Preface

The Fall 2009 issue of the Journal of the Association of Legal Writing Directors (J. ALWD) continues the steady expansion of the Journal's perspective. Our focus in this issue is best practices in persuasion, but we include as well general articles emerging from the discipline of legal writing.

By encouraging distinctive voices from authors employing different lenses, the Journal hopes to enrich, enliven, and encourage the study and practice of legal rhetoric and writing. The Journal's widening perspective is reflected in the research, theory, and subject matter underlying the articles in this issue. The articles range from empirical study of the issue statements in appellate briefs to quantitative analysis of law review articles; they turn to early literary theory and Abraham Lincoln's writing habits to advise today's legal writers; they explore the effects of narrative construction and characterization models on legal argument; and they suggest ways that contemporary rhetoric and developmental psychology may counter some of the negative effects of legal education on law students.

Best Practices in Persuasion

Lawyers practice persuasion. Although we typically think of persuasion as being essential to interactions with judges and courts, much legal communication rests on persuasion. We often use the techniques and tools of persuasion when we are communicating with clients, opposing parties, other lawyers, the media, government officials and agencies, corporate entities, community groups and organizations.

In this issue, we have included articles that will be helpful to anyone interested in the study or practice of persuasive legal rhetoric. First, testing the advice of legal writing experts and the guidance provided by framing theory, Professor Judy Fischer examines the issue statements contained in a sample of persuasive briefs recently filed in six states. The resulting article, *Got Issues? An Empirical Study about Framing Them*, compares the issues actually framed by lawyers with the recommendations of experts and theorists. Professor Fischer analyzes various aspects of issue statements ranging from succinctness to sentence structure to the manner of addressing the parties and the inclusion of facts. Finally, she provides recommendations to lawyers interested in framing the most effective issue statements.

Marking the 200th birthday of President Lincoln, Professor Julie Oseid recommends that lawyers emulate his writing style and work process in *The Power of Brevity: Adopt Abraham Lincoln's Habits*. The article explores Lincoln's use of brevity for persuasive purpose in three speeches that have become exemplars of oral rhetoric, the First and Second Inaugural and the Gettysburg Address. Professor Oseid also describes Lincoln's writing and editing approaches and urges lawyers to adopt the habits of "writing early, visualizing audience, and ruthlessly editing."

Drawing on the works of rhetoricians, literary critics, and philosophers, Professor Stephen Smith recommends that legal writers look to early literary theory for writing advice in *The Poetry of Persuasion: Early Literary Theory and Its Advice for Legal Writers*. Even though a brief is rarely a poem, Professor Smith suggests that it is "a piece of writing . . . [and as] such, it may have the power and even responsibility to offer the reader some sort of aesthetic pleasure." The article translates early literary advice into guidance that a contemporary legal writer might use, including applications of visual imagery, word choice, figures of speech, stylistic variety, and tone.

Professor Kathryn Stanchi recommends resources for legal writers interested in both the practical and theoretical aspects of the subject in *Persuasion: An Annotated Bibliography*. Professor Stanchi's compilation concentrates on scholarship explicitly focused on persuasion in legal communication, but it also includes more general sources about aspects of persuasion. By putting together a kind of "greatest hits" bibliography, Professor Stanchi's goal was to provide "a starter list for someone who wants to learn more about the topic," one that celebrates the "renaissance of the discipline of persuasion and rhetoric in law and legal writing, and the treatment of persuasion as a theoretical, academic pursuit."

The editors selected two "classic" articles that address fundamental concepts in persuasion: narrative construction and characterization. In *The Narrative Construction of Legal Reality*, Richard Sherwin explores how story elements shape the meaning of legal problems, using a possible homicide case and the briefs submitted in *Miranda v. Arizona*. Professor Sherwin explains that he hopes such "close textual analysis will stimulate increased self-reflectiveness about how legal narratives trigger or induce a particular belief or expectation" that what is being portrayed is truthful or life-like. Because the stakes of legal storytelling are so high, we should try to make "as complete an assessment as we can manage of how the law's stories . . . captivate belief. There lies the calling of the legal storytelling scholar."

In *Characterization and Legal Discourse*, Laura E. Little explores one of the most important rhetorical questions for lawyers: how different schemes of characterization can shape the meaning and range of potential resolutions of a legal problem. She argues that characterization skills and models can help law students and lawyers more effectively solve problems, advocate for a client, and meet arguments from adversaries. Moreover, Professor Little suggests that studying and understanding characterization may help students overcome some alienating aspects of law study.

General Articles

In *Legal Writing and Disciplinary Knowledge-Building: A Comparative Study*, Douglas Coulson examines professional academic writing in the law with a goal of better understanding the knowledge-building activities of the discipline through comparison with others. Professor Coulson concludes that the law

review and journal articles he studied resemble professional academic writing in the sciences, rather than writing in the humanities. His study suggests reasons for this resemblance; for example, "the articles in the sample reflect a sustained discourse among jurists who seek to build on, refine, and dispute each others' conclusions regarding the application of well-developed concepts to a newly emerging legal question." The authors' concerns appear to reflect the influence of legal formalism; they move toward simplicity and closure rather than exploring the "complexity of phenomena, data, or texts for their own sake." In addition to better understanding of the discipline itself, such studies of knowledge-building activities may help guide authors who want to apply humanistic or interdisciplinary knowledge to legal writing.

Professor Mollie Falk takes on the challenge of imagination and invention in *"The Play of Those Who Have Not Yet Heard of Games": Creativity, Compliance, and the "Good Enough" Law Teacher*. Finding that highly achieving third-year law students seem to have "lost the knack of play," Professor Falk considers the adverse effects of mastering legal skills on students' abilities to think differently about law and legal argument. Drawing on the work of developmental psychoanalyst D.W. Winnicott, Professor Falk suggests ways that law teachers can "devise and integrate activities that have the essential characteristics of play while encouraging the intellectual rigor that, if not the be-all-end-all of thinking like a lawyer, is certainly inseparable from it." Among other benefits, she argues that "[b]ecause play engages the whole person across the boundaries of reason and emotion, . . . it has an important role in a revised notion of thinking like a lawyer."

Acknowledgments

As always, the editors' deepest appreciation goes to the members of the J. ALWD Editorial Board. The board members whose careful reading and thoughtful insights guide the Journal's course include Michael Smith, a founding member of the editorial committee; Carol Parker, Terry Phelps, and Marilyn Walter, editorial committee members since 2004; Melody Daily, a committee member since 2006; and Ian Gallacher, Ruth Anne Robbins, and Melissa Weresh, committee members since 2008.

In 2009, J. ALWD gained its first Assistant Editors and its first co-Editor. We extend very special thanks to the inaugural assistant editors—Sara Gordon, Jeff Jackson, Sue Painter-Thorne—for their conscientious and diligent work. I am most appreciative to Ian Gallacher, the gracious and knowledgeable co-editor on this issue, and look forward to his continuing in that role.

We are indebted as well to the following groups and individuals:

the ALWD members, officers, and boards whose consistent and generous support makes this publication possible;

the anonymous peer reviewers who expertly guide and inform the editorial board's decisions and who provide the kind of feedback that all authors need;

my administrative secretary, Sandy Studdard, for making distribution of the Journal run smoothly throughout the year;

Brooke Bowman, for graciously sharing her expertise and "style" guidance;

Mercer University School of Law, for its administrative and collegial support;

and, of course, our thanks to West, A Thomson Reuters Business, for its past support and its commitment to the future of the Journal.

Linda Berger
June 2009