

THE NEW LEGAL WRITING: THE IMPORTANCE OF TEACHING LAW STUDENTS HOW TO USE E-MAIL PROFESSIONALLY

KENDRA HUARD FERSHEE*

I. INTRODUCTION

Anyone who has worked in a legal capacity in the last ten years can attest to the meteoric rise in the use of e-mail as a means of professional communication. Recent empirical research demonstrates that e-mail is the most common method for professional legal communication today.¹ Professor Kristen Robbins-Tiscione researched the decline of the interoffice memorandum as a tool in lawyers' arsenals and the rise of e-mail as a more straightforward and informal medium to convey legal analysis.² As Professor Robbins-Tiscione determined through her research, lawyers have retreated from writing formal memos to instead distilling the salient arguments of their legal analysis into an e-mail that recipients can read and share quickly and efficiently.³ The reality of this change is raising questions in the legal writing community about the usefulness of the traditional written memo and whether legal writing professors should be teaching students how to distill their analysis into this new, shorter, more direct form of legal writing. The discussion has brought about an even more intense need for legal writing professors to address professionalism and effective communication in e-mail with their students.⁴

Copyright © 2011 by Kendra Huard Fershee.

* Assistant Professor of Law, University of North Dakota School of Law.

1. See Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 32 (2008) (discussing her survey of practicing attorneys, which showed that the traditional format and substance of the legal memorandum has become nearly obsolete in favor of substantive e-mail as the preferred method for communicating with clients).

2. See *id.* at 32–33 (discussing a survey of recent law school graduates that revealed they are more likely to communicate with clients through informal media—such as e-mail—than through a formal legal memorandum).

3. See *id.* (stating that recent law school graduates frequently e-mail informal memoranda to clients, composed of “a statement of the legal issue and the attorney’s conclusion or advice, followed by supporting analysis”).

4. See Maria Perez Crist, *Technology in the LRW Curriculum—High Tech, Low Tech, or No Tech*, 5 LEGAL WRITING J. OF THE LEGAL WRITING INSTIT. 93, 101–02 (1999) (noting that an overwhelming majority of attorneys use e-mail, and that it is imperative that the rules and conventions of professional legal e-mailing be taught in legal writing courses).

Whether the traditional legal memorandum is in its twilight is not yet clear, but Professor Robbins-Tiscione's research clarified that the most common mode of written communication used in law offices today is e-mail.⁵ The reasons for the newly emerging preference for e-mail are multilayered and driven by client demands for cost-savings and efficiency; e-mail is getting a workout at most law firms.⁶ The change has prompted legal writing professors to think harder about whether teaching the traditional, redundant, and expensive memo is appropriate any longer.⁷ It seems that, at least in form, and also perhaps in substance, that version of legal communication is falling out of favor.⁸ It is not clear whether a new style of teaching students how to communicate legal analysis is in order,⁹ but it is clear that students should be able to enter into legal practice with a basic working knowledge of e-mail etiquette and professionalism.¹⁰

The use of e-mail in everyday life is a recent phenomenon, and even more recent for lawyers. Very little had changed with the method in which the written word was distributed until the invention of e-mail thirty-nine years ago.¹¹ E-mail made the transmission of the written word practically instantaneous, paperless, and virtually limitless.¹² The adoption of e-mail as a popular mode of communication was swift. The common usage of digital or electronic communication has been pervasive for approximately twenty years,¹³ which means that

5. See Robbins-Tiscione, *supra* note 1, at 32–33 (explaining that ninety-two percent of the polled law school graduates use e-mail to communicate with clients while over seventy-five percent of practicing attorneys write no more than three office memoranda per year).

6. See *id.* at 47–48 (documenting attorneys' preference of e-mail over formal office memoranda).

7. See, e.g., Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 325 (2010) (arguing that professors should consider new applications for traditional memorandum writing).

8. See Robbins-Tiscione, *supra* note 1, at 32 (noting the comparatively low percentage of young attorneys who employ traditional legal memoranda instead of other methods).

9. See Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web*, 11 HARV. J. L. & TECH. 141, 143 (1997) (stating that although parts of the legal academe have accepted using technology in the classroom, many professors are reluctant to abandon traditional teaching methods).

10. See Robbins-Tiscione, *supra* note 1, at 44. (noting one survey respondent's comment that students should learn the proper use of e-mail in law school: "Although e-mail is by nature informal, students should not 'perceive it as a more casual form of communication than a memo to another attorney.>"). Another survey respondent noted: "If e-mail is to be formally taught, I do think it's important to realize that e-mail to clients is very different from e-mail to friends." *Id.* at 45.

11. MICHAEL R. WESTON, JERRY YANG & DAVID FILO, *THE FOUNDERS OF YAHOO!* 21–22 (2007).

12. *Id.*

13. See *id.* at 27–30 (stating that since the 1990s, the Internet has become a nexus for the free flow of information and commerce).

the current generation of law students is the first to have no memory of a time before e-mail.

Most law students today have never received instruction about how to write e-mail professionally, which leaves them to their own devices when they try to venture into their first post-law school job and use e-mail in a professional context for the first time. Using e-mail in a professional setting is a wholly separate skill from using e-mail for personal purposes, and bridging the gap may be harder than it appears. At the very least, professors must appreciate that writing professional e-mail for many law students is not intuitive and must be learned.¹⁴ Law schools must make teaching students how to write e-mail in a professional setting as high a priority as teaching students how to write a basic legal memorandum has been since the inception of legal writing programs.

II. THE IMPORTANCE OF QUALITY WRITTEN COMMUNICATION IN THE LEGAL PROFESSION

The process and ability to convey thoughts and concepts in writing is crucial to the foundation of the law. Without the written word, neither statutory nor common law could have created stability for emerging nations attempting to establish standards and boundaries for the people.¹⁵ But more importantly to lawyers and law professors, the development of the written word, and its use to convey the law, created the foundation for the legal profession.¹⁶ Without the introduction of the written word in a legal context, lawyers would have been doomed to suffer the whims of judicial divination, unguided by

14. See Robert H. Thomas, *Hey, Did You Get My E-Mail? Reflections of a Retro-Grouch in the Computer Age of Legal Education*, 44 J. LEGAL EDUC. 233, 244–45 (1994) (arguing that because e-mail depersonalizes the interaction between a law student and a law professor, law professors must help their students learn to create personal and professional messages through e-mail).

15. William Blackstone alluded to the value of the written word when he espoused the virtue of precedent:

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his [own] private sentiments . . . but according to the known laws and customs of the land

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1768).

16. See Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 617–18 (1916) (stating that interpreting the written word is the purpose of the American jurist).

written precedent.¹⁷ With only memory to supply the foundation of the law, the legal profession would have to re-invent the law in every new dispute or deal.¹⁸

It is obvious that written law is crucial when establishing and maintaining a legal and political system for a nation. The United States Constitution is one of the earliest examples of this in American history, a document revered for its ability to provide reliable and consistent governance over hundreds of years, and a document that elegantly reveals the written word as a lawyer's most important tool.¹⁹ It is hard to imagine the fledgling United States government, battered and feeble after the Revolutionary War, surviving without a system of written rules. Moreover, those rules had to be drafted with precision and care to convince a wary American public that rules in this legal system would result in more just and fair governance than rules promulgated by the British.²⁰ While reasonable minds can disagree about whether the Constitution was written as perfectly as it could have been,²¹ it is hard to deny that the Constitution is the seminal work of American lawyers and a fine example of how the careful employment of the written word can create and maintain a stable "government of laws not of men."²²

While few will dispute that quality writing is important to lawyers, there is much room for debate about what constitutes quality writing. Law libraries and writing professors' bookshelves are stacked with

17. The earliest reporting of court proceedings were said to help litigants and judges remember what had been asserted earlier in the proceedings. Paul Brand, *Observing and Recording the Medieval Bar and Bench at Work, The Origins of Law Reporting in England* 9 (July 6, 1998) (unpublished lecture, on file with author).

18. See PHILIP S. JAMES, *INTRODUCTION TO ENGLISH LAW* 21 (11th ed. 1985) (detailing that in the mid-sixteenth century, English practitioners began compiling and publishing reports of cases in order to recapitulate the essential elements of a case to inform their fellow lawyers).

19. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 694 (1976) ("The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live."); but see Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *HARV. L. REV.* 1, 4-5 (1987) (observing that the United States Constitution has not provided consistent governance for the country with regard to the treatment of African-Americans and is, in effect, an entirely different document than it was at the time of its original ratification).

20. See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 892 (1978) (asserting that many post-Revolutionary Americans were distrustful of a strong federal executive branch and instead preferred state autonomy with a strong federal legislative branch).

21. See *supra* note 19.

22. See DAVID MCCULLOUGH, *JOHN ADAMS* 377-78 (2001) (referring to John Adams's belief that there must be a separation of powers in government in order to mitigate the concentrated political power of the aristocracy).

textbooks that teach lawyers-to-be how to write about the law. If it were simple or intuitive, these books would be unnecessary. But one thing is obvious: lawyers can identify poor writing as easily as Justice Potter Potter could identify pornography—they know it when they see it.²³ The attendant negatives that accompany poor legal writing are vast and harsh: a lawyer who does not write well can lose respect, business, or even violate his or her ethical responsibility to effectively represent his or her clients.²⁴ To confront the potential problems created by poor writing, most law schools decided to address the issue directly by creating classes in which students could learn how to best represent their clients using the written word.²⁵

III. THE VALUE OF TEACHING LEGAL WRITING

As early as the 1950s, law schools began to understand that their role in the professional development of budding lawyers went beyond just lecturing about the doctrine of law.²⁶ In the United States, the tradition of legal apprenticeship, carried over from the British colonial days, began to wane in the 1800s.²⁷ Prior to that, lawyers were responsible for teaching legal apprentices how to write in a legal con-

23. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

24. *See, e.g., Kowalski v. Scott*, No. Civ. A. 02-7197, 2004 WL 1240658, at *10 n.6 (E.D. Pa. May 26, 2004) (illustrating how poor and thoughtless writing could lead to judicial sanctioning of an attorney). The clearly angry court unleashed on the plaintiff's attorney:

We caution Plaintiff's attorney that his counterstatement of facts and brief opposing the Facticon Defendants' motion for summary judgment borders on sanctionable. The use of unsupported insults and rhetorical questions neither persuades nor impresses this Court, especially when it fails to accompany any kind of legal argument or discussion of relevant case law. Moreover, the numerous incoherent, grammatically incorrect statements (*see e.g., Counterstatement of Facts* at 4(# 2), 6 (12, 13, 15-20), 7(# 27)), combined with garrulous rhetoric (*see e.g., Br.* at 7) frequently placed this Court in the inappropriate position of having to attempt to decipher Plaintiff's legal points. The dignity of this Court demands that parties submit coherent, concise, and legally sound arguments. At the very least, materials should be proofread before being filed. We expect that Plaintiff's lawyer will heed this warning should he file any papers with this Court in the future.

Id. *See also infra* Part III.

25. *See* Ellie Margolis & Susan DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 94–95 (2005) (noting that the purpose of legal research and writing courses is to ensure students acquire a baseline level of analytical competence as future lawyers).

26. *See id.* (noting that legal writing programs first appeared at some law schools in the 1950s, and recognizing that the goal of those programs was to teach students to think and write like lawyers).

27. *See* Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 189–90 & n.22 (2001) (“The apprenticeship method would remain the dominant method of legal training in America until the second half of the nineteenth century.”).

text by providing instruction about how to write important legal documents such as contracts, briefs, motions, and writs, as well as client correspondence, although many mentors did not spend much time teaching their pupils any of those important skills.²⁸ Lawyers in the apprenticeship days often relied on their students as scribes and for help doing menial tasks and did not teach them doctrine or writing.²⁹ This lackadaisical teaching attitude made it possible for many new lawyers to begin practicing law without a solid foundation in writing.

In the late-1800s, law schools began to replace the apprenticeship system with a more formal instructional setting for law students.³⁰ Law schools focused primarily, and still do, on teaching the doctrine of the law by using case law and the Socratic teaching method to encourage (or alternatively, to terrify) law students to learn the intricacies of American law.³¹ Professors provided students with little to no instruction on how to craft any kind of legal writing.³² That task was reserved for their future employers, who either accepted this responsibility as a vestige of the apprenticeship system, provided instruction out of necessity, or refused to train the budding lawyers, leaving them to train themselves or lose their jobs.³³ As late as the 1980s, many law schools still had not addressed the importance of legal writing in their curriculum and instead continued to rely on law firms to do that training on the job.³⁴

While many law schools did not value the need to teach students how to write about the law for far too long, a few law schools, guided by a few pioneering professors of writing and the law, began to offer writing courses to law students in the 1940s.³⁵ A new philosophy be-

28. *See id.* at 189–90 (noting that, although most lawyers received their training through apprenticeships, many mentors neglected to teach or explain the practice of law to their apprentices).

29. *See id.* at 190 (explaining that many lawyers required their apprentices to spend the majority of their time copying writs or performing other clerical tasks).

30. Julie A. Oseid, *When Big Brother Is Watching [Out For] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues from My Mentor*, 59 S.C. L. REV. 393, 396–97 (2008).

31. ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION 112 (2007) (suggesting that the Socratic method often results in a negative and confusing approach to teaching law, yet “[t]he Socratic dialogue and case method has been a fixture in legal education in the United States for over 100 years”).

32. *See* Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 895–96 (2002) (explaining that a decrease in the amount of mentoring firms were willing to provide to new lawyers meant that new lawyers were often not trained in legal writing).

33. *See id.* (stating that law firms, which had formerly allotted time to training their new associates in legal writing, began to consider such training to be a waste of billable hours).

34. *Id.* at 894.

35. *Id.*

gan to take hold, and over the next fifty years most law schools adopted some version of a legal writing, research, and analysis course.³⁶ These courses helped alleviate the problems and concerns many practicing attorneys had about young lawyers' ability to draft memos, motions, briefs, client correspondence, and—depending on the depth and requirements of the course—possibly more.³⁷ Professors of legal writing could closely monitor the style, analysis, and quality of the writing, enabling them to catch bad habits before they took hold. Professors could also emphasize, in the relatively safe environment of law school, the attention to detail and precision students need to succeed in the legal profession and how that affects a student's reputation in the legal community.³⁸

Legal writing professors also began to use their writing courses to introduce and teach certain rhetorical concepts. For example, the rhetorical concept of ethos characterizes the credibility that, in the context of legal practice, a lawyer evinces as she communicates in a professional, or any, setting.³⁹ Legal writing professors have begun to return to rhetorical concepts to frame students' thinking about how to establish credibility in their writing.⁴⁰ The words a lawyer puts on a page tell a multilayered story about the writer herself, which goes far beyond the meaning of the message she is trying to convey. A lawyer can signal her competence, intelligence, diligence, forthrightness, a sense of good will, and more, through her writing.⁴¹ Whether they discuss ethos or not, legal writing professors have stressed the importance of thoughtful organization, careful research, precise citation, articulate expression, and much more since the beginning of legal writing programs.⁴² The importance of establishing ethos in writing becomes particularly important when teaching law students who will

36. *Id.* at 896.

37. *See id.* at 896–98 (discussing the formalistic method commonly used to teach legal writing).

38. *Id.* at 897–98 (noting that professors' comments on student papers emphasized clarity, accuracy, and attention to detail).

39. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING, THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 127 (2002).

40. *See* Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129, 129–30 (2006) (providing citations to works that apply rhetoric theory to the teaching of legal writing).

41. *See generally* SMITH, *supra* note 39, at 101–26 (explaining that ethos exhibits many traits that are important to credibility, and suggesting that ethos can be established in legal writing).

42. *See* Pollman, *supra* note 32, at 896–98, 905–08 (describing some of the elements of legal writing professors stress through different methods of teaching legal writing).

likely be expected to use e-mail in their communications immediately upon entering legal practice.⁴³

Professor Michael R. Smith's advanced legal writing book provides students with a number of ways lawyers can demonstrate intelligence in legal writing.⁴⁴ Professor Smith organizes these traits into several categories of writer: the informed writer, the writer adept at legal research, the organized writer, the analytical writer, the deliberate writer, the writer empathetic toward the reader, the practical writer, the articulate writer, the eloquent writer, the detail-oriented writer, and the innovative writer.⁴⁵ Ideally, each of these traits is evident in an intelligent and credible writer's work, but in terms of teaching students how to use e-mail effectively, the most important trait to emphasize is how to be articulate. Being articulate requires a writer to use proper grammar and punctuation and to write in a clear, simple, understandable style.⁴⁶ In the context of e-mail, law students often overlook these skills.

IV. THE DEVELOPMENT OF ELECTRONIC COMMUNICATION

The medium of written communication provided a foundation upon which the legal profession could build, and the use of the written word has kept lawyers busy since the beginning of legal practice. And while the importance of the ability to write about the law is obvious, how lawyers write to each other, the courts, or clients changed very little for thousands of years. Putting ink to paper, either by quill, ball-point pen, typewriter, word processor, or personal computer was the only means through which lawyers could communicate until the development of electronic, and now digital, communication. In 1972, e-mail was invented,⁴⁷ but it took approximately twenty years for it to become as commonly used as it is now. In the fifteen to twenty years

43. See Robbins-Tiscione, *supra* note 1, at 32 (noting that ninety-two percent of Georgetown University Law Center's 2006 class reported using substantive e-mails to communicate with clients).

44. See SMITH, *supra* note 39, at 127–33 (explaining how students can evince the trait of intelligence as an aspect of ethos).

45. See *id.* at 133–70 (defining each category of writer and explaining the different ways intelligence can be demonstrated in each category of writing).

46. *Id.* at 164.

47. See Tom Van Vleck, *The History of Electronic Mail*, MULTICIANS.ORG, www.multicians.org/thvv/mail-history.html (last updated Dec. 20, 2010) (describing several different simple e-mail programs that were written in 1972).

since e-mail has been a part of most people's everyday lives, it has supplied another sea change to the profession.⁴⁸

Electronic communication has been immensely helpful to lawyers, who can work faster and more efficiently than ever. Lawyers can use e-mail to complete tasks quickly and efficiently, like sending the results of research to clients, contacting opposing counsel to work on a deal, or asking court clerks for information about docketing and local rules. E-mail can make difficult conversations a little easier by avoiding potentially volatile person-to-person contact that can make achieving client goals difficult.⁴⁹ E-mail can make file sharing easier, late-night communication possible, and help lawyers check ministerial tasks off of their to do lists more quickly by providing a quick and easy medium to ask neutral questions of opposing counsel. In short, e-mail has created huge advantages for many people in the legal profession and is likely here to stay

The benefits of e-mail to lawyers are vast and cannot be easily quantified, but lawyers who are not careful can also suffer greatly through the misuse of e-mail. Problems with tone can inadvertently and counterproductively anger a client, opposing counsel, or the court.⁵⁰ As discussed above, a lawyer can build credibility by evincing intelligence in her writing, and being articulate is one way to do that.⁵¹ It is, however, unfortunately much easier to lose credibility by sending inarticulate communications, particularly those that can be easily shared with others.⁵² E-mail mistakenly forwarded to the wrong person can create embarrassing consequences—even professional ethics repercussions—for the person forwarding the information.⁵³ And including sensitive client information in e-mail can create dis-

48. See Crist, *supra* note 4, at 96 (noting that as clients become more familiar with e-mail and the Internet, they will expect their lawyers to be equally technologically proficient).

49. See Robert H. Thomas, *Hey, Did You Get My E-Mail? Reflections of a Retro-Grouch in the Computer Age of Legal Education*, 44 J. LEGAL EDUC. 233, 237 (1994) (noting that e-mail reduces social impediments that may arise in other forms of communication).

50. See Gary L. Stuart, *The Legal Word, E-Mail*, ARIZ. ATT'Y, Feb. 2009, at 10, 10 (explaining that thoughtlessly worded e-mails can anger their recipient and result in immediate, angry responses).

51. See *supra* Part III.

52. See Robbins-Tiscione, *supra* note 1, at 45 (quoting a survey respondent who stated, "I also think it's important to remember how easily e-mails can be forwarded. I've definitely had people at client companies *other than the person to whom I sent an e-mail* call me to talk about it.") (emphasis in original).

53. See, e.g., Debra Cassens Weiss, *Did Lawyer's E-mail Goof Land \$1B Settlement on NYT's Front Page?*, A.B.A. JOURNAL, http://www.abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_front_page/ (Feb. 6, 2008, 6:55 AM) (providing an example of professional repercussions stemming from a potentially mistakenly sent e-mail).

covery problems that can adversely affect clients who are under investigation or engaged in litigation.⁵⁴

While electronic communication has a few potential downsides, the good news is that lawyers and law students can be trained to use e-mail properly. In fact, lawyers and law students must be trained to use e-mail properly to help them avoid making mistakes that electronic communication can invite.⁵⁵ Obviously, there is no way to avoid every mistake that can be made in e-mail, but with careful instruction, those mistakes can be limited to the good old fashioned kind that lawyers have made on paper since the beginning of the legal profession. The combination of common use among lawyers and the potential for dangerous errors in e-mail make it imperative that legal writing professors include instruction about how to write e-mail as part of their curriculum.⁵⁶ Failing to teach students how to use e-mail professionally could be likened to failing to teach students how to write a legal memorandum (setting aside, for the moment, the burgeoning debate about whether the legal memo is dead with the advent of the shorter, more direct legal analysis e-mail lawyers commonly use now).⁵⁷

V. WHY E-MAIL PROFESSIONALISM SHOULD NOT BE ASSUMED AND MUST BE TAUGHT

Just as it is unfair to stereotype all law students as totally ignorant of professional norms regarding e-mail, it is also unfair to assume that writing professional e-mail is an inherent skill that law students possess. Most law students are in their mid-twenties, which means that most people in law school today were born in the mid-1980s. The infant stages of e-mail communication began in the early 1970s.⁵⁸ Of course, e-mail was not commonly used in a professional or social context until more than twenty years after that, probably the late-1980s or

54. See, e.g., *Zubulake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 316–17 (S.D.N.Y. 2003) (holding that e-mail is governed by Federal Rule of Civil Procedure 34, which governs discovery requests, and that for purposes of discovery e-mail is just as relevant as writings on paper).

55. See Wayne Schiess, *E-Mail Like a Lawyer*, MICH. B.J., Sept. 2010, at 48 (noting that e-mail is commonly misused as a form of business communication and that lawyers should review their e-mail practices for errors).

56. See Crist, *supra* note 4, at 101–02 (arguing that teaching students to communicate effectively through e-mail, including instruction in e-mail rules and conventions, is an essential skill that should be taught in legal writing courses).

57. See Robbins-Tiscione, *supra* note 1, at 32 (noting that seventy-five percent of survey respondents wrote no more than three legal memoranda per year, but that ninety-two percent reported communicating with their clients through e-mail).

58. Van Vleck, *supra* note 47.

early-1990s at the earliest.⁵⁹ That means that many law students today were probably just learning how to print when e-mail communication began to gain momentum as an effective communication tool.

As today's law students entered elementary school and began learning how to write, they had significantly more exposure to technology such as e-mail than their parents.⁶⁰ But while they may have been taught how to write a paper about grasshoppers or what they did over the summer, they probably did not receive the same instruction regarding the proper way to write an e-mail. As children, many of today's law students rarely used e-mail to communicate with anyone other than their peers, or possibly their parents.⁶¹ Youth generally use e-mail and instant messaging to make social plans, discuss school assignments, or chat about friends, movies, or popular culture.⁶² The style of communication that many young adults now possess is a direct result of self-training and peer influence, not lessons they received from teachers or parents.

The self-guided nature of children's learning and handling of electronic communication is not all bad. Confidence, freedom, and social connections are but a few of the positive results that can come with learning and possessing a new skill without adult influence. But those positive results do not necessarily include the skills lawyers must possess to write professional e-mail.⁶³ In fact, many of the advantages

59. See Thomas, *supra* note 49, at 237 & n.17 (1994) (noting that e-mail did not gain widespread acceptance until the 1980s and that those in the legal profession began to use e-mail in the 1990s).

60. See *id.* at 241 (noting that today's law students "have been taught *on* computers as well as *about* computers") (emphasis in original).

61. Cf. *Teens & Parents 2004*, PEW INTERNET, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/Shared-Content/Data-Sets/2004/Teens-Parents-2004.aspx> (last visited Sept. 9, 2011) (noting the number of hours a week teens spent communicating through e-mail and the percentage of teens who reported using e-mail to write messages to their friends). Comparing the oldest survey on record, conducted in 2000, to the 2004 survey makes it clear that Internet and e-mail usage—as well as instant messaging or text messaging—among young people was high to begin with and has only continued to rise. *Compare Teens and Parents 2000 Survey Data*, PEW INTERNET, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/Shared-Content/Data-Sets/2000/Teens-and-Parents-2000-Survey-Data.aspx> (last visited Sept. 9, 2011) *with* *Teens & Parents 2004, supra* (demonstrating that online shopping and online game play each increased over thirty percent among teens between December 2000 and December 2004). In 2004, eighty-nine percent of young people indicated that they had sent or read e-mail. *Teens & Parents 2004, supra*.

62. See *id.* (reporting the high percentage of teenagers who use the Internet to send or read e-mail; send or receive instant messages; get news and information; and stay informed about movies, television, and popular culture).

63. See Thomas, *supra* note 49, at 241 (suggesting that the computer training today's law students may receive does not prepare them for the careful and deliberate study that law requires).

to e-mail for young people appear to be linked to the decided informality of the medium. Its speed and efficiency may have inadvertently encouraged young people learning how to use e-mail to loosen whatever standards they learned about writing in more formal settings.⁶⁴

The trend toward text and instant messaging and away from e-mail as a means of social contact among young people⁶⁵ has resulted in even more rudimentary language usage. And while it may be clever, it does not help students write e-mail professionally.⁶⁶ Digital messages are sent via cell phones, which have limited data fields that make abbreviation and dropped punctuation cheaper and more efficient for people sending text messages. Some cell phones have adapted to make typing words easier, but interestingly, many people sending text messages have adapted their writing style to speed up the process of typing text messages.⁶⁷ Texting has given birth to a whole new system of writing that might seem like top secret encryption to those unfamiliar with the popular vernacular.⁶⁸ Spelling, punctuation, and grammar may have no place in proper text messaging, but that has certainly not stopped, and perhaps is contributing to, the popularity of the medium.

The informality of personal e-mail use and texting are not appropriate in a professional context. As noted above, professional e-mail use by lawyers is common today and is not likely to wane as even courts have moved toward paperless communication and filings.⁶⁹

64. See *Teens & Parents 2004*, *supra* note 61.

65. See *id.* (noting that in 2004 forty-six percent of teens most often sent instant messages to friends compared to thirty-three percent who most often sent e-mail).

66. See Andrea Eger, *Learning Language: Spelling Still Counts*, TULSA WORLD, Feb. 8, 2007, at A1 (explaining a high school policy of penalizing informal language, including abbreviations, in written work). But see Aamina Zafar, *TEXTING MKS U CLVR, Boffins Says Kids Can Learn from Mobiles*, DAILY STAR, May 26, 2008, at 27 (quoting Professor David Crystal, honorary professor of linguistics at the University of Wales, as saying that “the use of textual abbreviations improves overall literacy”).

67. See Crispin Thurlow, *Generation Txt? The Sociolinguistics of Young People’s Text-Messaging*, DISCOURSE ANALYSIS ONLINE (Apr. 28, 2005), <http://faculty.washington.edu/thurlow/papers/Thurlow%282003%29-DAOL.pdf> (noting the development of predictive text function on some cell phones and that “[a]s such, the length (and abbreviated linguistic forms) of messages would therefore seem instead to be a function of the needs for speed, ease of typing and, perhaps, other symbolic concerns”).

68. See Zafar, *supra* note 66, at 27 (translating the title of the article from textual abbreviations to standard English for those readers unfamiliar with texting).

69. See, e.g., *Frequently Asked Questions*, THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, <http://support.cacd.uscourts.gov/faq.aspx> (last visited Sept. 13, 2011) (“In January 1996, the Administrative Office of the U.S. Courts began development of the Case Management/Electronic Case Filing (‘CM/ECF’) system. CM/ECF is a comprehensive case management system that will allow courts to maintain electronic case files and offer electronic filing over the Internet . . . Full case information is available immediately to attorneys, parties, and the general public through the Internet.”).

The problem arises when law students and newly graduated lawyers, many of whom have never worked in an office setting that requires professional e-mail communication before, are expected to transfer the legal writing and analysis skills they have acquired in school into the e-mail medium without any training.⁷⁰ It is true that many, perhaps most, students and new lawyers inherently have the ability and intuition to write e-mail professionally, but not all do.⁷¹ And of those who know how to write e-mail professionally, many do not know how to maximize the efficiencies e-mail offers in a professional environment.

In addition to the problems that can arise when someone who has only used e-mail in a social setting makes the switch to using it in a professional setting, there are potential legal implications to e-mail that students should learn. E-mail is discoverable communication, which can get lawyers and their clients into trouble if not used carefully.⁷² Because many people do not understand the far reaches of document discovery, the use of e-mail in a professional setting can serve to document legally questionable conduct by clients in a business setting, for example.⁷³ Even receiving an e-mail that raises criminal or civil legal issues can be devastating for a client, and it can affect the client's lawyers negatively as well.⁷⁴ Simple instruction about what should and should not go into e-mail will save students a lot of trouble in the future, and prepare them to teach clients how to do the same.

Law students today are going to be lawyers who know how to communicate effectively via e-mail tomorrow. As stated above, legal employers today do not take much responsibility in training their new hires in any aspect.⁷⁵ E-mail is no exception to that rule, even though

70. See John Paschetto & Margaret M. DiBianca, *Digital Ink Done Right*, 27 DEL. LAW. 18, 19 (Winter 2009/2010) (stating that e-mail etiquette is not a part of most firms' training programs).

71. See *id.* at 22 (stating that most newly hired attorneys realize that emoticons and abbreviations are not appropriate in business correspondence).

72. Before he became governor of New York, and ultimately resigned amid scandal, Eliot Spitzer was the attorney general of New York with strong opinions about the professional use of e-mail. Spitzer was once quoted as saying: "Never write when you can talk. Never talk when you can nod. And never put anything in an e-mail." *My Golden Rule*, BUSINESS 2.0, CNNMONEY (Nov. 28, 2005, 1:37 PM), http://money.cnn.com/2005/11/28/news/newsmakers/goldenrule_biz20_1205/index.htm.

73. Marcus R. Jones & Hugh H. Makens, *Traps in Electronic Communications*, 8 J. BUS. & SEC. L. 157, 165 (2008) (listing multiple ways e-mail communications can be used to demonstrate legally questionable conduct).

74. See *id.* at 169 (noting that e-mail can raise legal issues for anyone who sends, receives, or is copied on a message).

75. See *supra* note 33 and accompanying text.

it is perfectly reasonable to expect that new lawyers would not know how to use e-mail in a professional context. As was true when law schools began to understand the importance of teaching legal research, writing, and analysis, law schools should also take on the responsibility of teaching students how to improve their e-mail communication skills. Even though the lessons students must learn are crucial to their budding legal careers, they are not complex or difficult to teach.

VI. HOW TO TEACH E-MAIL PROFESSIONALISM

As previously discussed, professors cannot assume that students know how to write e-mail professionally, so writing classes must include instruction on e-mail form and style. That instruction must include several components, all of which dovetail nicely with other topics that must be addressed in legal research, writing, and analysis classes. The lessons must be crafted to reach a skeptical audience, provide examples of good and bad e-mail technique, address tone and grammar issues that can easily occur in e-mail, and offer students an opportunity to practice the more refined style they have learned. Teaching students how to write e-mail professionally is easier than teaching any of the skills that students learn throughout the semester, because students will be using a similar skill set, just in e-mail instead of on paper.⁷⁶ The crucial difference that makes separate e-mail lessons imperative is that most students' prior experience with e-mail is extremely informal, and using it more professionally is not as intuitive as it might seem.⁷⁷

A. *Remember Your Audience and Avoid Finger-Wagging*

Although using e-mail professionally takes more than intuition, instructing students on the subject is not difficult as long as the students do not feel patronized by their professor. Students are so comfortable and familiar with e-mail that they may be skeptical of being taught how to use it from someone who may be, perhaps, more "mature" than they are. They need the reassurance that they are not going to be treated as neophytes, that most of them have an obvious expertise when it comes to the process of using e-mail, and that they are not going to be barred forevermore from using e-mail in ways with

76. See Robbins-Tiscione, *supra* note 1, at 46 (quoting a survey respondent who suggested that the skills learned in formal legal writing are easily transferrable to legal e-mails).

77. See *id.* at 44–45 (noting that e-mails to clients are very different from informal e-mails sent to friends in that legal e-mails must be more formal and structured).

which they are comfortable.⁷⁸ Professors should make clear to their students that this information is simply intended to ease their transition to using e-mail in a professional context, and has to do with tone and style more than ability or knowledge. In sum, students deserve some deference regarding their e-mail acumen; most of them have been using it for nearly their entire lives.

In keeping with this deferential tone, professors should avoid finger-wagging and preaching in their approach to introducing the concept of professionalism in e-mail. As most professors know, a holier-than-thou attitude, particularly about a topic with which most students feel is their rightful domain, will do little to encourage change and learning. One good way to connect with students is to employ humor in the lesson to soften what might be taken as sharp criticism if not handled delicately. An easy way to introduce humor into the lesson is to give, if possible, real-life anonymous examples of horrible e-mail mistakes people make.⁷⁹ Examples of poorly written e-mail are all too easy to acquire, unfortunately (except in this context), and are often so bad that they are funny.

It might seem risky to show examples of terrible e-mail style, form, and grammar when introducing the concept of e-mail professionalism because students might recognize errors they make and take offense. If the example e-mails are terrible enough, though, students tend to see little resemblance to their own e-mail style (even if they should), but relate to the information because they have received similar e-mails from others. As is true in many contexts, it could be hard for students to fix a problem if they cannot acknowledge that there is one in the first place. But students tend to be able to understand e-mail professionalism as a broader issue and are often able to incorporate rules and tips into the e-mails they write without first having to admit that their usual e-mail style is not fit for professional contexts.⁸⁰ Using bad example e-mails written by others is personal, but personal to someone else and can issue a wake-up call in a non-confrontational way.

B. What to Emphasize When Teaching E-Mail Professionalism

The more things change, the more they stay the same, as the old adage goes, and it holds true when teaching students about writing e-

78. Cf. STUCKEY, *supra* note 31, at 114–15 (advocating that law professors and students display mutual respect for each other and consider each other's experiences).

79. For an example of how to use e-mail mistakes to prove a point about the need for professionalism, see Stuart, *supra* note 50, at 10–11.

80. See Schiess, *supra* note 55, at 48 (noting that legal writing students can recognize and report on examples of poor e-mail professionalism).

mail professionally. First, students may not be accustomed to writing e-mail with careful editing and proper grammar in mind, but it is obviously as important in e-mail as it is when writing on paper. Second, students may not realize that the context in which they are writing e-mail can dramatically change the style and form they use. And third, students should have an understanding of how the tone of their communication can be very difficult to discern in the electronic medium, but using the same tone they would use in paper writing will serve them well. Grammar, context, and tone are important concepts for students to understand, regardless if they are writing on paper or in e-mail, but e-mail presents particular challenges of which they must be apprised.

No one would dispute that grammar is a constant. But many people employ their grammar skills in non-formal e-mail less stringently (much as we do in speech), which is a widely accepted practice. Whatever people do in their private e-mail is their business, but a lack of capitalization, punctuation, and proper spelling can become a bad habit that creeps into professional e-mail as well.⁸¹ Because lawyers evince intelligence through articulate writing, transferring those skills to e-mail is particularly crucial.⁸² Professors should make two important points with students to help them “professionalize” their e-mail correspondence: their inner grammar maven must emerge, and they must edit their work.

Reminding students to use proper grammar in professional e-mail is an easy task, but what students may not realize is that making typos in e-mail is much easier to do than on paper. Reading and editing on a computer screen can be more difficult than reading and editing on paper.⁸³ Errors are easily missed and writers can easily prematurely hit the “send” button. To help ensure that recipients only see clean, carefully edited messages, students should be instructed to save their messages as drafts before hitting send, and then to print and edit their e-mail on paper when the text is longer than four lines.⁸⁴ While this might diminish the efficiencies of e-mail (and the relatively low environmental impact it offers), it is the only safe way to edit e-mail for content and avoid errors.

81. *See id.* (differentiating what is appropriate for personal e-mails from what is appropriate for professional business e-mails).

82. *See supra* Part III.

83. *See Crist, supra* note 48, at 106 (“Reading online is not the same as reading a hard copy. When people read online, they tend not to read word by word, instead, they scan the page. In a recent study, seventy-nine percent always scanned any new page—only sixteen percent read word by word.”).

84. *See id.* (suggesting that students learning to utilize e-mail are better off reading hard copies first).

Students should also understand how important context is in e-mail. While professional e-mail is always going to be more formal than e-mails sent between spouses, friends, or family, it does not have to be stiff or unfamiliar. Knowing one's audience can serve students well when writing professional e-mail. For example, an e-mail to a long-time client who is also a friend can be more informal than an e-mail to a judge's clerk.⁸⁵ Writing e-mail more formally than is called for can also be off-putting to recipients, as can the obvious problem of sending e-mail riddled with colloquialisms and typographical errors, so students should be very thoughtful about their intended recipient while drafting professional e-mail.

Writing professional e-mail requires more than simply cutting and pasting text from a document that might have been printed onto paper into an e-mail. E-mail should be kept short and simple. Dumping huge amounts of text into an e-mail can be overwhelming to read on the screen,⁸⁶ so if a long document must be sent, it should be forwarded in its original form with a short cover e-mail describing the attachment. If the e-mail is one or two paragraphs long but has several important points, those should be set off by bullets or numbers to highlight the "action items" or crucial bits of information.⁸⁷ In addition to being straightforward, e-mail should also be respectful, devoid of sarcasm, and written with clarity.

The most important message to deliver to students about the style in which they write e-mail is to be very careful about tone. Many people do not realize how easy it is to sound annoyed or angry in e-mail when the writer actually intended to be sarcastic or humorous.⁸⁸ A standard aid in clarifying a playful tone is the "emoticon," a sideways grouping of punctuation marks that look like smiley faces, but emoticons are unprofessional and often hard to decipher, leaving the reader to believe that the writer is angry and/or uses punctuation sloppily.⁸⁹ Instead of relying on emoticons to set the tone of an e-mail, students should carefully choose their words to ensure that the message they send is the intended one. In short, the students need to

85. See Paschetto & DiBianca, *supra* note 70, at 19 (explaining when lawyers should use the most formal, moderately formal, and least formal e-mail styles).

86. See Schiess, *supra* note 55, at 49 (stating that readers are more likely to stop reading long e-mail messages than they are to stop reading other written communication).

87. See *id.* at 50 (suggesting that e-mails be broken up into short block-style paragraphs for ease of reading).

88. See Thomas, *supra* note 49, at 243 ("[I]rony and humor, for instance, are not easily conveyed electronically.").

89. See Schiess, *supra* note 55, at 48 (stating that emoticons are inappropriate for professional office e-mails).

know that they should say what they mean in the most deferential, respectful, and clear terms possible.

C. Assign Some Practice

Most law students have lots of practice at sending e-mail, but not a lot of practice sending professional e-mail. An easy way to rectify this is to explain in course guidelines to the students that they are expected to start implementing the rules that govern e-mail in a professional setting when interacting with their professors, potential employers, and any other recipient who might expect something more formal.⁹⁰ An easy way to assign practice to students is to ask them to condense an assignment already completed in the more traditional format, such as a client letter, into a shorter, more concise, clear e-mail and send it to you. This might also be the appropriate place to consider teaching students how to re-style a traditional memo into an e-mail that focuses more on the substance of the legal issue and less on the old-fashioned redundancies built into traditional memos.⁹¹

VII. CONCLUSION

Law professors must take the opportunity to teach e-mail professionalism to students because it is a skill that cannot be assumed. The learning curve for law students and new lawyers is incredibly steep, so the temptation to allow students to figure out how to use e-mail in a professional setting rather than overload them is great. With the pervasiveness of e-mail in the lawyer's workplace, however, it is unfair to assume that students know how to translate their legal writing skills into proper e-mail form. Just as legal writing professors do not leave students to their own devices to learn how to write memos or briefs, professors should not assume that students can use e-mail professionally. The medium is likely here to stay, and while its usage may change over time, injecting some common sense rules into students' minds regarding e-mail will allow them to present themselves well professionally and adjust as e-mail etiquette rules change.

Legal writing professors have proved themselves flexible and adaptable when change in the legal profession commands adjustment

90. See Crist, *supra* note 4, at 101–02 & n.27 (suggesting that legal writing teachers require the formal use of e-mail as a part of teaching writing, and suggesting that some ground rules use for e-mail use be laid out for students).

91. See Robbins-Tiscione, *supra* note 1, at 33 (noting that many new lawyers write substantive e-mails in the form of informal memoranda that focus more on the specific question at issue and less on the structure and elements of a traditional legal memorandum).

to what students learn.⁹² Knowing what we now know about the winds of change in client communication, teaching students how to effectively use e-mail is imperative.⁹³ Doing what we already do—for example, requiring properly written e-mail from students in our classes, asking students to think about and adjust their online personas to reflect their new professional identities, modeling good e-mail etiquette—is certainly important. But an affirmative effort by legal writing professors to help students use e-mail in a professional legal context will be even more effective in assisting them to start to shape their professional ethos. If, for no other reason, legal professors should teach e-mail professionalism to avoid having to read any more horrifically written, unclear, inappropriate e-mails written at 2 a.m. and demanding an immediate response.

92. *See supra* Part III.

93. *See supra* note 48 and accompanying text.