



2006

Can Legal Writing Programs Benefit from Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized, Performance-Type Assignments?

John Schunk

Santa Clara University School of Law, jshunk@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Legal Education Commons](#)

Automated Citation

John Schunk, *Can Legal Writing Programs Benefit from Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized, Performance-Type Assignments?*, 29 *HAMLIN L. REV.* 307 (2006),
Available at: <http://digitalcommons.law.scu.edu/facpubs/102>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

**CAN LEGAL WRITING PROGRAMS BENEFIT FROM
EVALUATING STUDENT WRITING USING SINGLE-
SUBMISSION, SEMESTER-ENDING, STANDARDIZED,
PERFORMANCE-TYPE ASSIGNMENTS?**

TABLE OF CONTENTS

I.	INTRODUCTION	308
II.	WHAT IS A SINGLE-SUBMISSION, SEMESTER- ENDING, STANDARDIZED, PERFORMANCE-TYPE ASSIGNMENT?	309
	<i>A. WHAT IS IT?</i>	310
	<i>B. HOW DOES THIS DIFFER FROM OTHER LEGAL WRITING PROGRAMS?</i>	311
	<i>C. WHY DID SANTA CLARA MAKE THIS CHANGE, AND WHAT WERE THE ANTICIPATED BENEFITS?</i>	313
III.	WHAT BENEFITS CAN LEGAL WRITING PROGRAMS GAIN?	316
	<i>A. BENEFITS OF USING A PERFORMANCE-TYPE ASSIGNMENT</i>	316
	<i>B. BENEFITS FROM A SINGLE-SUBMISSION ASSIGNMENT</i>	320
	<i>C. BENEFITS FROM A SEMESTER-ENDING ASSIGNMENT</i>	323
	<i>D. BENEFITS FROM A STANDARDIZED ASSIGNMENT</i>	327
IV.	REACTIONS TO USING THESE ASSIGNMENTS	331
	<i>A. EFFECT ON STUDENT COURSE EVALUATIONS</i>	331
	<i>B. TEACHER REACTIONS</i>	333
V.	CONCLUSION	335

**CAN LEGAL WRITING PROGRAMS BENEFIT FROM
EVALUATING STUDENT WRITING USING SINGLE-
SUBMISSION, SEMESTER-ENDING, STANDARDIZED,
PERFORMANCE-TYPE ASSIGNMENTS?**

*John D. Schunk*¹

I. INTRODUCTION

As a recent popular book² makes clear, people react to incentives,³ and law students are no different. Law school students often shape their work and study habits according to what they think will help them maximize the grades they receive in a particular course.⁴ Law school students study differently depending on what and how their professor will base or calculate their grade.⁵ Law school students will prepare differently for an essay examination than for a multiple-choice examination, for a take-home examination than for an in-class examination, and for an open-book

¹ Legal Writing Instructor, Santa Clara University, Santa Clara, California; J.D., University of California, Hastings College of the Law, 1988; B.A., *magna cum laude*, Saint Mary's College of California, 1985. Mr. Schunk served as the Acting Director for the legal writing program at Santa Clara University School of Law from 2001-2004. The author wants to acknowledge and thank those who have taught legal writing at Santa Clara University School of Law over the last four years. They have many years of teaching experience and, as this essay explains, were willing to try something a little different. These legal writing teachers are, in alphabetical order: Evangeline Abriel, Shane Cortright, Molly Current, Yvonne Ekern, Lisa Hague, Michael Jones, Rebecca Jones, Natalie King, Karen Markus, Penny Oliver, Sean Raft, Patricia Rauch, JoLi Schunk, and Lois Schwartz.

² STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* (2005) (stating on the book jacket that this book was a *New York Times* best seller).

³ *Id.* at 13 ("Incentives are the cornerstone of modern life.").

⁴ I have observed this behavior consistently over the last ten years while teaching courses in law school. During this time, I have taught both writing based courses and substantive courses. In both types of courses, my students often want to know on what grades will be based so that they can plan their study habits accordingly. My experience is consistent with the advice the American Bar Association offers adjunct faculty. In the American Bar Association's *Adjunct Faculty Handbook*, new adjunct faculty are warned about "the focus students place on knowing what it will take to get a good grade. Learning objectives, no matter how compelling, may take a back seat to knowing how many points can be earned for performance on each class task – quizzes, projects, participation, performance, mid-terms, and final exams." ABA ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *ADJUNCT FACULTY HANDBOOK* 31 (2005), available at <http://www.abanet.org/legaled/publications/adjuncthandbook/adjuncthandbook.pdf>.

⁵ For example, one can see this behavior in law students when they ask the degree to which class participation will affect their semester grades. My teaching experience suggests that upper-division law students often participate in class discussions more effectively when they know class participation can have an impact on their final grades.

examination than for a closed-note examination.⁶ In short, how and when students are evaluated helps shape how they study for a particular course.

This essay suggests that this principle applies to legal writing courses as well and that legal writing programs can obtain a number of benefits from altering the traditional way of evaluating student performance in the areas of legal research, writing, and analysis. Many legal writing programs evaluate a student's performance based on a series of assignments that students write and then rewrite after receiving comments from their legal writing teacher.⁷ Over the last decade, some have proposed altering this model by introducing the Multistate Performance Test into the legal writing curriculum⁸ or by using traditional objective examinations in first-year legal writing courses.⁹

Based on a three-year experience at Santa Clara University School of Law, this essay suggests that using these principles, those of performance testing and traditional examinations, in a slightly modified form can reap significant benefits for legal writing programs. In part II, this essay explains what this modified concept looks like and how it works, explains how it differs from what many other law schools do, and explains what motivated the Santa Clara legal writing program to try this alternative.¹⁰ In part III, this essay identifies the numerous benefits that may come from adopting this idea for evaluating student writing.¹¹ As this essay will illustrate, these benefits were far greater and far more extensive than were anticipated. In part IV, this essay examines student and teacher reactions to using the kind of assignments described here.¹²

II. WHAT IS A SINGLE-SUBMISSION, SEMESTER-ENDING, STANDARDIZED, PERFORMANCE-TYPE ASSIGNMENT?

Before describing the benefits of using these types of assignments, part II discusses three things. First, it seeks to define a single-submission,

⁶ Over the last ten years, I have observed this behavior because I have taught various courses using different forms of examinations. In the past, depending on the course, I have used (1) a traditional three-hour, three-essay examination, (2) a short-answer examination, (3) a multiple-choice examination, (4) a true-false examination, (5) closed-book and close-note examinations, and (6) open-book and open-note examinations. When students learn the format of that semester's examination, it does affect how they prepare for it.

⁷ 2005 Survey Results, 2005 ASS'N OF LEGAL WRITING DIRECTORS/LEGAL WRITING INST. 13, available at <http://lwionline.org/survey/surveyresults2005.pdf> (responses to question twenty-three).

⁸ Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, 8 PERSPS.: TEACHING LEGAL RES. & WRITING 118 (Spring 2000).

⁹ Douglas Miller, *Using Examinations in First-Year Legal Research, Writing, and Reasoning Courses*, 3 LEGAL WRITING 217, 231 (1997).

¹⁰ See *infra* notes 13-49 and accompanying text.

¹¹ See *infra* notes 54-120 and accompanying text.

¹² See *infra* notes 121-133 and accompanying text.

semester-ending, standardized, performance-type assignment.¹³ Second, it describes how it differs from the way many law school legal writing programs currently evaluate student writing for the purpose of assigning grades.¹⁴ Third, it explains why Santa Clara's legal writing program decided to go in this direction and what benefits were anticipated.¹⁵

A. *What Is It?*

As the introduction suggests, these assignments seek to blend the positive aspects of the performance tests used on the majority of bar examinations with the positive aspects of traditional end of semester law school examinations. The assignments discussed in this essay have four features.

1. *Performance-Type Assignments* – These assignments use performance tests¹⁶ as a model, but they have some differences. If they are closed assignments, then students receive a File¹⁷ and a Library¹⁸ like they would with a performance test on the bar examination. The File would contain a series of real-world documents which provide the facts for the assignment.¹⁹ These documents may include complaints, transcripts, letters, or almost anything else.²⁰ The Library would contain the only legal

¹³ See *infra* notes 16-25 and accompanying text.

¹⁴ See *infra* notes 26-37 and accompanying text.

¹⁵ See *infra* notes 39-49 and accompanying text.

¹⁶ For a general description of what constitutes a performance test, one can read many articles. See, e.g., Barbara M. Anscher, *Turning Novices Into Experts: Honing Skills for the Performance Test*, 24 HAMLINE L. REV. 224, 226-28 (2001); National Conference of Bar Examiners, *The MPT*, <http://www.ncbex.org/tests.htm> (follow "The Multistate Performance Test (MPT)" hyperlink) (providing a description of The Multistate Performance Test) (last visited Jan. 20, 2006).

¹⁷ The website for the National Conference of Bar Examiners describes the concept of the File:

The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include, for example, transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, and lawyer's notes. Relevant and irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. National Conference of Bar Examiners, *supra* note 16.

¹⁸ The website for the National Conference of Bar Examiners describes the concept of a Library:

The Library consists of cases, statutes, regulations and rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. . . . Library materials provide sufficient substantive information to complete the task. *Id.*

¹⁹ See *id.*

²⁰ During the first three years using this kind of assignment, the File consisted of an office memorandum from a senior partner at a fictional law firm instructing the students on what they needed to analyze and write. The file also contained other documents. In 2002, the

authorities the students could use to analyze the issues raised in the assignment.²¹ If the assignment is open, then students only receive the File and are expected to conduct their own research in order to analyze the relevant issues.²² It varies from the traditional performance test used on bar examinations in that students have more than ninety minutes²³ or three hours²⁴ to complete the tasks assigned; instead, students get a number of days or weeks to complete the assignment depending on its complexity and depending on whether it is a closed or open assignment.

2. *Semester-Ending* – These performance-type assignments are given to students at the end of the particular semester much like a traditional law school examination ends a semester or a year-long course. Like these traditional examinations, the performance-type assignment forms the primary basis for a student's grade.²⁵

3. *Single-Submission* – As the name suggests, students only submit their written work for this assignment once. Students do not rewrite the assignment after receiving their teacher's comments. Students are expected to revise and edit their work so that it has a professional quality before submitting it for evaluation by their legal writing teacher.

4. *Standardized* – This means that all students receive the same assignment. Essentially, it becomes a common assignment for all legal writing sections within a legal writing program. Also, it gets distributed to students and collected from students in a standard manner.

B. How Does This Differ From Other Legal Writing Programs?

According to the 2005 annual survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute,²⁶ this method of

students received a complaint for damages. In 2003, the students received a tort claim filed with a public entity. In 2004, the students received the transcript of a tape recording and portions of three deposition transcripts.

²¹ See National Conference of Bar Examiners, *supra* note 16.

²² Some refer to this as a "research-added performance test." Joseph Kimble, *The Best Test of a New Lawyer's Writing*, 80 MICH. B.J. 62, 63 (July 2001).

²³ The Multistate Performance Test Booklet Instructions begin with the following: "You will have 90 minutes to complete this session of the examination." National Conference of Bar Examiners, *supra* note 16.

²⁴ The State Bar of California, *Description of the California Bar Examination: General Bar Examination and Attorney's Examination*, <http://www.calbar.ca.gov/calbar/pdfs/admissions/ex1020900.pdf> (last visited Mar. 19, 2006).

²⁵ Through the first three years of using this kind of assignment, students earn ninety percent of their semester grade based on their performance on this semester-ending assignment. This differs from how some other legal writing instructors have used performance-type assignments in their classes. For example, one legal writing instructor who wrote about using a multi-state performance test in his legal writing course as a final exam decided to make it worth only ten percent of the student's grade. Jamar, *supra* note 8, at 119.

²⁶ The Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) conduct an annual survey of information relating to legal writing programs.

evaluating or grading students differs from the traditional methods still being used by a significant number of legal writing programs. While 149 legal writing programs now report assigning grades for their courses,²⁷ most assign these grades differently than other first-year courses. Although most first-year courses use a semester-ending or year-ending examination for assigning the bulk of a student's grade, most legal writing programs grade all or almost all of the major assignments used during the course.²⁸ When grading these assignments, legal writing programs split fairly evenly over whether students should submit their work anonymously.²⁹

Legal writing programs also differ on the extent to which students receive grades based on rewritten work. While a substantial minority of legal writing programs require students to rewrite all their major assignments,³⁰ the majority require rewrites of some assignments.³¹ In contrast, twenty-two legal writing programs do not require rewrites of major assignments.³² Of those legal writing programs considering rewritten student work in assigning grades, a slim majority graded both drafts and rewrites submitted.³³ Approximately one-quarter graded only the rewritten student work, and one-fifth graded "final versions . . . after which rewrites are required."³⁴

Overall, legal writing programs also traditionally show some aspects of coordination or collaboration. Unlike other first-year courses, law schools often view legal writing courses as part of a program.³⁵ Consistent with this idea, legal writing faculty within a particular program often show consistency in terms of syllabus coverage, number of major assignments, due

See 2005 Survey Results, supra note 7. ALWD and LWI ask the legal writing director from each law school to answer a series of 108 questions. In recent years, the surveys have had a high response rate. For example, 178 law schools responded to the 2005 survey. *Id.* at i. One can read the 2005 survey results online. *2005 Survey Results, supra* note 7. Additionally, the annual ALWD/LWI Survey Reports are available online for the years 1999-2004. Association of Legal Writing Directors, *ALWD/LWI LRW Survey Reports*, <http://www.alwd.org> (follow "ALWD/LWI Survey" hyperlink) (last visited Mar. 19, 2006).

²⁷ *2005 Survey Results, supra* note 7, at 8 (responses to question fifteen).

²⁸ *Id.* at 14 (responses to question twenty-five).

²⁹ *Id.* at 9 (responses to question seventeen).

³⁰ *Id.* at 13 (stating that fifty-eight of the responders to question twenty-three require at least one rewrite for all major assignments).

³¹ *Id.*

³² *Id.*

³³ *2005 Survey Results, supra* note 7, at 13 (stating that of the responders to question twenty-three, seventy-nine graded all drafts and rewrites; twenty-three graded only final versions, after which rewrites were required; and thirty-seven graded only rewrites).

³⁴ *Id.*

³⁵ Jan M. Levine, "You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching in) a First-Year Legal Writing Program, 29 VAL. U. L. REV. 611, 619 n.28 (1995) (stating that law schools may have a "legal writing committee" but none have an analogous "torts committee or a contracts committee").

dates, length of assignments, required textbooks, and citation manuals.³⁶ Legal writing directors report less consistency among legal writing faculty within a program with respect to the number of minor assignments, the content of class lectures and exercises, and, surprisingly, grading.³⁷

Essentially, the model proposed in this essay would differ from some common practices in the following ways. First, it would reduce the number of assignments being graded. Second, it would turn the basis for assigning grades toward original student work and away from work rewritten based on teacher comments. Third, it would require some consistency and collaboration among legal writing faculty with regard to the grading of one assignment each semester. As part III explains, making these changes can lead to a number of benefits.³⁸

C. Why Did Santa Clara Make This Change, and What Were the Anticipated Benefits?

The opportunity to consider making a change in the way Santa Clara's legal writing program evaluated student writing came during the 2001-2002 academic year. During this year, at the dean's direction, the faculty undertook a study of the legal writing program and restructured it.³⁹ This process resulted in a three-semester legal writing program.⁴⁰ As approved by the faculty, the first semester was designed to focus almost exclusively on writing and analytical skills by using shorter, simpler assignments with the objective office memorandum as the basic format.⁴¹ The second semester was designed to introduce research while moving students to more complex assignments in advocacy (e.g., a memorandum of points and authorities) and client advice formats.⁴² The third semester was designed to reinforce and expand the skills introduced during the first two semesters by using a more complex appellate advocacy assignment.⁴³

With this plan, the legal writing faculty needed to decide how to evaluate first-year students at the end of the first and second semesters for the purpose of assigning grades. At this time, some articles began appearing that discussed the potential uses of the Multistate Performance Test in legal

³⁶ See *2005 Survey Results*, *supra* note 7, at 14-15 (responses to question twenty-six).

³⁷ *Id.*

³⁸ See *infra* notes 49-119 and accompanying text.

³⁹ John D. Schunk, A Summary Review of the Initial Implementation of the Santa Clara University School of Law LARAW Reform Proposal 1 (Apr. 7, 2004) (unpublished manuscript, on file with the *Hamline Law Review*) (LARAW is Santa Clara University's acronym for legal analysis, research and writing).

⁴⁰ *Id.* at app. A at 1-3.

⁴¹ *Id.* at 4, app. A at 1.

⁴² *Id.* at app. A at 1.

⁴³ *Id.* at app. A at 1-2.

writing courses.⁴⁴ The concept behind a performance test matched quite closely with the faculty's direction of focusing on writing and analysis in the first semester of the restructured legal writing program.⁴⁵

Discussions among legal writing faculty also raised two other issues. First, the legal writing faculty discussed whether the submission and grading of rewrites had any significant impact on the grades actually awarded. Given that Santa Clara legal writing faculty have to follow a law school imposed curve, the answer was no. Based on the legal writing faculty's collective experience, the submission of rewrites had the effect of narrowing the qualitative differences between higher scoring and lower scoring students, but it had little impact on the relative ranking of any student's work. As part III will explain, this fact can adversely effect a student's perception of a legal writing program.⁴⁶ Second, the legal writing faculty discussed how the program could get students to take their initial written submissions more seriously. The entire legal writing faculty had experiences with students who put little effort into the "draft" because the teacher's comments would tell them what to do. This often would include basic skills like issue-spotting.

Based on these discussions, the legal writing faculty collectively decided to try using a standardized, performance-type assignment for all first-year students at the end of the fall semester of 2002. Rather than using an old California Performance Examination or an old Multistate Performance Test, the legal writing faculty at Santa Clara decided to produce one in-house so that it could be tailored to the specific goals of the program and the perceived skill level of first-year law students at Santa Clara. In addition, producing it in-house reduced some security concerns.⁴⁷ Finally, the legal writing faculty also decided to allow students three days to write the assignment rather than just a few hours. This decision sought to allow students time for their other classes, time for reflection about the issues raised in the assignment, and time to revise and edit their work before submitting it for a grade.

For the spring semester, the legal writing faculty decided to use a similar concept but modified it in order to evaluate each student's research skills. In the spring, the semester ended with a two-week assignment. It was a more complex assignment than in the fall, and it required each student to write a memorandum of points and authorities. After receiving the assignment, the students would come to class one week later to answer

⁴⁴ See, e.g., Jamar, *supra* note 8.

⁴⁵ See Kimble, *supra* note 22, at 62. A performance test seeks to test "a lawyer's ability to analyze and apply the law in a clear and coherent way – to think straight on paper (or on a computer screen). At the same time, of course, you can assess the work . . . for style and grammar." *Id.* This coincides with the direction Santa Clara's legal writing faculty received to focus the first semester "almost exclusively on writing." See Schunk, *supra* note 39, at app. A at 1.

⁴⁶ See *infra* notes 50-120 and accompanying text.

⁴⁷ By producing the assignment in-house, no one had to worry about students searching the Internet for answers to assignments used previously.

questions in writing about the research they conducted during the first week.⁴⁸ These questions were designed to evaluate the students' basic research knowledge and to evaluate how well the students were prepared to write a good memorandum of points and authorities. Each legal writing teacher wanted to know whether students had located the relevant cases and statutes needed to write the assignment. The answers to these questions then formed the basis for a percentage of the students' semester grade.⁴⁹ After students submitted their answers, students received a large non-exclusive library of cases and statutes from which they could draft their assigned memorandum of points and authorities. The legal writing faculty decided to offer some form of library in order to limit the adverse effect on a student who conducts poor legal research but has good writing and analytical skills. Essentially, the legal writing faculty wanted to weigh the writing and analytical skills higher than the research skills for purposes of assigning grades. Finally, the legal writing faculty opted not to use a standardized assignment for all three hundred students out of concern for limited research resources (e.g., certain books in the library). With the growing use of LexisNexis and Westlaw by law students, the concern about the availability of research resources still exists, but it has not proven to be a problem.

In making these choices for the fall and spring semesters, the legal writing faculty anticipated a few benefits. These included getting a better evaluation of student skills developed during that semester, getting students to take their assignments more seriously as a project independent of their teacher's comments, simulating a work-type situation they might encounter during a summer legal job, and gaining insight into how students perform across sections within the legal writing program.

After implementing this model for three years, one can report that Santa Clara's legal writing program not only reaped these benefits, but that it reaped them more extensively than anticipated. Part III now explains what Santa Clara's legal writing faculty learned.

⁴⁸ This functions much like a research assessment examination. Some legal writing teachers have criticized the use of research examinations. See, e.g., Judith Rosenbaum, *Why I Don't Give a Research Exam*, 11 PERSPS.: TEACHING LEGAL RES. & WRITING 1 (Fall 2002). This criticism has focused on the use of an "in-class exam taken outside the law library where there are correct and incorrect answers and the ability to identify correct answers depends on memorizing details about research sources." *Id.* at 3. These legal writing teachers do not have the same concerns about research assessment examinations where, for example, a librarian trails a student through a research project or a teacher reads a student's written narrative of the student's thought processes while researching a specific assignment. *Id.* For the spring semester assignments, the legal writing faculty at Santa Clara was encouraged to use questions designed to elicit from students the legal research processes they used, and the results they found during the prior week.

⁴⁹ Collectively, Santa Clara's legal writing faculty discussed and decided to apportion twenty percent of students' scores on this semester-ending assignment to the answers they gave in response to questions about their legal research.

III. WHAT BENEFITS CAN LEGAL WRITING PROGRAMS GAIN?

In comparison to other methods for evaluating student performance, a legal writing program can reap significant benefits from using these kinds of assignments. The different features identified in the title of this essay produce different benefits. Part III of this essay identifies and explains the benefits with respect to the four different features: (1) a performance-type assignment,⁵⁰ (2) a single-submission assignment,⁵¹ (3) a semester-ending assignment,⁵² and (4) a standardized assignment.⁵³

The benefits described in Part III of this essay are based on the actual experience of using these kinds of assignments since the fall semester of 2002. While serving as the acting director of Santa Clara's legal writing program, I had the benefit of both teaching in the program and directing it. In both capacities, I could see the benefits described in the following subparts of this essay. By teaching a section of legal writing students, I could see how students behaved differently when they were evaluated using the kinds of assignments described in this essay in comparison to how they behaved when they knew that rewritten assignments would form the primary basis for their semester grade. In the capacity of program director, I had the ability to compare student work and student reactions from different legal writing sections. For example, as the acting program director, I requested that other legal writing faculty send me examples of student writing that had received different grades. I then had the ability to compare student work across legal writing sections. In addition, I had the ability to review student course evaluations from all legal writing sections at the end of each semester. This allowed me to compare the students' responses to those that previous first-year students had given regarding the legal writing program before it began using the assignments described in this essay.⁵⁴ Based on these experiences, this essay describes a series of benefits in the following subparts.

A. *Benefits of Using a Performance-Type Assignment*

The benefits of using performance-type assignments are numerous and well-recognized. Some have described performance-type tests as the best test for assessing a lawyer's ability to analyze and apply law in a clear coherent way.⁵⁵ In addition, performance-type tests can be drafted as

⁵⁰ See *infra* notes 55-87 and accompanying text.

⁵¹ See *infra* notes 88-98 and accompanying text.

⁵² See *infra* notes 99-112 and accompanying text.

⁵³ See *infra* notes 113-120 and accompanying text.

⁵⁴ See *infra* notes 121-125 and accompanying text (giving a general summary of the changes in student course evaluation responses experienced by Santa Clara's legal writing program).

⁵⁵ See Kimble, *supra* note 22, at 62.

“closed-world” or “research added” depending on what skills one wishes to evaluate.⁵⁶

Unlike essay examination questions, performance tests ask bar examination test takers to complete a task that a new lawyer may actually perform.⁵⁷ For example, a performance test may ask a candidate to draft a brief in support of a motion,⁵⁸ an office memorandum, a discovery plan, a letter to a politician, or a closing argument.⁵⁹ The performance test provides the test taker with an array of documents and authorities.⁶⁰ This differs from an essay examination question where the relevant facts generally fit on one page. In short, when evaluating student writing, performance tests place more weight on a set of legal skills rather than on specific legal knowledge.⁶¹

Performance testing began in California in 1983.⁶² In 1980, California sought to determine the feasibility of measuring a broader range of lawyering skills on the bar examination and to determine whether alternatives to essay examinations and multiple-choice questions would narrow the difference in bar passage rates between minority and majority candidates.⁶³ While essay and multiple choice questions tested the candidate’s ability to identify and analyze issues, they also placed a premium on the candidate’s ability to remember rules of law for the examination.⁶⁴ In July 1980, California experimented with a variety of examination techniques during a special half-day session of the bar examination.⁶⁵

From these experimental tests, California drew a few conclusions. First, a candidate’s performance on alternative tests tended to correlate well with the same candidate’s performance on traditional MBE and essay examination questions.⁶⁶ Second, none of the alternative tests narrowed the performance level gaps among racial groups.⁶⁷ Third, the alternative tests

⁵⁶ *Id.* at 63.

⁵⁷ Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, 65 THE B. EXAMINER 13, 14 (Aug. 1996).

⁵⁸ *Id.* at 13.

⁵⁹ Jane Peterson Smith, *Performance Testing in California, 1983-1989*, 58 THE B. EXAMINER 17, 20-22 (Aug. 1989) (describing the various tasks used in the California Bar Examination performance tests between 1983 and 1989).

⁶⁰ *See* Klein, *supra* note 57, at 13.

⁶¹ *See id.* at 14.

⁶² Peterson Smith, *supra* note 59, at 18-19.

⁶³ *Id.* at 17.

⁶⁴ *Id.*

⁶⁵ *Id.* at 18. These experiments included (1) using a videotape of some trial or arbitration proceedings where students would have five to ten minutes to write answers to one to three questions about the videotaped segment, (2) using a “research test” where students had to work with a given set of materials, and (3) selecting students to participate in a two-day assessment center where students completed numerous oral and written tasks each day with actors playing the parts of clients, witnesses, and judges and where students were videotaped performing these tasks for subsequent evaluation. *Id.*

⁶⁶ *Id.*

⁶⁷ Peterson Smith, *supra* note 59, at 18.

more closely approximated the practice of actual attorneys.⁶⁸ Fourth, written tests of practical skills were the most feasible way of evaluating large groups of people.⁶⁹

These conclusions caused California to design and implement two three-hour performance tests during its semi-annual bar examination.⁷⁰ The California performance test attempts to gauge a candidate's ability to analyze issues in simulated real-life situations a new lawyer may encounter.⁷¹ California designed the test to evaluate a candidate's competency in four categories of skills: (1) legal analysis, (2) factual analysis, (3) professional responsibility, and (4) problem solving.⁷² Other states followed this development.⁷³

In the 1990s, the National Conference of Bar Examiners began to design performance test questions which individual states could use on their bar examinations.⁷⁴ As it became known, the Multistate Performance Test became available in 1997. By 2005, twenty-seven states, the District of Columbia, and Guam have adopted it.⁷⁵ It differs from California's performance test in that it is shorter, requiring only ninety minutes rather than three hours.⁷⁶

Using assignments modeled after performance tests to evaluate the writing of law students can benefit a legal writing program in a number of ways. This essay identifies five ways in the following paragraphs.

First, a performance-type assignment tests a set of skills rather than specific legal knowledge.⁷⁷ This fits with the ultimate goal of most legal writing programs. Legal writing programs seek to develop a set of skills that students can use in their other law school courses and that they can use when they leave law school.⁷⁸

Second, a performance-type assignment tests the majority of skills identified in *The MacCrate Report*⁷⁹ as being necessary for new lawyers.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 19.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Peterson Smith, *supra* note 59, at 28 n.10.

⁷⁴ The National Conference of Bar Examiners decided to offer a Multistate Performance Test following its review of the results from the July 1993 Performance Test Research Project. National Conference of Bar Examiners, *supra* note 16.

⁷⁵ National Conference of Bar Examiners, *The MPT*, <http://www.ncbex.org/tests.htm> (follow "The Multistate Performance Test (MPT)" hyperlink; then follow "Which Jurisdictions Use the MPT?" hyperlink) (last visited Mar. 19, 2006).

⁷⁶ Compare National Conference of Bar Examiners, *supra* note 16, with The State Bar of California, *supra* note 24.

⁷⁷ Klein, *supra* note 57, at 17.

⁷⁸ See *infra* notes 88-98 and accompanying text.

⁷⁹ ABA Section of Legal Educ. & Admissions to the Bar, Report of the Task Force on Law Schs. & the Profession: Narrowing the Gap Legal Educ. and Prof'l Dev. – An Educ. Continuum (Robert MacCrate ed., West 1992) [hereinafter *The MacCrate Report*].

Published in 1992, *The MacCrate Report* identified ten fundamental lawyering skills.⁸⁰ Depending on whether a legal writing program uses a “closed world” or a “research added” performance-type assignment,⁸¹ the assignment can help a legal writing teacher evaluate eight of these fundamental skills. These include problem solving (skill one), legal analysis and reasoning (skill two), legal research (skill three), factual investigation (skill four), communication (skill five), counseling (skill six), knowledge of litigation and alternative dispute-resolution procedures (skill eight), and organization and management of legal work (skill nine).⁸²

Third, a performance-type test better reflects the real world into which the law students will go. In connection with skill nine identified in *The MacCrate Report*, a performance-type test effectively introduces students to time management and to confronting unfamiliar issues. Because performance-type assignments seek to evaluate skills and not substantive knowledge, they often are designed around topics or raise issues which few, if any, law students know.⁸³ This helps introduce them to the situation they will face after they leave law school.

Fourth, using performance-type assignments tends to help students prepare for the bar examination.⁸⁴ This benefit might interest students and legal writing programs seeking to help their law schools improve their bar passage rates. Studies have shown that students improve their ability to pass a performance test by doing more of them.⁸⁵ Essentially, it is a skill one can develop. One sees this in the test results of experienced attorneys taking another bar examination.⁸⁶ For example, studies have shown that attorneys with four or more years of experience score higher on performance tests than one would expect given their scores on other portions of a bar examination.⁸⁷

Fifth, lengthening the performance-type assignment from ninety minutes or three hours to a number of days or weeks allows a legal writing program to obtain these benefits while promoting additional skills. By lengthening the time for the performance-type assignment, a legal writing program can build in sufficient time for revising and editing one’s work to a professional level. The nature of performance tests on the bar examination

⁸⁰ *Id.* at 121-24.

⁸¹ Kimble, *supra* note 22, at 63.

⁸² The two remaining skills not being evaluated were negotiation (skill seven) and recognizing and resolving ethical dilemmas (skill ten). See THE MACCRATE REPORT, *supra* note 79, at 123-24.

⁸³ Klein, *supra* note 57, at 17.

⁸⁴ See Jamar, *supra* note 8, at 121 (“Familiarizing students with the MPT by giving them one or more MPT-style tests in law school helps make the bar exam a more fair test of what it is seeking to test.”).

⁸⁵ Klein, *supra* note 57, at 16 (“[T]he applicants who took [performance test] A and then B did relatively better on B whereas those who took B then A did relatively better on A.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

preclude giving this skill the emphasis that a legal writing program might find appropriate. By selecting an appropriate number of days for a performance-type assignment, a legal writing program can strike the right balance between evaluating most of the skills identified in *The MacCrate Report*, including the difficult but necessary skill of real-world time management, and allowing students to demonstrate that they can produce well-drafted documents resulting from careful revision and editing.

B. Benefits from a Single-Submission Assignment

While many legal writing programs prefer to have students rewrite all their assignments,⁸⁸ using a single-submission format, especially for grading at the end of a semester, can produce a number of benefits. At a general level, these benefits fall into three categories.

1. Promotes Student Independence

When used at the end of a semester or course, a single-submission assignment promotes the goal of making students independent. The ABA's *Sourcebook on Legal Writing Programs* identifies the ultimate goal of any legal writing program: "[T]he ultimate goal should be to make each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem."⁸⁹

Law schools design their legal writing programs to teach research, writing, and analytical skills; however, the design may not foster self-sufficiency and independence.⁹⁰ Placing an undue emphasis on rewriting based on teacher comments can create a culture of dependence or laziness in students that does not reflect the real world.⁹¹ While legal writing teachers

⁸⁸ 2005 Survey Results, *supra* note 7 (responses to question twenty-three).

⁸⁹ ABA Section of Legal Educ. & Admissions to the Bar, *Sourcebook on Legal Writing Programs* 8 (1997).

⁹⁰ See Jamar, *supra* note 8, at 121. In his article, Professor Jamar observed that many legal writing programs "use cooperative learning techniques and provide a large amount of help through class workshops, individual conferences, and modeling processes of analysis and synthesis for regular writing projects." *Id.* While these approaches and techniques may help students learn necessary skills, "they have a weakness – the degree of mastery by a particular student can be masked by the amount of help the student received in preparing the writings." *Id.* (footnote omitted).

⁹¹ Christine G. Mooney, When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments?, 10 *PERSPS.: TEACHING LEGAL RES. & WRITING* 69, 70-71 (Winter 2002).

Depending on the employer's environment, the student may be expected to know how to delve into a legal issue with minimal assistance. If a student's only experience in written legal analysis has involved significant help by the professor, that student may not be capable of meeting the employer's expectations. A student who has not been required to independently produce a legal document will be forced to either admit his inability or try to learn on the job.

should guide students through their initial assignments,⁹² students should learn from the very beginning in their legal writing program that they are responsible for producing written work at a professional level independent of anyone else's review or comments.⁹³ Senior partners at law firms do not expect rough drafts from summer or junior associates. Judges do not comment on court filings and return documents for revision. Knowing that they have to submit a draft document and revise it for a second submission creates a situation where many law students, acting quite rationally, fail to put their best effort into producing a first draft. They know that their legal writing teacher will comment on and identify any major flaws in their analysis and written work. Some students even become dependent on this process, never developing the self-confidence they will need in the practice of law.⁹⁴

Having at least one single-submission assignment forming a large part of a student's grade creates an incentive for a student to develop the needed self-sufficiency and independence identified by the ABA.⁹⁵ In short, students take other assignments more seriously if they know they will be graded ultimately on what they do independently. As others have noted, the primary purpose of a graded assignment is not to teach but to test students' abilities to apply what they were taught during the course.⁹⁶

2. A Better Evaluation of a Student's Skills

Single-submission assignments also provide a better evaluation of student skills. The grading of rewritten student work has two effects, neither of which is ultimately helpful to the students or to a legal writing program. First, having students rewrite their work after receiving teacher comments tends to narrow the range of student performance artificially. Teachers can help poor written work more than originally good work. When assigning grades based on rewritten work, students performing at the lower end can develop a misperception of their work's quality.⁹⁷ If they compare their rewritten work and grade with other students, lower performing students will think their work is closer in quality to that of better students because they will not know the original difference. Second, when legal writing teachers

Id.

⁹² *Id.* at 71.

⁹³ *Id.*

⁹⁴ *Id.* By grading student work that has been rewritten based on a teacher's comments, legal writing programs basically create an artificial environment that can distort students' perceptions of their abilities. *Id.*

⁹⁵ Some refer to this as developing "the personal accountability of the individual students." See Jamar, *supra* note 8, at 121.

⁹⁶ Mooney, *supra* note 91, at 72.

⁹⁷ *Id.* at 71 ("By failing to require students to take full responsibility for the legal writing process, we are creating an artificial environment that may distort students' perception of their abilities.").

grade rewritten work, they often find themselves merely determining whether a student could follow comments written on the original paper. Legal writing teachers often think the rewritten work improved because they now are evaluating whether students incorporated their suggestions that made sense to the teacher in the first place.

With a single-submission assignment, the student's written work better represents only the student's skills and efforts. Among the skills that improve with a single-submission assignment is issue-spotting. Often this important skill gets overlooked in the design of a legal writing program. This occurs due to the fact that legal writing students often discuss assignments in class with their teacher and receive the chance to rewrite many of their assignments.⁹⁸ With the final drafts for most legal writing assignments, students address all the necessary issues because they heard them discussed and outlined in class or their teacher wrote comments about them on their initial draft submitted for an assignment. Only rarely do students get to demonstrate whether they have the skill of issue-spotting necessary to begin any legal analysis. By using a single-submission assignment for grading, one has a better opportunity to identify those students who have trouble spotting the correct issues even if they can write a good legal analysis.

3. Reduction in the Frequency and Intensity of Student Complaints Regarding Grades

At the program level, using single-submission assignments tend to reduce both the frequency and the intensity of student complaints about the grades assigned. For the reasons just discussed, students complain less often and less intensely when the range of student performance is not artificially narrowed through the grading of rewritten student work. If a legal writing teacher summarizes the performance of the entire class in a memorandum or a review session, average and lower performing students will complain about their scores and grades less frequently when, for example, they know half the class spotted and analyzed a particular issue and the other half did not. In addition, having a greater range of performance makes it easier to explain scoring and grading decisions later. Merely by showing students examples of higher scoring and lower scoring writing makes many potential complaints go away. This becomes easier when a legal writing teacher can use examples of student writing that has not been revised based on a teacher's comments.

⁹⁸ See Jamar, *supra* note 8, at 121. In his article, Professor Jamar notes that legal writing students often receive "a large amount of help through class workshops, individuals conferences, and modeling processes of analysis and synthesis for regular writing projects." *Id.*

C. Benefits from a Semester-Ending Assignment

Most law school courses use semester-ending final examinations.⁹⁹ These examinations provide a means of ensuring that students have mastered the content of a course before they receive academic credit for that course.¹⁰⁰ Semester-ending examinations also provide a means for distinguishing among students for the purpose of awarding different grades.¹⁰¹

Using semester-ending assignments, especially single-submission assignments, produces a number of benefits for a legal writing program. Many of them mirror the effects produced by using final examinations in other law school courses. One should consider three of these benefits.

1. Student's Learning Increases by Studying for a Legal Writing Final Exam

Students study for semester-ending examinations, and this has proven true for semester-ending, single-submission assignments in Santa Clara's legal writing program. As most law professors know, much student learning takes place during the preparation for a final examination.¹⁰² The process of preparing for an examination by outlining and anticipating potential examination questions increases learning. Students typically know more about a subject at the time of the examination than they did at the time of the last scheduled class for that course.¹⁰³

While Santa Clara had not anticipated this benefit, this has proven true with the legal writing students. It became clearer in the second and third year of this experience. During the fall of 2003, the legal writing program at Santa Clara made the final assignment from the fall of 2002 available to students. While it should not have surprised anyone, students began to treat the prior assignment much like previous examinations in other classes. Students reviewed it to see if they could spot the issues and analyze the issues correctly. If they had questions, they asked them in conferences and during office hours in the weeks leading up to the distribution of the semester-ending assignment. The same process happened in the fall of 2004 when students had access to the final assignments used in the fall of 2002 and the fall of 2003.

The effect and unanticipated benefit of using this format has been prompting a significant number of students to practice their analytical skills more frequently than they otherwise would have done.¹⁰⁴ Much like their

⁹⁹ Miller, *supra* note 9, at 218.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ This proved true again for the majority of my legal writing students in the 2005 fall semester. During this semester, these students had been given copies of the final

preparation for other law school examinations, the students do this extra work because they know they will need to demonstrate their skills independently at the end of the semester.

2. Students take Ungraded Assignments More Seriously

By using a semester-ending assignment as the primary basis for awarding grades, most students have taken their ungraded assignments as seriously or more seriously than they did before making this change. When the Santa Clara legal writing program opted for this change, there was some concern about how seriously students would take assignments earlier in the semester knowing that their grade would be based primarily on one semester-ending assignment.

This concern proved unfounded for a couple of reasons. First, when the students knew that they would have to do the work independently with only a single-submission at the end of the semester, the course suddenly made more sense to them. Rather than viewing all the assignments as a series of tasks through which one must suffer, students readily accepted the model where the assignments were viewed as building blocks. Since the legal writing faculty members knew in advance what the semester-ending assignment would cover, they had the ability to structure their courses and convey to the students the sense that each assignment would help develop a skill that they would use at the end of the semester.

Second, while ungraded, students still wanted to receive some sort of evaluation of their work on these earlier assignments. The format of the final assignment increased a desire in a significant number of students to know how their work on the initial assignments would rank. These students knew what grade they wanted to earn at the end, and they wanted to know if they were on track to meet their goal. Even if students did not seek a rating of their ungraded work, the legal writing faculty thought it important to use some rating system (e.g., check, check+, check-) to make sure that no student had a misperception of his or her work quality before beginning the semester-ending assignment.

3. Improvement in Teacher-Student Interactions

Using these semester-ending assignments also has improved teacher-

assignments used in fall 2002, fall 2003, and fall 2004. During the last few weeks of the semester, students were encouraged to review these past assignments and construct outlines for how they would analyze and write an office memorandum for the particular assignment. Based on the questions asked during individual student conferences at the end of the semester, more than half the class had followed this advice with respect to at least two of the three prior assignments. This meant these students voluntarily practiced their analytical skills two more times during the semester than they likely would have if the legal writing curriculum had followed a write, teacher-comment, and rewrite methodology exclusively for all assignments.

student interactions. Without receiving a series of grades over the course of a semester, the interaction between legal writing faculty and students has improved. One can see this in a number of ways.

First, legal writing teachers no longer have to justify or explain scoring decisions and grading decisions multiple times over the course of a semester. This lack of confrontation has increased the productive time in student conferences. In addition, students do not feel as though it is too late in the semester to improve their skills. As most experienced legal writing teachers know, first-year law school students enter with differing skills and differing skill levels. For example, some are organized but have language or grammar problems while others write well but may not spot issues well. In addition, some students enter law school with English as a second language or with a learning disability. By giving students a whole semester to master new skills or improve old skills, the students at Santa Clara have proven to be much more open to teacher comments and instruction.

4. Increase in Student Satisfaction Regarding the Legal Writing Course

Using a semester-ending assignment format also may help reduce student discontent with the legal writing course. As this essay demonstrates later, the level of student satisfaction increased demonstrably after moving to this semester-ending format. One can surmise that the lack of grades or scores early in the semester played some role in this.¹⁰⁵ Previously, first-year law students at Santa Clara typically received their first grades in the legal writing course when the program assigned a series of graded assignments throughout the fall semester.¹⁰⁶ Essentially, the legal writing teacher became the bearer of bad news for about half of the first-year students when they received below average grades or scores on these assignments.¹⁰⁷ Without grades from other first-year courses to provide some context, many law students instinctively thought their legal writing teacher must be mistaken. By delaying grading until the end of the semester, Santa Clara's legal writing

¹⁰⁵ David D. Walter, *Student Evaluations – A Tool for Advancing Law Teacher Professionalism and Respect for Students*, 6 LEGAL WRITING 176, 189 (2000) (stating that teachers who give grades “during the semester – before students complete their evaluation forms – are at risk of lower evaluations from students disappointed with their grades”). This feature of many legal writing courses may cause greater student discontent. Judith D. Fischer, *The Use and Effects of Student Ratings in Legal Writing Courses: A Plea for Holistic Evaluation of Teaching*, 10 LEGAL WRITING 111, 132 (2004) (stating that “the instructors’ lower ratings for legal writing courses may be partially attributable to features of the course rather than poor teaching”).

¹⁰⁶ Throughout the mid and late 1990s, Santa Clara's legal writing program had graded all assignments students submitted throughout a semester.

¹⁰⁷ See, e.g., Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 363-64 (2001) (asserting that student reactions to receiving disappointing grades throughout the semester can lead some students to direct anger toward their legal writing instructor).

program reflects more closely what first-year students experience in their other courses, and the first-year students receive their grades at about the same time they receive their other first-year grades. In making this change, Santa Clara's legal writing faculty no longer bears the burden of being the initial bearer of perceived bad news by those students receiving below average grades.¹⁰⁸

5. *Benefits Regarding the Perception of Legal Writing Programs*

Using semester-ending performance-type tests also can help the perceptions of legal writing programs with both students and other faculty. For students, using a semester-ending assignment as a type of final examination makes the legal writing course seem less different than other courses students typically take during the first-year of law school.¹⁰⁹ With regard to other faculty, using a semester-ending, performance-type examination allows a legal writing program to provide students with a service that a legal writing course is either uniquely designed or best-positioned among first-year courses to provide.¹¹⁰ Other traditional first-year courses¹¹¹ help students learn subjects generally tested on most bar examinations and often introduce students to essay examination or multiple choice examination formats related to those subjects. In contrast, most legal writing programs have no fixed subject matter.¹¹² As a result, based on the skills they seek to teach, legal writing courses can provide a service to both law students and the law school by introducing students to the performance test format and the skills needed to succeed on it.

¹⁰⁸ The change in this one feature of the legal writing course helped overcome or reduce the traditional disparity between student ratings for legal writing courses and other law school courses. See Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology: Diagnosis Confirmed"*, 5 N.Y. CITY L. REV. 115, 125-27 (2002) (presenting data showing that teachers tend to receive lower student ratings for legal writing courses than for other law school courses).

¹⁰⁹ See Jamar, *supra* note 8, at 121.

¹¹⁰ *Id.*

¹¹¹ According to the American Bar Association, the typical courses in the first-year law school curriculum included contracts, civil procedure, property, torts, criminal law, legal research and writing, and possibly constitutional law or criminal procedure. *A Survey of Law School Curricula: 1992-2002*, 2004 ABA ASS'N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE B. 25-28.

¹¹² *2005 Survey Results*, *supra* note 7, at 12 (responses to question twenty-two). According to the 2005 survey results, only five of 174 law schools report having topics coordinated between legal writing faculty and doctrinal faculty. *Id.* An additional thirty-one law schools report some coordination of topics. *Id.* This is consistent with the American Bar Association's survey of law school curricula which reported that only 8.5% of law schools tied their research and writing experience to another first year class. See *A Survey of Law School Curricula: 1992-2002*, *supra* note 111, at 28.

D. Benefits from a Standardized Assignment

If a legal writing program sees some merit in using a performance-type assignment, it should seriously consider using a common or standard assignment for all students. If a program uses a common assignment, then the program will have a compilation of data from which it can improve its ability to evaluate the program, the best practices within a program, the abilities and deficiencies of students at the law school,¹¹³ and teacher effectiveness. In addition, a semester-ending common assignment can lead to innovation while providing quality control for a legal writing program. Essentially, using a common assignment for evaluating student work at the end of a semester can provide a legal writing program with a series of benefits.

1. Evaluation of a Program's Effectiveness

Initially, student writing submitted in response to a common assignment helps evaluate the effectiveness of a program. This becomes especially true when the students only get a single-submission opportunity. As stated earlier, the ABA has identified the ultimate goal for any legal writing program: "[T]he ultimate goal should be to make each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem."¹¹⁴

Using a common or standard assignment creates a pool of potentially hundreds of writing samples depending on the size of a law school. From this pool, one can better detect whether students are achieving the necessary level of proficiency than one could by asking each individual legal writing teacher to report on his or her own smaller section of students. By reviewing a significant sample of student work from the first-year class at any particular law school, a legal writing program director can determine better whether the program has prepared its students to meet the ABA goals of self-sufficiency and independence. In addition, if a legal writing program used some common or standard writing assessment tool or exercise in its orientation program or in the first few weeks of the fall semester, the ability to measure a program's effectiveness would increase further.¹¹⁵

¹¹³ See Jamar, *supra* note 8, at 121 (stating that a performance "test can serve as a diagnostic tool both for assessing individual student performance and for assessing the effectiveness of the course itself").

¹¹⁴ See THE MACCRATE REPORT, *supra* note 79.

¹¹⁵ This practice would allow a legal writing program to track the performance of individual students and any improvement in their performances as they progressed through the legal writing program. A longitudinal analysis of individual student performance may be the best way to measure an individual teacher's performance and a legal writing program's effectiveness.

2. Identifies Student's Strengths and Weaknesses and Potential Predictors of Success

The use of a common assignment also helps identify strengths and weakness of the law school's student population and potential predictors of success. Two examples from Santa Clara's experience illustrate this.

First, in each of the first three standardized assignments used at the end of the fall semester with Santa Clara first-year students, the assignment included some "threshold" issues which were relatively unimportant yet necessary to a complete analysis. In each year, slightly more than one-third of the first-year students would skip these issues. This occurred in similar proportions in all legal writing sections. After the first year, the legal writing faculty sought to emphasize this point the next fall, yet it happened again. It happened in the third year as well. By using a common assignment, the Santa Clara legal writing faculty learned something about the analytical skills of its student population to an extent it would not have known if each legal writing teacher looked at just his or her own students.

Second, at least for Santa Clara first-year students, the relative ability to follow a citation manual's rules tends to correlate with other skills. After reviewing a number of student writing samples from different grade ranges within each legal writing section, one could see that a student's ability to cite cases and statutes correctly declined along with other skills, and the grades assigned reflected this. This did not mean that high scoring students fully understood a citation manual, but it did mean that they understood it and could apply its rules better than lower scoring students. While following citation rules seems less significant than other skills being taught in a legal writing course, this one factor could help predict a student's relative performance within a section of legal writing students. It probably tends to show that some students pay more attention to details than others, and this attention to detail is an important skill for lawyers. Without using a common assignment, this probably would have gone unnoticed.

3. Identification of Best Practices

Using a common assignment also helps a program identify its best practices. When a legal writing faculty can review samples of comparable work from different legal writing sections, it can begin to identify differences in student performance between sections. This can then lead to an analysis of what, if anything, caused those differences.

One can consider the teaching of citation rules as an example. If one finds that students from a particular teacher's section cite cases and statutes better than students in other sections, one might ask what techniques or practices is that legal writing teacher using to achieve that result. This is different than merely looking for alternatives; instead, the use of a common assignment allows one to identify a best practice that has produced consistent

results better than other practices. Again, citation rules should rank low on a program's priority list, but this principle should work with higher priority issues as well.

In addition, it can also help identify practices that do not seem to make a difference. For example, after reviewing a large sample of student writing from different sections, it became difficult to conclude that classroom presentation techniques made any real difference. At Santa Clara, some faculty members rely heavily on PowerPoint software while some do not. Over three years, one could not see any difference in actual student work correlated with the techniques used in the classroom to convey information to the students.

4. Alternative Method for Evaluating Teacher Effectiveness

Using a common assignment also helps evaluate individual teacher effectiveness in a way that does not rely on student course evaluations¹¹⁶ or a single classroom observation by a director or another faculty member. In the end, an effective legal writing teacher helps produce students who reach a level of proficiency necessary to succeed in the real world. If one reviews the work submitted by students from a particular teacher, one can learn at least two things.

Initially, one can learn whether the teacher effectively communicates with his or her students. If one sees that the students from a particular legal writing section have common tendencies, such as the format of a document or a similar large-scale or small-scale organization of an issue, one can conclude that the teacher has communicated effectively with the students.

Additionally, by comparing the same student work to that submitted by students in other legal writing sections, one can then assess whether the teacher is communicating the right information to students. Using a common assignment allows the program director to determine whether any particular teacher is effectively communicating professionally acceptable information to a group of students over time.

5. Promotes Innovation While Providing Quality Control

Using a common assignment at the end of a course also promotes innovation while providing quality control checkpoints for a legal writing program. This occurs for two reasons. First, the common assignment helps identify and communicate the program's priorities. If a director or a faculty member prepares a semester-ending common assignment in advance of the particular semester, each legal writing teacher knows the important goals for that semester and when they need to be achieved. Subsequently, a director

¹¹⁶ A recent article discusses the value of using student course evaluations for assessing legal writing teachers. See Fischer, *supra* note 105.

can check the student work submitted to see if the student writing met those goals.

By using only a semester-ending common assignment, legal writing faculty may also innovate more over time. When knowing the quality goals in advance, different legal writing teachers may choose to prepare their students for the assignment differently.¹¹⁷ Some may use a series of small building block assignments while others may use a sink or swim approach.¹¹⁸ Some may start with a case synthesis assignment while others may start with a statutory interpretation assignment. The performance of first-year students in prior years, especially when one can see how it compares to student work from other sections on the same assignment, can spur legal writing teachers to change or can confirm for them that current techniques are effective.

Much like federalism,¹¹⁹ the semester-ending common assignment allows individual legal writing teachers to act as laboratories within a program, experimenting with changes, while providing a basis for evaluating the effectiveness of those experiments¹²⁰ This helps a legal writing program in the long run.

6. Creation of an Assignment Bank

Over time, the development and use of semester-ending common assignments creates an assignment bank for that particular legal writing program. If developed in-house, these assignments are tested and designed for the particular needs of the students at that law school. They can then be used as un-graded assignments in later years. This can be particularly useful for newly hired legal writing teachers. It reduces the need for new teachers to design assignments from scratch, and it provides them with examples of what to expect from first-year students.

7. Reduction in Student Complaints

Finally, the use of common assignments also can reduce certain types of student complaints. If a legal writing program ever finds that a significant number of students complain about the relative workload in their

¹¹⁷ See Mooney, *supra* note 91, at 69-70. For example, some legal writing teachers strongly believe in a sink or swim approach where students are made to struggle in order to help them develop their skills while other legal writing teachers seek to walk students through the research and writing process, step by step. *Id.* (summarizing these different teaching philosophies).

¹¹⁸ *Id.*

¹¹⁹ With respect to federalism, the United States Supreme Court has identified as a positive aspect the ability of individual states to serve as laboratories and try novel experiments without putting the rest of the country at risk. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), *cited in* *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

¹²⁰ *New State Ice*, 285 U.S. 262 at 311 (Brandeis, J., dissenting).

legal writing section, using a common assignment for grading almost eliminates this complaint. The semester-ending common assignment increases the perception among students that the legal writing program has a coherent plan. At the same time, students can no longer complain that their teacher requires more work or assigns more complex work than other teachers when assigning grades. Once again, this helps the program by reducing the time students and teachers deal with complaints and by increasing the time students and teachers spend on productive tasks.

IV. REACTIONS TO USING THESE ASSIGNMENTS

Unfortunately, no one conducted a scientific study of Santa Clara's move to this model. Beyond assessing the student work submitted and how student behavior changed since making this move, one also can look at student reactions in course evaluations and at the reactions of those teaching in Santa Clara's legal writing program.

A. *Effect on Student Course Evaluations*

After implementing these changes to the legal writing program, Santa Clara undertook no special efforts to measure student reaction. The only available data touching on these subjects comes from student course evaluations. Obviously, using student course evaluations has many limitations.¹²¹ They are a rather blunt instrument to measure the impact of any changes.

With these limitations in mind, when one analyzes the data from student course evaluations submitted for the year before the legal writing program made this change and for the second and third semesters after the change was implemented, the data suggest that the change in format of evaluating students has had the effect of improving student satisfaction with the legal writing courses and with the legal writing faculty. This conclusion is based on the data coming from the course evaluation responses from approximately 750 students.¹²²

The following charts illustrate these points. These charts analyze data from Spring 2002, Spring 2003, and Fall 2003 course evaluations.¹²³ The data from course evaluations in Spring 2003 and Fall 2003 cover a high percentage of the possible student responses. While Spring 2002 responses

¹²¹ See Fischer, *supra* note 105.

¹²² When I served as acting director of Santa Clara's legal writing program, I would review personally all the student course evaluations submitted for the legal writing courses during that particular semester.

¹²³ These charts focus on these data points because they reflect student responses to the first-year legal writing course just before the law school legal writing reform went into effect (i.e., Spring 2002) and two and three semesters after it went into effect (i.e., Spring 2003 and Fall 2003).

represents data from 152 course evaluations (approximately 55% of that first year class), the Spring 2003 responses and the Fall 2003 responses include 90% of the respective first-year classes (Spring 2002 includes 272 responses and Fall 2003 includes 283 responses).¹²⁴

Chart One illustrates the shift in Instructor Ratings over time for the first-year component of Santa Clara's legal writing program. As Chart One shows, the number of first-year students rating the Legal Analysis, Research, and Writing (LARA W) Faculty as a "1" has increased from 21.7% in Spring 2002 to 34.2% in Spring 2003 and 43.1% in Fall 2003.¹²⁵ Over these three semesters, the instructor ratings showed consistent improvement.

Chart One

Distribution of LARA W Instructor Ratings over Time

Instructor Rating	Distribution of Spring 2002 Responses (pre-change)	Distribution of Spring 2003 Responses	Distribution of Fall 2003 Responses
1	21.7%	34.2%	43.1%
2	38.8%	32.0%	32.5%
3	21.1%	17.3%	15.5%
4	13.8%	14.3%	6.7%
5	4.6%	2.2%	2.1%

More importantly, Chart Two illustrates that the implementation of the changes had a more significant effect on the course ratings first-year students gave to Santa Clara's legal writing program. For example, in Spring 2002, only 10.7% of first-year students rated the legal writing course a "1" while 12.0% rated the course a "5." Later, both Spring 2003 and Fall 2003 course ratings show that almost 25.0% of first-year students rated the course

¹²⁴ The first-year law school class at Santa Clara typically has 310-315 students; consequently, the submission of 272 and 283 course evaluations indicates more than 90% of first-year students completed and submitted the course evaluation forms for those semesters.

¹²⁵ At Santa Clara, course evaluation forms use a numeric system with "1" being best and "5" being worst.

a “1” while 4.0% or less of first-year students rated the course a “5.” If one combines the “1” and “2” ratings and combines the “4” and “5” ratings, this improvement became even clearer. The number of first-year students rating the legal writing course a “1” or “2” improved from 43.4% to 67.6%. At the same time, the number of first-year students rating the legal writing course a “4” or “5” declined from 28.0% to 8.2%. These numbers suggest that student satisfaction with the first-year component of the legal writing program improved significantly with the implementation of these suggested changes.

Chart Two

Distribution of Course Ratings over Time

Course Rating	Distribution of Spring 2002 Responses (pre-change)	Distribution of Spring 2003 Responses	Distribution of Fall 2003 Responses
1	10.7%	24.3%	24.9%
2	32.7%	35.7%	42.7%
3	28.7%	23.4%	24.2%
4	16.0%	12.1%	6.4%
5	12.0%	4.0%	1.8%

While improving student satisfaction with a legal writing course should not be the sole aim for any legal writing program, it remains important for at least one significant reason. If students have a reasonable level of satisfaction with a course and how it is graded, students will spend less time complaining about the course and seeking ways to avoid doing the work. A higher level of student satisfaction may cause students to devote more of their energy to doing the work and to actually learning than if they were dissatisfied with the legal writing course.

B. Teacher Reactions

After having been through three cycles of using a standardized assignment to end the fall semester, the reactions from those teaching in the

program have been very positive. In response to a series of five survey questions about whether to continue using these kinds of assignments, those teaching legal writing at Santa Clara expressed the desire to continue this practice. Among the ten faculty members¹²⁶ who had been through at least two cycles of using these kinds of assignments, they collectively expressed the following views:

1. *Continuing use of these assignments:* All ten were in favor.¹²⁷
2. *Prefer using standard assignment for all legal writing sections:* All ten were in favor.¹²⁸
3. *Length of time given to students for completing the assignment:* Eight were in favor of keeping the length at three days, one wanted to expand the time to seven days, and one wanted to give part-time students¹²⁹ ten days to complete the assignment.¹³⁰
4. *Number of Authorities to Include in Library:* All ten were in favor of keeping the number of legal authorities in the range of three to five.¹³¹
5. *Length of Writing Expected from Students to Complete Assignment:* While some variation existed, all ten legal writing teachers thought creating assignments that required between 1500-2000 words was appropriate for first-year students at the end of the first semester in a three-day period.¹³²

¹²⁶ Santa Clara's legal writing program has eleven full-time teaching positions.

¹²⁷ On this issue, the survey asked, "Do you prefer to use a semester ending assignment similar in format to the one we have used over the last three years? (a) Yes; or (b) No." E-mail from John D. Schunk to Santa Clara legal writing faculty (Mar. 14, 2005, 12:24:15 PST) (on file with author).

¹²⁸ On this issue, the survey asked, "If you wish to continue using this practice, do you prefer using a common assignment for all legal writing sections? (a) Yes; or (b) No." *Id.*

¹²⁹ Santa Clara has both part-time and full-time students. In a typical academic year, Santa Clara's first-year class has approximately 250 full-time students and sixty-five part-time students.

¹³⁰ On this issue, the survey asked, "If you wish to continue this practice, what is the preferred scheduling? (a) Friday (pick-up) and Monday (submit) (3 days); (b) Monday (pick-up) and Friday (submit) (5 days); (c) Friday (pick-up) and Friday (submit) (7 days); or (d) Friday (pick-up) and Monday (week later submit) (10 days)." E-mail from John D. Schunk to Santa Clara legal writing faculty (Mar. 14, 2005, 12:24:15 PST) (on file with author).

¹³¹ On this issue, the survey asked, "If you wish to continue this practice, what number of legal authorities should be included in the assignment (assume – the assignment must include at least one statute and at least one case)? (a) 3-4 legal authorities; (b) 4-5 legal authorities; (c) 5-6 legal authorities; (d) 6-7 legal authorities; or (e) over 7 legal authorities." *Id.*

¹³² On this issue, the survey asked, "If you wish to continue this practice, what length of legal writing from the students should be the assignment target? (a) 1250-1500

Given the benefits identified in Part III of using these types of assignments, these responses were not surprising.¹³³ The advantages of evaluating students with these kinds of assignments were seen by basically every member of Santa Clara's legal writing faculty who had been through the process for at least two academic years. This included three legal writing faculty members who had spent more than ten years and seven others who had spent more than five years evaluating students with the traditional method of grading rewritten assignments.

V. CONCLUSION

To answer the question posed in the title of this essay, yes, legal writing programs can benefit from changing the way they have traditionally evaluated student work for the purpose of assigning grades. By moving from grading a series of papers rewritten based on a teacher's comments toward grading single-submission, semester-ending, standardized, performance-type assignments, legal writing programs can obtain a series of benefits which other law school courses and the typical bar examination already have identified. The major benefits include (1) exposing first-year students to real world tasks while evaluating the majority of skills identified in *The MacCrate Report*, (2) promoting independence and responsibility in students for developing their own writing, research, and analytical skills, (3) promoting better student-teacher interaction during the semester, and (4) creating an environment where legal writing faculty members can evaluate their programs while simultaneously creating an environment where innovation in teaching legal writing can take place. If legal writing programs want to achieve the ultimate objective of making "each student self-sufficient, able to independently analyze, research, synthesize and communicate each new problem,"¹³⁴ then those designing the curriculum for legal writing programs should seriously consider moving in this direction.

words (e.g., 5 pages at 12 pt. font); (b) 1500-1750 words (e.g., 6-7 pages at 12 pt. font); (c) 1750-2000 words (e.g., 7-8 pages at 12 pt. font); (d) 2000-2250 words (e.g., 8-9 pages at 12 pt. font); or (e) over 2250 words (e.g., over 9 pages at 12 pt. font)." *Id.*

¹³³ See *supra* notes 54-119 and accompanying text.

¹³⁴ ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 89, at 8.

