


Winter 2019

Beyond the “Practice Ready” Buzz: Sifting through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys

Jason G. Dykstra

Concordia University School of Law, Boise, Idaho, jdykstra@cu-portland.edu

Follow this and additional works at: <https://commons.cu-portland.edu/lawfaculty>

 Part of the [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

CU Commons Citation

Dykstra, Jason G., "Beyond the “Practice Ready” Buzz: Sifting through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys" (2019). *Faculty Scholarship*. 142.

<https://commons.cu-portland.edu/lawfaculty/142>

This Article is brought to you for free and open access by the School of Law at CU Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CU Commons. For more information, please contact libraryadmin@cu-portland.edu.

**BEYOND THE “PRACTICE READY” BUZZ: SIFTING
THROUGH THE DISRUPTION OF THE LEGAL
INDUSTRY TO DIVINE THE SKILLS NEEDED BY NEW
ATTORNEYS**

*Jason G. Dykstra**

ABSTRACT

A heightened velocity of change enveloped the legal profession over the last two decades. From big law to rural practitioners, the traditional law firm model proved ripe for disruption. This disruption is fueled by several discrete changes in how legal services are provided, including technological advances that allow for the automation of many routine tasks and the disaggregation of legal services; enhanced client sophistication and cost-consciousness; global competition from offshoring routine legal services; the rise of the domestic gig economy, creating a new wave of home-shoring legal services; and competition from non-traditional legal services providers. In the face of declining revenues, rapid systemic changes, and burgeoning competition from near and far, law firms have shuttered many of the traditional mentorship opportunities for new attorneys. Firms have also curtailed many once-billable activities that formerly served as profitable training grounds for new associates at law firms.

Given this new norm, students must emerge from law school both ready for practice and prepared to immediately generate revenue, whether they ply their practice-ready skills as contract attorneys, associates, in-house counsel, or solo practitioners. This Article proposes designing a required, upper-division legal writing class that incorporates the skills most needed by new attorneys entering the practice of law. The data shows that most new lawyers are destined for private practice, whether with small firms or as solo practitioners, and

*Assistant Professor of Law and Assistant Director of the Legal Research and Writing Program at Concordia University School of Law. I am grateful to Tenielle Fordyce-Ruff and McKay Cunningham for their encouragement and helpful comments. I also am profoundly grateful to all of my mentors within the academy, in the practice of law, and in life. Thanks to all of you for your generosity, patience, and inspiration.

most likely, this private practice will include civil litigation. Since most civil litigation resolves by settlement or dispositive motion, new lawyers will focus primarily on pretrial civil litigation. Given this reality, the Article proposes requiring an upper-division legal research and writing course designed to introduce practice-style legal research and writing. This course would serve as an analogue to introduce the pretrial civil litigation skills most needed by new attorneys.

TABLE OF CONTENTS

INTRODUCTION	151
I. THE ONGOING DISRUPTION OF THE TRADITIONAL LAW FIRM MODEL.....	154
A. <i>Unprecedented Global Competition in the Law Fueled by Disruptive Technology and Enhanced Client Sophistication</i>	161
B. <i>An Era of Enhanced Client Sophistication Wrings Profitability from the Traditional Law Firm Business Model</i>	163
C. <i>Technological Efficiencies Curtail Many Once-Billable Activities that Formerly Served as the Profitable Training Grounds of Newer Attorneys</i>	170
D. <i>Technology Facilitates the Disaggregation of Routine Legal Services into Discrete, Fungible, and Outsourceable Tasks</i>	172
1. <i>The rise of the gig economy and the home-shoring of legal services</i>	176
2. <i>Domestic firms respond to the rise of non-traditional legal services by insourcing work to lower-cost domestic offices</i>	180
3. <i>The rise of non-traditional legal services portends difficulties for newer attorneys including a decline in mentoring opportunities</i>	182
II. THE MURKY CONTENT OF A PRACTICE-READY CURRICULUM	184
A. <i>Most New Attorneys Are Destined for Private Practice in Small Firms and as Solo Practitioners</i>	187
B. <i>Most Private Practitioners Engage Primarily in Activities Related to Pretrial Civil Litigation</i>	189
C. <i>What New Attorneys Actually Do: Unfiltered Reading and a Wide Variety of Writing</i>	191

2018]	<i>BEYOND THE “PRACTICE READY” BUZZ</i>	151
	1. <i>Efficient self-directed learning via readings distilled from a wide variety of online and hard copy materials</i>	191
	2. <i>Writing for the practice: a varied craft of synergistically integrating readings and upcycled forms to produce work product</i>	199
III.	DESIGNING A COURSE TO TEACH PRACTITIONER-STYLE	
	UNFILTERED READING AND ADAPTIVE WRITING.....	205
	A. <i>Refining a Dispute into Legal Issues, Drafting Professional Correspondence, and Drafting the Complaint</i>	206
	B. <i>Introduction to Discovery Practice</i>	210
	C. <i>Pretrial Motion Practice</i>	212
	CONCLUSION.....	213

INTRODUCTION

Imagine: the culmination of your dream to attend culinary school in France. On the first day, you enter a large lecture room rather than a kitchen. Somewhat befuddled, you sheepishly inquire about the location of the kitchen. Your professor incredulously responds:

This is a culinary institute, not a cooking school. Here, we will teach you how to think like a chef, not how to actually cook anything. In fact, I have never worked in a restaurant. But I attended a great culinary institute followed by a prestigious clerkship with a renowned Michelin inspector. I am also a noted scholar on the chemistry underlying meat preparation in Scotland during the late nineteenth century.

You sit in stunned silence as the professor commences a Socratic discourse regarding the esoteric techniques once used to tenderize and boil mutton riblets in Scotland. As a culinary student, you might be apt to bolt with your tuition in tow for a school with a more “kitchen ready” curriculum.

As a first-year law student, however, you don't know what to expect from your legal education. Instead, you follow in the footsteps of generations of law students, entrusting your education to the time-honored bona fides of the legal education academy. You might hope that the requisites for practicing law really distill to three years of hard labor spent learning to "think like a lawyer." You also might anticipate that at some point over the next three years, somehow the skillset of thinking like a lawyer might transform into the ability to practice law like a lawyer. After all, the recruiting buzz at your law school promised that your legal education would prove to be uniquely "practice ready."

Of late, no law school defiantly clings to a mantra of providing a traditional, good old-fashioned legal education so steeped in the dialectical process as to be virtually devoid of practical value post-bar exam. Instead, the legal academy grasps at the marketing buzz of purveying an ever more "practice-ready" legal education. Marketing buzz aside, what exactly prepares a student to become a successful practitioner proves a bit elusive.

Legal education may have evolved from the *Paper Chase* days of yore. However, much of the law school curriculum remains myopically focused on doctrinal casebook courses purportedly preparing students to "think like a lawyer,"¹ often at the expense of preparing students to practice as lawyers.² For centuries, aspiring lawyers honed their craft by

1. This is a nebulous concept that seems to defy explanation. "It seems like defining what it means to 'think like a lawyer' is a bit like defining what constitutes pornography: we may not know how to define it, but we know it when we see it." Peter T. Wendel, *Using Property to Teach Students How to "Think Like a Lawyer": Whetting Their Appetites and Aptitudes*, 46 ST. LOUIS U. L.J. 733, 734 (2002).

2. See Ronald K. L. Collins & David M. Skover, *The Digital Path of the Law*, in LEGAL EDUCATION IN THE DIGITAL AGE 13, 14 (Edward Rubin ed., 2012). Collins and Skover discuss the institutional constraints and inertia that perpetuate the casebook method and "why the ghost of Langdell still haunts us," arguing that "[i]f legal education remains tethered to print and the case method, . . . if it remains largely oblivious to the way law is practiced, . . . it does so mainly because we remain bound by our comfortable ways." *Id.*

apprenticeship,³ but in the nineteenth century legal education formalized into the higher education academy.⁴ Of note, a series of educational reforms in the latter half of the nineteenth century sent medical and legal education on divergent paths.⁵ Embracing the practical education of doctors, medical education evolved “toward practice education, clinical work, and residencies for fledgling doctors.”⁶ Contemporaneously, as legal education moved from traditional apprenticeships to academia, legal education siloed itself from the practice of law and into the laboratory of the law library. This evolution away from a hands-on education seemed to stem from a desire to consider legal education a science.⁷ Harvard’s influential Dean Christopher Columbus Langdell considered the law library to be the laboratory of the law; thus, he foresaw no utility in students interacting with the bench or bar beyond the study of appellate court opinions.⁸ With this myopic focus on legal theory and scholarship, legal education largely concentrated on producing fledgling law professors.⁹ Meanwhile, the voluminous chaff of future attorneys produced by law schools graduate ill-prepared for the practice of law.

Traditional law firms widely condoned this educational status quo, preferring to mold the practice habits of new

3. Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 158 (1965) (describing the traditional apprenticeship system of legal education, coined “reading law,” which “remained the basic avenue into the legal profession until 1850”).

4. *Id.* at 159–61 (discussing the series of reforms that led from the apprenticeship system to the lecture system following the Civil War, and noting “[t]he increased complexity of the law” and “the emergence of even more law schools”).

5. JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 196 (2d ed. 2013).

6. *Id.*

7. See Austin, *supra* note 3, at 162 (noting the scientific approach of Langdell’s casebook method); Edward Rubin, *What’s Wrong with Langdell’s Method and What to Do About It*, 60 VAND. L. REV. 609, 632–33 (2007) (“[S]ince Langdell saw this methodology as a means of discerning general, objectively identifiable principles of law, he really seemed to believe that his approach was natural science itself.”).

8. MOLITERNO, *supra* note 5, at 196 (“Langdell famously said that for law, the ‘library is the laboratory,’ and that there was no use in having students engage with courts or practitioners, except for the study of appellate court opinions reported in the library stacks.”).

9. *Id.* (explaining further that “[l]aw departments at major universities resembled philosophy or social science departments, with theory and scholarship the main products”).

associates rather than risk needing to reteach practice skills.¹⁰ Thus, the practical shortcomings of legal education were traditionally cured in the first years of practice. Once upon a time, seasoned practitioners patiently mentored newer attorneys through the first years of practice.

However, the legal industry has experienced a sea change over the last two decades. Part I of this article examines the ongoing disruption of the legal industry, in particular, the traditional law firm model and the ancillary reduction of mentorship opportunities for new attorneys. Part II discusses the content of a practice-ready curriculum and hones in on the likely practice settings and skills needed by new attorneys. Part III proposes designing a required upper-division legal writing class that incorporates the skills most needed by new attorneys entering the practice of law.

I. THE ONGOING DISRUPTION OF THE TRADITIONAL LAW FIRM MODEL

Following a long period of unprecedented growth from the 1970s until the late 1990s, the legal profession entered the doldrums with the new millennium. During the last three decades of the twentieth century, the number of active attorneys in the United States more than tripled from about 326,842 in 1970 to approximately 1,022,426 in 2000.¹¹ In contrast to three decades of robust 7% growth per year, since 2000 the number of active attorneys crept up about 1.8% per year to 1,338,678 in 2018.¹² Going forward, the U.S. Bureau of Labor Statistics projects an optimistic 8% growth rate until 2026, just over the 7% projected for all occupations.¹³ Regardless of this perhaps optimistic projection, job growth for attorneys during

10. *Id.*

11. AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: HISTORICAL TREND IN TOTAL NATIONAL LAWYER POPULATION 1878–2018 (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf.

12. *Id.*

13. Job Outlook for Lawyers, U.S. BUREAU LAB. STAT., <https://www.bls.gov/ooh/legal/lawyers.htm> (last modified Apr. 13, 2018).

the new millennium has proven stagnant.¹⁴ This stagnant job growth may reflect similar doldrums in revenues for the legal services industry.

Just as job growth for attorneys has proven stagnant since 2000, the Gross Domestic Product (GDP) generated by the legal services sector also remains static when adjusted for inflation. Originating during the Great Depression, GDP serves as a tool to measure our country’s overall productivity.¹⁵ However, since GDP was born in an industrial era as a measure of primarily industrial production, it is an imperfect yardstick for our modern economy. In a speech at the University of Kansas on March 18, 1968, Robert F. Kennedy noted that GDP included the production of napalm and nuclear warheads and reflected the “loss of our natural wonder in chaotic sprawl”:

Yet the gross national product does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials.

It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country, it measures everything in short, except that which makes life worthwhile.¹⁶

14. *See id.*

15. Congress commissioned economist Simon Kuznets to create a measure to gauge the productivity of the United States on a quarterly basis to better understand how to cure the Great Depression. *See generally* SIMON KUZNETS, NATIONAL INCOME, 1929–32, S. Doc. No. 124 (2d Sess. 1934) (depicting and analyzing statistics related to national income and employment rates).

16. Simon Rogers, *Bobby Kennedy on GDP: ‘Measures Everything Except that Which is Worthwhile’*, GUARDIAN (May 24, 2012, 3:00 PM), <https://www.theguardian.com/news/datablog/2012/may/24/robert-kennedy-gdp>.

Stump speech rhetoric aside, in particular GDP proves a clunky gauge for services.¹⁷ A treasure trove of information is available regarding the production of manufacturing industries. As the U.S. Census Bureau readily concedes, service industries account “for almost 70% of economic activity, over 85 million employees, and a disproportionate share of economic growth,” but there remains “a significant imbalance in the information available on service industries.”¹⁸ Nonetheless, GDP may be the only viable tool to measure the legal services sector. Presently, the GDP is compiled by the U.S. Department of Commerce, Bureau of Economic Analysis (BEA), which “collects source data, conducts research and analysis, develops and implements estimation methodologies, and disseminates statistics to the public.”¹⁹

Within the overall GDP, the BEA disaggregates and independently measures various sectors of the economy to reflect the contribution of each sector toward the overall GDP. These sectors are classified using the North American Industry Classification System (NAICS), “the official industry classification system for the United States.”²⁰ NAICS categorizes legal services under sector 54, covering professional, scientific, and technical services.²¹ Sector 54

17. MICHAEL F. MOHR & ANNE S. RUSSELL, U.S. CENSUS BUREAU, NORTH AMERICAN PRODUCT CLASSIFICATION SYSTEM: CONCEPTS AND PROCESS OF IDENTIFYING SERVICE PRODUCTS 7 (Sept. 23, 2002), <https://www.census.gov/eos/www/napcs/papers/voorburg17.pdf> (noting that identifying a “final product” for a classification system “can be difficult for many service industries” and defining a “service product” as “a change in the condition of a person, or a good belonging to some economic entity, brought about as the result of the activity of some other economic entity, with the approval of the first person or economic entity”).

18. *Frequently Asked Questions (FAQs) About NAPCS*, U.S. CENSUS BUREAU, <https://www.census.gov/eos/www/napcs/faqs.html> (last visited Dec. 15, 2018).

19. *Government Agencies*, CTR. FOR POVERTY RES., <https://poverty.ucdavis.edu/government-agencies-and-other-poverty-centers> (last visited Dec. 15, 2018).

20. BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, CONCEPTS AND METHODS OF THE U.S. NATIONAL INCOME AND PRODUCT ACCOUNTS, at 2-20 (Nov. 2017), <https://www.bea.gov/sites/default/files/methodologies/nipa-handbook-all-chapters.pdf#page=6>; see also North American Industry Classification System Notice of Final Decision, 62 Fed. Reg. 17287–337 (Apr. 9, 1997) (adopting the NAICS to replace the former Standard Industrial Classification System).

21. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM 461 (2017), https://www.census.gov/eos/www/naics/2017_NAICS/2017_NAICS_Manual.pdf.

includes a wide variety of services such as legal, accounting, bookkeeping, architectural, engineering, computer, consulting, advertising, and veterinary services.²² The legal services group, denoted as 5411, includes “establishments primarily engaged in offering legal services, such as those offered by offices of lawyers, offices of notaries, and title abstract and settlement offices, and paralegal services.”²³ Within this group, “Offices of Lawyers” is further defined:

This industry comprises offices of legal practitioners known as lawyers or attorneys (i.e., counselors-at-law) primarily engaged in the practice of law. Establishments in this industry may provide expertise in a range or in specific areas of law, such as criminal law, corporate law, family and estate law, patent law, real estate law, or tax law.²⁴

Thus, the legal services sector encompasses “Offices of Lawyers,” which primarily includes attorneys engaged in private practice but omits attorneys employed by governmental entities and attorneys employed in other sectors, such as in-house counsel. Therefore, the legal services sector includes the vast majority of attorneys, roughly 75% of whom are engaged in private practice.²⁵

In calculating its contribution to GDP, the type of product is considered and classified as either goods, services, or structures.²⁶ Basically, goods consist of tangible products²⁷ ranging from breakfast cereal to automobiles and nuclear

22. *Id.*

23. *Id.*

24. *Id.*

25. AM. BAR ASS’N, LAWYER DEMOGRAPHICS (2013), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf (showing that the percentage of lawyers in private practice has steadily crept up from 68% in 1980 to 75% in 2005).

26. BUREAU OF ECON. ANALYSIS, *supra* note 20, at 2-19.

27. *Id.*

warheads. In contrast, “Services are products, such as medical care, that cannot be stored and are usually consumed at the place and time of their purchase.”²⁸ Last, structures consist of products with a long economic life generally constructed on location, for example, buildings, highways, dams, and houses.²⁹

The relatively recent commodity counterpart to the NAICS, dubbed the North American Product Classification System (NAPCS), provides a comprehensive integrated list of products, definitions, and codes for goods and services.³⁰ The NAPCS structure includes a “six-level hierarchical structure consisting of 24 sections, 61 subsections, 172 divisions, 276 groups, 497 subgroups, and 1,167 trilateral products.”³¹ For example, NAPCS parses “legal services” into a variety of subsidiary services, such as “legal services, civil law.”³² However, still somewhat embryonic, NAPCS remains “a reference classification system for beta testing by U.S. statistical programs.”³³ Given the initial focus of NAPCS on service industries, this classification system may help alleviate the “significant imbalance in the information available on service industries.”³⁴ Thus, the NAPCS classification system may eventually provide more detailed data on the legal services sector.

In the interim, “the measures of the contribution of the legal services sector as a proportion of GDP are typically based on the total revenues earned in the sector.”³⁵ In many respects,

28. *Id.*

29. *Id.*

30. *Id.* at 2-18 n.40.

31. *North American Product Classification System (NAPCS)*, U.S. CENSUS BUREAU, <https://www.census.gov/eos/www/napcs/structure.html> (last modified Mar. 23, 2016).

32. See U.S. CENSUS BUREAU, *NAPCS PRODUCT LIST FOR NAICS 5411: LEGAL SERVICES 2* (2016), https://www.census.gov/eos/www/napcs/finalized/web_5411_final_reformatted_edited_US082208.pdf.

33. *North American Product Classification System (NAPCS)*, *supra* note 31.

34. *Frequently Asked Questions (FAQs) About NAPCS*, *supra* note 18.

35. GEORGE YARROW & CHRISTOPHER DECKER, REGULATORY POLICY INST., *ASSESSING THE ECONOMIC SIGNIFICANCE OF THE PROFESSIONAL LEGAL SERVICES SECTOR IN THE EUROPEAN UNION* 50 (2012), http://www.ccbe.eu/NTCdocument/RPI_study_Yarrow_D1_1348650358.pdf (noting that the GDP estimates for the legal services sector based on revenue “fail to capture the significance of the legal sector in facilitating other sorts of business transactions”).

measuring the legal sector’s overall contribution to GDP by revenue may not adequately consider the sector’s overall contributions toward the economy. For example, by this measurement, the contribution of legal services is capped at revenue, omitting any contribution for pro bono services³⁶ or the contribution of legal services toward even an extraordinarily lucrative project.³⁷ But measuring a services sector by metric of revenue provides a gauge on the growth of that sector, or for the legal services sector, the lack of growth, at least when adjusted for inflation.

Specifically, the BEA’s GDP by industry annual tables³⁸ reveal that, when adjusted to 2009 dollars to negate the effects of inflation,³⁹ the real gross output of the legal services sector gradually retreated from \$291.7 billion in 2008 to \$259.8 billion in 2014.⁴⁰ This amount climbed a bit to \$262.9 in 2015 but still remains below the \$267.3 billion output of 1998.⁴¹ Further, when adjusted for inflation, the gross output of the legal services sector remained less than the sector’s output of \$277.1 billion in 1999 for *every* year from 2009 to 2017.⁴² In contrast, the legal services sector’s parent category of Professional, Scientific, and Business Services grew 70% from \$1,249.8 billion in 1999 to

36. As an example, an assessment of the total value of the Justice & Diversity Center of the Bar Association of San Francisco’s legal services to the community placed the annual value of these services for one local bar association at \$18,220,639 in 2013. See *Assessment Finds Justice & Diversity Center’s Legal Services Annual Value to San Francisco \$18,220,000*, B. ASS’N S.F. (Apr. 20, 2015), <https://www.sfbar.org/newsroom/2015/20150420.aspx>.

37. For example, the GDP contribution of registering what becomes an iconic and enormously profitable trademark will be capped at the attorney’s fees billed for the trademark registration.

38. See *Interactive Access to Industry Economic Accounts Data: GDP by Industry*, U.S. BUREAU ECON. ANALYSIS (Apr. 19, 2018), <https://www.bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=2&isuri=1>.

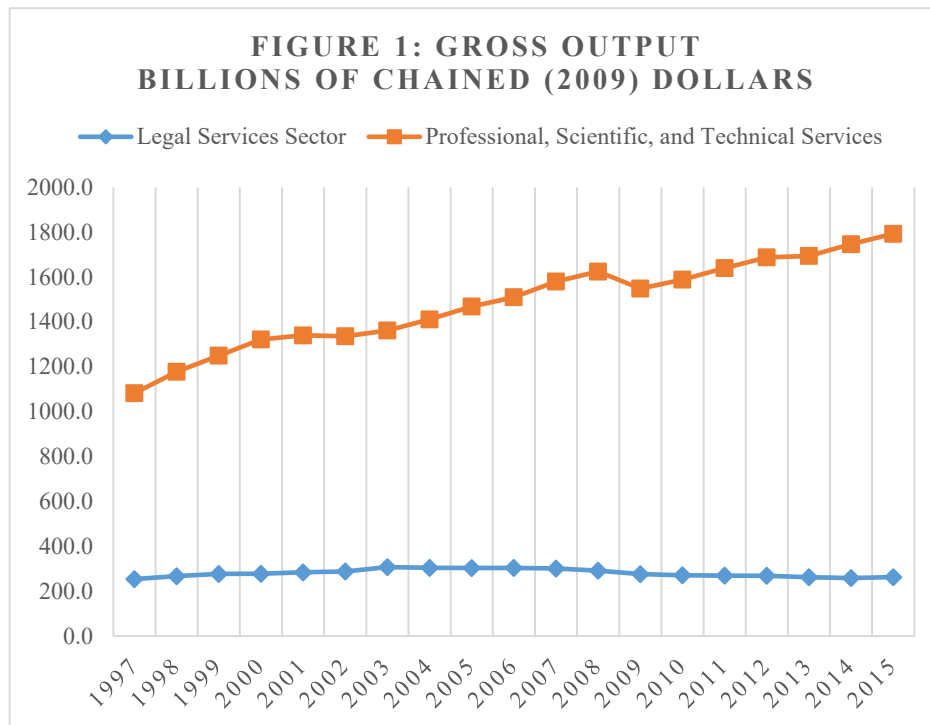
39. *Id.* (follow “GDP-by-Industry” hyperlink, then follow “Gross Output by Industry” hyperlink, then follow “Real Gross Output by Industry (A) (Q)” hyperlink, then click “Annual,” then click “Next Step” hyperlink) (explaining that chained 2009 dollar series are calculated as the product of the chain-type quantity index and the 2009 current-dollar value of the corresponding series, divided by 100).

40. *Id.*

41. *Id.*

42. *Id.*

\$1,807.2 billion in 2015.⁴³ This robust growth occurred despite the apparent drag of the legal services sector. As reflected in Figure 1,⁴⁴ the gist is that, when adjusted for inflation, the revenues of the legal services sector remain static at 1990s levels.



Given the anemic job growth in the legal profession and the static revenues for the legal services sector at 1990s levels when adjusted for inflation, the competition for legal jobs is apt to continue to be robust.⁴⁵ Despite projecting an optimistic 8% growth rate until 2026 for lawyer employment in the United

43. *Id.*

44. *Id.* (follow “Chart” hyperlink, then choose both “Professional, scientific, and technical services” and “Legal services” from the list, then follow “Line Chart” hyperlink).

45. See generally U.S. DEP’T OF COMMERCE, SERVICE INDUSTRIES AND ECONOMIC PERFORMANCE 15 (1996), http://www.esa.doc.gov/sites/default/files/serviceindustries_0.pdf (finding that the legal services industry experienced an annual growth rate of -3% between 1977 and 1993).

States,⁴⁶ the U.S. Bureau of Labor Statistics minces no words regarding the job prospects for newly-minted lawyers:

competition for jobs should continue to be strong because more students are graduating from law school each year than there are jobs available Some law school graduates who have been unable to find permanent positions turn to temporary staffing firms that place attorneys in short-term jobs.⁴⁷

Given the anemic growth in revenues for the legal sector⁴⁸ and the heightened competition for jobs, newly minted lawyers need to emerge from law school both readier for practice and better prepared to immediately enhance profitability for their employers, clients, or contractors. A more granular dive into the underlying changes to the legal sector as reflected by anemic revenue growth illuminates the skills likely needed by new attorneys and the likely practice settings where newer attorneys will apply those skills.

A. Unprecedented Global Competition in the Law Fueled by Disruptive Technology and Enhanced Client Sophistication

Relatively static for decades, the largely self-regulatory scheme surrounding the practice of law in the United States insulated the legal profession from competition everywhere but at the local level.⁴⁹ States regulate the practice of law to protect the public from unscrupulous and incompetent providers of

46. Job Outlook for Lawyers, *supra* note 13.

47. *Id.*

48. THOMAS S. CLAY & ERIC A. SEEGER, ALTMAN WEIL, 2017: LAW FIRMS IN TRANSITION, at ii (2017), http://www.altmanweil.com/dir_docs/resource/90D6291D-AB28-4DFD-AC15-DBDEA6C31BE9_document.pdf (“Decreasing demand for legal services is endemic in the profession.”).

49. See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999) (opining that regulating the unauthorized practice of law is essential because it may otherwise lead to increased competition that would negatively affect clients and the legal field as a whole).

legal services.⁵⁰ Generally, lawyers must be admitted to practice law in a given jurisdiction.⁵¹ Admission to practice is overseen by each state supreme court and requires that applicants receive the proper education, demonstrate their character and fitness, and pass a written bar examination.⁵² Regarding education, while a few states still permit legal studies by apprenticeship, correspondence school, or even online education, most states require that individuals who take the bar exam possess a juris doctor (J.D.) or a legum baccalaureus (LL.B.).⁵³ All states “recognize ABA-approved law schools as meeting the legal education requirements to qualify for the bar examination,” and “forty-six states limit eligibility for bar admission to graduates of ABA-approved schools.”⁵⁴

In addition, the ability to practice in specific courts within a given jurisdiction, such as the U.S. district courts, often requires another specific petition for admission.⁵⁵ Many courts allow an attorney not admitted in the jurisdiction to appear in a limited *pro hac vice* capacity on a particular matter with a designated member of the bar acting as local counsel.⁵⁶ Coupled with prohibitions against the unauthorized practice of law,⁵⁷ the

50. See Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 73 (2009) (“State supreme courts are responsible for promulgating disciplinary codes and local court rules governing lawyers practicing in their jurisdictions.”).

51. MODEL RULES OF PROF’L CONDUCT r. 5.5 (AM. BAR ASS’N 2018).

52. See NAT’L CONFERENCE OF BAR EXAM’RS., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at ix (2017) (“A person who is not a member of the bar of another jurisdiction of the United States should not be admitted to practice until the person has passed a written bar examination.”).

53. See *id.* at 8–9.

54. *About the Section of Legal Education*, A.B.A., <http://apps.americanbar.org/legaled/section/sectioninfo.html> (last visited Dec. 15, 2018).

55. See Attorney Admission Instructions, U.S. DISTRICT CT.: DISTRICT OF IDAHO, https://www.id.uscourts.gov/district/attorneys/Attorney_Admissions.cfm (last visited Dec. 15, 2018) (“[A]dmission and continuing membership to the bar of this court is limited to attorneys of good moral character who are active members in good standing of the Idaho State Bar.”).

56. See, e.g., DIST. IDAHO R. CIV. P. 83.4(e).

57. See, e.g., IDAHO CODE § 3-420 (2016) (penalizing anyone who without authorization “holds himself out to the public” as an attorney or practices law or “car[r]ies on the calling of a lawyer” with a fine “not to exceed five hundred dollars (\$500), or [by imprisonment] for a period of not to exceed six (6) months”).

geographic lines of statehood proscribe the practice of law and have long-operated to limit national and global competition.

The rise of multijurisdictional practice, coupled with the promulgation of reciprocal bar admission and the Uniform Bar Exam, somewhat chipped away at the traditional geographic limitations on the practice of law.⁵⁸ But disruptive technology has spurred an era of rapid change and unprecedented competition in the legal services sector. This disruptive technology and unprecedented competition may be reflected in the sluggish growth of the legal services sector. Regardless of whether the proto-chicken of technology or proto-egg of unprecedented competition came first, new lawyers will hatch fledgling into a new era of practice far less insulated from global competition as technology allows the disaggregation of many legal services into a variety of constituent, fungible tasks.

As discussed below, routine legal tasks can be insourced by clients or outsourced to the lowest cost provider by offshoring or, more recently, home-shoring, which involves outsourcing work domestically in a lower-cost setting or geographic area. Simply put, from big law to rural practitioners, the traditional law firm model proved ripe for disruption fueled by technological advances during the new millennium. That disruption tends to follow on the heels of inefficiency, hubris, and excess.

B. An Era of Enhanced Client Sophistication Wrings Profitability from the Traditional Law Firm Business Model

Perhaps most dramatically, the 2008 financial crisis walloped big law firms.⁵⁹ During the boom preceding the crisis, law firms expanded and grew their burgeoning corporate practice

58. See generally Kelly Swan Taylor, *The Uniform Bar Exam: An Unclear Hurdle to Licensure*, A.B.A. (Aug. 1, 2016), <https://abaforslawstudents.com/2016/08/01/uniform-bar-exam-unclear-hurdle-licensure/> (discussing the reciprocity within the states created by the Uniform Bar Exam).

59. CLAY & SEEGER, *supra* note 48, at 3 (noting that 65% of law firms surveyed in 2017 responded that demand for their firm’s services has not returned to pre-recession levels).

groups.⁶⁰ But as the financial sector soured, law firms drastically reduced their practice groups servicing the financial sector.⁶¹ All told, during 2009, “law firms laid off 12,259 attorneys and staff.”⁶² Several large firms dissolved altogether in the wake of the financial crisis: Thelen LLP,⁶³ Heller Ehrman LLP,⁶⁴ and, perhaps “most spectacularly[,] the thousand-lawyer New York firm of Dewey & LeBoeuf.”⁶⁵

Beyond the acute shock of the financial crisis, the Great Recession revealed inefficiencies in the traditional law firm model that proved ripe for disruption due to an era of enhanced corporate client sophistication fueled by rapid technological advances and increased global competition in the market for legal services. Percolating for decades, these factors continue to force law firms to operate more efficiently.⁶⁶ One primary factor stems from corporate clients increasingly retaining routine legal work in-house and also approaching outside legal work with enhanced cost-consciousness.⁶⁷

60. MOLITERNO, *supra* note 5, at 192.

61. *Id.*

62. *Id.*; see also Martha Neil, *March Mayhem: Law Firm Layoffs in 1 Week Total Nearly 1,500*, A.B.A. J. (Mar. 4, 2009, 11:59 PM), http://www.abajournal.com/news/article/march_mayhem_law_firm_layoffs_top_500_today_over_1200_since_friday.

63. After losing its line of credit in the fall of 2008, Thelen LLP, “one of the country’s largest and most venerable law firms,” dissolved. Elie Mystal, *Thelen Officially Dissolves*, ABOVE L. (Oct. 28, 2008, 5:18 PM), <https://abovethelaw.com/2008/10/thelen-officially-dissolves/>.

64. Tom Abate & Andrew S. Ross, *Heller Ehrman Law Firm to Dissolve Friday*, SFGATE (Sept. 26, 2008, 4:00 AM), <http://www.sfgate.com/business/article/Heller-Ehrman-law-firm-to-dissolve-Friday-3193215.php>.

65. Stephen M. Sheppard, *The American Legal Profession in the Twenty-First Century*, 62 AM. J. COMP. L. 241, 251–52 (2014) (noting that the bankruptcy of Dewey & LeBoeuf was “likely . . . attributable more to idiosyncratic difficulties, such as the over-promised recruitment of high-billing partners, than to long-term changes in the legal marketplace”).

66. See *id.* at 251–53; see also James Podgers, *State of the Union: The Nation’s Lawyer Population Continues to Grow, but Barely*, A.B.A. J. (July 2011), http://www.abajournal.com/magazine/article/state_of_the_union_the_nations_lawyer_population_continues_to_grow_but_bare/ (“The U.S. legal profession is going through some heavy turbulence these days: downsizing at larger law firms, a more competitive business environment, the growing impact of globalization and technology, and angst about job prospects and debt.”).

67. See Sheppard, *supra* note 65, at 251; see also ALM LEGAL INTELLIGENCE, 2013 LAW DEPARTMENT METRICS BENCHMARKING SURVEY 57–59 (2013) <http://www.lexisnexis.com/counselink/documents/2013-ALM-Lexis-Law-Department-Metrics-Benchmarking-Survey.pdf> (indicating that approximately 80% of surveyed companies saw increased workloads for in-house legal staff).

Increasingly, corporate clients opted to retain routine legal tasks, performing this work in-house.⁶⁸ The math underlying this trend is relatively straightforward. Consider the traditional rule of thirds: the time-honored metric for calculating law firm salary and expense ratios that divided an attorney’s annual billable hours into thirds, with one-third covering the attorney’s salary, one-third covering the firm’s overhead, and one-third contributing to the law firm’s profit.⁶⁹ Not surprisingly, sophisticated clients spied the opportunity to pay wholesale rather than retail for legal services, excising at least the partnership profit from their legal expenses by hiring in-house counsel to handle matters formerly assigned to outside legal counsel.⁷⁰ This trend commenced in the late 1990s and continues unabated.⁷¹

For example, rather than retaining outside counsel, insurance companies set up their own “firms” employing in-house or staff counsel to handle routine claims, including defense and subrogation litigation.⁷² Insurance companies that opted to insource routine legal work wrung additional cost savings beyond forgone law firm profits, presumably due to dispensing with oft-bloated law firm overhead.⁷³ For example, insurance companies could forgo subsidizing a variety of law firm expenses, from prestigious Class A office space to firm marketing expenditures such as country club memberships. The savings will prove significant: insurance companies

68. Sheppard, *supra* note 65, at 251 (“Many companies that outsourced the bulk of their legal work have been enlarging their in-house counsel staff, both as a means to manage better their legal affairs and as a means of cutting costs.”).

69. See Susan A. Berson, *10 Tips to Maximize Your Firm’s Profits and Keep Your Numbers on Track*, A.B.A. J. (Dec. 1, 2014), http://www.abajournal.com/magazine/article/10_tips_to_maximize_your_firms_profits_and_keep_your_numbers_on_track/ (discussing the one-third rule as “a standard practice for salary and expense ratios”).

70. See Debra Baker, *A Grab for the Ball*, 85 A.B.A. J. 42, 43 (1999).

71. See *id.*; see also CLAY & SEEGER, *supra* note 48, at iii (noting that over two-thirds of surveyed law firms “report losing business to corporate law department insourcing”).

72. Baker, *supra* note 70, at 43–45. Baker notes that “[a]lmost all major insurers now use house counsel to represent significant numbers of policyholders,” and that by 1999, State Farm employed “500 attorneys in [thirty-nine] firms, who represent about 25[%] of policyholders.” *Id.*

73. *Id.* at 43.

estimate savings of “40[%] to 60[%] off their legal budgets” due to the use of in-house counsel rather than outside counsel.⁷⁴ By internalizing legal work, corporate clients effectively pay the wholesale cost of their legal services, rather than retail law firm prices.

Increasingly, insurance companies are using contractual arbitration clauses to resolve coverage and subrogation claims and disputes amongst insurers without the need for legal services.⁷⁵ As a consequence of the promulgation of inter-company arbitration agreements, insurers reduced the volume of claim-related litigation and largely excised the need for legal services to resolve these disputes.⁷⁶ For example, Arbitration Forums, Inc., a non-profit, member-owned entity, provides arbitration services for insurance disputes involving subrogation claims for automobile damage, medical payments coverage, property subrogation, and uninsured motorist coverage.⁷⁷ Arbitration Forums, Inc. uses panels of its members’ claims professionals—commonly known as insurance claims adjusters—as arbitrators.⁷⁸ Annually, the 4700 members of Arbitration Forums, Inc. “file over 797,000 arbitration disputes and 1.8 million subrogation demands collectively worth over \$12.5 billion in claims.”⁷⁹ Basically, members trigger inter-company arbitration, insurance adjusters present their respective claims, and arbitrators assay liability and liquidate claims.⁸⁰ With inter-company arbitration, an enormous annual

74. *Id.* at 45.

75. PETER KOCHENBURGER, NAT’L ASS’N OF INS. COMM’RS, ARBITRATION CLAUSES IN INSURANCE POLICIES 1 (2016), https://www.naic.org/documents/cmte_d_predispute_arbitration_wg_exposure_kochenburger_arbitration_provisions_in_insurance_contracts.pdf (noting that insurance policies increasingly contain provisions “requir[ing] that disputes be arbitrated rather than litigated in open court, or making it permissive if both sides agree”).

76. See MICHAEL YOUNG, COLLEGE OF COM. ARBITRATORS, INSURANCE COVERAGE ARBITRATION 1 (2017), <https://www.ccaarbitration.org/wp-content/uploads/Insurance.pdf>.

77. *About Arbitration Forums, Inc.*, ARB. FS. INC., <https://home.arbfile.org/company-information/about-af> (last visited Dec. 15, 2018).

78. *Id.*

79. *Id.*

80. *Id.*

volume of disputes are resolved expediently, extra-judicially, and without resort to hiring legal counsel.

Beyond retaining routine legal tasks and resolving disputes extra-judicially, corporate clients also approach legal expenses with enhanced sophistication and cost-consciousness. Corporate legal departments work with fewer firms for outside legal work.⁸¹ Also, corporate legal departments and insurance companies increasingly monitor and manage outside counsel.⁸²

The traditional model stands in stark contrast. Those practicing insurance defense before the 1990s, for example, employed simple and unquestioned billing practices: once a month the attorney would send a cursory letter to each insurance company that contained an amount to be remitted for services rendered during the prior month. Insurance companies once tolerated expensive, protracted litigation and casual billing practices since the investment income earned due to high interest rates during the 1980s more than compensated insurers for the additional defense costs of lengthy litigation.⁸³ But “[w]hen interest rates plummeted during the 1990s, insurance companies began seeking means of reducing costs and found they could cut legal fees more easily than they could reduce indemnity or raise premiums.”⁸⁴ Other commentary focuses on the temptation for defense counsel to pad bills given the typically low rates paid for legal services by insurance companies.⁸⁵ Regardless of the causation, the insurance industry—an enormous nationwide consumer of legal

81. See ALM LEGAL INTELLIGENCE, *supra* note 67 (quoting one general counsel: “[M]ost people in my kind of position are working with fewer firms and leaner, more efficient firms.”).

82. See *id.* (quoting Lauren Chung, an industry consultant: “There’s increasing focus on outside counsel management from retention to billing arrangements, to planning and budgeting, to ongoing evaluation and monitoring of performance of outside counsel.”).

83. William G. Ross, *An Ironic and Unnecessary Controversy: Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 527, 532 (2000) (“The willingness of insurance companies to pay more lavish legal bills attracted the services of large law firms, which used elaborate and sometimes wasteful case preparation procedures that insurance companies traditionally had shunned.”).

84. *Id.* at 532–33.

85. *Id.* at 532.

services—began aggressive cost-cutting campaigns in the mid-1990s. This cost cutting continues unabated.

Despite concerns voiced by defense counsel that this paring of costs would diminish the quality of their services,⁸⁶ insurers are “[n]o longer willing to hand blank checks for legal fees.”⁸⁷ Instead, “insurers are setting strict guidelines for the types of services and amounts of legal services outside lawyers use in cases.”⁸⁸ Insurance companies commonly impose contractual billing guidelines,⁸⁹ require itemized statements, routinely expect discounts,⁹⁰ and subject itemized statements to third-party audits.⁹¹

Contractual billing guidelines vary widely among insurance companies, but most have eliminated block billing of time and instead require itemized statements that account for time billed in tenths of an hour.⁹² For example, The Hartford Financial Services Group, Inc. requires counsel provide detailed time entries accounting for “each type of activity/task code” in tenths of an hour.⁹³ The Hartford further excludes charges for items deemed “overhead expenses” such as in-house photocopies, postage, scanning, proofreading, local meals, interoffice conferences, law student/law clerk time, and billing activities.⁹⁴ Travel time is compensated “at 50% of the total” unless “spent working on another matter, for another client, or on firm business”; then, the travel time must be billed elsewhere or absorbed by counsel.⁹⁵ Mileage is reimbursable at the Internal

86. *Id.* at 533.

87. Baker, *supra* note 70, at 43.

88. *Id.*

89. *Id.*

90. ALM LEGAL INTELLIGENCE, *supra* note 67 (quoting one corporate general counsel: “I won’t work with a firm unless they agree to a 20[%] across-the-board cut of what their normal fees would be.”).

91. Baker, *supra* note 70, at 43 (noting that “[c]ompanies also are using independent auditors to scrutinize legal bills”).

92. *Building Guidelines*, HARTFORD, http://www.thehartford.com/cs/Satellite?c=Page&cid=1444598271862&pagename=Claims_Panel_Counsel%2FPage%2FGeneralContentWrap (last visited Dec. 15, 2018).

93. *Id.*

94. *Id.*

95. *Id.*

Revenue Service rate, but “not to exceed \$100 per day.”⁹⁶ Some insurance billing guidelines even reputedly preclude charges for legal research, presumably since attorneys should know the law. Other guidelines preclude billing time for analysis, proofing, and editing. Regardless of the specific guidelines, defense counsel can no longer recoup broad categories of once billable time and expenses for insurance defense work.

Similarly, the growth of both in-house and third-party auditing of legal services billing statements has vexed defense counsel by often delaying and reducing the payment of invoices.⁹⁷ Billing statement audits present a double whammy for defense counsel. First, given the varying methodology and lack of generally accepted accounting principles for legal billing and auditing,⁹⁸ almost invariably some portion of the billing statement will be disallowed. With the advent of auditing, regardless of compliance with the particular insurance company’s billing guidelines, auditors invariably seem to disallow some portion of any audited bill. Perhaps cynically, this amount might be just enough to justify the cost of the audit but not enough for defense counsel to put up much of a fight or just quit working for a particular insurance company. Second, rather than generating billable revenue, billing statement audits force defense counsel to expend additional non-billable time “preparing, checking, and defending legal bills.”⁹⁹

Beyond constricting billable time and expenses, corporate legal departments also increasingly manage spending on outside counsel by replacing the billable hour with alternative fee arrangements,¹⁰⁰ such as fixed fees for services and even reverse auctions for services.¹⁰¹ With reverse auctions, clients

96. *Id.*

97. Ross, *supra* note 83, at 534 (“Audits sometimes cause delay of payment from insurance companies, which traditionally have ameliorated the impact of their relatively low compensation by paying legal bills more promptly than other clients.”).

98. *Id.*

99. *Id.*

100. See ALM LEGAL INTELLIGENCE, *supra* note 67.

101. See Patrick G. Lee, *Pricing Tactic Spooks Lawyers, Companies Use of Reverse Auctions to Negotiate Legal Services Is Accelerating*, WALL STREET J. (Aug. 2, 2011), <https://>

invite qualified counsel or firms to bid on a flat fee basis for performing routine legal work. Some reverse auctions, also known as competitive bidding, “pit multiple law firms against each other in an online chat room where they anonymously submit quotes Firms then race against the clock to tender incremental discounts against competing bids.”¹⁰² Some of these arrangements may include additional compensation, for example, a per diem for each day of trial if a litigation matter proceeds to a trial. Otherwise, reverse auctions can effectively transfer the risk and cap expense of legal services onto counsel. The annual legal expenses incurred by Fortune 500 companies typically range “from about \$20 million to \$200 million a year,” and “[r]everse auctions can help cut 15% to 40% off those costs.”¹⁰³

By “insourcing” legal work to in-house counsel and decreasing the profitability of routine legal work with billing guidelines, audits, and alternative fee arrangements, sophisticated corporate clients, including insurance companies, reduced the profitability of a swath of routine legal work. Germane to this discourse, much of this swath of routine legal work once served as profitable training grounds for newer associates at law firms. Traditionally, newer associates generated revenue for firms with tasks such as chipping away at large document review projects, attending depositions and hearings with firm partners, and sitting second chair at trials. As these tasks became less profitable and even non-billable, many mentorship opportunities for newer associates evaporated.

C. Technological Efficiencies Curtail Many Once-Billable Activities that Formerly Served as the Profitable Training Grounds of Newer

www.wsj.com/articles/SB10001424053111904292504576482243557793536 (noting that large companies, including eBay Inc., GlaxoSmithKline PLC, and Toyota Motor Corp., have used reverse auctions to significantly reduce legal expenses).

102. *Id.*

103. *Id.*

Attorneys

Since the mid-1990s, rapid technological advances further curtailed the profitability of newer associates. For example, the billable hours once expended updating research using printed citators have largely been supplanted by online cite checking.¹⁰⁴ Once a rite of passage for law students and newer attorneys, mastering the tedious process of manually updating research using the Shepard's paper format,¹⁰⁵ with its multiple volumes and cryptic abbreviations, has been expedited online by the push of a virtual Shepard's (or KeyCite) button and convenient hyperlinks to subsequent precedent.¹⁰⁶ Shepardizing a significant brief once took hours, culminating with a phone call to the publisher to inquire with a reference librarian about the newest case law not included in the supplements to the various Shepard's volumes.¹⁰⁷

Most likely, practitioners do not miss cite checking legal briefs with the Shepard's paper format, but such Shepardizing is one example of the myriad of legal practice tasks performed far more efficiently in the online era.¹⁰⁸ Attorneys entering the practice during the new millennia may never crack open a West *Decennial Digest*, manually review a court docket, or comb through a grantor-grantee index to research real property

104. Kathleen Sasala, *Shepardizing and Keyciting Online*, CLEVELAND L. LIBR. ASS'N (Mar. 25, 2011), <https://clevelandlawlibrary.org/public/misc/Shepardizing%20and%20KeyCiting.html>. Sasala notes that the process of Shepardizing with books "has almost become a lost art." *Id.* Shepardizing and KeyCiting authorities on-line "ha[ve] virtually made the use of print citators obsolete." *Id.* These two on-line resources "also remove the drudgery and time involved in using print resources." *Id.*

105. See generally LEXISNEXIS, HOW TO SHEPARDIZE (2001), https://www.lexisnexis.com/shepards-citations/printsupport/shepardize_print.pdf (explaining how to use *Shepard's Citations* in print).

106. See Sasala, *supra* note 104.

107. Cindy Lindau, *How to Shepardize a Case in Print*, U.N.H. L. LIBR., <https://library.law.unh.edu/Shepardize> (last updated Oct. 14, 2008) ("To complete the process, you should call the toll free number listed on the back of the soft cover supplements. The publisher will check your cite and provide more current information.").

108. See Sasala, *supra* note 104 (explaining that the efficiency of online Shepardizing has rendered print citators nearly extinct).

records.¹⁰⁹ But the efficiencies afforded by technology in the legal services sector operate to reduce billable hours expended primarily by newer attorneys on routine legal tasks.¹¹⁰

Similarly, in complex litigation, searchable electronic discovery databases replaced rooms filled with banker's boxes of documents, once manually Bates numbered and methodically reviewed, catalogued, and organized by teams of associates and paralegals.¹¹¹ Further, aided by technology, routine document review and discovery compliance can be readily digitized and insourced by corporate clients,¹¹² outsourced to foreign subsidiaries,¹¹³ or outsourced to third-party vendors.¹¹⁴

D. Technology Facilitates the Disaggregation of Routine Legal Services into Discrete, Fungible, and Outsourceable Tasks

Beginning in the mid-1990s, a growing volume of legal services has been outsourced from the United States to various foreign countries.¹¹⁵ While "[t]here is no consolidated data on outsourcing destinations, . . . it is believed that India, which graduates 80,000 lawyers per year, is the main destination for legal services outsourcing."¹¹⁶ The legal services typically

109. Travis McDade & Phill Johnson, *Print Shepard's Is Obsolete: Coming to Terms with What You Already Know*, 12 PERSP.: TEACHING LEGAL RES. & WRITING 160, 161 (2004), <https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2004-spring/2004-spring-5.pdf>.

110. *Id.*

111. MICHAEL R. ARKFELD, LEXISNEXIS, PROLIFERATION OF "ELECTRONICALLY STORED INFORMATION" (ESI) AND REIMBURSABLE PRIVATE CLOUD COMPUTING COSTS 3 (2011), http://www.lexisnexis.com/documents/pdf/20110721073226_large.pdf.

112. See Christopher Danzig, *Inside Job*, INSIDE COUNS. (Nov. 2009, 12:00 AM), <https://www.law.com/almID/4dcafb1b160ba0ad5700173d/>.

113. Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2197 (2007) (defining outsourcing as obtaining lower-cost services from more affordable markets and noting that technological advancements have fueled the growth of outsourcing services).

114. David A. Steiger, *The Rise of Global Legal Sourcing: How Vendors and Clients Are Changing Legal Business Models*, BUS. L. TODAY, Nov.-Dec. 2009, at 39-42, <https://apps.americanbar.org/buslaw/blt/2009-11-12/steiger.shtml>.

115. Krishnan, *supra* note 113, at 2193.

116. COUNSEL FOR TRADE IN SERVS., WORLD TRADE ORG., LEGAL SERVICES: BACKGROUND NOTE BY THE SECRETARIAT 7 (2010), <https://www.americanbar.org/content/dam/aba>

outsourced consist of “routine tasks such as document review, legal transcription, litigation support[,] and publishing services.”¹¹⁷ Since 2001, the velocity of corporations outsourcing legal services to foreign subsidiaries has accelerated.¹¹⁸ “In 2004 alone, 12,000 legal jobs were outsourced abroad.”¹¹⁹ For example, General Electric created an in-house office in India to provide services to its consumer finance and plastics divisions.¹²⁰ Likewise, Indian lawyers draft patent applications for DuPont and write synopses of legal opinions at Westlaw’s Mumbai office.¹²¹

Other large American corporations directly hire foreign law firms.¹²² For example, one Indian law firm, Nishith Desai Associates, now has offices in New York and the Silicon Valley and boasts a client list that includes many Fortune 500 corporations.¹²³ Additionally, a growing group of legal process outsourcing vendors help American-based corporations and law firms outsource routine legal services both domestically and abroad. The term outsourcing references the use of third parties that provide services in lieu of employees.¹²⁴ Most legal services outsourcing takes the form of either domestic outsourcing or exporting work offshore either to third-party contractors or foreign employees of either the law firm or—as discussed above—the client.¹²⁵

As an example of offshoring to a third-party vendor, in 2010, Thomson Reuters “acquired Pangea3, a fast-growing legal process outsourcing (LPO) provider serving corporate legal

/administrative/professional_responsibility/gats_migrated/wto_legal_services.authcheckdam.pdf.

117. *Id.*

118. Krishnan, *supra* note 113, at 2201.

119. *Id.* at 2194.

120. *Id.* at 2201.

121. *Id.* at 2202.

122. *Id.*

123. See *About Us*, NISHITH DESAI, <http://www.nishithdesai.com/information/about-us/about-nishith-desai-associates.html> (last visited Dec. 15, 2018).

124. K. William Gibson, *Outsourcing Legal Services Abroad*, L. PRAC. MAG., July–Aug. 2008, at 47.

125. *Id.*

departments and law firms worldwide.”¹²⁶ The variety of services offered by LPO vendors vary from administrative, such as legal transcription and litigation support, to document review,¹²⁷ legal research, intellectual property work, and contract related services.¹²⁸

As American firms become comfortable with outsourcing lower-value services previously provided by support staff, LPO service providers are able to “sell up” to perform higher-level services previously performed domestically by attorneys such as document review and e-discovery.¹²⁹ Offshore LPO vendors charge up to \$25 an hour for lower-skill services and up to \$90 per hour for higher-level tasks.¹³⁰ This lower cost inures from lower labor costs: a junior lawyer in India in 2010 earned the equivalent of just over \$8,000, compared to the six-figure salaries expected by law firm associates in major cities in the United States.¹³¹

At the time of its acquisition by Thomson Reuters, Pangea3 employed over 650 individuals and generated annual revenue of \$25 to \$30 million.¹³² American law firms, corporations, and even solo practitioners outsource services offshore to glean significant cost savings,¹³³ primarily due to the lower salaries paid to foreign employees, often a fraction of domestic legal services sector salaries.¹³⁴ For example, one Maryland solo practitioner, Richard Granat, positively describes his experiences with outsourcing work for \$12 per hour, inclusive

126. Press Release, Thomson Reuters, Thomson Reuters Acquires Pangea3 (Nov. 18, 2010), <https://ir.thomsonreuters.com/news-releases/news-release-details/thomson-reuters-acquires-pangea3?ID=1500714&c=76540&p=irol-newsArticle>.

127. COUNSEL FOR TRADE IN SERVS., *supra* note 116, at 7 (noting that “[t]ypically outsourced are routine tasks such as document review, legal transcription, litigation”).

128. Gibson, *supra* note 124, at 47.

129. *Id.*

130. COUNSEL FOR TRADE IN SERVS., *supra* note 116, at 7.

131. *Id.*

132. Shivani Shinde & Arijit Barman, *Thomson Reuters to Acquire LPO Firm Pangea3*, BUS. STANDARD (Feb. 11, 2013), http://www.business-standard.com/article/technology/thomson-reuters-to-acquire-lpo-firm-pangea3-110111900086_1.html.

133. Gibson, *supra* note 124, at 47.

134. *Id.*

of online legal research service fees. As Granat notes: “I have used an Indian firm to do legal analysis for clients that I’m working with, and the results have been excellent—and it costs about [50%] less than the cost of a [U.S.] paralegal. Since the person doing the work is an attorney trained in English common law, the quality of the work is often better.”¹³⁵ In 2010, Pangea3 reputedly increased its salary package for new hires from Rs 4 to 6 lakh to Rs 5 to 7 lakh per year (approximately \$14,952 at the time) for “top test performers” from top schools.¹³⁶

Outside Pangea3 as an exemplar, by one estimate, LPO vendors in India and the Philippines employed over 5200 professionals and generated annual revenue of approximately \$300 million in 2010.¹³⁷ Another study placed estimates even higher, noting revenue from “legal outsourcing in India had grown from \$146 million . . . in 2006 to \$640 million by 2010, and that associated employment had increased from [7500] to 32,000 over that same time period.”¹³⁸ Beyond just India, law firms based in America and the United Kingdom have also been “outsourcing work to Australia, Canada, New Zealand[,] and South Africa to take advantage of the lower costs in those countries and of the benefits of zonal time differences in helping to complete tasks within shorter time periods.”¹³⁹ Reportedly, the similarity of legal education and legal systems in these nations facilitates the off-shoring of higher value legal services, “but on the back of a lower cost base.”¹⁴⁰

However, the explosive growth of legal services outsourcing has proven an imperfect elixir in some respects for lowering the cost of legal services in the United States. Some skepticism remains regarding the suitability of higher value legal services

135. *Id.*

136. *Revealed: 17 Law Firm Starting Salaries as AZB, Trilegal, Wadia Ghandy Hike Fresher Pay*, LEGALLY INDIA (June 11, 2010, 5:29 PM), <http://www.legallyindia.com/law-firms/revealed-17-law-firm-starting-salaries-as-azb-trilegal-wadia-ghandy-hike-fresher-pay-20100611-955>.

137. Shinde & Barman, *supra* note 132.

138. YARROW & DECKER, *supra* note 35, at 75.

139. *Id.* at 75.

140. COUNSEL FOR TRADE IN SERVS., *supra* note 116, at 7.

for outsourcing.¹⁴¹ Moreover, domestic retention of even routine legal tasks by law firms “provides a valuable opportunity to train new lawyers to develop the judgment which provides the basis for the reputation of the top law firms.”¹⁴² Further, law firms may risk tarnished reputations as the trusted law firm-client relationship transforms the lawyer’s role into project managers of a disaggregated group of low-cost contractors sprinkled around the globe.¹⁴³ Not surprisingly, legal services outsourcing poses a thicket of potential ethical challenges “related to confidentiality, disclosure, and billing for the outsourced work.”¹⁴⁴ Further, as LPO vendors gain experience and develop reputations, sophisticated clients are apt to increasingly contract directly with vendors for services, bypassing traditional law firms altogether.¹⁴⁵ But rising costs and growing concerns about the offshoring of legal services coincide with the rise of the domestic gig economy, creating a new wave of home-shoring legal services back to the Occident.

1. *The rise of the gig economy and the home-shoring of legal services*

Rising wages in India coupled with soft labor costs in the United States in the wake of the Great Recession narrowed the arbitrage opportunity of outsourcing legal services abroad.¹⁴⁶ Following the Great Recession, tough times in the United States created a glut of unemployed and underemployed law school graduates in the United States.¹⁴⁷ This narrowed India’s advantage as lower labor costs rose with other costs, such as

141. *Id.*

142. *Id.*

143. See Leonard Bierman & Michael A. Hitt, *The Globalization of Legal Practice in the Internet Age*, 14 *IND. J. GLOBAL LEGAL STUD.* 29, 32 (2007).

144. *COUNSEL FOR TRADE IN SERVS.*, *supra* note 116, at 7.

145. See Krishnan, *supra* note 113, at 2202.

146. See Vanessa O’Connell, *Lawyers Settle... for Temp Jobs*, *WALL STREET J.* (June 15, 2011), <https://www.wsj.com/articles/SB10001424052702303714704576383641752966666>.

147. See Barry Shlachter, *Atlas Legal Research: A Passage to India*, *D MAG.* (Dec. 2013), <https://www.dmagazine.com/publications/d-ceo/2013/december/atlas-legal-research-a-passage-to-india/>.

capital expenses.¹⁴⁸ Beyond just cost, outsourcing legal services to India requires navigating the logistical headaches inherent in conducting business operations in India, including the challenges of training and retaining employees, particularly to perform higher value legal services.¹⁴⁹ The diminished labor arbitrage opportunity and challenges of providing American style legal services abroad are driving a new wave of domestic outsourcing, sometimes referenced as homesourcing.¹⁵⁰

Dallas-based Atlas Legal Research LP provides an example of both the outsourcing of legal services abroad and the return of these services to the United States. Since 2001, Atlas has provided legal research, writing, and litigation support services.¹⁵¹ Atlas, founded by Indian-born entrepreneur and American-trained attorney Abhay Dhir, helped kick-start the legal services offshoring boom by training Indian lawyers to produce American style legal briefs at an office in Bangalore.¹⁵² To produce American style legal writing, Atlas trained its “Indian lawyers to write like American lawyers for an American legal audience.”¹⁵³ This was no small task—Dhir spent a full year training his “first eight Indian lawyers before Atlas opened its doors for business in August 2001.”¹⁵⁴

The Bangalore office grew rapidly to a staff of forty-five, but Atlas experienced the myriad of challenges inherent in engaging in business in modern India.¹⁵⁵ Foremost, Indian professionals often hopscotched from one employer to another “for an extra \$150 or \$250 more per month.”¹⁵⁶ Also, competitors

148. *Id.*

149. *Id.*

150. *Id.*

151. *About Us*, ATLAS LEGAL RES., LP, <http://www.atlaslegal.com/about.html> (last visited Dec. 15, 2018).

152. Shlachter, *supra* note 147.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

poached Atlas's attorneys.¹⁵⁷ Atlas at one point "lost the bulk of [its] research team"; nonetheless, Dhir rebuilt the team.¹⁵⁸

But following the Great Recession, tough times for the legal services industry in the United States left a glut of underemployed and unemployed law school graduates in the United States.¹⁵⁹ This excess capacity of domestic law school graduates narrowed India's advantage as its once lower labor costs rose with other costs, such as capital expenses.¹⁶⁰ Further, Atlas continued to grapple with India's burdensome compliance and reporting rules.¹⁶¹ But for Atlas, training employees and quality control became its "single biggest cost factor," affecting growth of the business.¹⁶² In particular, for high value services, such as legal research and writing, the competitive advantage of off-shoring to India narrowed.¹⁶³

Atlas reversed course, and whenever an Indian employee quit, Atlas replaced that employee with a domestic employee in the United States.¹⁶⁴ Gradually, Atlas returned most of its LPO services to the United States. By December of 2013, Atlas employed about twenty-five employees in the United States while just four employees remained in India.¹⁶⁵ Atlas's domestic attorneys are located across the country and telecommute to perform work for various clients, including solo practitioners, law firms, and corporate legal departments.¹⁶⁶ Atlas serves as one example of the growing trend of the domestic outsourcing of legal services.

Beyond economic necessity, many domestic attorneys gravitate to performing outsourced contract work for the potential of an improved quality of life. In 2009, two female

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

attorneys started Montage Legal Group in order to work in the law while remaining at home raising children.¹⁶⁷ Each attorney invested \$2000 to start Montage, which provides contract legal services on a temporary basis to law firms via a network of attorneys working from home.¹⁶⁸ In 2013, Montage’s revenues exceeded \$1 million.¹⁶⁹ By 2014, 125 freelance attorneys worked for Montage and were paid by the hour.¹⁷⁰ For law firms, Montage allows temporary staffing of cases while keeping firm overhead low. As one client notes, “In terms of capability, I can compete with a larger firm. Yet in terms of cost, I’m probably substantially cheaper.”¹⁷¹

Far from an anomaly, Montage joins a growing scrum of nontraditional providers of legal services including Axiom, which provides remote legal services and employs over one thousand attorneys and over two thousand employees located on three continents.¹⁷² “Both Clearspire and Virtual Law Partners emphasize cost-reducing work-at-home attorney staff, technology infrastructures to efficiently manage work flow, and fixed-fee pricing.”¹⁷³ Axiom boasts a clientele that includes a cadre of Fortune 500 companies including Cisco, Johnson & Johnson, Hewlett-Packard, Kraft, and Xerox.¹⁷⁴

Hewlett-Packard provides a case study in the ongoing disruption of the legal industry. Post the Great Recession, Hewlett-Packard wanted “an efficient and cost-effective way to

167. Mamie Joeveer, *How Two Stay-at-Home Moms Are Changing the Legal Industry*, FORBES (Aug. 27, 2014, 11:03 AM), <https://www.forbes.com/sites/mamiejoeveer/2014/08/27/how-2-stay-at-home-moms-are-changing-the-legal-industry/>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (quoting Kang, Spanos and Moos, LLP partner Damian Moos about the benefits of working with Montage: “Because I don’t have to carry an employee’s salary on payroll or accommodate a larger office space, I can keep my overhead down and offer my services at a lower price.”).

172. *About Us*, AXIOM, <http://www.axiomlaw.com/about-us/> (last visited Dec. 15, 2018); see also Drew Combs, *Disruptive Innovation; Look Out Firms, Axiom Is Trying to Beat You at Your Own Game*, 34 AM. LAW. 58, 58 (2012) (“While Virtual Law Partners focuses on transactional matters, Clearspire offers a full range of litigation and corporate matters.”).

173. Combs, *supra* note 172.

174. *About Us*, *supra* note 172.

negotiate, draft, and execute sales-related contracts, licensing deals, and follow-on agreements (that in some cases would be for as much as \$10 million) for some of its business units.”¹⁷⁵ While certainly familiar with offshoring, Hewlett-Packard wanted these legal services handled onshore to facilitate efficient interactions between the lawyers, Hewlett-Packard’s employees, and its customers involved in the transactions.¹⁷⁶ Hewlett-Packard also desired scalability, since the volume of software-licensing agreements tends to ramp up during the final three weeks preceding the end of each business quarter.¹⁷⁷ Rather than bolstering its in-house counsel ranks or retaining a traditional law firm, Hewlett-Packard put the bundle of legal services out to bid and selected Axiom from amongst a pool of seventeen bidders.¹⁷⁸ Perhaps spurred by lost revenue, traditional law firms have taken notice of the rise of non-traditional legal services.

2. *Domestic firms respond to the rise of non-traditional legal services by insourcing work to lower-cost domestic offices*

To avoid exclusion from the non-traditional legal services fray, traditional law firms are using both contract and staff lawyers and also insourcing work to their lower-cost domestic offices.¹⁷⁹ For example, Orrick, a firm with over twenty-five offices worldwide, operates its “Global Operations Center (GOC)” in Wheeling, West Virginia.¹⁸⁰ Orrick touts its GOC as “the first global insourcing center within a major [U.S.] law firm.”¹⁸¹ With the GOC, Orrick purports to “bring the highest quality and efficiency to client services, such as due diligence,

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. CLAY & SEEGER, *supra* note 48, at iii (noting that survey responses reflect that “[f]irms are using contract lawyers, staff lawyers[,] and part-time lawyers in an effort to mitigate costs and improve efficiency and profitability”).

180. *Wheeling, W.V. (GOC)*, ORRICK, <https://www.orrick.com/Locations/Wheeling> (last visited Dec. 15, 2018).

181. *Id.*

research, drafting[,] and Ediscovery.”¹⁸² Located in a former metal-stamping factory, Orrick relies heavily on contractors “hired by the hour.”¹⁸³ Orrick couples cheaper lawyers with artificial intelligence for “routine tasks, such as sorting and tagging documents.”¹⁸⁴ Daryl Shetterly, who directs the firm’s analytics division, explains “it is a factory in that we work to drive efficiency and discipline into every mouse click.”¹⁸⁵ Shetterly posits that with contractors, “we might have [thirty] people working today, and tomorrow we might have [eighty].”¹⁸⁶

Similar to Orrick’s GOC, WilmerHale opened its Business Services Center in 2010 in a research park east of Dayton, Ohio.¹⁸⁷ In addition to administrative support staff, WilmerHale’s “DiscoverySolutions” group in Dayton provides discovery support and document review for the firm’s clients.¹⁸⁸ While not usually with the transparency and marketing buzz of Orrick’s GOC or WilmerHale’s Business Services Center, other traditional law firms are insourcing work to lower-cost domestic offices.

Specifically, traditional large firms seem to be insourcing legal work from expensive coastal metropolitan branches to lower cost, inland offices. For example, law firms were amongst the seventeen bidders on Hewlett-Packard’s contract for legal services discussed above.¹⁸⁹ As Gabriel Buigas, a vice president and deputy general counsel at Hewlett-Packard, noted at the time: “Law firms would say you can use my partners in this regional office that bill at a lower rate, but they were a little

182. *Id.*

183. Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce*, NAT’L PUB. RADIO (Jan. 22, 2018), <https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now>.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Dayton*, WILMERHALE, <https://www.wilmerhale.com/en/contact-us/dayton> (last visited Dec. 15, 2018).

188. *WilmerHale Discovery Solutions*, WILMERHALE, <https://www.wilmerhale.com/en/solutions/wilmerhale-discoverysolutions> (last visited Dec. 15, 2018).

189. Combs, *supra* note 172.

behind on the use of process and technology and that this was a different kind of labor force."¹⁹⁰ This anecdote may reveal a significant trend amongst large and regional law firms: responding to the price competition of non-traditional legal services providers, both domestic and abroad, by insourcing legal work from expensive urban offices on the East and West Coasts to lower-cost, inland offices. This perhaps begrudging response by traditional law firms to price competition does not bode well for mentoring opportunities for newer attorneys.

3. *The rise of non-traditional legal services portends difficulties for newer attorneys including a decline in mentoring opportunities*

These trends in the legal services industry of insourcing, outsourcing, and the rise of the non-traditional provision of legal services are not apt to abate anytime soon. The U.S. Bureau of Labor Statistics job outlook for lawyers reflects these trends and sagely notes:

Demand for legal work is expected to continue as individuals, businesses, and all levels of government require legal services in many areas.

Despite this need for legal services, more price competition over the next decade may lead law firms to rethink their project staffing in order to reduce costs to clients. Clients are expected to cut back on legal expenses by demanding less expensive rates and scrutinizing invoices. Work that was previously assigned to lawyers, such as document review, may now be given to paralegals and legal assistants. Also, some routine legal work may be outsourced to other, lower cost legal providers located overseas.

190. *Id.*

Although law firms will continue to be among the largest employers of lawyers, many large corporations are increasing their in-house legal departments in order to cut costs. For many companies, the high cost of hiring outside counsel lawyers and their support staffs makes it more economical to shift work to their in-house legal department. This will lead to an increase in the demand for lawyers in a variety of settings, such as financial and insurance firms, consulting firms, and healthcare providers.¹⁹¹

As traditional law firms continue to evolve, including adapting to operate more efficiently, many of the traditional mentorship opportunities for new attorneys fall to the wayside.¹⁹² As noted, newer attorneys formerly observed hearings, attended depositions with partners, and sat second chair at trials, but as clients balked at the billability of on-the-job training activities, firms increasingly eliminated non-billable mentorship activities.¹⁹³ Firms faced a choice to sacrifice either profitability or training opportunities for newer associates. The seemingly new norm of law firms seeking lateral associates with the almost proverbial three to five years of experience may indicate a choice favoring immediate profitability for associates over subsidizing new lawyer training.¹⁹⁴

191. Job Outlook for Lawyers, *supra* note 46.

192. See Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1659 (2011) (noting that “increased competition reduces firms’ freedom to bill training time to clients”).

193. See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> (“[F]or decades, clients have essentially underwritten the training of new lawyers, paying as much as \$300 an hour for the time of associates learning on the job. But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: [t]each new hires on your own dime.”).

194. See CLAY & SEEGER, *supra* note 48, at 53 (highlighting survey results showing that in 2017, over 50% of surveyed law firms believed that smaller first year associate classes would be “a permanent trend going forward” compared with just over 11% of respondents in 2009).

Likewise, with fewer associate positions at traditional firms for new graduates, more newly-minted attorneys transition straight into practice, either performing contract work as part of the gig economy, entering solo practice, or a muddle of both.¹⁹⁵ These newer attorneys are often under-resourced, starting small, low budget practices without large firm luxuries like unlimited subscriptions to online legal research or a seasoned support staff.¹⁹⁶ Without the institutional knowledge and resources of a traditional law firm, coupled with the absence of mentorship from seasoned attorneys, many new attorneys enter the practice of law woefully underprepared to practice law.

These newly-minted attorneys increasingly face a steepened learning curve akin to trial by fire. Given this new norm, law schools cannot rest in stasis, but must endeavor to better prepare students for actual legal practice. Beyond myopically focusing on teaching how to think like an attorney, modern legal education must prepare students to emerge from law school ready to generate revenue and able to “think, write, and speak like a lawyer.”¹⁹⁷ However, parsing the specific skillset that will facilitate this practice readiness proves elusive.

II. THE MURKY CONTENT OF A PRACTICE-READY CURRICULUM

Since the curricular migration of legal education from apprenticeships to formal academic settings, critics periodically push for the reincorporation of practical skills into legal

195. See Deborah L. Cohen, *So You Want to Go Solo? You Sure?*, A.B.A. J. (Nov. 2009), http://www.abajournal.com/magazine/article/so_you_want_to_go_solo_you_sure (noting a likely increase in attorneys entering solo or small firm practice “as law firms reorganize and re-evaluate their professional staffing needs”).

196. See Debra Cassens Weiss, *Why Go Solo? Some Have No Choice, But Discover They Like the Flexibility and Interaction*, A.B.A. J. (July 20, 2016, 9:59 AM), http://www.abajournal.com/news/article/why_go_solo_some_have_no_choice_but_discover_they_like_the_flexibility_and (“The learning curve and the lack of resources [are] the most difficult thing[s] about going solo.”).

197. Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 95 (2005) (quoting RALPH L. BRILL ET AL., AM. BAR ASSOC., SOURCEBOOK ON LEGAL WRITING PROGRAMS 5 (1997)).

education.¹⁹⁸ The latest buzz amidst law schools encompasses the notion of a “practice-ready” legal education.¹⁹⁹ While many law schools trumpet their “practice ready” bona fides, the concept of what constitutes a practice-ready curriculum varies widely and its efficacy proves somewhat illusory. Despite incremental changes, “[t]he core of the law school curriculum . . . has not dramatically wavered.”²⁰⁰ Some schools merely affix a “practice ready” moniker upon existing course offerings that already include experiential courses like externships, clinics, and practicums. Some of these courses may provide a good analog to the actual skills needed for many practice settings, while others prove too granularly focused or tangential to the civil litigation skills needed for most legal practices. Other notions of a practice-ready curriculum range from the remedial²⁰¹ to the innovative.²⁰² Assembling a dauntingly long list of assorted skills that are viewed as key for newly-minted

198. See Karen Sloan, *Practice Ready? Law Students and Practitioners Disagree*, NAT’L L.J. (Mar. 6, 2015), <https://advance.lexis.com/api/permalink/dcadbe93-85e3-43e6-928c-a4c6957bb538/?context=1000516> (identifying “years of criticism to that [sic] law schools weren’t teaching practical skills” and noting that “only 23[%] [of surveyed practicing attorneys] believed new lawyers have the necessary practical skills”).

199. See generally *Practice Ready*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?cat=958&date=today%205-y&q=practice%20ready> (last visited Dec. 15, 2018) (showing that Google searches including the term “practice ready” spiked during the springs of 2016, 2017, and 2018, perhaps as prospective law students searched to glean more about this term).

200. Gary S. Gildin, *Practice-Ready Legal Education: The Four New Demands Law Schools Must Satisfy*, PA. LAW., May–June 2015, at 33.

201. Robert Steinbuch, *The Problem with Focusing on “Practice Ready” Graduates*, NAT’L JURIST (July 2, 2015, 9:40 AM), <http://www.nationaljurist.com/content/problem-focusing-practice-ready-graduates> (noting that employers “still want graduates who can research and write well So, one impetus for this movement may actually be remedial. That is, ‘practice ready’ may simply be a euphemism for mere competence.”).

202. Gildin, *supra* note 200, at 34 (noting the importance of “extra-legal competencies, such as financial literacy [and] emotional intelligence” and also discussing the need to “acquaint . . . students with the ability to research and analyze the unique features of transnational and international law”); see also Alfred S. Konefsky & Barry Sullivan, *There’s More to the Law than ‘Practice-Ready’*, CHRON. HIGHER EDUC. (Oct. 23, 2011), <https://www.chronicle.com/article/Theres-More-to-the-Law-Than/129493> (“Law graduates must be practice-ready, not simply in the sense of being ready for the first stage of practice, but by being equipped for a lifetime of professional growth and service [Law graduates must] pay attention to the work of anthropologists, . . . psychologists, and sociologists . . . because their insights are useful—even indispensable—in understanding and solving legal problems in our complex and rapidly changing world.”).

attorneys could make the creation of a practice-ready curriculum rather cumbersome.

Perhaps, if the salvo of constituent skills that ought to be incorporated into a practice-ready curriculum could be easily articulated, such a curriculum might also be readily implemented. But not all legal practices are cut from the same cloth. Instead, legal practices vary widely from the very nature of the legal work to the particular bundle of skills required to optimally perform that work. Further, these skills may vary amongst practice settings, for example, from big firm to small, from contract gig to gig, and even geographically. This ambiguity of the constituent practice skills needed by newer attorneys may compound the conundrum of what a practice-ready legal education should include.

It may seem a folly to seek to distill a group of key skills apt to render a law student ready to practice. Acquiring proficiency in the skills needed for a particular practice might occur at a glacial pace and even take the arc of a career to master. Depending on the level of practice readiness expected, exiting law school ready to practice may not prove feasible.²⁰³ Instead, as one commentary wryly noted, "'practice ready' might simply be a euphemism for mere competence."²⁰⁴ However, competence would seem to connote emerging from law school with a requisite level of skill to efficiently perform common lawyering tasks.

Many great proposals and possibilities exist for the wholesale overhaul of legal education.²⁰⁵ While not quite a fossilized

203. See Robert Steinbuch, *The Problem with Focusing on "Practice-Ready" Graduates*, NAT'L JURIST (July 2, 2015, 9:40 AM), <http://www.nationaljurist.com/national-jurist-magazine/problem-focusing-practice-ready-graduates>.

204. *Id.*

205. See, e.g., Adam Lamparello & Charles E. MacLean, *Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It*, 4 HOUS. L. REV. 95, 99 (2014) (proposing new requirements for law students to take "skills courses that mirror the actual practice of law," register for "four writing credits in every semester," and implement "increased collaboration between legal writing professors and doctrinal faculty").

“freemasonry of mediocrity,”²⁰⁶ the legal education academy proves impressively resistant to systemic change despite over a century of scathing criticism.²⁰⁷ This article proposes a more modest option: requiring an upper-division legal writing course designed to cover the aspects of practice most apt to be routinely encountered by newer attorneys. Designing such a course necessitates divining the most common practice settings, practice areas, and work activities encountered by new attorneys. Ascertaining this information could facilitate reverse engineering the skills to teach in an upper-division legal writing course and perhaps even how to teach these skills to maximize student learning and practice readiness.

A. Most New Attorneys Are Destined for Private Practice in Small Firms and as Solo Practitioners

In the last three decades, the percentage of lawyers engaged in private practice steadily rose to approximately 75% of all attorneys.²⁰⁸ In contrast, 8% of all attorneys work in government and a paltry 1% work in legal aid or as public defenders.²⁰⁹ Accordingly, most new lawyers are destined to enter private

206. This term was used by Colonel Sir Archibald David Sterling, founder of the Special Air Services, to describe the fossilized state of the British Army at the inception of World War II. BEN MACINTYRE, *ROGUE HEROES: THE HISTORY OF THE SAS, BRITAIN’S SECRET SPECIAL FORCES UNIT THAT SABOTAGED THE NAZIS AND CHANGED THE NATURE OF WAR* 25 (2016).

207. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1984 (2012) (“The defects of the present method may be summed up, we think, in one very familiar antithesis: they do not educate, they only instruct In office study, the daily participation in actual business gave the student at least some empiric training Our law schools, as usually conducted, offer nothing. Most of them do not, in their plan of study, seem ever to recognize the need. It is fortunate for them and for their pupils alike that the training thus omitted may be supplied in the early years of practice, at least to a very considerable extent.”); see also ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 147 (1953) (noting the sizable gap between law school learning and the practical skills required for the practice of law); AM. BAR ASS’N, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS* (1979) (the “Crampton Committee Report”); AM. BAR ASS’N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* 1, 13–27 (1992) (the “MacCrate Report”); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (the “Carnegie Report”).

208. AM. BAR ASS’N, *supra* note 25 (explaining that the percentage of lawyers in private practice has steadily crept up from 68% in 1980 to 75% in 2005).

209. *Id.*

practice. Further, almost three-quarters of private practitioners are in a solo practice or are members of small firms.²¹⁰ Thus, the likely practice setting for most new attorneys seems relatively straightforward: most new attorneys will enter private practice by either joining small firms or starting solo practices. Beyond discerning just practice setting, developing a triage upper-division writing course to better prepare new attorneys requires ascertaining the likely practice areas of newer attorneys.

Most new attorneys in solo and small firm practice settings will engage primarily in civil litigation. One nationwide survey conducted by the Institute for the Advancement of the American Legal System found that two-thirds of the 23,837 survey respondents worked in litigation.²¹¹ This comports with other recent survey results. In 2013, the Ohio State Bar Association conducted a member survey regarding the economics of the practice of law.²¹² Disaggregating the net income by primary area of law reported by full-time private practitioners in Ohio supports the proposition that most private practitioners engage primarily in civil litigation.²¹³ Of the 821 respondents, 131 listed their primary area as trial practice or personal injury.²¹⁴ Adding in other categories that presumably encompass civil litigation, such as family law, medical malpractice, product liability, workers' compensation, appellate law, and bankruptcy confirms that a significant majority of private practitioners engage primarily in civil litigation.²¹⁵ In contrast, only about 5%, or forty-three of the 821 private practitioners, identified their primary area of law to be

210. *Id.* (noting that, as of 2005, 49% of private practitioners engaged in solo practice and 14% were in firms with two to five lawyers).

211. ALLI GERKMAN & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, FOUNDATIONS FOR PRACTICE: SURVEY OVERVIEW AND METHODOLOGICAL APPROACH 12 (2016), http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_survey_overview_and_methodological_approach.pdf.

212. See OHIO STATE BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN OHIO IN 2013: A DESKTOP REFERENCE 4 (2013), https://www.ohiobar.org/NewsAndPublications/Documents/OSBA_EconOfLawPracticeOhio.pdf.

213. *Id.* at 29.

214. *Id.*

215. *Id.*

criminal law.²¹⁶ Thus, most private practitioners primarily engage in civil litigation.

This conclusion also comports with state bar section membership. Section membership may be somewhat aspirational in that a bar member may join a practice section to gain either perceived or real expertise in a new area of the law. Nonetheless, state bar civil litigation sections reflect the highest membership numbers.²¹⁷ This seems to confirm the significant role of civil litigation among state bar members.

In addition, tenure in private practice tends to traditionally prove requisite for many other legal positions, such as in-house counsel. So, even if new attorneys aspire to eventually migrate from private practice into other practice settings, these attorneys need to gain practice experience to facilitate an exit from private practice. Thus, most new attorneys are destined for private practice, at least in the near-term, and most will be primarily engaged in civil litigation.²¹⁸ But civil litigation encompasses a huge swath of skills and activities.²¹⁹ Perhaps a bit more specificity regarding the likely tasks encountered in civil litigation can yield a better bead on the likely day-to-day activities of newer attorneys.

B. Most Private Practitioners Engage Primarily in Activities Related to Pretrial Civil Litigation

Private practitioners engaged in civil litigation engage primarily in *pretrial* civil litigation.²²⁰ The annual volume of civil litigation in the United States continues to escalate, while the

216. *Id.*

217. *About the Litigation Section*, CAL. LAW. ASS'N, <https://calawyers.org/Sections/Litigation/About> (last visited Dec. 15, 2018) (“With approximately 10,000 members from the bench and bar, the Litigation Section is the largest section of The State Bar of California.”).

218. See Jamie Collins, *The Pros of Working in Civil Litigation*, BALANCE CAREERS, <https://www.thebalancecareers.com/litigation-law-part-i-2164539> (last updated Nov. 8, 2017) (stating that civil litigation is the most popular practice area among attorneys).

219. See Sally Kane, *Introduction to Civil Litigation*, BALANCE CAREERS, <https://www.thebalancecareers.com/introduction-to-civil-litigation-2164619> (last updated May 13, 2018) (stating that civil litigation includes a wide range of areas and disputes).

220. OHIO STATE BAR ASS'N, *supra* note 212, at 29 (showing that only four respondents out of 821 full-time private practitioners in Ohio listed their primary field of law as appellate law).

number of cases proceeding to trial appears to be in a decline.²²¹ For example, approximately 7.4 million civil claims²²² were filed nationwide in state courts during 2005. In contrast, roughly 26,950 civil cases proceeded through a trial in state court during 2005.²²³ Thus, statistically few cases filed in state court actually proceed through a trial.

Basically, for every three hundred civil cases filed, one proceeded through a trial in 2005.²²⁴ Limited data illuminates exactly what transpires that resolves the vast majority of cases prior to trial.²²⁵ Most cases appear to resolve via dispositive motion practice, settlement prior to trial, dismissal for failure to prosecute, or a transfer to a different court.²²⁶ This comports with the author's practice experience, where the vast majority of civil litigation cases resolved via settlement or dispositive motion. Thus, the most common lawyering tasks apt to be encountered by newer attorneys commence with the inception of a dispute and include drafting and reviewing a wide variety of correspondence, investigating and researching pre-litigation, drafting pleadings, propounding and responding to discovery, reviewing documents, and engaging in pretrial motion practice.²²⁷

221. See LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 8 (2008), <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> ("In the nation's [seventy-five] most populous counties, the number of civil trials decreased 52%, from 22,541 in 1992 to 10,813 in 2005.").

222. *Id.* at 1.

223. *Id.*

224. See *id.*

225. For example, most settlement agreements are confidential and the only interaction with a court consists of the filing of a stipulation to dismiss. See generally Sterling Miller, *Ten Things: Settlement Agreements—Making Sure It's Really Over*, WORDPRESS (Mar. 31, 2016), <https://sterlingmiller2014.wordpress.com/2016/03/31/ten-things-settlement-agreements-making-sure-its-really-over/> (discussing the importance of dismissing the claim); see also Lee Ann Obringer, *How Lawsuits Work*, HOWSTUFFWORKS, <https://people.howstuffworks.com/lawsuit4.htm> (last visited Dec. 15, 2018) (discussing motion practice).

226. See, e.g., *Government Survey Shows 97 Percent of Civil Cases Settled*, PHX. BUS. J., <https://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html> (last updated May 27, 2004, 3:00 PM) (stating that 97% of cases are settled or dismissed before trial).

227. See generally Sally Kane, *Lawyer Job Description and Career Profile*, BALANCE CAREERS, <https://www.thebalancecareers.com/lawyer-career-profile-2164294> (last updated July 31, 2018) (discussing litigation attorney job duties).

But before designing a course that delves into these common lawyering tasks, let’s consider how new attorneys approach these tasks. Such an empirical examination may illuminate analogues to the traditional law school curriculum and reveal gaps that might be filled by a required, upper-division legal writing and research course.

C. What New Attorneys Actually Do: Unfiltered Reading and a Wide Variety of Writing

A recent three-year ethnographic study of junior associates in law firm settings shows that newer attorneys devote a significant portion of their professional time to reading various materials²²⁸ and writing a “large variety of documents.”²²⁹ But these junior associates both read and write very differently than law students. Examining how new attorneys read and write may aid in triaging the content of a required, upper-division legal writing class designed to teach the skills most apt to be needed by newer attorneys.

1. Efficient self-directed learning via readings distilled from a wide variety of online and hard copy materials

Law students become hard-wired to read casebooks to facilitate a discourse in class.²³⁰ The contents of law school case books are meticulously curated by subject matter and linearly organized within the particular subject,²³¹ and each case is digested to excise extraneous facts and tangential legal issues.²³² Casebook content also dispenses with editorial enhancements added to cases published in reports, such as synopses,

228. Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63, 73, 82 (2016) (observing that “[r]eading occupied much of the attorneys’ working hours”).

229. *Id.* at 99.

230. Austin, *supra* note 3, at 157.

231. *Id.* at 161 (noting the composition of casebooks “so that each decision had a discernable relation to those coming before and after,” adding “some new element or twist to current legal theory”).

232. *Id.* at 162.

headnotes, and key numbers.²³³ To prepare for class, law students focus on the assigned case readings to glean the legally relevant facts and the court's reasoning and holding for each case.²³⁴ In contrast to this regimented reading style, practitioners engage in a far more free-range style of learner-driven reading to facilitate self-education relevant to their clients' legal issues.²³⁵

Further, real world legal issues often remain in a state of flux, evolving during the arc of litigation, as attorneys sift through the parties' contentions, discover the underlying facts and issues of fact, and define and then refine legal issues. This evolving nature of real-world legal issues can prove challenging for both newer and seasoned attorneys. During ethnographic observations, junior associates "read to learn, to educate themselves, and to inform themselves so that they could handle situations or solve problems that, at times, had no immediate solutions."²³⁶ This required junior associates to efficiently read a wide variety of material. This efficient reading style varied in tempo from a quick skim to painstakingly slow and meticulous reading.²³⁷ For example, the cursory review of routine emails produced in discovery might take only a quick scan while a key portion of a relevant judicial opinion or contract provision might warrant a meticulous word by word review.²³⁸

To navigate legal research projects, practitioners rely extensively on secondary authority, particularly for orientation to unfamiliar legal issues and areas of the law.²³⁹ For example, practitioners unfamiliar with a legal issue often gravitate to

233. See WESTLAW, USING WEST'S NATIONAL REPORTER SYSTEM 2 (2009), <http://lscontent.westlaw.com/images/banner/documentation/2009/NationalReporter09.pdf>.

234. *Preparing for Class*, VILL. SCH. L., <https://www1.villanova.edu/villanova/law/currentstudents/academicsuccess/prepclass.html> (last visited Dec. 15, 2018).

235. Sinsheimer & Herring, *supra* note 228, at 73–74.

236. *Id.* at 73.

237. *Id.* (noting that lawyers "sometimes read quickly, sometimes painstakingly slowly, reading and rereading the same text, but they were always aware of the need to read efficiently and time-effectively").

238. *Id.*

239. *Id.*

legal treatises, encyclopedias, or practice-focused resources, both online and in print.²⁴⁰ Observers noted that junior associates frequently started research projects by accessing Wikipedia or Google to review general background information.²⁴¹ Both hardcopy and online secondary resources efficiently orient the legal researcher with accessible background information and annotations to relevant precedent, statutes, and regulations.²⁴² As an example, one observational excerpt described an associate navigating from a hard-copy legal treatise to alternating between Google and Westlaw to find the text of a statute referenced in the treatise and the reported case law related to the statute by using an online citator, Westlaw KeyCite.²⁴³

Notably, practitioners almost never crack open leftover law school casebooks as a secondary resource. The focus on black-letter law culled from excerpted cases in casebooks rarely proves useful as an efficient legal research tool. Thus, in contrast to most of the directed case book reading performed by law students, practitioners navigate a wide variety of secondary resources and interact with those resources in a free-form manner to self-educate regarding unfamiliar legal areas and to hone in upon relevant primary authority.

Practitioners also tend to use secondary authority as an aid to problematize and refine granular legal issues. Often, these narrow legal issues fielded by practitioners fall between the cracks of rules, statutes, precedent, and regulations. For example, a cursory review of the Federal Rules of Civil Procedure explains the availability of depositions as a discovery procedure.²⁴⁴ But a myriad of potential granular legal issues seemingly fall between the cracks of the rules. For example, the

240. TENIELLE FORDYCE-RUFF & KRISTINA RUNNING, *IDAHO LEGAL RESEARCH* 139 (2d ed. 2015).

241. Sinsheimer & Herring, *supra* note 228, at 84.

242. *Id.* at 81. Sinsheimer and Herring observe that attorneys “typically read secondary materials before turning to relevant judicial opinions.” *Id.* Thus, before researching case law, attorneys would “inform themselves generally in the area of law pertaining to an issue.” *Id.*

243. *Id.* at 84–86.

244. *See* FED. R. CIV. P. 30.

rules do not specify a physical location for depositions.²⁴⁵ Should depositions be taken at a courthouse, a court reporter's office, at the firm representing the plaintiff, or at the offices of the attorney representing the deponent? And if the deponent resides in another state or even a foreign country, the rules remain silent regarding who needs to travel, perhaps the deponent, counsel noticing the deposition, or maybe the court reporter.²⁴⁶ The rules also omit mention of who bears the cost of any travel required to attend discovery depositions.²⁴⁷ These types of narrow legal issues fall between the cracks of rules, statutes, and regulations, and tend to be addressed by custom, local rules, and precedent.²⁴⁸

Upon receipt of a deposition notice, an attorney needs to problematize any issues raised by the time, place, and location of the proposed deposition and efficiently seek solutions to these issues. While this process varies by issue and attorney, often secondary resources serve as an entry point for research to assist with both refining the legal issue and finding annotations to relevant materials.²⁴⁹ Beyond the heavy emphasis on secondary authority to refine legal issues and to serve as an entry point to access primary authority, practitioners also interact with primary authority differently than law students.²⁵⁰

245. *Id.*

246. *Id.*

247. *Id.*

248. *See, e.g.,* Pennington v. Cuprum, No. 1993-C-3887, 1996 WL 932082, at *80-81 (Pa. Ct. Com. Pl. July 2, 1996) (stating it is "unreasonably burdensome" [sic] for deponents to travel from Mexico to Pennsylvania and finding that the deposition should be held in Mexico, but that it was proper for the court to find defendant responsible for paying the travel costs); Econ Mktg. Inc. v. Side II Assocs. Ltd., No. 3975 Civil 1991, 1992 WL 573010, at *346-47 (Pa. Ct. Com. Pl. Dec. 10, 1992) (requiring that defendant pay the reasonable expenses incurred by deponent in responding to the notice of deposition).

249. Sinsheimer & Herring, *supra* note 228, at 80-82 (explaining practicing attorneys' use of secondary sources in order to familiarize themselves with a legal issue before turning to primary authority).

250. *See generally id.* at 81 (noting that "[w]hen the attorneys did use cases, it was in a focused manner," looking for cases with a specific situation in mind, quickly identifying relevant cases, and continuously thinking about more search terms to narrow down what would be relevant).

To efficiently navigate primary authority, practitioners rely on editorial enhancements such as synopses, headnotes, and key numbers, and readily utilize citators. Practitioners also engage in non-linear skimming of particular legal issues in order to rapidly assess the relevance of cases to the tasked research issues.²⁵¹ This nuanced, practitioner-style reading varies in tempo from a quick skim²⁵² to a focused, in-depth review of a particular case. For example, summarizing observations of one junior associate’s system of reading cases: the associate skimmed cases for relevance, quickly culled irrelevant precedent, and then closely read the relevant materials while the associate highlighted pertinent information “by tabbing or making notes, and question[ing] what he was reading and vocaliz[ing] potential theories.”²⁵³ To assess relevancy, the associate “relied on a narrative recounting of the case to analogize or distinguish his client’s situation.”²⁵⁴ While this system likely evolved to suit the needs of one associate, a successful practitioner develops some analogue to this system: basically a self-directed process to intuitively problematize legal issues and efficiently hone in upon relevant precedent to address clients’ legal issues.²⁵⁵ Not surprisingly, ethnographic observations reflect a tentativeness and uncertainty regarding such a process by newer associates not observed in more experienced peers.²⁵⁶

Beyond legal research related reading, such as cases, statutes, and rules, practitioners also read a wide variety of documents and correspondence.²⁵⁷ In particular, modern practitioners spend a significant amount of time reviewing email correspondence.²⁵⁸ Dependent on practice area and the nature

251. *Id.* at 83.

252. *Id.* at 81 (discussing observations of an attorney skimming cases while thinking of additional search terms).

253. *Id.* at 97.

254. *Id.*

255. *Id.* at 87.

256. *Id.* at 94.

257. *Id.* at 77.

258. *Id.* at 73.

of the legal dispute, practitioners routinely review a variety of correspondence and documents generated by clients, other parties to litigation, third parties, opposing counsel, and courts.²⁵⁹ This material may include emails, letters, pleadings, scheduling orders, discovery requests and responses, deposition transcripts, medical records, architectural drawings, accident reports, insurance agreements, commercial leases, transactional documents, and expert reports.²⁶⁰ As needed, practitioners also read non-legal authority and non-legal texts, including newspaper reports and online resources.²⁶¹

Practicing attorneys routinely review documents provided by clients for possible production during the course of discovery.²⁶² Attorneys also review documents produced either informally or via discovery from other parties, or by subpoena from non-parties. As one observer noted, the volume of time attorneys spent reviewing discovery documents proved “striking, particularly because relatively little time, if any, is spent in the traditional law school curriculum explicitly discussing the process or the reading skills associated with this type of task.”²⁶³ This multi-modal style of reading and review of documents tends to be foreign to the law student more accustomed to a routine of casebook reading to prepare for classes.

During document review, practitioners efficiently review and categorize the documents for legal relevance to the dispute, broader relevance in terms of discoverability, confidentiality, and for privileges and protections from discovery.²⁶⁴ In addition, as the practitioner categorizes each document, she must also be mindful of potential utility of each document as part of the discovery process. For example, a lengthy email

259. *Id.* at 74.

260. *Id.* at 74–75 (denoting an extensive bullet-pointed list of documents observers noted attorneys reviewed over a three-year period).

261. *Id.* at 75–76.

262. *Id.* at 77.

263. *Id.*

264. *Id.*

chain may illuminate the existence of additional fact witnesses and documents.

The practitioner must not only review a wide variety of documents through a multi-modal lens, she must organize this disaggregated information into a linear format.²⁶⁵ Thus, document review entails an ongoing effort to organize, synthesize, and categorize relevant information throughout the arc of a legal dispute. Often, practitioners create an evolving storyline to process the factual details of a client’s dispute and create malleable framework of relevance for coalescing legal issues.²⁶⁶ This requires that documents and information be continually reevaluated, filtered, and re-categorized as the factual details and disputes clarify and the relevant legal issues evolve. Observers noted numerous strategies employed by junior associates to manage this complex and on-going process.²⁶⁷

One junior associate sought to construct a timeline to organize the limited information provided by a partner and a complaint alleging breach of contract by a client.²⁶⁸ During a subsequent document review, the associate “tr[ie]d to put the information into story form, construct[ing] a simple narrative [as she] read through additional information from her client and tried to get a handle on her client’s claim.”²⁶⁹ The associate narrated the evolving story by summarizing the content of documents.²⁷⁰ For example, after reading an email chain between the client and the broker asserting breach of contract, the associate explained: “Our company is telling the broker to put ‘a hold on your activities.’”²⁷¹ With this method, the junior associate constructed a tentative narrative to evaluate the case.²⁷² For the junior associate, this process also seemed to yield

265. *Id.* at 88.

266. *Id.* at 89.

267. *Id.* at 90.

268. *Id.* at 88.

269. *Id.* at 89.

270. *Id.*

271. *Id.*

272. *Id.*

a theory of relevance for the case.²⁷³ Observations of more senior attorneys revealed similar narrative methods of organizing material into a client story or timeline to conceive a sense of relevance to the case.²⁷⁴ Not surprisingly, this process appeared to be more refined for more senior attorneys.²⁷⁵

For example, an experienced attorney trying primarily employment discrimination cases exhibited significant autonomy and expertise as “[s]he engaged in a sorting and categorizing process that reflected a deep understanding of how a case progressed, and she was able to efficiently scan for information she wanted, probe the text, and envision how to use the information gleaned.”²⁷⁶ Thus, the highly experienced attorney both anticipated possible problems and contemplated potential solutions while reviewing her client’s documents.²⁷⁷ For example, as she reviewed documents, she considered propounding interrogatories to prepare for the possibility that a witness might be unavailable for a discovery deposition.²⁷⁸ Perhaps this high level of efficiency and functional autonomy epitomizes many of the attributes of a practice-ready attorney.

To summarize, newer attorneys spend a significant amount of time reading a wide variety of documents. Unlike the law school student’s refined and directed casebook readings, practicing attorneys read an unbounded variety of documents in a varying manner, from a quick skim to a detailed study. Particularly during document review, practicing attorneys also must process disaggregated factual details of a client’s dispute into an evolving storyline. But in addition to voracious reading, newer attorneys often simultaneously produce a diverse range of written work product.

273. *Id.* (noting that as the associate read the facts and constructed her tentative narrative, “[s]he was mentally evaluating the case, considering what was relevant”).

274. *Id.* at 40 (noting that similar to the junior associate, a more senior associate also “read with the client’s story in mind and was thinking through the strengths and weakness of his client’s case as he read”).

275. *Id.* at 43.

276. *Id.*

277. *Id.*

278. *Id.*

2. *Writing for the practice: a varied craft of synergistically integrating readings and upcycled forms to produce work product*

Writing for a civil litigation practice also varies significantly from law school writing. Law school writing curriculums include a first-year introduction to legal writing and research.²⁷⁹ Generally, these courses include an introduction to drafting objective legal memos.²⁸⁰ Often, introductory courses include a persuasive writing component culminating in drafting an appellate brief.²⁸¹ Law schools scaffold this introduction with a requirement that students also complete an upper-division legal writing course.²⁸² Nonetheless, the skill set acquired by students during introductory legal writing and research courses tends to atrophy during the second and third years of law school as students take required and elective courses that include scant feedback, let alone formative assessment, of legal writing. Beyond the introductory legal research and writing coursework, most of writing in the law school curriculum consists of drafting essay answers under test conditions.

Practitioner-style legal writing often differs significantly from law school legal writing. Newer attorneys draft a wide swath of documents.²⁸³ Many of these documents relate to litigation, including pleadings, motions, briefs, and discovery requests.²⁸⁴ Observationally, much of the legal writing performed by newer attorneys consists of drafting email correspondence.²⁸⁵ But

279. See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, at 16 (2016) (mandating 1L curriculums include a “writing experience”).

280. AM. BAR ASS'N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 21 (2d ed. 2006). The most recent survey of legal writing programs conducted by the Associate of Legal Writing Directors and the Legal Writing Institute notes that 100% of the 194 responding schools assigned an office memorandum in the required program, and that over 50% of schools assign email memos, client letters, pretrial briefs, and appellate briefs. ASS'N OF LEGAL WRITING DIRS./LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 2015, at xi (2015) [hereinafter ALWD SURVEY], <http://www.alwd.org/wp-content/uploads/2017/03/2015-survey.pdf>.

281. See AM. BAR ASS'N, *supra* note 279.

282. See ALWD SURVEY, *supra* note 280, at x.

283. Sinsheimer & Herring, *supra* note 228, at 43 (noting that junior associates were observed “working on a large variety of documents”).

284. *Id.* at 43–44.

285. *Id.* at 45.

newer attorneys draft few law school style legal memorandums.²⁸⁶ Instead, attorneys often summarize and communicate research findings informally via email correspondence.²⁸⁷

Further, law students write for a sophisticated audience: law professors in their professed area of putative expertise. In contrast, practitioners write to a far more diverse audience. Practitioners devote a significant amount of time to drafting email correspondence for varied audiences that include coworkers, supervising attorneys, clients, and both collaborating and opposing counsel.²⁸⁸ As such, the audience for practitioner writing ranges from unsophisticated clients struggling to understand their legal issues to senior counsel well-versed in particular legal issues.

This wide and varied audience requires that attorneys calibrate their legal writing for the needs of both a primary audience and potential secondary audiences. For example, a cease and desist letter in a trademark dispute might only be addressed to a small business owner, yet copies of this correspondence may land on the desk of counsel for said small business, the insurance adjuster for an insurer of the business, and even a media outlet.²⁸⁹ Given this varied potential audience, successful practitioners hone the tone and content of their work product for both expected and potential audiences.²⁹⁰

Additionally, much of the work product produced by newer attorneys is ghostwritten for later use by senior attorneys.²⁹¹ As

286. *Id.* at 43 (“In contrast to what is taught in the traditional first-year legal writing course, these associates wrote few formal legal memoranda.”).

287. *Id.* at 45.

288. *Id.* (noting that during observations, seven attorneys drafted “hundreds of emails” to “supervising attorneys, other associates, paralegals, collaborating attorneys outside the firm, opposing counsel, and to clients”).

289. Aaron Gulley, *The War on Specialized*, OUTSIDE ONLINE (Dec. 16, 2013), <https://www.outsideonline.com/1920596/war-specialized>.

290. Sinsheimer & Herring, *supra* note 228, at 48 (summarizing excerpts of observations of a junior associate as she “constantly considered the tone and appropriateness of her choice of language within her emails”).

291. *Id.* at 54 (noting that in the litigation group observed at a large firm, junior associates typically worked as ghostwriters for senior partners).

such, successful newer attorneys learn to emulate the tone and content of their supervisors’ work product.²⁹² For example, one junior associate—cognizant of the need to emulate the style of assigning partners—often began writing projects by searching her firm’s database to try to glean the particular partner’s writing style.²⁹³ Thus, newer attorneys must also emulate the tone and style of senior attorneys to produce ghostwritten work product appropriate for both anticipated and potential audiences.

Beyond drafting for a varied audience, legal writing in practice tends to be far more unfiltered than law school legal writing. Many law school legal writing tasks are meticulously curated²⁹⁴ and often confined to a closed research universe.²⁹⁵ Similarly, law school essay exams predictably cover material in a particular subject.²⁹⁶ Just as bar examinees can struggle with cross-over questions, new attorneys may feel unprepared for the free-range nature of their real clients’ unrefined legal disputes.²⁹⁷ As such, new attorneys must learn the self-directed skill of distilling their clients’ disputes into granular legal issues, then researching and discussing the issues in objective and persuasive written formats.

Practitioners also approach legal writing tasks from a different angle than law students. Generally, law students must

292. *Id.*

293. *Id.*

294. See, e.g., Lorraine Bannai et al., *Sailing Through Designing Memo Assignments*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 193, 195–200 (1999) (detailing the top ten mistakes in creating fact patterns); Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163, 165–68 (1997).

295. The most recent survey of legal writing programs conducted by the Associate of Legal Writing Directors and the Legal Writing Institute reports that 154 law schools use a combination of open and closed-universe assignments in their required first-year legal writing courses and that twenty-four law schools use exclusively closed-universe assignments in their required first-year legal writing courses. ALWD SURVEY, *supra* note 280, at 12. Only thirty-seven law schools used exclusively open-universe assignments. *Id.*

296. RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* 4–13 (2012) (discussing the logical progression of casebook reading in a typical immersion course in law school to the essay exam for the course).

297. Sinsheimer & Herring, *supra* note 228, at 55–56 (observing the frustration of a junior associate tasked with drafting a mortgage foreclosure complaint without sufficient background knowledge or experience).

produce their own work product in its entirety. As an assurance that students produce their own work product, law schools prohibit plagiarism and require proper attribution of any resources used to generate most student work.²⁹⁸ From a pedagogical perspective, this approach ensures grading equity, in that students can be assessed entirely on their own legal writing skills. This approach also mirrors bar testing conditions. In contrast, practitioners rarely start a project facing a blinking cursor on a blank screen.²⁹⁹

Instead, practitioners rely heavily on a wide variety of commercial and non-commercial secondary resources, often amalgamating material from forms gleaned from various sources. These forms may include the practitioner's prior work product from other matters, forms culled from firm databases and brief banks, and the work product of other attorneys cached from other matters.³⁰⁰ This pragmatic drafting process tends to intertwine simultaneous drafting with reading,³⁰¹ often coupled with performing legal research.³⁰²

For example, drafting a complaint may commence with adapting a pleading format from another matter, recycling some content from another complaint, engrafting additional claims culled from pattern jury instructions, and including verification from another pleading. But this organic process of generating work product involves no attribution to the sources and resources used and even copied while drafting.

298. See, e.g., CORNELL LAW SCHOOL, LAW SCHOOL CODE OF ACADEMIC INTEGRITY 6-7 (1999), https://support.law.cornell.edu/students/forms/Law_School_Code_of_Academic_Integrity.pdf (prohibiting “[k]nowingly representing work of others as one’s own”).

299. Sinsheimer & Herring, *supra* note 228, at 48 (noting that, during observations, attorneys rarely started writing tasks from scratch, instead adapting prior templates and documents “to fit their needs”).

300. *Id.* (noting that newer attorneys were observed using templates and “sometimes found a similar document housed on their firms’ databases”).

301. *Id.* at 53 (discussing a seventy-three-minute period of observation during which a fifth-year associate drafting a brief “transitioned eight times from writing to reading, spending only [twenty-two] minutes on writing”).

302. *Id.* at 48 (observing one attorney drafting a brief by recycling a brief on the same issue, who “just changed words from that brief to fit specifics of this motion and Shepardized the case law that was used”).

Practitioners readily cite to primary authority and commercially published secondary sources to demonstrate the support for particular legal propositions.³⁰³ However, practitioners do not tend to cite or otherwise provide any attribution for the wide swath of non-commercial secondary materials routinely recycled, adapted, and even copied verbatim to generate pleading and practice documents.³⁰⁴ This evolutionary process of adaptation and recycling of work product was fueled by technical advancements including word-processing, copying and scanning, and the growth of the internet.³⁰⁵ In particular, the proliferation of electronic docketing and document filing allows practitioners to access an unprecedented volume of non-commercial pleadings and practice documents.

As a consequence, practice documents tend to reverberate with emulative material, from formatting, to content, and even individual word choice.³⁰⁶ The primary limits on this unattributed borrowing in practice documents tend to arise in the context of blatant plagiarism accompanied by a varnish of

303. See BEAU STEENKEN & TINA M. BROOKS, *SOURCES OF AMERICAN LAW: AN INTRODUCTION TO LEGAL RESEARCH* 28, 155–56, 175 (2015).

304. Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 *CATH. U. L. REV.* 777, 804–05 (2008) (highlighting the special leeway enjoyed by practicing attorneys in the use of previously drafted documents, which in a scholastic setting would generally be viewed as plagiarism); N.Y. ETHICS OPINION 2018-3 (N.Y. ST. B. ASS’N COMM. PROF. ETHICS), 2018 WL 4608938 (opining that the verbatim usage of another’s legal writing in briefs and other court filings is not an ethics issue in light of the litigation norms that lawyers routinely copy from form books and recycle prior briefing without attribution).

305. Sheppard, *supra* note 65, at 253–54 (showcasing a selection of databases permitting attorneys to quickly access a wide range of legal documents and filings).

306. K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32 *COLO. LAW.* 53, 53 (2003) (noting that “[t]he legal profession was built on borrowing” and finding that practitioners “frequently borrow ideas as well as the language in forms”); *Fed. Intermediate Credit Bank of Louisville v. Kentucky Bar Ass’n*, 540 S.W.2d 14, 16 n.2 (Ky. 1976) (“Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer’s adopting another’s work, thus becoming the ‘drafter’ in the sense that he accepts responsibility for it.”).

deceit³⁰⁷ or inadequate diligence.³⁰⁸ In addition, copyright law may afford a remedy for the outright copying of practice documents in violation of the prior author's rights.³⁰⁹ But subject to these limits, unattributed borrowing is generally accepted in the practice.³¹⁰ Anecdotally, this drafting method of amalgamating recycled, adapted, and copied material yields practice documents that tend to be far more voluminous than the "short and plain" pleadings envisioned by the Federal Rules of Civil Procedure.³¹¹ But this drafting method proves both efficient and somewhat predictably reliable.

Regarding efficiency, drafting from a blank screen takes far more time and effort than starting with templates and forms. Regarding reliability, in the superstitious realm of litigation, practitioners take comfort in recycling work product that previously proved reliable, from causes of action in a complaint to the provisions of a complex settlement agreement.³¹² But newer attorneys can struggle to learn to cull and adapt appropriate templates and forms.³¹³ This skillset, or art, of locating, assaying, and adapting appropriate materials to craft

307. *Id.* at 54 (noting judicial sanctions occasioned "when one of the objectives of submitting another's work was deception or financial gain"); Iowa Supreme Court Bd. of Prof'l Ethics v. Lane, 642 N.W.2d 296, 297, 300–01 (Iowa 2002) (suspending the license of an attorney following the request of excessive fees of \$16,000 allegedly incurred drafting post-trial brief that included a legal argument consisting of "eighteen pages of plagiarized material, including both text and footnotes" from a legal treatise without attribution).

308. *See In re Mundie*, 453 F. App'x 9, 10 (2d Cir. 2011) (attorney sanctioned in part for submitting a plagiarized brief in an immigration proceeding without adapting the brief to the facts and issues of his case, thus, misstating the petitioner's name and gender and discussing irrelevant facts and issues).

309. *See* N.Y. ETHICS OPINION 2018-3, *supra* note 304, at *12 n.2.

310. *Id.* at *1 (discussing the ethics of the "verbatim use of another's writing" without attribution in briefing and noting that "legal briefs are submitted to present an argument on behalf of a client, and their value derives from their persuasiveness, not from their originality of thought or expression").

311. *See* FED. R. CIV. P. 8(a)(2) (requiring that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

312. *See generally* Benjamin G. Shatz & Colin McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing*, 26 CAL. LITIG. 14 (2013) (discussing lawyers' re-use of work products and whether courts approve of recycled use).

313. Sinsheimer & Herring, *supra* note 228, at 109–10 (observing a junior associate's frustrations as he navigates his firm's proprietary document system unsure which document template to utilize).

legal documents is not incorporated into the traditional law school curriculum.

To summarize, newer attorneys spend a significant volume of time writing, and ghostwriting, a wide-variety of documents, from email correspondence to pleadings and pretrial motions. Practicing attorneys rarely begin assignments with a blinking cursor, but rather amalgamate and adapt secondary resources to efficiently create a wide variety of practice documents.

III. DESIGNING A COURSE TO TEACH PRACTITIONER-STYLE UNFILTERED READING AND ADAPTIVE WRITING

This Article proposes requiring an upper-division legal writing course designed to cover the aspects of practice most apt to be routinely encountered by newer attorneys. Whether as contractors, solo practitioners, or law firm associates, most newly minted attorneys are destined for private practice, where they will most likely focus predominately on civil litigation.³¹⁴ These new attorneys will devote most of their time to unfiltered practitioner-style reading, and correspondence, pleadings, and pretrial motions drafting.

Given the infrequency of trials in modern civil litigation and even fewer cases proceeding to an appeal,³¹⁵ the proposed course focuses on civil litigation from the inception of a dispute through dispositive motion practice. But in conceiving such a course, care should be taken to avoid creating a pleading drafting course akin to a class at trade school. Given the velocity of change in the practice of law, coupled with the unpredictable nature of litigation, the course should focus on the development of an adaptive skill set designed to foster intellectual curiosity and continual self-learning. “Someone once said that education

314. See generally Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 889 (2012) (explaining that “three-fourths of all attorneys work in private practice”).

315. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIG. ONLINE 2, 2 (2004), https://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf.

was knowing what to do when you don't know."³¹⁶ The practice of law invariably involves a myriad of moments "when you don't know." Thus, the content of the course should create a foundational familiarity with professional correspondence, pretrial civil litigation pleadings, and pretrial motions. But as the course progresses, the foundational content can recede to facilitate scaffolding and spur self-sufficient student learning. Students are expected to exhibit a mastery of structure, organization, grammar, and punctuation. Students should also exhibit a mastery of basic legal citation and legal research. Students are evaluated on these skills in each of the substantive writing assignments in the proposed course.

Loosely based on actual case files from a civil litigation practice, the proposed course commences with a memorandum from a senior partner outlining a fictional client's legal dispute accompanied by a few key documents related to the dispute. Like practitioners, the students will focus on case evaluation, working collaboratively in groups to evaluate a client's dispute, and researching the potential legal issues raised by the dispute. Together, the student groups move from objective evaluation to distilling their client's dispute into legal issues. Students use practitioner-style, free-range research skills and unfiltered legal writing skills to produce pretrial legal documents in three modules of the course that include: (1) complaints, (2) discovery requests and discovery responses, and (3) motions, memorandums, and affidavits, as well as a variety of professional correspondence throughout the course.

A. Refining a Dispute into Legal Issues, Drafting Professional Correspondence, and Drafting the Complaint

The first module of the proposed class emphasizes pre-litigation planning, professional correspondence, and drafting pleadings. The students begin with case evaluation, honing the

316. MICHAEL LEWIS, *THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS* 140 (2016) (quoting an influential student comment to Nobel Prize-winning psychology professor Daniel Kahneman).

ability to objectively evaluate a client’s dispute and breakdown this dispute into legal issues. The students work together in small “law firm” groups used throughout the proposed course to provide a forum for students to work collaboratively.³¹⁷ For students versed in studying casebooks organized by subject area,³¹⁸ the blank canvas for developing legal theories may seem foreign. But working in their law firms, students can begin by brainstorming a list of legal protections that may be infringed by the wrongful acts or omissions described by their client. The students learn to move from objective evaluation to refined legal issues to strategic decision-making by determining the strength of potential claims.

Regardless of the practice setting, practicing attorneys devote a significant amount of time to drafting professional correspondence.³¹⁹ This correspondence serves a variety of purposes and must be tailored for various intended and incidental audiences, including clients, opposing counsel, insurers, third parties, and courts. While drafting professional correspondence may seem intuitive to seasoned practitioners, law students can struggle to transfer their legal writing skills beyond objective legal memorandums and persuasive briefs. For this reason, students in the course focus on drafting a variety of professional correspondence honed for various

317. Law school often seems to be a solitary journey of individual achievement. But practicing attorneys must work collaboratively both within firms and externally with clients, insurance adjusters, experts, other attorneys, and judges. For this reason, the proposed course focuses on collaboration and teamwork. See Julia Hayhoe & Larry Richard, *The Secret Lives of Teams*, 28 AM. LAW. 59, 59 (2006) (“Effective teamwork is critical to law firms. Increasingly, clients expect firms to work effectively across departments, offices, and even jurisdictions.”).

318. MCKINNEY, *supra* note 296, at 4–5 (noting that traditional casebooks focus on one broad area of the law, then divided into sub-topics, and the cases within are “carefully selected and carefully edited by the casebook author based on what the author wants [the students] to learn”).

319. Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 MISS. C. L. REV. 419, 435–36 (2014) (noting that letters were the most often drafted documents by surveyed alumni of University of Dayton School of Law).

audiences, considering both primary recipients and the “foreseeable audience” of the correspondence.³²⁰

Students draft three pieces of correspondence: an engagement letter, followed by a demand letter directed to a potential defendant, and finally an email to opposing counsel confirming an extension to respond to discovery. This correspondence affords the opportunity to draft both objective and persuasive correspondence. Students learn to consider the purpose of particular correspondence³²¹ and how to calibrate the tone and content of correspondence for both the primary and potential secondary audiences. The engagement letter provides the perfect vehicle to introduce practitioner-style drafting. Students are encouraged to look to a variety of forms and examples for inspiration. But to ensure grading equity, students are not permitted to plagiarize secondary resources. Like most assignments in the proposed course, the student correspondence is lightly graded with comments providing formative assessment. Additionally, a model answer is provided, purportedly representing the final document sent out by the fictional senior partner. Inspired by actual correspondence, the model answers and the class discussion of the model answers provide an additional formative assessment loop.

Next, students draft a demand letter to an adverse party. Drafting a demand letter provides an opportunity for students to explore crafting effective persuasive correspondence. An effective demand letter can resolve a legal dispute without the need to resort to litigation, while a poorly conceived demand letter can accelerate a dispute toward litigation. For pedagogical purposes, the students direct their demand letter to an unrepresented potential defendant, to reinforce the efficacy of using plain English in legal writing and add the overlay of

320. For example, while an alleged tortfeasor may be the recipient of a demand letter, the foreseeable audience could encompass insurance adjusters, in-house counsel, and a swath of the public via social media or press coverage. See KAMELA BRIDGES & WAYNE SCHIESS, *WRITING FOR LITIGATION* 21 (2011) (discussing the audience of a demand letter).

321. To inquire, inform, persuade, acknowledge, or a combination of the aforementioned.

professionalism and civility required for communications directed at non-lawyers.³²² Students perform the requisite due diligence on their clients’ claims,³²³ organize the content of their letter, and hone an appropriate tone to optimize the potential of resolving the legal issue while cognizant of the ethical³²⁴ and legal obligations inherent in communicating with unrepresented parties.³²⁵

Next, students research and draft a complaint and demand for jury trial for filing in district courts.³²⁶ A group discussion introduces the multiple purposes served by the complaint,³²⁷ from commencing litigation to invoking insurance coverage for claims.³²⁸ As an in-class exercise, students review and discuss a sample complaint,³²⁹ noting the style and content of the caption, discussing the legal allegations regarding the parties, jurisdiction, venue, the factual allegations (including allegations based on information and belief),³³⁰ the causes of action, prayer for relief, and demand for jury trial. To conceive causes of action, the student groups utilize precedent civil jury instructions as a resource to determine the elements of legal

322. See *Lawyers’ Duties to Other Counsel and to the Court*, A.B.A. (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties/ (“In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.”).

323. This due diligence includes a factual investigation and legal research sufficient to support the assertions of the demand letter.

324. See MODEL RULES OF PROF’L CONDUCT r. 4.1 (A.B.A. 1983) (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”).

325. See *id.* at r. 4.3.

326. See FED. R. CIV. P. 8(a).

327. See BRIDGES & SCHIESS, *supra* note 320, at 30.

328. *Id.* (noting that liability policies commonly contain a contractual duty to defend, and that whether this duty is deemed to be triggered generally turns on the allegations within the four corners of the complaint).

329. The sample complaint discussed in class consists of a complaint filed in federal district court in another jurisdiction, juxtaposed with state specific material, to afford the opportunity to also learn about varying regional practice styles and local court rules.

330. Rule 11(b) contemplates information and belief pleading, providing that the signature on a pleading “certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that there is a basis for the allegation. FED. R. CIV. P. 11(b).

claims. Starting with the format gleaned from a sample complaint from an unrelated matter, each student drafts a complaint that includes the three main causes of action agreed upon as a class and a wild-card claim chosen by each student.

As with correspondence, the student complaints are graded with individual feedback and comments. The students also receive a model complaint purportedly filed in the case. This complaint purposefully models the concise and flexible notice pleading³³¹ style discussed in class, attaches a key document as an exhibit, and includes verification in anticipation of seeking injunctive relief. To emulate the uncertainties inherent in litigation, the model complaint also includes a claim that raises a federal question³³² allowing the case to be removed to federal court. Removal allows the course content to reinforce the bar tested Federal Rules of Civil Procedure³³³ during the remainder of the course.

B. *Introduction to Discovery Practice*

The second module of the course focuses on discovery, with the student groups drafting a set of interrogatories, requests for production, and requests for admission and also responding to discovery purportedly propounded by a defendant. For these two discovery assignments, 75% of each student's grade is based on the work product produced by the student's group. Twenty-five percent of the grade is based upon a peer assessment of each student's contribution using a teamwork rubric to gauge the collaborative effort of each student. The

331. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To satisfy this pleading requirement, a complainant need only give the defendant "fair notice of what the plaintiffs' claim is and the grounds upon which it rests." *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

332. The U.S. Code confers upon federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2018) (granting, statutorily, what is commonly referred to as federal question jurisdiction, which serves as an all-purpose jurisdictional statute).

333. *Multistate Bar Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mbe/preparing/> (last visited Dec. 15, 2018) (noting that the Multistate Bar Examination commenced testing Federal Civil Procedure as a subject area in February 2015).

teamwork rubric explains the performance expectations and assesses points in five categories: contribution, problem-solving, attitude, focus on the task, and working with others. This teamwork component of the grade is calculated by averaging the scores of the teamwork rubrics submitted by the other members of the law firm.

First, the student law firms research and collaboratively draft the set of discovery documents listed above. Again, the student drafted discovery is lightly graded with formative feedback provided to each student group in the form of discovery purportedly propounded by a defendant. The discovery documents will be marked up with the hypothetical client’s hand-written responses that include relevant and irrelevant material, and the client’s editorial comments. This discovery is purposefully drafted to represent practitioner quality work product that includes objectionable queries.

The hypothetical client also provides the students with a document dump consisting of scanned, Bates-numbered documents, that include correspondence, emails, and contracts. By design, these documents include legally relevant documents, discoverable documents, privileged communications, work product, and some completely irrelevant documents. The document review component of this assignment introduces a fundamental skill essential to civil litigation—the ability to rapidly review a variety of documents while assaying each document’s discoverability and legal relevance to the dispute, and also reviewing the documents for privileges and work product.

As commonly occurs in actual litigation, the hypothetical client belatedly provides this material, necessitating an extension to respond to discovery. After confirming an extension to respond to the defendant’s discovery with a professional email, each student law firm drafts discovery responses and interposes appropriate objections based on additional documentation and rough answers provided by the hypothetical client. In addition, each student law firm prepares a detailed privilege log to accompany the discovery responses.

C. Pretrial Motion Practice

For the students' first foray into motion practice, they draft a motion for a preliminary injunction and supporting memorandum. A class discussion orients students to the origins, purposes, and types of injunctions. The class discussion focuses on Federal Rule of Civil Procedure 65 and the equitable factors considered by courts deciding motions for a preliminary injunction. Because preliminary injunctions are used to equitably maintain the status quo in litigation pending a determination upon the merits,³³⁴ the preliminary injunction provides a good vehicle for students to explore the interplay between the Federal Rules of Civil Procedure, state substantive law claims, general principles of equity, and overlays of public policy.

As the first brush with motion practice, the class discussion includes an overview of a motion for preliminary injunction. In deciding whether to grant a preliminary injunction, courts consider four equitable factors: the likelihood of success on the merits of the underlying litigation, whether immediate irreparable harm will result if the relief is not granted, whether the balance of hardships to the parties weighs in the movant's favor, and whether the public interest is best served by granting the injunctive relief.³³⁵ With a focused group activity, the students explore each of these factors.

Each student drafts a Motion for Preliminary Injunction and a Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, the latter including a background section, the applicable legal standard, a discussion section, and a conclusion. As with all assignments, the students receive detailed feedback on this assignment.

Last, the course covers dispositive motion practice. By design, the model complaint and documents obtained during discovery reveal a legal claim most likely ripe for summary adjudication. Another claim remains infused with potential issues of fact that

334. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

335. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

most likely preclude summary judgment. A third claim, weakened during discovery, gives the defense an opportunity to seek summary judgment. The students submit a draft discussion section for their supporting memorandum, briefing the first two claims. This section is returned with formative feedback and serves as the subject of an individual conference.³³⁶ Thereafter, the students submit a complete motion package consisting of a motion for partial summary judgment, supporting memorandum, and client affidavit.

In their substantive writing assignments, primarily the memorandums in support of preliminary injunction and partial summary judgment, students refine and master basic persuasive techniques. Students are expected to have mastered the basic organizational paradigm for legal writing and should begin to show understanding of when and how to manipulate the basic organizational paradigm for persuasive purposes. In readings and via in-class group activities, students are introduced to more advanced persuasive techniques. Students are expected to exhibit a mastery of structure, organization, grammar, and punctuation. Students should also exhibit mastery of basic legal citation and legal research. Students are evaluated on these skills in each of the substantive writing assignments in the proposed course.

CONCLUSION

A heightened velocity of change enveloped the legal profession over the last two decades. From big law to rural practitioners, the traditional law firm model proved ripe for disruption.³³⁷ This disruption has been fueled by several discrete changes in how legal services are provided that cumulatively generated a substantial disruption across the board.³³⁸ They include: technological advances that allow for

336. This allows the course to fulfill the ABA requirements regarding the form and extent of individualized assessment for writing courses. *See* AM. BAR ASS'N, *supra* note 279, at 17.

337. *See supra* Part III.

338. *See id.*

the automation of many routine tasks and the disaggregation of legal services; enhanced client sophistication and cost-consciousness; global competition from offshoring routine legal services; the rise of the domestic gig economy, creating a new wave of home-shoring legal services; and competition from non-traditional legal services providers.³³⁹ In the face of declining revenues, rapid systemic changes, and burgeoning competition from near and far, law firms have shuttered many of the traditional mentorship opportunities for new attorneys.³⁴⁰ Firms have also curtailed many once-billable activities that formerly served as the profitable training grounds for new associates at law firms.³⁴¹

Given this new norm, students must emerge from law school both ready for practice and prepared to immediately generate revenue, whether they ply their practice-ready skills as contractors, associates, in-house counsel, or solo practitioners. This Article proposes designing a required, upper-division legal writing class that incorporates the skills most needed by new attorneys entering the practice of law. The data shows that most new lawyers are destined for private practice, whether with small firms or as solo practitioners, and most likely, this private practice will include civil litigation. Since most civil litigation resolves by settlement or dispositive motion, new lawyers will focus primarily on pretrial civil litigation. Given this reality, students need an upper-division legal research and writing course designed to introduce practice-style legal research and writing. This course would serve as an analogue to introduce the pretrial civil litigation skills most needed by new attorneys.

339. *See id.*

340. *See supra* Section II.E.3.

341. *See id.*