

# CHAPTER 1

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## LEGAL WRITING AS AN ETHICAL PRACTICE

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### I INTRODUCTION

In this book, we hope to encourage the development of legal writing skills, a love for the craft of writing, and an appreciation that legal writing is always an inherently ethical practice. In our view, good legal writing is based upon an ethical awareness of, and respect for, self and other; upon an awareness of the norms and conventions of the legal profession's community of practice; and upon fundamental professional ethical obligations such as honesty, civility, competence, duty to law and duty to the client. We believe that an appreciation of these ethical dimensions of legal writing can produce not only better legal writers but also better legal practitioners.

We often take writing for granted – possibly because it is so fundamental to contemporary life:

Writing has become central in the workplace, in education, and to our personal lives. In the realm of the personal, much social communication has moved online, to such settings as e-mail, texting programs for mobile phones, blogs, vlogs, and social networks ... In the professional sphere, written reporting of all kinds has become central to management, and as such, on-the-job writing has become a 'marker of high-skill, high-wage, professional work' ... Finally, in terms of education, many states have mandated critical, persuasive, and **analytical writing** assessments, pushing teachers to include a greater emphasis on writing throughout the curriculum ... All of these trends suggest that writing skills are becoming more vital than ever in the technology rich environments that have begun to infuse all spheres of our lives.<sup>1</sup>

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1 Alecia Marie Magnifico, 'Writing for Whom? Cognition, Motivation and a Writer's Audience' (2010) 45(3) *Educational Psychologist* 167, 167 (refs omitted).

As a professional practice, writing is at the very heart of lawyering: it has been said that ‘[l]awyering is a craft at the center of which is communication’.<sup>2</sup> If you are a law student, learning legal writing is not only a matter of skill development. Learning legal writing is fundamental to your own development as a lawyer: writing has been described as ‘thinking on paper’,<sup>3</sup> so learning to ‘write like a lawyer’ is inextricably linked to learning to ‘think like a lawyer’ and so to the development of your own professional identity.

In this chapter, we begin by outlining the relationship between legal writing and legal professional ethics in legal education. We turn then to the conventional mode of legal writing instruction – formalism – and the criticisms that have been made of that approach. We then consider an alternative view of legal writing that emphasises process, **mastery**, awareness of the **discourse community** and appreciation of professional obligations. Finally, we consider the implications of this alternative mode of writing instruction and the benefits of breaking down the boundaries between legal writing and ethics.

At the most basic level, this chapter outlines the fundamental professional obligations in legal writing, such as competence and honesty. If you are a law student, understanding the approach your law school takes to legal writing will help you understand what is expected of you. More importantly, though, we hope this chapter will encourage you to reflect upon the ethics of legal writing and thus begin to develop your own professional identity as a legal writer within a wider community of practice.

We begin by outlining the conventional view of legal writing taken in many law schools, in both the US and Australia. From here, we outline the ethical aspects of legal writing. These include an ethical awareness of self and other; an ethical awareness of the community of practice; and an ethical awareness of professional responsibility.

Throughout this book, we model the ethical obligation of referencing the ideas and words of others. You will thus see that the book is footnoted throughout, using the style of the *Australian Guide to Legal Citation* (AGLC). Although correct referencing in legal writing is emphasised in all law schools, many students view this emphasis as a compliance issue rather than an ethical issue. But all writing builds on the work of others, and this work should be acknowledged. At the same time, good referencing is important to the reader, providing them with the information needed to follow up on a point or read further. Referencing in legal writing is thus an essential aspect of the ethical awareness of self and other, discussed below.

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2 Terrill Pollman, ‘Building a Tower of Babel or Building a Discipline? Talking About Legal Writing’ (2002) 85 *Marquette Law Review* 887, 892.

3 Grant Wiggins, ‘EJ in Focus: Real-world Writing: Making Purpose and Audience Matter’ (2009) 98(5) *The English Journal* 29, 32, quoting the US National Commission on Writing.

## II THE RELATIONSHIP BETWEEN LEGAL WRITING AND LEGAL PROFESSIONAL ETHICS

In orthodox legal education in Australia, legal writing is taught either as a stand-alone subject or as part of an introductory course. It may be linked to the content of a substantive subject but it is rarely linked to professional ethics. Taught as a stand-alone course or embedded in one or more subjects, the tendency is to teach legal writing in a **formalistic** and **technocratic** way, focusing primarily upon grammar, structure and genre. We argue that legal education would benefit by breaking down the boundaries between legal writing instruction and ethics. As we have already noted, in our view, good legal writing is an inherently ethical practice: it is based upon an awareness of, and respect for, the other; upon **reflection** and **reflexivity**; upon an awareness of the norms and conventions of the legal profession; and upon the fundamental professional ethical obligations of honesty, civility, competence, and duty to law. We maintain that changing the way we teach legal writing by acknowledging its inherently ethical foundations could potentially enrich the instruction of legal writing, create better legal writers and develop legal practitioners who are more ethically aware.

When we look at the literature, although a good deal has been written about legal ethics, and about legal writing, the two are generally kept separate. There are some notable exceptions. As far as legal writing is concerned, over 15 years ago now, Bell and Pether argued that ethical considerations are ineluctably a part of legal writing;<sup>4</sup> some years earlier, Johns had argued that ‘a legal writing course should cover the professional responsibility issues that arise in the writing assignments’.<sup>5</sup> More recently, Weresh suggests that ‘by incorporating a study of ethics and professionalism into our courses, we can effectively teach a more ethical **discourse** practice’.<sup>6</sup>

In relation to writing more generally, Burke discusses the links between ethics and writing, particularly highlighting the issue of **authorial** responsibility,<sup>7</sup> and Pemberton and the authors who contribute to his book emphasise ethical issues in writing instruction.<sup>8</sup> In relation to writing in other disciplines, Blancett highlights

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- 4 Daniel Bell and Penny Pether, ‘Re/Writing Skills Training in Law Schools – Legal Literacy Revisited’ (1998) 9(2) *Legal Education Review* 113, 124.
  - 5 Margaret Z Johns, ‘Teaching Professional Responsibility and Professionalism in Legal Writing’ (1990) 40 *Journal of Legal Education* 501, 507.
  - 6 Melissa H Weresh, ‘Fostering a Respect for Our Students, Our Speciality, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum’ (2005–2006) 21 *Touro Law Review* 427, 428.
  - 7 Sean Burke, *The Ethics of Writing* (Edinburgh University Press, 2008).
  - 8 Michael A Pemberton, *The Ethics of Writing Instruction: Issues in Theory and Practice* (Ablex Publishing Corp, 2000).

ethical pitfalls in scholarly writing and publishing in the specific context of nursing,<sup>9</sup> and Rhodes has written on the linkages between ethics and writing with reference to organisational studies.<sup>10</sup>

In this book, we view ethics more widely as including, but not limited to, the professional conduct rules, and we apply ideas from some of the wider literature specifically to legal writing. Our approach thus most closely aligns with that of Bell and Pether,<sup>11</sup> in that we believe that good legal writing is inherently ethical.

### III CONVENTIONAL AND PROGRESSIVE LEGAL WRITING

Australian law schools adopt various positions on legal writing instruction in the LLB or JD. For some, legal writing is taught as a stand-alone course;<sup>12</sup> for others, it is co-taught with legal research;<sup>13</sup> and for many, it is embedded – most commonly within a first-year introductory unit.<sup>14</sup> Some law schools also offer advanced legal writing units, ordinarily in postgraduate courses.<sup>15</sup> A few offer legal writing courses specifically to international students.<sup>16</sup>

Despite this diversity of positioning, there is relatively high consistency of approach, with a standard tendency to be formalistic, **instrumental** and technocratic. Such an approach

focuses on the formal features of legal texts—that is, on their formats, organization, and language and style. In it, the primary concern of the writer is with the subject, and with a text that communicates that subject well. It is based on an unproblematized view of language – that language does not contribute to the construction of meaning, but rather is a transparent medium for meaning. Thus, the primary formal concern in the writing of the text is with clarity—in organization, in style, in word choice—and with accuracy.<sup>17</sup>

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9 Suzanne Smith Blancett, 'The Ethics of Writing and Publishing' (1991) *Journal of Nursing Administration* 32.

10 Carl Rhodes, 'After Reflexivity: Ethics, Freedom and the Writing of Organization Studies' (2009) 30(6) *Organization Studies* 653.

11 Bell and Pether, above n 4.

12 See, for instance, 'Legal Writing and Drafting' (VU); 'Legal Writing (Griffith).

13 See, for instance, 'Legal Research and Writing' (Flinders); 'Advanced Legal Research and Writing' (University of Canberra).

14 See, for instance, 'Legal Method' (UQ); 'Legal Process and Research' (USQ); 'Studies in Law' (Newcastle).

15 See, for instance, 'Advanced Legal Research and Writing' (University of Canberra).

16 For instance UNSW.

17 J Christopher Rideout and Jill J Ramsfield, 'Legal Writing: A Revised View' (1994) 69 *Washington Law Review* 35, 49.

Here, the implicit assumption is that writing is primarily representational, so the focus is upon the mechanics of writing: structure, grammar, spelling, and the tenets of plain language. As an example of this approach, one stand-alone legal writing unit description, similar to many others, provides:

Students will be taught principles of plain English, effective written communication and drafting legal documents, including court documents and how to apply them in practice. The unit will cover the function and operation of a document, stages in preparing a document and structuring a document. Students will also learn about style, appearance, content and presentation of documents. The unit will further address legal rules of construction that apply to documents such as agreements, the use of precedents and rules of evidence and procedure that apply to court documents.<sup>18</sup>

Students are encouraged to write clearly and persuasively, cognisant of academic conventions and sometimes also of professional conventions, such as writing a letter of advice to the client. But in many law schools, the focus still tends to be upon academic, rather than professional, conventions.<sup>19</sup>

In the US, where the professionalism of legal writing instruction is well developed, the limitations of this approach have been acknowledged. Rideout and Ramsfield argue that traditional views of legal writing:

have crippled legal writing programs because they have ensured that the complex task of introducing novices to legal discourse cannot be reasonably undertaken. Without fully understanding the epistemic, social, and process dimensions of legal writing, law schools do not assign the proper resources to developing good legal writers.<sup>20</sup>

Bell and Pether maintain that '[t]o learn the language of the law, and of the legal cultures in which the law exists, requires a teaching environment that is critical and reflective, as well as instrumental'.<sup>21</sup> Weresh, citing Krieger, argues that a technocratic approach may contribute to student distress,<sup>22</sup> a problem that has received considerable attention in Australian law schools in recent years.<sup>23</sup>

The main differences between the two approaches are summarised in Figure 1.1.

18 Victoria University, available at <http://www.vu.edu.au/units/BLB2120>.

19 Particularly where legal writing is embedded in a first-year course, the emphasis appears to be upon academic writing. Stand-alone courses tend to cover both academic and professional writing.

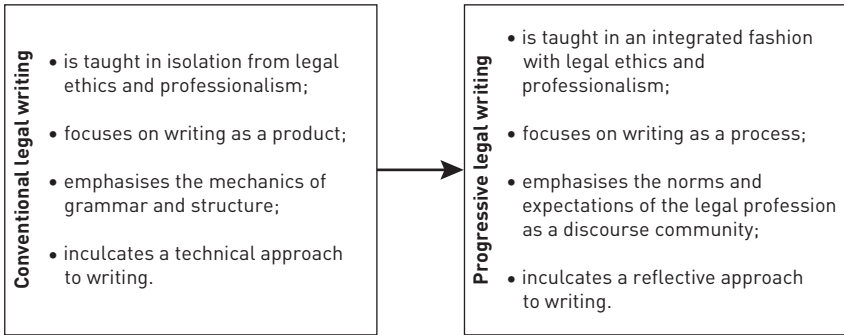
20 Rideout and Ramsfield, above n 17, 51.

21 Bell and Pether, above n 4, 118.

22 Weresh, above n 6, 450.

23 See further, Paula Baron, 'Sleight of Hand: Lawyer Distress and the Attribution of Responsibility' (2014) 22(2) *Griffith Law Review* 261; and Paula Baron, 'Althusser's Mirror: Lawyer Distress and the Process of Interpellation' (2015) *Griffith Law Review* 1 and the references therein.

FIGURE 1.1



In response to such criticisms, progressive legal writing instructors advocate a process approach, rather than a product approach, to legal writing (that is, in formalism, the emphasis is on the final written product rather than on the process of writing).<sup>24</sup> A process approach treats the act of writing as not merely representing but ‘constructing’ the law; it involves processes of description, **synthesis**, application, reasoning, **analogising** and developing legal **arguments**,<sup>25</sup> and appreciates that the student-novice needs to develop mastery over time. The process approach acknowledges that this development of expertise is often a struggle. It also acknowledges the inextricable link between writing and thinking:

Writing is not just the act of putting words on the page through pen or keystrokes; writing is a cognitive act in which we must exercise our brains to express ourselves through words. Before we can craft sentences and phrases we must consider not only what words and phrases we intend to use but also why we intend to use some words and not others. In this sense, writing and thinking are inextricably linked. One cannot engage in the process of writing without simultaneously engaging in the process of thinking.<sup>26</sup>

A process approach to writing causes the mind to act like a ‘radar scope that plays continually over one’s own text’.<sup>27</sup> Such an approach is well suited to legal writing, because the writer enters ‘into a sustained and serious dialogue about the subject under consideration ... resulting in a much fuller and richer consideration of

<sup>24</sup> Rideout and Ramsfield, above n 17, 50.

<sup>25</sup> Ibid 55.

<sup>26</sup> Peter Kaufman, ‘On Reflexivity: Scribo Ergo Cogito, Reflexivity through Writing’ (2013) 41(1) *Teaching Sociology* 70, 70.

<sup>27</sup> Phillip C KISSAM, ‘Thinking (By Writing) About Legal Writing’ (1987) 40 *Vanderbilt Law Review* 135, 140 citing Richard Marius, available at [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr40&section=12](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr40&section=12).

contradictory evidence, counter-arguments, and the complex elements of a subject'.<sup>28</sup> While we certainly maintain that a process approach is preferable to a formalist approach, we argue that good legal writing instruction needs to go beyond the process approach to acknowledge the ethical foundations inherent in legal writing.

## IV ACKNOWLEDGING THE ETHICAL FOUNDATIONS OF LEGAL WRITING

Ethical legal writers will consciously consider how their writing may be influenced by their own views; how their writing might affect others; and how it must comply with the norms and conventions of the discourse community and the fundamental professional ethical obligations of the legal profession. Our approach is summarised in Figure 1.2.

FIGURE 1.2

<p><b>What are your ethical responsibilities to the other?</b></p>	<ul style="list-style-type: none"> <li>• What is your purpose?</li> <li>• Who is your audience?</li> <li>• Reflect on the reader's needs, understanding and the consequences of potential interpretations.</li> </ul>
<p><b>What are your ethical responsibilities to the community of practice?</b></p>	<ul style="list-style-type: none"> <li>• What are the conventions, standards, responsibilities and genres of the community?</li> <li>• What is your professional identity and voice within this community?</li> <li>• Reflect on the legal community's expectations of voice, tone, structure, genre and presentation.</li> </ul>
<p><b>What are your professional responsibilities?</b></p>	<ul style="list-style-type: none"> <li>• What are the standards as expressed in the relevant professional rules?</li> <li>• Reflect on the professional expectations of competence, diligence, honesty and civility as expressed in the ASCR.</li> </ul>

### *Ethical awareness of self and other*

Learning legal writing is a process of developing your own professional voice, of understanding and accepting authorial responsibility, and of appreciating the 'other' through an understanding of the importance of audience, purpose and **tone**. As noted above, the process of learning to write is often a struggle: as a law student, you must move from novice to mastery and in this process must learn to write with

<sup>28</sup> Ibid 140–1.

care, understanding that your choices (of words, of the information you can and cannot convey) reflect not only on your competence as a legal writer but on your personal integrity. Indeed, Bell and Pether cite studies that indicate that good writing is tentative and cautious (a finding that may come as a surprise to novice legal writers): ‘expertise in both reading and writing seems to entail less certainty, and far more caution, about words and language’.<sup>29</sup> A similar view is taken by Williams: ‘the writer must be confident that he [sic] understands the law well enough to give up its concreteness’.<sup>30</sup> This calls for you, as a legal writer, to write with clarity, persuasively, and in a way that signals ‘authority without depending for its power on mere verbal opacity’.<sup>31</sup>

Legal writing demands an understanding of the self. Good legal writers understand and acknowledge their own biases, their conflicts, their agency and power. They ‘communicate in a voice of their own – as a lawyer and as a mind’.<sup>32</sup> As Bell and Pether point out, ‘the genres of legal **discourse** [are] explicitly concerned with issues of power and authority’.<sup>33</sup> Good writing is reflexive.

Legal writing also demands awareness of the other. As a legal writer, you must sustain awareness that what you write has consequences for others *beyond* the person for whom the writing is intended. This requires you to ‘take account of the other side, not as someone to be “bested” or beaten, but as someone with needs, interests, and goals as well’.<sup>34</sup>

Ethical awareness of self and other extends also to research. Those undertaking legal research need to be aware of the fact that they can potentially harm the research participants psychologically, socially, emotionally or culturally.<sup>35</sup> Such harm may follow when participants ‘have not fully considered the consequences of the disclosure of their attitudes, beliefs and behaviour’ with respect to the research question.<sup>36</sup> Researchers’ own values and assumptions can influence the analysis and dissemination of their work, and they must not fabricate or invent data; falsify or distort the results<sup>37</sup> or misrepresent data in such a way that it fails to report the

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29 Bell and Pether, above n 4, 119.

30 Joseph M Williams, ‘On the Maturing of Legal Writers: Two Models of Growth and Development’ (1991) 1 *Legal Writing: The Journal of the Legal Writing Institute* 1, 28.

31 *Ibid* 29.

32 Weresh, above n 6, 427.

33 Bell and Pether, above n 4, 119.

34 Carrie J Menkel-Meadow, ‘When Winning Isn’t Everything: The Lawyer as Problem Solver’ (2000) 28 *Hofstra Law Review* 905, 915.

35 R Iphofen, *Ethical Decision Making in Social Research. A Practical Guide* (Palgrave Macmillan, 2009) 444.

36 *Ibid*.

37 Sanjay Singh, ‘Ethics in Research’ (2012) 78(4) *Indian Journal of Dermatology, Venereology, and Leprology* 411, 412.



truth.<sup>38</sup> While the question of ethical writing may seem to attach in particular to **qualitative** research, Iphofen notes that ‘it is dangerous to assume that **quantitative** approaches have less reason to be concerned about, say, vulnerability, sensitivity and the complex distinctions between anonymity and confidentiality’.<sup>39</sup> As Kritzer points out, ‘[t]he lines between quantitative and qualitative social science are less clear than often presumed. Both types of analysis involve extensive interpretation, and tools of interpretation that have many fundamental similarities’.<sup>40</sup> In effect, the underlying **premise** is that the findings of all research are the product of interpretation. We discuss research and your ethical obligations in more detail in Chapter 4.

### *Ethical awareness of the community of practice*

Fundamentally, instruction in legal writing should serve to initiate you, as a law student, into the legal profession’s community of practice. As some commentators have pointed out, as a law student, you ordinarily go on to become a professional writer, whether in legal practice or one of the other employment destinations for law graduates in the government or private sector.<sup>41</sup> Instruction in good writing is thus a core aspect of legal education, albeit too often neglected.

Legal writing is constrained by conventions, standards, responsibilities and genres. Learning to engage in legal discourse is an act of socialisation, not only cognition;<sup>42</sup> of engaging in a dialogue; and of gaining access to a community of practice, matters we discuss in more detail in the chapter on purpose and audience. Bell and Pether argue that ‘expertise is a process of mastering the codes of entry into, and acquiring acceptance within, a disciplinary culture’.<sup>43</sup> At the same time, they eschew a simplistic approach to aspects of legal discourse, such as genre:

It is important to understand genre not as a recipe-like description of the characteristics or rules of writing, but as an analysis of what it is that facilitates communication in any act of writing and/or speaking. In other words, understanding writing means going beyond the words on the page to recognise the material and interactive qualities of genre – or what has been called ‘genre as social action’.<sup>44</sup>

38 David B Resnik, ‘What is Ethics in Research & Why is it Important?’, *National Institute of Environmental Health Sciences*, 1 May 2011, available at <http://www.niehs.nih.gov/research/resources/bioethics/whatis/>.

39 Iphofen, above n 35, 445

40 HM Kritzer, ‘The Data Puzzle: The Nature of Interpretation in Quantitative Research’ (1996) 40(1) *American Journal of Political Science* 1, available at <http://www.jstor.org/stable/10.2307/2111692>.

41 See, for instance, Wayne Schiess, ‘Lawyers are Professional Writers’ (2012) *Austin Lawyer* 11, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2274981](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274981).

42 Bell and Pether, above n 4, 119.

43 *Ibid* 117.

44 *Ibid* 119.

At the core of your obligation to the discourse community as a legal writer is the concept of the duty to the law. Legal writing entails responsibility to society<sup>45</sup> ‘to insure the legitimacy of the legal system in society’.<sup>46</sup>

What distinguishes the legal community from other interpretive communities is the presence of order and justice at the center of our webs of belief about law, the principles of legitimacy, stare decisis, and legislative supremacy near the center, and the commitment to legal reasoning in bringing these values and principles to bear in particular cases. The legal conversation is a conversation about the implications of these values and principles in particular cases.<sup>47</sup>

### ***Ethical awareness of professional responsibility***

Good legal writing requires the integration of a range of skills (problem solving, analysis, reasoning) and an appreciation of organisational responsibilities and constraints (time management, the need for strategic research, hierarchies). It also requires an appreciation of professional responsibility: the need to be honest, competent, and courteous, and duties to the law and to the client. Along with the applicable legislation, lawyers are governed by professional conduct rules which mandate certain standards of behaviour. A breach of these rules can attract disciplinary measures. For the purposes of this book we will primarily be referring to the Australian Solicitors Conduct Rules (ASCR) adopted by New South Wales, Victoria, Queensland, and South Australia. We then provide, in the Learning Materials, the equivalent references for the other states, and the rules governing barristers – again, primarily the Australian Bar Association Barristers’ Conduct Rules (Bar Rules), now adopted by New South Wales, Victoria, Queensland, South Australia and Western Australia.

Provisions relating to competence and diligence, honesty and courtesy have direct implications for legal writing. Within practice, ‘legal writing is generally done in service of a specific client or set of clients’.<sup>48</sup> But the effects of writing are much wider: As Fischer notes, ‘a lawyer’s writing not only embodies his or her sense of professionalism and ethics, but also affects clients, opposing parties, the courts, and the legal system’.<sup>49</sup>

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45 Frank Pommersheim, ‘Voices, Values and Community: Some Reflections on Legal Writing’ (1988) 12 *Legal Studies Forum* 477, 478.

46 *Ibid* 479.

47 *Ibid* quoting Steven Burton, *An Introduction to Law and Legal Reasoning* (Boston, 1985) 209.

48 SR Kedia, ‘Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing’ (2009) *University of Detroit Mercy Law Review* 147, 156.

49 Judith D Fischer, ‘The Role of Ethics in Legal Writing: The Forensic Embroiderer, the Minimalist Wizard, and Other Stories’ (2004) 9 *The Scribes Journal of Legal Writing* 77.

### *Competence and diligence*

Members of the public expect that lawyers, as legal experts, will be competent. ASCR r 4.1.3 enforces that expectation, stating that a solicitor must ‘deliver legal services competently, diligently and as promptly as reasonably possible’. The rule does not elaborate on what competence entails, but it is generally understood that it includes the elements explicitly set out in the American Bar Association rules, the *Model Rules of Professional Conduct*: ‘A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation’.

In terms of legal writing, the phrase ‘thoroughness and preparation ... for the representation’ are particularly important. This implies that clients can expect that their lawyers will carry out whatever legal research is required to enable their competent representation. However, this reference to preparation should not lead to verbosity as it is now well established that ‘concise prose communicates and persuades better than wordy, cluttered legalese’.<sup>50</sup>

Poor legal research can also result in a lack of diligence – for instance, failing to recognise that the statutory limitation has expired for commencing a claim.<sup>51</sup> Lawyers also need to bring their skill of analysis to bear on the legal research they conduct. A failure to do so may result in ‘substandard documents’.<sup>52</sup> Given the fact that the court relies on lawyers to ‘elucidate the issues’,<sup>53</sup> ungrammatical sentences, a poorly written argument, and failing to include pinpoint citations hinder the court from understanding a party’s case.<sup>54</sup> A document that makes an unsubstantiated or frivolous claim may also attract a claim of incompetence, and be held to be a breach of ASCR r 21, which provides that a solicitor must not allege any matter of fact in, *inter alia*, court documents, unless they believe on reasonable grounds that the factual material already available provides a proper basis to do so.

Good legal writing also requires an awareness of any formal expectations of the written work – for instance, court rules such as the number of pages allowed; or the font to be used.<sup>55</sup>

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50 Ibid 99, n 144, referring to a number of other authors.

51 Carol M Bast and Susan W Harrell, ‘Ethical Obligations: Performing Adequate Legal Research and Legal Writing’ (2004) 29 *Nova Law Review* 49, 57.

52 Fischer, above n 49, 93.

53 Ibid 96.

54 Bast and Harrell, above n 51, 53–6.

55 Ibid 54.

### *Honesty and courtesy*

Lawyers are required by the professional rules to ‘be honest and courteous in all dealings in the course of legal practice’ (ASCR r 4.1.2). The theme of honesty underpins all aspects of lawyering. It is the criterion used to determine admission as an Australian lawyer and continuing membership of the legal profession. As officers of the court, lawyers have an overriding duty to the court (ASCR r 3) which is particularly manifested in honesty. In this regard, lawyers are duty bound to ensure that they ‘do not deceive or knowingly or recklessly mislead the court’ (ASCR r 19.1) and must ‘take all necessary steps to correct any misleading statement’ they have made (ASCR r 19.2). In fact, this duty extends to require the lawyer to advise the court of any binding authority (ASCR r 19.6.1), even if this authority is damaging to the client’s case (ASCR r 19.6.3). This requirement means that a document that fails to inform the court of all of the relevant legal research undertaken is deficient. In fact, it is suggested that ‘when a lawyer errs by failing to cite relevant adverse authority, a court must spend valuable time and effort to perform its own analysis’,<sup>56</sup> and this may cause the court to make a decision without referring to a relevant precedent.<sup>57</sup> Dishonest behaviour, according to ASCR r 5, can potentially ‘be prejudicial to, or diminish the public confidence in, the administration of justice ... or bring the profession into disrepute’. Of course, for law students, the requirement of honesty means that written work that is **plagiarised** may compromise admission. We address plagiarism in later chapters.

The requirements of civility and courtesy must be adhered to in communications. Effective and appropriate communications with clients, other practitioners, the court and third parties are fundamental aspects of good legal service delivery and professionalism. Courtesy or civility in a general sense is gaining prominence. For instance, the professional conduct rules in New South Wales prior to 1 January 2014 only required lawyers to be courteous to other practitioners, whereas ASCR r 4.1.2 (now adopted in New South Wales) extends the requirement for lawyers to be courteous in *all* dealings and presumably this includes clients, other practitioners, and third parties with whom the lawyer interacts. ASCR r 34, which specifically sets out how members are to deal with other persons and includes a direction to not mislead, intimidate, embarrass or frustrate others,<sup>58</sup> emphasises the importance of civility. It also provides a basis for complaint by anyone who believes that a lawyer

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56 Fischer, above n 49, 77.

57 Ibid 83.

58 ASCR r 34.

is guilty of discourteous and inappropriate communications.<sup>59</sup> ASCR r 42 now also includes an explicit prohibition against discrimination, bullying and harassment by lawyers. In fact, civility in legal writing is so important, we have devoted a separate discussion to the topic in Chapter 11.

## V CONCLUSION

Writing can often seem like a solitary task, but at its heart it is fundamentally both social and ethical in nature. For the lawyer, writing is fundamental to professional practice; and to the student, writing is the gateway to the practice of law, the legal community, and the development of a distinct professional identity. In this chapter we have suggested that good legal writing entails an awareness of, and reflection upon, the self and other, the community of practice and the professional expectations as expressed in the relevant rules of conduct. In the chapters that follow, we hope to encourage an appreciation of good legal writing and its relationship to ethical conduct.

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59 Further, there are rules relating to lawyers communicating with clients, ASCR r 7; opponents, ASCR r 22; witnesses, ASCR r 26; and clients of another solicitor. While these do not speak specifically of courtesy, they do call for clarity, and show intolerance for misrepresentations and efforts to gain an advantage using 'smart' practices.

## REVIEW MATERIALS

### SUMMARY

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This chapter set out the reasons for arguing that good legal writing is always an ethical act. It covered the relationship between legal writing and legal professional ethics, the conventional and progressive approaches to teaching legal writing, and the ethical foundations of legal writing in awareness of self and other, in the legal profession's community of practice, and in one's own professional responsibility.

### KEY POINTS

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1. Legal writing is a core aspect of lawyering.
2. Legal writing is an important aspect of professional identity.
3. Good legal writing reflects self-awareness and ethical awareness of others.
4. Legal writing is constrained by the conventions, standards, expectations, responsibilities and genres of the community of practice.
5. The ASCR imposes professional obligations upon written communications.

### QUESTIONS FOR REFLECTION

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1. What does it mean to be part of a community of practice? How might membership of the legal profession's community of practice affect your legal writing?
2. What does it mean to have an ethical awareness of the 'other' in your writing? How might such an awareness reveal itself in your writing?
3. How might a letter to a client written by a lawyer differ from a letter written to a student by a lecturer?
4. What, in your view, makes for 'professional' written communication? Is it wording? The organisation of the text? The presentation?
5. Why are rules imposed on the conduct of lawyers in the ASCR? What sanctions do those rules impose for breaching them?

### EXERCISES

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These exercises are constructed with a view to encouraging reflection on what might be your own biases and goals, your relationship with your reader and with others, and any consequences for the reader and others involved in legal writing.

1. Is it unethical for a student to hide the seminal text on the topic of a required essay that is held in the university library? If you saw a student hiding such a text, what would you do?
2. Group work is an important skill for future lawyers. While it can bring challenges, it also provides an opportunity for group members to present something of a higher standard, superior to what any single student can accomplish. However, a high degree of cooperation is needed to achieve that goal. Competitiveness or a desire to promote yourself may cause tension within the group, impeding effective decision making; it may even result in unethical behaviour. Consider the following issues, and discuss ways of avoiding or alleviating the problems raised.
  - a. Four out of five members of a particular group come from a clique of students who went to high school together. They write a dishonest report about the contribution of the fifth member whom they dislike and with whom they disagree.
  - b. Members of a particular group disagree strongly with the views of one member of the group. That person had conducted all of the research and the other members had either not read any of the material or skimmed lightly over it.
  - c. A member of a particular group signs off on participation in the work, but, in fact, had made no contribution at all.
3. Would it be unethical for a law teacher to provide a reference for a student whom they taught more than five years ago?
4. Write a professional identity letter.<sup>60</sup>

The purposes of this exercise are to identify your core values, to consolidate the commitments you want to make to yourself as a professional, and to begin to establish your professional identity.

Write a letter to yourself that outlines your core values and explain why they are important. Explain how those values can be incorporated into your professional identity as a lawyer. You may find the following prompts helpful:

- What motivated you to be a lawyer, and why? How does that motivation relate to your core values?
- How do you want to treat your clients?
- How you want to interact with other members of your profession?
- How will you incorporate your core values into your practice of law?

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60 Adapted from Institute for the Advancement of the American Legal System, Educating Tomorrow's Lawyers, 'Sample Professional Identify Assignments', available at [http://iaals.du.edu/sites/default/files/documents/resources/5\\_sample\\_professional\\_identity\\_assignments\\_burgess.pdf](http://iaals.du.edu/sites/default/files/documents/resources/5_sample_professional_identity_assignments_burgess.pdf).

- What type of reputation do you want to create in the legal community? Is there a difference between how you want your clients to know you and how want your colleagues, and those in the legal profession generally, to know you? If you do this exercise in first year, you might want to read this letter periodically as you continue through your degree and when you become a lawyer.

## FURTHER RESOURCES

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1. Examples of communities of practice
  - First-year law: <http://fyhe.com.au/current-activities/communities-of-practice/>
  - Health and law: <http://globalhealth.org/event/community-practice-health-law/>
2. Communication skills
  - Communication skills for lawyers: <http://www.cuttingedgelaw.com/content/communication-skills-lawyers>
  - Written communication skills: <http://www.kent.ac.uk/careers/sk/written-communication.htm>
  - Communicating with your client: [https://www.lsc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/97753/FACT-SHEET-7-Communicating-with-your-client-June-2012.pdf](https://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/97753/FACT-SHEET-7-Communicating-with-your-client-June-2012.pdf).