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Writing in Law Reviews, Bar Association Journals, and Blogs (Part I)

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WRITING IT RIGHT

WRITING IN LAW REVIEWS, BAR ASSOCIATION JOURNALS, AND BLOGS (PART 1)

By: DOUGLAS E. ABRAMS

LAWYERS COMMONLY WRITE AS THE CLIENT’S REPRESENTATIVE, BUT THIS ARTICLEexplores three opportunities for lawyers who wish also to write sometimes in non-representational roles.

PART 1 HERE DISCUSSES WRITING OR CO-WRITING LAW REVIEW ARTICLES.

In the Journal’s March-April issue, Part 2 will explore writing in state and local bar association journals and on blogs.

A few years ago in Precedent (The Missouri Bar’s former quarterly magazine), I discussed a fourth opportunity: lawyers’ writing in general circulation newspapers. The discussion focused on op-ed columns (essays appearing “opposite the editorial pages”) and letters-to-the-editor.

The quartet highlights what commentators sometimes call “extracurricular writing” – lawyers’ publications about legal topics that are unrelated to matters on their calendar, and sometimes even about topics that are unrelated to law.

Threshold Considerations: Responsibility, Rewards, and Wisdom

Especially on newspaper editorial pages and on blogs, lawyers frequently publish extracurricular writing about personal health, sports, or similar social or cultural matters. Like anyone else, lawyers hold essentially free rein to write about these matters, which typically have little or nothing to do with law or public policy.

Lawyers’ extracurricular writing about law or public policy, however, presents a different story. Before turning to the key-board, the lawyer should weigh three threshold considerations – responsibility, rewards, and wisdom. This extracurricular writing can help fulfill the lawyer’s responsibility to enrich public discussion, and it can reward the lawyer by generating business, educating the lawyer, and providing professional satisfaction.

But extracurricular writing about law or public policy may not be wise because, for example, the lawyer’s arguments or conclusions might antagonize current and prospective clients, because the lawyer’s employer might discourage or even prohibit such writing, or because the writing may demand a time commitment that might intrude unduly on the lawyer’s other personal and professional obligations, including ones to family and clients.

A. Responsibility

Extracurricular writing about law or public policy can help lawyers fulfill a responsibility, recited in the ABA Model Rules of Professional Conduct, to perform as “public citizens” who “further the public’s understanding of and confidence in the rule of law and the justice system.” President Theodore Roosevelt said that every person “owes some of his time to the upbuilding of the profession to which he belongs.” Writing about law or public policy can help lawyers repay this “debt” by advancing what Justice Louis D. Brandeis called the “processes of education.”

B. Rewards

Time spent on extracurricular writing normally brings little or no immediate remuneration to lawyers who are accustomed to billing for client representation. But extracurricular writing can bring the lawyer short-term and long-term rewards – free advertising, learning and education, and professional satisfaction.

1. Free Advertising. Publication suggests expertise, which can impress current and prospective clients, showcase the lawyer’s background and experience, and enhance networking. Published writings (and citations or links to them) may interest friends, professional acquaintances, legislators and other policymakers, and bloggers. Citations or links can adorn the lawyer’s resume, the law firm’s webpage or blog, or the web pages of the publication in which the articles appeared.
Published lawyers can also distribute reprints or links at bar association and other professional meetings. Westlaw, Lexis and other electronic databases typically also carry downloadable articles. Published lawyers may speak at continuing legal education programs and similar forums where reputation gets around.

2. Learning and education. Writing, said author John Updike, "educates the writer as it goes along." Researching and writing educates the lawyer, who may be able to apply new sources and insights in future billable client representation. The close connection among extracurricular writing, learning, and lawyering helps explain why state bar associations typically confer continuing legal education credit for some portion of time spent researching and writing or co-writing law-related publications.

3. Professional satisfaction. Many of my former students in private or public law practice tell me that they pursue extracurricular writing because they yearn to be heard on subjects that matter to them. Their personal or professional experiences spark insights that they believe belong in the public discourse, and they seek a stimulating change of pace by connecting with audiences that are considerably larger than those typically reached in client representation.

When lawyers write as the client's representative, they frequently grapple with subjects that they would not have chosen of their own accord—subjects that might not particularly interest them, or that they would not pursue if left to their own devices. Lawyers sometimes write for clients or superiors they find difficult or may not know very well, and they sometimes take positions they would not take if they were writing for themselves. The immediate readership may number fewer than a dozen—the court, the client, and opposing parties.

Extracurricular writing lets lawyers select their topics, fashion their arguments and conclusions, and reach out to a readership that sometimes numbers in the hundreds or thousands. Daniel J. Boorstin briefly practiced law before he became one of the nation's premier social historians, a Pulitzer Prize-winner, and the Librarian of Congress. The Massachusetts Bar member later explained the exhilaration that comes from reaching large public audiences. Many historians "tend to write for other historians," Boorstin said, but "I want to write for the human race."

C. Wisdom

Bar leaders frequently urge lawyers to write about legal issues for lay or professional audiences, or about respect for law and the legal process. These writings may resemble extended public service announcements, which typically ruffle few readers' feathers.

In 1932, for example, the Missouri Bar Journal advised that writing "newspaper articles concerning the law as it touches the lives of ordinary people...is an assured way to affect public relations favorably." In our own times, The Missouri Bar and other state bar associations urge lawyers to "speak out on public policy issues impacting the rule of law" by writing op-eds and letters-to-the-editor. The aim is to nourish "an informed citizenry"
and “make a difference in others’ lives.” The American Bar Association invites members to write “fair and informative letters to the editor.”

These days, however, many of lawyers’ most effective extracurricular writings about law or public policy do not merely inform readers or summon respect for the law. In our polarized times, these writings can provoke and even anger members of the audience. Readers with ruffled feathers may include the lawyer’s clients, prospective clients, or private or public employers.

The lawyer’s firm may have policies or expectations concerning extracurricular writing by its attorneys. Many law firm websites proudly list their lawyers’ print and major blog publications, but some firms might frown on writings whose arguments and conclusions depart noticeably from ones generally held by the firm’s clientele or prospective clientele, that reflect adversely on current or prospective clients, or that even risk revealing client confidences or privacy.

Agencies and other public sector employers sometimes prohibit or discourage their lawyers from writing about subject areas that the employer handles. In other public sector employment, a footnoted disclaimer sometimes makes publication permissible. (“The opinions expressed in this article are solely the author’s and do not necessarily represent those of the [agency].”)

Lawyers’ extracurricular writing may also create potentially embarrassing conflicts. When lawyers publish about law or public policy issues touching on their practice specialty, the publication is frozen in time, available in print and electronically. Adverse consequences may follow. If the lawyer contemplates future engagements as an expert witness, for example, publication can provide grist for an adversary’s cross-examination if the writer’s conclusions and later expert testimony diverge.

The potential for future conflicts and divergence may reach even judges. In Obergefell v. Hodges last term, for example, the U.S. Supreme Court held, 5-4, that same-sex couples hold a Fourteenth Amendment due process and equal protection right to marry. With voters, legislatures, or lower courts already legalizing such marriages in more and more states before the Supreme Court decision, dissenting Chief Justice Roberts argued that future change would have been better effected by continued evolution of the political process than by constitutional decision making.

The Chief Justice’s Obergefell dissent quoted “a thoughtful commentator [who] observed about another issue, ‘The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial resolution was difficult to justify and appears to have provoked, not resolved, conflict.’”

The “other issue” was abortion, and the “thoughtful commentator,” writing in the North Carolina Law Review in 1985 about Roe v. Wade, was then-U.S. Circuit Judge Ruth Bader Ginsburg, who joined Obergefell’s five-justice majority.

Law Reviews

Once the responsibility-reward-wisdom triad discussed above points toward pursuit of extracurricular writing, the lawyer may contemplate writing or co-writing occasional articles in law reviews. These forums continue to suffer harsh criticism for abstract, theoretical, sometimes impractical analysis that bears little resemblance to the actual responsibilities of courts, legislators, administrative agencies, and other decision makers and policy makers. Greater input from practicing lawyers might help bridge theory and practice.

A. Criticisms of Current Law Review Scholarship

In 1992, U.S. Circuit Judge Harry T. Edwards chastised the nation’s law professors for not “producing scholarship that judges, legislators, and practitioners can use.” “[M]any law schools—especially the so-called ‘elite’ ones,” said the former University of Michigan Law School professor, “emphasize[ ] abstract theory at the expense of practical scholarship and pedagogy.”

In 2014, Judge Edwards signaled that little had changed in the nation’s law reviews: “Intensely theoretical, philosophical, and empirical scholarship, which is very much in vogue in the legal academy these days, is rarely of interest or use to wide audiences. It is too abstract. Indeed, it does not even purport to address concrete issues relating to legal practice, procedure, doctrine, legislation, regulation, or enforcement.” Judge Edwards advocates a balance between abstract and practical articles in academic law reviews.

The harsh criticism has continued, and even intensified. U.S. Circuit Judge Stephen R. Reinhardt, for example, criticizes academic law reviews for emphasizing scholarship that is marked by “abstract, theoretical points that are of no interest or use to anybody except the people that write them and some law professors.”

In 2016, Judge Richard A. Posner identifies a still-growing “chasm between the academy and the judiciary,” “The current legal academic career tends to focus on publishing severely academic, often interdisciplinary, sometimes pie-in-the-sky scholarship of limited interest—sometimes limited intelligibility—to most judges and to the lawyers who appear before them. . . . Feasibility, practicality, are not these academics’ forte.”

The Supreme Court has joined the critique. Justice Breyer says that “law review articles have left terra firma to soar into outer space.” “Pick up a copy of any law review that you see,” says Chief Justice Roberts, “and the first article is likely to be . . . the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”

“If the academy wants to deal with the legal issues at a particularly abstract, philosophical level,” the Chief Justice adds, “that’s great and that’s their business, but they shouldn’t expect that it would be of any particular help or even interest to the members of the practice of the bar or judges.”

Judge Edwards, and earlier commentators, posit that law’s purpose is to serve society. Theoretical writing about difficult legal issues can ripen into practical doctrinal development, but critiques from the bench suggest that more legal scholarship written or co-written by practicing lawyers would also serve society with practical commentary relevant to judges and such other decision makers. The under-representation of scholarship by practicing lawyers may deprive the law of thoughtful, yet practical perspectives that could help make a difference.
B. Sources of Law Reviews

Law reviews come from two basic sources. The first (introduced above) is the nation's law schools, which publish "academic law reviews." Nearly all of these publications are edited by second- and third-year law students who demonstrate academic distinction, writing prowess, or both. The student editors select articles for publication, sometimes with informal advice about an article's content from the faculty advisor or from another faculty member who is an expert in the field.

A law school typically publishes both a primary law review (such as the Missouri Law Review), and one or more specialty law reviews (such as the Journal of Dispute Resolution). Most primary, and many specialty, academic law reviews are dominated by articles written by law professors. Articles written by judges or practicing lawyers sometimes appear, but these articles remain a distinct minority.

The second basic source of law reviews is professional organizations that publish scholarly reviews featuring articles written by their members or other commentators. For example, American Bar Association sections publish The Business Lawyer and the Antitrust Law Journal. Similar scholarly reviews are published by other professional organizations such as the National Council of Juvenile and Family Court Judges, which publishes the Juvenile and Family Court Journal.

Professional organizations generally publish articles that are selected after peer review (that is, after evaluation by editorial boards whose members are practicing professionals and not upper-class law students). Law professors may submit manuscripts, but other lawyers' articles with a practical yet scholarly approach to the organization's specialty may predominate because professional organization reviews typically appeal to practitioners, lawmakers, and other policy makers.

C. Wisdom Revisited

The lawyer's decision whether to write in academic or professional organization law reviews depends on weighing the three considerations explored above—responsibility, rewards, and wisdom. The first two may favor law review writing, but wisdom presents a weighty matter in addition to those discussed above: the burdens imposed by time constraints. Researching and writing a quality law review article is time-consuming work, and a lawyer's commitments to family and clients may counsel against sole authorship.

Practitioners contemplating sole law review authorship should recognize that writing is a central part of the typical law professor's job description. A law professor's fixed classroom schedule—typically six hours a week at most, for about 28 weeks a year—permits time and flexibility for scholarly writing, which remains a professional expectation even after conferral of tenure. Even as they fulfill their commitments to class preparation, student counseling, and public service, law professors can carve out time to write with only intermittent professional interruptions.

A busy law practice is different. In today's technological age, lawyers are rarely beyond their clients' reach during "normal business hours," as sometimes generously defined. When lawyers work full days representing clients and their causes for most of the year, lawyers normally must do the bulk of law review writing largely on their own time, often in fits and starts because clients come first.

Some practicing lawyers do write law review articles alone, but other lawyers opt for co-authorship to create division of labor that better accommodates the clock. A lawyer may collaborate with an acquaintance who is a law professor, a judge, another lawyer, an associate, or even a student law clerk in the firm. Publication wins each co-author public exposure, and each typically remains fully responsible for anything that the article says.

A practicing lawyer's co-authorship with a law professor (perhaps one of the lawyer's former professors) can create an especially productive collaboration. Each writer can contribute distinct approaches and perspectives, and the article may...
respond to judges’ recent critiques by combining the strengths of both theory and practice. Each co-author can bounce ideas off the other while encouraging a final product that is more likely to rest on what Justice Breyer calls “terra firma” and not in “outer space.”

D. The Law Review Submissions Process in a Nutshell

Once responsibility, reward, and wisdom lead a lawyer to write or co-write a law review article, the lawyer should become familiar with the process for submitting manuscripts to academic and professional organization reviews.29 (A law professor co-author will likely already know the process and can shepherd the manuscript to publication.) In my experience, these factors remain at the forefront:

1. All law reviews and journals are not created equal. As of this writing, the United States has 205 ABA-approved law schools.30 Virtually all schools publish a primary law review, and most also publish one or more specialty reviews. The nation has more than 600 academic law reviews that publish about 10,000 articles each year.31

As might be expected, the range of academic law reviews runs the gamut from the most exclusive to the less exclusive. To learn the landscape, a good place to start is the annual U.S. News & World Report law school rankings.32 These rankings have their critics, but a primary academic law review’s prestige tends to follow the prestige of the law school that publishes it. Academics have also created other, sometimes controversial, rankings based on such factors as how often a particular law review’s articles are cited in other law reviews.33

A law school’s primary law review may rank higher than any of the school’s specialty reviews. But the rankings compiled by the Washington and Lee University School of Law’s law library demonstrate that many academic specialty reviews rank quite high.34 Some academic specialty reviews (such as ones devoted to law and psychology, or to health care law, for example) assemble editorial boards that often include students who can enhance the post-acceptance editorial process because they had career experience in the specialty before enrolling in law school.

Competition for publication offers can be fierce in highly ranked primary academic law reviews, which sometimes receive a few thousand submissions annually but can accept only a handful (though the numbers are doubtlessly skewed because so many authors submit manuscripts simultaneously to 50 reviews or more but can publish in only one). Academic specialty law reviews may receive a smaller volume of submissions because of their narrower substantive focus, so chances of publication may be enhanced for quality submissions that concern the specialty.

Among many professionals (including many law professors), publication in a leading professional organization’s law review carries particular force because peer reviewers are experts rather than less experienced law students. Despite the professional review’s disclaimer that articles express only the authors’ opinions, publication can suggest that the peer review team, and thus the organization itself, takes the article seriously.

Whether in the academic or the professional association world, publishing in the most prestigious forum possible remains a plus. The potential readership of articulate law review writing may extend considerably beyond the print audience. Law review articles (like many bar journal articles, discussed next time in Part 2) typically reach Westlaw, Lexis, and other electronic sources, such as the website or blog of the law review or of the bar association itself.

2. Originality and finality matter. Law reviews ordinarily consider only manuscripts that have not appeared in other publications, wholly or in substantial part. Unless an author has an especially strong reputation, the author stands the best chance of acceptance with a carefully proofread final manuscript that presents a fresh perspective, without bracketed material awaiting refinement, and without citations that editors must complete or put in standard style.

The writer’s submitted cover letter and accompanying abstract must make the case for publication because the “first cut” may depend on these sources alone. But even when the writer transmits a manuscript in final form with all the i’s dotted and all the t’s crossed, editors invariably discover matters of substance, style, or citation that need correction. Provided that editors do not seek to interfere unreasonably with substantive matters, writers should restrain pride of authorship during a constructive editorial process.

Submitting the manuscript in final form helps the author maintain the upper hand during the editorial process. Law review writers sometimes complain, for example, about nettlesome student editors who seek to influence the substance and style of accepted manuscripts. When it turns out that an accepted manuscript remains riddled with incomplete text or inaccurate footnotes, law review standoffs are the author’s own fault. When writers conscript editors to do their work for them, writers have nobody to blame but themselves when the editors do the work.

3. Multiple submissions and exclusivity present strategic questions. Academic law reviews (both primary and specialty) generally permit authors to make unlimited simultaneous submissions, and most authors undoubtedly do just that. Submitting a manuscript to 50 or more academic reviews is not unusual, and may be the norm. Many peer-reviewed journals published by professional organizations require exclusive submission, plus the author’s commitment to accept an offer if one is forthcoming.

Other things being equal, a writer stands a better chance with submissions to multiple reviews than with an exclusive submission. If one of the 50 or more submissions to academic law reviews yields an offer of publication, the review usually allows the writer a week or so to consider the offer, though the writer may be able to negotiate a longer period. The writer may accept the offer immediately or within the period, or the writer may seek to “ratchet up” by requesting higher ranked academic law reviews to expedite consideration of the previously submitted piece before the period elapses.

Publication in a peer-reviewed professional organization journal, however, may confer prestige beyond what comes from publication in a student-edited academic review. Because exclusive submission can delay the process in the event of rejection, the writer should check whether the professional organization, on its website or in the print edition, commits to reaching a publication decision within a reasonable period. Rejection after extended
consideration may leave the article less cutting edge, and thus less appealing to other law reviews.

4. Electronic submission of manuscripts is the norm. Most law reviews now require or prefer manuscripts submitted electronically, and not in hard copy. The law review’s website usually states the requirements, including the permisibility or expectation of emailed submissions. For the past several years, two University of Missouri-Kansas City School of Law professors, Allen Rostron and Nancy Levit, have assembled annually updated compendiums of requirements for many academic law reviews.35

Many reviews require electronic submission through one of two services, Express-O or Scholastica.36 For a nominal fee per submission, the service transmits the manuscript, the author’s cover letter, a brief abstract (which may appear atop the published article), and the author’s resume (which editors may expect to consider). Free of further charge, the service will transmit requests to expedite previous submissions, and then transmit requests to withdraw manuscripts following acceptance of a publication offer.37

Next month (Part 2): Lawyers’ writing in bar association journals and blogs.

Endnotes
1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written five books. Four U.S. Supreme Court decisions have cited his law review articles.
2 This two-part article is adapted from Prof. Abrams’ upcoming book, Effective Legal Writing: A Guide for Students and Practitioners, which West Academic will publish in Spring 2016. Reprinted by permission. Thank you to my colleagues, Professors Dennis C. Crouch and Melody R. Daily, for reviewing this article (and the upcoming book) in manuscript form. Thank you also to Journal of the Missouri Bar Editor Gary Toobey for his review of the article and the upcoming book’s manuscript.
12 Mark A. Cunningham, President’s Message: Civil Discourse and the Role of the Profession In Public Policy, 63 LA. B.J. 186, 186 (2015).
13 Keith A. Birkes, An Informal Citation . . . ,” 1 PRECEDENT 5 (Fall 2007).
19 Id.; see also, Harry T. Edwards, The Role of Legal Education in Shaping the Profession, 38 J. LEGAL EDUC. 285, 291 (1988). (“Law professors seem more and more often content to talk only to each other – or perhaps to a few colleagues in other academic disciplines – rather than deal with the problems facing the profession.”).
22 Id.
31 http://law.emory.edu/news/;
33 Harry T. Edwards, supra note 19, at 1484 (paraphrasing Prof. Fred Rodell).
34 For helpful discussions of the law review submission process, see Eugene Volokh, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW, ch. 23 (4th ed. 2010) (discussion geared to law student writers, but with information helpful also to law graduates); Gerald Lebovits, Academic Legal Writing: How to Write and Publish, 70 N.Y. ST. B.J. 64 (Jan. 2006) (discussion geared to law practitioners).
36 Id.