writing techniques is selective. It does not discuss, for example, developing an overall theme for the argument, strategic word choice, or strategies for distinguishing or devaluing adverse legal authority. More detailed information on the content of a US persuasive writing course (including my own syllabus, power point presentations, and some sample classroom exercises) is available on the following Google drive: <[https://drive.google.com/a/kentlaw.iit.edu/folderview?id=0BwLqD0lscY\\_HTFpqb nROS2M0ck0&usp=sharing](https://drive.google.com/a/kentlaw.iit.edu/folderview?id=0BwLqD0lscY_HTFpqb nROS2M0ck0&usp=sharing)>.

The textbooks cited in footnotes 27, 57, 64, and 74 of this article are also extremely useful resources in designing a persuasive writing course.

*A Developing Arguments that Establish Credibility and Motivate the Judge to Rule Favourably*

In his treatise on the art of persuasion, the *Rhetoric*, Aristotle identified three modes of persuasion.<sup>50</sup> First, '[p]ersuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible.'<sup>51</sup> Second, 'persuasion may come through the hearers, when the speech stirs their emotions.'<sup>52</sup> Finally, 'persuasion is effected ... when we have proved a truth or an apparent truth' through logical reasoning.'<sup>53</sup> The Roman rhetoricians Quintillian and Cicero later labelled these three modes of persuasion, respectively, as 'ethos, pathos and logos', terms which are still used today in referring to Aristotle's triad of persuasive strategies.<sup>54</sup>

Most attorneys focus primarily or even exclusively on logos — the logical argument — in writing a persuasive document. However, the emotional aspects of a case and the personal character of the arguing attorney have increasingly been recognised as critical in delivering a persuasive argument, whether orally or in writing.<sup>55</sup>

Regarding ethos, we emphasise to our students that '[a]n attorney who has not earned the trust of the court has little chance of success in that court'.<sup>56</sup> We teach them that in order to establish their credibility and gain the judge's trust, they must do the following in preparing a written submission: 1) state the law and facts accurately, refraining from hyperbole or misrepresenting mere factual inferences as facts; 2) avoid language that is belligerent, sarcastic or overly-dramatic; and 3) produce a document that is carefully edited for correct grammar, punctuation and spelling, and has a flawless appearance.<sup>57</sup>

Regarding pathos, we teach our students that while a logical argument necessarily forms the core of a persuasive brief, such an argument alone will not always persuade a judge. Faced with a choice

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<sup>50</sup> Aristotle, *The Rhetorics and the Poetics of Aristotle* (W Rhys Roberts trans, Modern Library, 1954) 24-7.

<sup>51</sup> Ibid 25.

<sup>52</sup> Ibid 91-115. Aristotle specifically identifies anger, pity, fear, shame, love and hatred as some of the 'feelings that so change men as to affect their judgements'.

<sup>53</sup> Ibid 25.

<sup>54</sup> Michael Frost, 'Ethos, Pathos & Legal Audience' (1994) 99 *Dickinson Law Review* 85, 86.

<sup>55</sup> See generally *ibid*; Richard K Neumann and Kristen Konrad Tiscione, *Legal Reasoning and Legal Writing* (Wolters Kluwer, 7<sup>th</sup> ed, 2013) 270-4; 279-80; 282-3; Helene S Shapo, Marilyn R Walter and Elizabeth Fajans, *Writing and Analysis in the Law* (Foundation Press, 6<sup>th</sup> ed, 2013) 355-6.

<sup>56</sup> Shapo et al, above n 55, 367.

<sup>57</sup> Neumann and Tiscione, above n 55, 282, 344-5; Shapo et al, above n 55, 355. In employing the persuasive mode of ethos, the attorney is arguably appealing as well to the judge's logic because if the technical aspects of the brief are correct and the brief presents the law and facts accurately, the judge is logically more likely to believe that the legal argument the attorney has made is correct. Additionally, the attorney is appealing to the judge's emotions by presenting himself or herself as a person of good will and high moral character, someone who is 'likeable.' Thus, the three persuasive modes are sometimes inextricably intertwined.

between two conflicting but reasonable legal arguments, ‘the judge will take the one she or he is motivated to take’.<sup>58</sup>

Professor Richard Neumann refers to arguments designed to motivate the judge by eliciting particular emotions as ‘motivating arguments’. ‘A *motivating argument* causes a judge to *want* to decide in your favour. It causes the judge to feel that any other decision would be unwise or unjust.’<sup>59</sup>

Motivating arguments may draw on a policy supporting the societal benefit or moral value of ruling in favour of the arguing party.<sup>60</sup> Additionally or alternatively, motivating arguments may draw on emotionally compelling facts and employ techniques of ‘narrative reasoning’.<sup>61</sup> Narrative reasoning ‘uses the components of a story (characterisation, context, description, dialogue, theme, and perspective) to appeal to commonly shared notions of justice, mercy, fairness, reasonableness, and empathy’.<sup>62</sup> The narrative works in tandem with rule or policy-based reasoning by providing a concrete example of how the legal principle or policy operates in the real world.<sup>63</sup>

Arguments grounded in narrative are often presented in the context of a legal analysis, where the attorney explains why the facts of the case satisfy the relevant legal standard.<sup>64</sup> But persuasion through the

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<sup>58</sup> Neumann and Tiscione, above n 55, 272.

<sup>59</sup> Ibid 270 (emphasis added).

<sup>60</sup> An example of a policy-based motivating argument for the defendant school in a case involving school censorship of student internet speech would be as follows: ‘The rapid rise in instances of cyber-bullying among high school students makes it imperative that public schools have authority to regulate student speech on the internet, regardless of whether it is initiated on or off campus. This authority is necessary in order for schools to preserve the safety and well-being of their students.’ The legal argument, in contrast, would focus solely on the legal principle underlying the school’s claim that it did not violate the student’s free speech rights, ie that the freedom of speech conferred by the Constitution is not unlimited and can be curtailed where the government has a compelling interest in doing so.

<sup>61</sup> Linda Edwards, *Legal Writing and Analysis* (Wolters Kluwer, 4<sup>th</sup> ed, 2015) 62-3; Jennifer Sheppard, ‘Once Upon a Time, Happily Ever After, and In a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda’ (2009) 46 *Willamette Law Review* 255.

<sup>62</sup> Edwards, above n 61, 62.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid. In her textbook, Professor Edwards uses an example of narrative reasoning in a brief addressing whether a contract made by a minor is enforceable. The applicable rule allows enforcement of such contracts only if the other party to the contract did not use undue influence to persuade the minor to enter into the contract. An argument on behalf of the minor, rooted in the concept of undue influence, might read as follows:

‘Sixteen-year-old Harold Collier should not be bound by the contract he signed with Jenkins, a used-car dealer for twenty-two years. Harold had never purchased a car before. In fact, he had only just obtained his driver’s license. He came to the dealership on his own, without his parents or anyone else who might have given him guidance in making such a major purchase. Moreover, when Harold told Jenkins that he wanted to call his parents to ask their advice, Jenkins discouraged him from doing so. Jenkins also pressured Harold to make an immediate decision by telling him another purchaser was looking at the car at that very moment. Jenkins further exploited Harold’s inexperience by conveying the impression that

use of narrative may also take place in the Statement of Facts, where the attorney tells the story of the case in a manner engendering sympathy for the client or outrage at the opponent's conduct.<sup>65</sup> These techniques, when combined with a rigorous argument based on legal rules and case law, can tip the balance in favour of an attorney who employs them.

### B *Presenting Relevant Law and Facts Persuasively*

Another skill central to the discipline of persuasive writing is that of implicit persuasion. When we think of advocacy, we tend to think of explicit legal, factual or policy arguments in which the advocate directly states the reasons why the court should reach a positive ruling for the client. But an advocate can persuade a judge in a more subtle manner, as well, by emphasising favourable and de-emphasising unfavourable law and facts.<sup>66</sup> A key objective of a persuasive writing course, therefore, is to teach students how to effectively highlight the positive aspects of their case and downplay the negative aspects.

Specifically, we teach them to use section and paragraph organisation, sentence structure, sentence length, repetition and level of detail to achieve the desired degree of emphasis.<sup>67</sup> Positive information should generally be placed at the beginning or end of an argument section paragraph, where the reader is most likely to pay attention to it; negative information should be placed in the middle, where the reader is less attentive.<sup>68</sup>

Additionally, an advocate can use sentence structure to emphasise positive and de-emphasise or neutralise negative information. One particularly effective method of doing so is to juxtapose an unfavourable fact or legal ruling with favourable facts or legal rulings

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he was giving Harold a special discount on the car. In fact, used-car dealers routinely sell cars for lower than the sticker price. Jenkins lowered his voice and said, "Tell you what I'll do. I'll knock off \$1000 just for you – just because this is your first car. But you can't tell anyone how low I went. This will have to be our secret."

<sup>65</sup> For example, in a United States Supreme Court brief filed on behalf of the plaintiff in a sexual harassment suit brought against President Bill Clinton, the Statement of Facts began as follows: 'In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a \$6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor.' Brief of Respondent Paula Corbin Jones, *Clinton v Jones*, 520 US 681 (1997). This sentence immediately sets up the unequal power relationship between Mr Clinton and Ms Jones and portrays her as a victim. The fact statement continues to describe in detail Mr Clinton's alleged sexual advances toward Ms Jones, including the allegation that he undressed from the waist down. It describes Ms Jones' reaction as 'horrified', 'shaken and upset', and explains that she failed to immediately complain because of fear for her job and her relationship with her fiancé. None of these allegations was actually relevant to the narrow procedural issue before the court. Nevertheless, they served both to engender sympathy for the plaintiff and to elicit a sense of outrage in the reader at the alleged harassment by Mr Clinton. Ms Jones prevailed in the appeal when the Court refused to stay her lawsuit until Mr Clinton left office. The lawsuit was ultimately settled.

<sup>66</sup> See Edwards, above n 61, 217-8; 223-9; Neumann and Tiscione, above n 55, 308-9.

<sup>67</sup> See *ibid.*

<sup>68</sup> Edwards, above n 61, 224-5; Neumann and Tiscione, above n 55, 308-9.

‘that explain, counter-balance or justify it’.<sup>69</sup> Persuasive advocates also use shorter sentences, and more detail and repetition to emphasise favourable information; they de-emphasise unfavourable information by devoting less detail to it or ‘burying it’ in the middle of a longer sentence.<sup>70</sup>

Regardless of which technique the advocate uses, it should never be so obvious that the judge feels that he or she is being manipulated.<sup>71</sup> Moreover, an advocate must state the relevant law and facts accurately, to comply with ethical duties<sup>72</sup> and maintain credibility.<sup>73</sup>

Ultimately, writing persuasively requires balancing credibility with the techniques necessary to highlight favourable law and facts. ‘It does not require the brute force of emphatic language so much as a subtle blend of strength and control of structure and detail.’<sup>74</sup>

### C *Effectively Rebutting Opposing Arguments*

A third skill taught in persuasive writing courses is rebutting opposing counsel’s arguments. Certainly any good legal analysis, whether it is persuasive or descriptive, should examine arguments on both sides of the legal issue. It should explain why the arguments supporting the author’s legal conclusion are more compelling than those opposing it. However, in the context of an adversarial proceeding, effective rebuttal is critical because it may well determine the outcome of the case.

Unfortunately, students tend to have tunnel vision when writing any type of legal analysis, viewing the issue solely from their own client’s perspective. And that tendency seems to be even more pronounced in persuasive writing. So, the initial challenge in teaching

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<sup>69</sup> Neumann and Tiscione above n 55. For example, ‘[a]lthough Mr. Braxton posted comments critical of the school’s anti-cheating program on his Facebook page, the school offered no evidence that any student accessed or viewed that page while at school nor disrupted class in response to his comments on Facebook.’ Not only does juxtaposition here neutralise the unfavourable fact, but placing the favourable facts in the sentence’s independent clause further serves to emphasise them.

<sup>70</sup> Edwards, above n 61, 227.

<sup>71</sup> See *ibid* 223-4. ‘An effective technique must be invisible or nearly so. Once the reader recognizes a technique, it has lost its power because the reader’s attention is on the technique and not the fact.’

<sup>72</sup> In the US, an attorney can be sanctioned under the relevant state’s code of professional conduct for knowingly making a false statement of law or fact, *Model Rules of Professional Conduct* (2016) r 3.3(a)(1) <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html)>, or knowingly failing to disclose to the court directly adverse legal authority in the controlling jurisdiction, *Model Rules of Professional Conduct* (2016) r 3.3(a)(2) <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html)>.

<sup>73</sup> See above nn 56-7 and accompanying text.

<sup>74</sup> Mary Barnard Ray and Ray Cox, *Beyond the Basics: A Text for Advanced Legal Writing* (West, 3<sup>rd</sup> ed, 2013) 195.

rebuttal techniques to students is getting them to actually identify and understand the competing arguments.<sup>75</sup>

Once students have identified plausible opposing arguments, they are taught a variety of strategies for responding to them, including the following: 1) demonstrate inadequate factual or legal support for opponent's conclusions; 2) point out faulty logic; 3) distinguish key cases on which opponent has relied; and 4) emphasise unfair or impractical consequences of adopting opponent's argument.<sup>76</sup>

We emphasise that in an opening brief, the advocate should rebut opposing arguments implicitly rather than explicitly, wherever possible. An effective rebuttal generally does not draw attention to an opposing argument by explicitly labelling it as such.<sup>77</sup> Rather, the rebuttal should respond to the counter-argument implicitly by simply stating the converse of the opponent's position.<sup>78</sup>

In contrast, in a responsive brief, we acknowledge that it makes sense to identify an argument made in the opposing brief before rebutting it. However, even here, the description of the opposing argument should be very concise and phrased in such a way as to cast doubt immediately on its validity. And the rebuttal should come swiftly, ideally in the same sentence.<sup>79</sup> We emphasise to students that

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<sup>75</sup> Because students in US persuasive writing classes typically are required to submit their briefs at the same time, regardless of whether they are writing on behalf of the appellant or the appellee, they must all learn to anticipate what opposing arguments will be. To help students better anticipate and understand opposing arguments, we may conduct a classroom debate on the issues in the brief and require students to switch from their assigned side to the opposing side for purposes of the debate. Alternatively, we may assign an exercise in which students list at least one plausible counter-point to every point they intend to make in their brief. As noted above, students at Chicago-Kent become intimately familiar with the arguments on both sides of the issue because they are required to write a trial-level brief on behalf of one party and then write an appellate brief in the same case on behalf of the opposing party.

<sup>76</sup> Fontham and Vitiello, above n 27, 70-1.

<sup>77</sup> Thus, an opening brief should not make a rebuttal argument like the following: Appellee will argue that the police were justified in searching Appellant's apartment without a search warrant because exigent circumstances existed here. Specifically, Appellee will argue there was a danger Appellant would destroy evidence of the suspected crime, ie marijuana. However, this argument is not persuasive because the exigent circumstances exception applies only where there is probable cause to believe the defendant committed a serious crime. Here, police had no probable cause to believe Appellant was engaged in drug distribution or trafficking, as opposed to mere possession.

<sup>78</sup> For example: Although police may be justified in searching a suspect's residence without a warrant where there are exigent circumstances, that exception does not apply here. It applies only where police have probable cause to believe the suspect committed a serious crime. Here, police had no probable cause to believe Appellant was engaged in drug distribution or trafficking, a serious crime, as opposed to mere possession, which is only a misdemeanor.

<sup>79</sup> A worthy example of this technique appears in the Reply Brief written to the US Supreme Court on behalf of President Bill Clinton in the *Clinton v Jones* case. Clinton was arguing that the sexual harassment suit brought against him by Ms Jones should be deferred until he left office: Respondent and her amici **offer a number of unfounded arguments** in opposition to deferral. They assert that litigation of this kind should not be viewed as an extraordinary event, **even though history clearly shows that it is**. They insist, **in**



regardless of whether the brief is opening or responsive, their primary job as advocates is to advance their own arguments rather than rehashing those of opposing counsel.

#### D Organising a Written Argument for Persuasiveness and Clarity

As discussed above, the more easily a judge can understand and absorb a legal argument, the more likely it is that the judge will be persuaded by the argument.<sup>80</sup> Because written submissions to some appellate courts can run as long as 60 double-spaced pages in the US,<sup>81</sup> providing a clear structure for the argument is essential. Thus, US courses in persuasive writing heavily emphasise clear, logical organisation and effective use of document design to highlight that structure.

It is customary in the US to organise the arguments in a brief into sections and sub-sections, presented in a hierarchical outline-type structure,<sup>82</sup> rather than a series of consecutively numbered points, as is common in Australian written submissions.<sup>83</sup> Moreover, each argument section is identified by a heading or sub-heading stating the main point addressed in that section of the argument. A table of contents for the brief presents all of these ‘point headings’ in an outline format, so that the judge can discern the major arguments (and their logical relationship to one another) at the very beginning of the brief.<sup>84</sup>

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**the face of overwhelming evidence to the contrary**, that the burdens of the Presidency are not so great that such litigation would impede a President’s ability to discharge his responsibilities. And they contend that deferral of such actions would place a President ‘above the law’ – **even though the President would remain amenable to liability when he leaves office**...: Reply Brief for Petitioner William J Clinton, *Clinton v Jones*, 520 US 681 (1997) (emphasis added).

<sup>80</sup> See above nn 41-43 and accompanying text.

<sup>81</sup> US Supreme Court Rule 33(g) permits each party to submit an opening brief of up to 15 000 words (including the Statement of Facts and Summary of Argument), which is roughly equivalent to 60 double-spaced pages. Federal Rule of Appellate Procedure 32 permits each party to submit an opening brief of up to 30 double-spaced pages (including the Statement of Facts and Summary of Argument). The High Court of Australia allows each party to submit an initial written submission of up to 20 pages (with no requirement of double spacing): *High Court Rules 2004* (Cth) r 44.02.

<sup>82</sup> See, eg, Petitioner’s Brief in *Carr v United States*, 551 F 3d 578 (2010) Table of Contents (ii-iii) and Argument section (16-48) <[https://www.appellate.net/wp-content/uploads/2014/11/Carr\\_08-1301\\_FINAL.pdf](https://www.appellate.net/wp-content/uploads/2014/11/Carr_08-1301_FINAL.pdf)>.

<sup>83</sup> See, eg, Appellants’ Written Submission for Permission to Appeal in *Joseph v Spiller*, Claim No HQ08X01759 <<https://inform.files.wordpress.com/2010/02/supreme-court-written-submissions-for-permission-to-appeal-tx.pdf>>; Reply Submissions of Plaintiff in *Roach v Electoral Commissioner* [2007] HCA 43 <<https://www.hrlc.org.au/news/roach-decision-prisoners-right-to-vote>>.

<sup>84</sup> In my persuasive writing course, I ask students to draft an initial set of point headings for their assigned persuasive brief several weeks before the completed brief is due. Requiring students to draft point headings for their argument not only makes the brief more easily accessible to the judge, it helps students work through difficult substantive and organisational issues before they write the argument section itself. Students can identify substantive gaps in their argument or places

In addition to teaching students how to organise an argument effectively with point headings, we emphasise using textual ‘roadmaps’ at the beginning of each major argument section to outline the subsidiary arguments the advocate will make in that section. We also stress using clear textual transitions that illustrate the logical connection between one point and another.

Finally, we teach students how to use document design (including fonts, emphatic typeface, indentation and white space) to create visually clear, accessible briefs.<sup>85</sup> One of the US Courts of Appeals has gone so far as to suggest that a well-designed brief can improve one’s chances of success on appeal, by ensuring ‘that judges grasp and maintain your points with less struggle’.<sup>86</sup>

In sum, the persuasive writing course aims to develop in students the skills necessary to produce a brief that is formally correct, clearly organised, lucidly written, and persuasively argued. The ultimate goal is for students to enter practice prepared to write such a brief on their own, with little supervision, which is increasingly what legal employers are demanding.<sup>87</sup>

#### IV CONCLUSION: PERSUASIVE WRITING INSTRUCTION — AN INVESTMENT WORTH MAKING

To minimise the importance of written argument is to disregard the crucial ‘role played by writing in persuading the court to the client’s cause’.<sup>88</sup> The written submission represents an advocate’s first opportunity to seize the judge’s attention and make his or her case. Moreover, the skills acquired in learning how to produce a written submission can enhance many other types of legal writing, as well as foster strong legal analysis.

Few law school administrators or faculty, therefore, would likely quarrel with the basic proposition that persuasive writing instruction could benefit their students. However, their predictable response to

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where the organisation of their point headings does not logically reflect the true relationship between individual points in the argument. For example, two points that are identified as parallel may really have a hierarchical relation to one another, such that one should be a sub-point of the other.

<sup>85</sup> See Beazley, above n 27, 271-8; Ruth Ann Robbins, ‘Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents’ (2004) 2 *Journal of the Association of Legal Writing Directors* 108.

<sup>86</sup> United States Court of Appeals for the Seventh Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers* 4 <<http://www.ca7.uscourts.gov/forms/type.pdf>>.

<sup>87</sup> Kirsten A Dauphinais, ‘Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake’ (2011) 10 *Seattle Journal for Social Justice* 49, 60. In the current legal employment market, law firms have the advantage and can freely dictate their terms of employment. The firms therefore ‘are likely to focus on hiring attorneys who are practice-ready, in whom [they] do not have to invest significant resources. Lawyers competing for a reduced number of law firm positions will be evaluated on merit-based core competencies and their ability to hit the ground running.’

<sup>88</sup> Wolski, above n 13, 58-9.

the argument that such instruction should be offered to, and even required of, all law students is that such intensive skills training is simply too costly for a law school to support.<sup>89</sup>

Under this same premise, law schools in the US for many years resisted implementing rigorous legal writing instruction.<sup>90</sup> However, they ultimately came to recognise the value of this training, as the practicing bar and the more enlightened members of their faculties lobbied for a curriculum that would produce more practice-ready law graduates.<sup>91</sup> Currently, a vast majority of law schools have a multi-course required legal writing curriculum, taught by full-time legal writing faculty, and incorporating at least one persuasive writing experience.<sup>92</sup> They understand that not only are investments in legal writing instruction critical to preparing their students for practice, but such investments give their schools an advantage over competing schools in the marketplace.<sup>93</sup>

Like the American bar, the Australian bar, which has an even greater degree of influence over its country's law schools, has urged that preparing students to work in the legal profession should be a significant consideration in designing the curriculum.<sup>94</sup> With continuing pressure, Australian legal educators may come to embrace the concept of a comprehensive legal writing curriculum, including persuasive writing, taught by full-time law faculty who are committed to skills training.

But the resource challenges faced by Australian law schools are far more significant those faced by most US law schools.<sup>95</sup> It may

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<sup>89</sup> There is no question that effective legal skills training consumes significantly more faculty resources than other types of law school pedagogy, see Paul O'Shea, 'The Complete Law School: Avoiding the Production of "Half-lawyers"' (2004) 29 *Alternative Law Journal* 272, 275; Butler and Mansted, above n 35, 297. For this reason, courses such as the Mooting, Appellate Advocacy and Legal Practice class taught by Mr Butler and Ms Mansted at Bond are unlikely to be implemented 'as anything but limited-numbers electives': Butler and Mansted, above n 35, 297. Similarly, clinical courses are not widely available to students at Australian law schools due to financial constraints: Wolski, above n 13, 50-1.

<sup>90</sup> Philip C Kissam, 'Thinking (by Writing) About Legal Writing' (1987) 40 *Vanderbilt Law Review* 135, 141; Maureen Arrigo-Ward, 'How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program' (1995) 29 *Valparaiso University Law Review* 557, 591.

<sup>91</sup> MacCrate Report, above n 1.

<sup>92</sup> See generally Mader and Rosenthal, above n 25.

<sup>93</sup> Dauphinais, above n 87, 120.

<sup>94</sup> Keyes and Johnstone, above n 1, 542. According to a survey conducted by the University of Sydney in 2005, proficiency in written communication was specifically identified as one of the skills most desired by legal employers: Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills – A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87.

<sup>95</sup> The problem of inadequate resources for Australian legal education was initially highlighted by the Pearce Report, above n 1. Seven years later, the McInnis-Marginson Report concluded that the Pearce Report had had no significant impact on this problem and that law continued to be plagued by resource difficulties: above n 1, vii. As of 2017, law continues to be one of the disciplines funded at the lowest level for commonwealth contribution – a mere A\$2089 per student annually, compared to A\$12 641 for the disciplines of clinical psychology, foreign language and the visual and performing arts, and A\$22 809 for the disciplines of medicine,

therefore be an unrealistic goal for Australian law schools to adopt this model of persuasive writing instruction in light of the chronic underfunding that has plagued them. Several less costly alternatives, however, still exist: 1) integrating persuasive writing instruction into doctrinal courses; and 2) hiring adjunct instructors to teach a persuasive course for a modest honorarium.

First, to offer students widespread access to persuasive writing instruction, Australian law schools might choose to integrate such instruction into doctrinal classes, as many have done with respect to legal writing generally.<sup>96</sup> This could be accomplished by making participation in a subject-related moot court competition a course requirement.<sup>97</sup> Alternatively, the doctrinal course instructor could require students to draft a written submission based upon a hypothetical case created by the instructor, or have students write a submission to the High Court from an intermediate appellate court decision in a case they have read for the class.

Merely incorporating a persuasive writing assignment into a doctrinal course as an assessment, however, is not sufficient to inculcate solid persuasive writing skills. Students must actually receive instruction in how to prepare the written submission. And they must receive meaningful feedback, during the drafting process (formative assessment) as well as after the final document has been submitted (summative assessment).<sup>98</sup>

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dentistry, veterinary science and agriculture. Total resourcing (including the student contribution) for Australian students at publicly funded law schools was A\$12 685. Australian Government, Department of Education and Training, *Total Resourcing for a Commonwealth Supported Place by Discipline* <[https://docs.education.gov.au/system/files/doc/other/2017\\_indexed\\_rates.pdf](https://docs.education.gov.au/system/files/doc/other/2017_indexed_rates.pdf)>. In comparison, in the US, the median annual tuition for in-state students at a publicly funded law school in 2016 was about US\$23 000: Matt Leichter, '2016: Full-Time Private Law School Tuition Up 2.7 Per Cent' on Matt Leichter, *The Last Gen X American* (27 December 2016) <<https://lawschooltuitionbubble.wordpress.com/2016/12/27/2016-full-time-private-law-school-tuition-up-2-7-percent/>>. The majority of US law schools, however, are private institutions and median tuition at these schools in 2016 was about US\$46 000 (subject to 'discounting' through merit scholarships at many institutions, particularly those ranked in the bottom half). Median tuition at the top 10 US law schools was US\$60 293 and these schools give few, if any, scholarships. Ilana Kowarski, 'U.S. News Data: Law School Costs, Salary Prospects *U.S. News* (online), 15 March 2017 <<https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-03-15/us-news-data-law-school-costs-salary-prospects>>.

<sup>96</sup> See above n 17.

<sup>97</sup> See above n 38.

<sup>98</sup> One excellent example of a course integrating legal doctrine (tax law) with persuasive writing instruction is that created by Professors Mary Keyes and Michael Whincop at Griffith Law School 20 years ago. See Mary E Keyes and Michael J Whincop, 'The Moot Reconceived: Some Theory and Evidence on Legal Skills' (1997) 8 *Legal Education Review* 1. Two characteristics distinguish this course in positive ways from others that have integrated mootings with doctrinal law instruction. First, it inverts the traditional hierarchy in Australian mootings by giving primacy to the written submission over oral argument. Students are required to prepare a graded written submission, rather than just a summary of points they will make orally to the judge. And they do not actually present an oral argument

Here is where the integrated model of teaching skills in connection with doctrine often breaks down. Doctrinal professors may be reluctant to devote adequate time in their courses for writing instruction because they are concerned about covering the substantive content for the course.<sup>99</sup> However, when students write a persuasive document to an appellate court, they are necessarily learning the substantive law involved in the appeal. Thus, a professor can use a persuasive writing assignment as an opportunity to cover a particular topic in the substantive curriculum. Another potential problem with the integrated model is that many doctrinal instructors may not have the requisite experience to teach students persuasive writing skills, nor believe that they have the time to provide students with thoughtful comments on their written work.

To meet the challenge of providing persuasive writing instruction in a doctrinal course where the professor does not have the necessary experience, the school could assign a law faculty member with expertise in this type of skills training to co-teach the course. Alternatively, the law school could offer extra-curricular persuasive writing workshops taught by such a faculty member.<sup>100</sup> These workshops could be delivered either through live instruction or delivered online through synchronous or asynchronous distance learning.

The challenge of providing students with meaningful formative and summative assessments is not as easily met. Individualised feedback on a persuasive writing document is unavoidably labour-intensive, regardless of whether one has expertise in written advocacy. However, cognitive learning theory supports that such assessment is critical to students' mastery of the skill.<sup>101</sup>

Using student teaching assistants to assess the writing assignments for correct grammar, punctuation and word usage can help relieve the professor's grading burden somewhat and leave the professor more time to assess for clear organisation, accurate substantive analysis and

laying out the legal and factual support for their case. Instead, the judges rely on the students' written submissions for this information. During the oral component of the moot, called the 'main hearing', judges spend the entire time questioning students about their written submissions and probing their understanding of the submission. The second distinguishing feature of the course is that it provides students with a formative assessment during the pre-writing phase of the project, while they are researching and analysing the legal issues and formulating their arguments. This assessment takes place at an 'initial hearing', during which students present judges with an initial summary of the facts and legal arguments upon which they intend to rely in their written submissions. The judges can then give students direction for moving forward, steering them away from irrelevant or unpersuasive arguments and helping students refine their understanding what facts are necessary to make their case.

<sup>99</sup> Keyes and Johnstone, above n 1, 539.

<sup>100</sup> For example the University of Melbourne Law School offers its students workshops in a variety of legal skills, including persuasive writing, taught by its Senior Lecturer in Legal Writing and Academic Skills, Dr Chantal Morton: University of Melbourne, *MLM Students* <<http://law.unimelb.edu.au/students/lasc/workshops/masters>>.

<sup>101</sup> Keyes and Whincop, above n 98, 4-8.

persuasive writing style and strategy. Additionally, because large doctrinal classes in Australia are frequently supplemented by small-group tutorials, the assessment of writing assignments could be delegated among the faculty members teaching the tutorials. However, it is also frequently the case that the professor teaching the large-group class is responsible as well for teaching several, and in some cases all, of the tutorials.

The second alternative to the 'stand-alone' persuasive writing course taught by full-time law faculty proposed in this article is a persuasive writing course taught by adjunct faculty, drawn from the practicing bar. Although this staffing model is not optimal,<sup>102</sup> advanced writing courses such as Appellate Advocacy can be effectively taught by adjunct faculty provided several protocols are in place. First, the adjunct instructors must have significant experience in drafting written submissions. Second, class size must be small — preferably capped at no more than 10 students. Finally, a full-time faculty member should serve as a course coordinator, who will hire, train and supervise the adjunct instructors and provide them with key course materials.<sup>103</sup>

As discussed above, the most critical requirement of a course in written advocacy is detailed and thoughtful formative and summative feedback to students on their writing. This objective can only be achieved where adjunct instructors are expert practitioners, have a limited number of papers to critique, and are being closely supervised by a faculty member who has a background in skills training.

Regardless of what type of law they intend to practice, the vast majority of US law students highly rate their experience of writing a persuasive brief and presenting an oral argument, under the guidance of a law professor or expert practitioner. Many find it the most intellectually challenging and rewarding activity of their law school

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<sup>102</sup> The consensus among legal writing professionals in the US is that '[a] full-time instructor model is superior ... to a model using adjuncts or students, since the problems with adjuncts or students are legion': Arrigo, above n 6, 135. See also Lucia Ann Silecchia, 'Designing and Teaching Advanced Legal Research and Writing Courses' (1995) 33 *Duquesne Law Review* 203, 234 (noting that adjunct instructors generally 'will not have the time to commit to the intense interaction' required by a legal writing course). Nevertheless, economic constraints compel many law schools to employ adjunct instructors to teach their upper-level legal writing courses. According to the 2014 Report of the Annual Legal Writing Survey, 31 per cent of the respondent law schools used either adjuncts or part-time faculty to teach some courses in their legal writing curriculum: above n 25, 6. Although this survey does not indicate which specific courses are taught by adjuncts, a different study indicates that instruction in third-semester legal writing courses tends to rely more heavily on legal practitioners than on full-time faculty. In 77 per cent of the studied programs, adjuncts were employed to teach these upper-level courses. In contrast, 92 per cent of the studied programs used full-time legal writing department faculty to teach the first semester legal writing course. The most logical reason for preferring adjuncts over full-time faculty is cost.

<sup>103</sup> For a general discussion of hiring, training and supervising adjunct instructors see Douglas E Ray, 'The Care and Appreciation of Adjunct Faculty' (2005) 37 *University of Toledo Law Review* 135.

careers. If this experience were routinely available to Australian law students, their legal education would surely be enriched.