

Readers' Expectations, Discourse Communities, and  
Writing Effective Bar Exam Answers

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## I. Introduction

“The discourse of law thrives on the written word . . . .”<sup>2</sup> From the first day of law students' training, they learn to speak and write in a new language unique to the legal profession. In addition to papers and essay exams, law students learn to write legal documents such as office memoranda, motion memoranda, and appellate briefs

After investing thousands of dollars and years of time in law school, graduates face their final hurdle for becoming licensed: the bar exam.<sup>3</sup> Graduates must write effective essay and performance answers to pass their bar exams and obtain their law licenses.

Once licensed, attorneys spend their entire careers writing documents like client letters, inner-office memoranda, contracts, wills, motion memoranda, and appellate briefs. Indeed, lawyers are professional writers: “Most lawyers write and publish more pages than most novelists, and with greater consequences hanging in the balance.”<sup>4</sup> Thus, to be an effective lawyer, one must be an effective writer.

This article focuses on effective writing for one of the most stressful writing tasks that new law graduates must complete: bar exam answers. Although students who are accepted into and graduate from law school are usually “good” writers, to perform well on bar exams it is necessary for students to understand the types of questions asked and to adapt their writing for their readers—bar exam graders.

Law school provides a foundation of knowledge for subjects tested on bar exams, but law schools do not traditionally address writing for bar exams.<sup>5</sup> After graduating from law school, bar review courses provide

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<sup>2</sup> RUTH ANN MCKINNEY, *READING LIKE A LAWYER* 264 (2005).

<sup>3</sup> For example, the cost of attending a public university's law school for one academic year (nine months) is approximately \$25,556 (\$11,118 tuition and fees; \$10,588 books and living expenses; \$1,224 travel; and \$2,626 miscellaneous expenses). UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW 2004-05 QUICK FACTS (2004).

<sup>4</sup> LINDA EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 1 (3d ed. 2002).

<sup>5</sup> Some law schools provide supplemental bar exam programs or workshops that include a writing component. For example, at the University of North Carolina we provide a series of bar preparation workshops covering the bar review process, the bar exam process, and essay writing techniques. In recent years, law schools have been increasingly providing bar preparation services. *E.g.*, Richard Cabrera,

large groups of students an efficient means for reviewing the law tested on bar exams. But, bar review courses are not well situated to assist students with analytical and writing skills.<sup>6</sup>

This article advocates that law schools should provide bar preparation for their students, including instruction in writing effective bar exam answers.<sup>7</sup> Regardless of students' levels of intelligence and motivation, their bar exam performance will be inadequate if they fail to communicate what they know to those grading their exams. In contrast, by understanding and meeting bar graders' expectations, bar takers' writing is more likely to be favorably received.

Students can be taught to adapt their writing skills for effective bar exam answers by using the reader expectation approach to writing, employing a step-by-step process for answering questions, completing practice questions, obtaining feedback, and reflecting on that feedback.<sup>8</sup>

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*Working to Improve: A Plan of Action for Improving the Bar Exam Pass Rate*, 27 WM. MITCHELL L. REV. 1169, 1170-71 (2000) (advocating for law school bar preparation programs). Since the ABA has approved law school for-credit bar preparation courses, law school programs are certain to increase. are likely to increase since the ABA has changed its standard to allow academic credit for law school bar preparation courses. See ABA Standard 302, Interpretation 302-7; Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools (Aug. 23, 2004), available at <http://www.abanet.org/legaled/standards/memor302and305standards.pdf>.

<sup>6</sup> Suzanne Darrow-Kleinhaus, *Incorporating Bar Pass Strategies into Routine Teaching Practices*, 37 GONZAGA L. REV. 17, 27 (2001-02).

<sup>7</sup> Passing a bar exam depends on several factors, including aptitude, motivation, preparation, and attitude. DENISE RIEBE & MICHAEL HUNTER SCHWARTZ, *PASS THE BAR!* (2005). This article only focuses on one factor, preparation—specifically, the preparation students need to engage in to adapt their writing style to the type expected in bar exam answers. This factor, like many other factors influencing students' likelihood of success (e.g., time management, motivation, and attitude) is a factor students can control.

<sup>8</sup> See GEORGE D. GOPEN, *THE SENSE OF STRUCTURE: WRITING FROM THE READER'S PERSPECTIVE* (2004) [hereinafter *STRUCTURE*] and *EXPECTATIONS: TEACHING WRITING FROM THE READER'S PERSPECTIVE* (2004) [hereinafter *EXPECTATIONS*] (explaining reader expectation approach); RUTH ANN MCKINNEY, *TEACHER'S MANUAL TO ACCOMPANY LEGAL RESEARCH: A PRACTICAL GUIDE AND SELF-INSTRUCTIONAL WORKBOOK 5* (4th ed. 2003) [hereinafter *TEACHER'S MANUAL*] (emphasizing importance of a step-by-step process and practice to master new skills); MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW*

By doing so, law schools can increase their students' likelihood of success on their bar exams.<sup>9</sup>

## II. The Reader Expectation Approach to Writing

### A. Introduction to the Reader Expectation Approach

The reader expectation approach to writing provides one method for determining which rhetorical habits are most helpful to readers.<sup>10</sup> Accordingly, it provides a means for communicating as precisely as possible and controlling readers' interpretations—tasks that should be at the heart of all lawyers' rhetorical agendas.<sup>11</sup>

Dr. George Gopen, a colleague of mine at Duke University, along with several of his associates, developed the reader expectation approach as a means for teaching students and professionals to increase the effectiveness of their writing skills. The reader expectation approach emphasizes reader-based perceptions of rhetoric and deemphasizes two components of the communication triangle, the writer and discourse itself.<sup>12</sup>

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STUDENTS 30-31, 71-78 (2005) (emphasizing the importance of receiving and reflecting about feedback to learn and improve skills).

<sup>9</sup> As a bar review director, bar exam consultant, and professor, I have spent almost fifteen years helping students pass bar exams. Since most bar exam information is confidential, many of my insights and recommendations are the result of years of first-hand experience working with students (especially repeaters who have the right to examine their exams). Law schools that provide bar preparation programs have reported a positive impact on bar passage rates. *E.g.*, Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence That a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L. J. 646, 648, 671 (2005) (reporting that bar passage program significantly improved bar passage rates, especially for at-risk students; 28.5% improvement from at-risk non-participants to at-risk participants for the bottom half of the class). Positive results have also been reported at other law schools. *See, e.g.*, Cabrera, *supra* note 5, at 1179 (reporting a positive impact at William Mitchell School of Law); Interview with Michael Hunter Schwartz, Professor, Western State University College of Law (May 7, 2005) (reporting a 35% increase in the bar passage rate, from 30% to 47%, in California where the state's overall passage rate is usually relatively low (in the 40% range)).

<sup>10</sup> EXPECTATIONS, *supra* note 8, at 13.

<sup>11</sup> STRUCTURE, *supra* note 8, at 13.

<sup>12</sup> EXPECTATIONS, *supra* note 8, at 360.

Fairly recently, it was discovered that there are recognizable patterns in the interpretive process of most readers of English.<sup>13</sup> Of course, not all readers read the same way.<sup>14</sup> However, most readers go through the same kinds of processes most of the time.<sup>15</sup> Both writers and readers are creatures of habit: writers continually use and reuse the same strategies for the same types of writing tasks, and readers have "relatively fixed expectations of where in the structure of any unit of discourse to expect the arrival of certain kinds of substance."<sup>16</sup>

For example, at the sentence level, readers of English expect that the subject of a sentence will be followed almost immediately by a verb.<sup>17</sup> At the paragraph level, readers expect the issue of a paragraph to appear at the beginning of the paragraph.<sup>18</sup> Readers then assume that a paragraph will develop the issue stated at its beginning.<sup>19</sup>

The reader expectation approach deemphasizes language as an object of interest by itself or a means of self-expression and shifts attention to how language functions.<sup>20</sup> It thus values readers more than writers, and judges the effectiveness of a piece of writing by how the writing is perceived by readers.<sup>21</sup> After all, once students graduate and enter the working world, no one will care how hard they worked or improved.<sup>22</sup> For example, a judge does not look at a lawyer's brief and say, "This is a real mess; but it is so much better than the last one you turned in, you win the case."<sup>23</sup> "Real-world" writing is done almost entirely for the sake of readers.<sup>24</sup> Thus, writing is effective to the extent that readers receive the communication that writers intend to send.<sup>25</sup>

#### B. Readers' Expectations

Some of the major rhetorical techniques that control a reader's interpretive process include diction, punctuation, sentence construction,

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<sup>13</sup> STRUCTURE, *supra* note 8, at xi.

<sup>14</sup> EXPECTATIONS, *supra* note 8, at 367.

<sup>15</sup> *Id.* at xvi.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> STRUCTURE, *supra* note 8, at 31.

<sup>18</sup> *Id.* at 96-111.

<sup>19</sup> *Id.*

<sup>20</sup> EXPECTATIONS, *supra* note 8, at xvi.

<sup>21</sup> *Id.*

<sup>22</sup> STRUCTURE, *supra* note 8, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at xi.

complexity, specificity, reference, and structural location.<sup>26</sup> Although structural location may seem the least of all of these techniques, it may actually be the single most important skill a writer can develop.<sup>27</sup> In fact, Dr. Gopen asserts that the meaning of writing is derived eighty-five percent from structure.<sup>28</sup>

Accordingly, the reader expectation approach is based on the premise "that the mere *articulation* of information conveys far fewer clues for interpretation than does the *placement* of that information."<sup>29</sup> In other words, "*where* a piece of information appears has a great deal to do with *how* that information is processed."<sup>30</sup> Consequently, whenever possible, writers should consciously "try to locate the various types of substance in the structural locations where readers expect those types of substance to arrive."<sup>31</sup>

Structural choices are "by no means merely cosmetic; they go to the heart of thought itself."<sup>32</sup> If material is not structurally located where readers will be expecting to find it, then the odds are low that readers will perceive the intended meaning.<sup>33</sup> Writers are communicating, "*You* figure out what to do with [this]."<sup>34</sup> Writers thus fail to communicate how a reader should connect information to form a whole train of thought and risk having their writing efforts result in noncomprehension.<sup>35</sup> Consequently, writing that fails to conform to readers' expectations about structural location is interpretable, but is highly likely to be misinterpreted and ineffectively communicative.<sup>36</sup>

In contrast, by consistently placing pieces of information where readers expect it, writers gain readers' trust.<sup>37</sup> Readers thus ebb and flow with the content and thought just as the writers intended them to and understand the messages being sent.<sup>38</sup> Although substance with an expected structure may not be interpreted the same way by all readers, the

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<sup>26</sup> *Id.* at 9-12.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> EXPECTATIONS, *supra* note 8, at 363.

<sup>29</sup> *Id.* at 55.

<sup>30</sup> *Id.* at xvi.

<sup>31</sup> *Id.* at 78.

<sup>32</sup> STRUCTURE, *supra* note 8, at 46.

<sup>33</sup> EXPECTATIONS, *supra* note 8, at 16.

<sup>34</sup> STRUCTURE, *supra* note 8, at 85.

<sup>35</sup> *Id.*

<sup>36</sup> EXPECTATIONS, *supra* note 8, at xiv.

<sup>37</sup> STRUCTURE, *supra* note 8, at 81, 83.

<sup>38</sup> *Id.* at 83.

likelihood of shared interpretation increases greatly.<sup>39</sup> More importantly, readers are more willing to accept the analysis of one who is considerate of their expectations.<sup>40</sup>

### C. Benefits of the Reader Expectation Approach

Most readers are intuitively aware of their expectations in their role as readers.<sup>41</sup> The reader expectation approach makes these expectations consciously available to writers.<sup>42</sup> By utilizing the reader expectation approach, writers can accomplish a number of objectives.

First, the reader expectation approach demystifies the writing-reading process and empowers writers.<sup>43</sup> By utilizing the reader expectation approach, writers send clear reading instructions and gain control over readers' interpretive processes.<sup>44</sup> Consciously meeting and working with readers' expectations increases the likelihood that writers' substance will be interpreted as they intend it to be.<sup>45</sup>

Second, the reader expectation approach provides a method of invention.<sup>46</sup> It puts writers in touch with their own thought process, thereby helping writers clarify and keep their own thoughts ordered.<sup>47</sup> It also helps writers create and organize text by providing a method for making structural choices while drafting.<sup>48</sup>

Third, in a similar vein, the reader expectation approach provides a method for revision, helping writers to clean up their own writing.<sup>49</sup>

Finally, utilizing the reader expectation approach can help to minimize the amount of "reader energy" that must be summoned to read, interpret, and contemplate a piece of writing.<sup>50</sup> If reader expectations are violated, readers are forced to devote a disproportionate amount of reader energy to the discerning of structure.<sup>51</sup> In contrast, by meeting readers'

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<sup>39</sup> EXPECTATIONS, *supra* note 8, at xiv.

<sup>40</sup> EDWARDS, *supra* note 4, at 263.

<sup>41</sup> EXPECTATIONS, *supra* note 8, at 12.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at xvi.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> STRUCTURE, *supra* note 8, at 110.

<sup>46</sup> EXPECTATIONS, *supra* note 8, at xvi.

<sup>47</sup> STRUCTURE, *supra* note 8, at xii.

<sup>48</sup> *Id.* at 45-46, 84.

<sup>49</sup> *Id.* at xii.

<sup>50</sup> EXPECTATIONS, *supra* note 8, at 10-11.

<sup>51</sup> *Id.* at 11.

expectations, a writer can minimize the amount of reader energy necessary to discover the structure of a piece of writing, making more reader energy available for understanding and contemplating its substance.<sup>52</sup>

#### D. Historical Support for the Reader Expectation Approach

Focusing on readers' expectations is nothing new.<sup>53</sup> Many reader expectation concepts "have been articulated many times over the course of the history of rhetoric."<sup>54</sup> Indeed, the lines "of development can be traced all the way back to the beginning of the Western rhetorical tradition."<sup>55</sup> Although the ancient rhetoricians were dealing with Greek and Latin prose that was heard, not read, their insights demonstrate their recognition of the importance of structure to the perception of substance.<sup>56</sup>

For example, readers expect to be provided context at the beginning of a unit of writing to help them make sense of what follows.<sup>57</sup> Readers' needs for contextualizing information is so pressing that they will tend to use whatever is stated first to make sense of what follows.<sup>58</sup> In the fourth century, B.C., Aristotle communicated this sentiment in *On Rhetori*: "The unlimited leads astray; he who gives, as it were, the beginning into the hand [of the audience] allows him, by holding on, to follow the speech."<sup>59</sup>

The importance of structure to communication was noted as far back as the first century, A.D., by Marcus Fabius Quintilian, a Roman rhetorician. Quintilian stated, "for it is not only of consequence what we say, and how we say it, but also where we say it; there is need therefore also for *arrangement*."<sup>60</sup>

Another example is provided by the concept of reader energy, the amount of effort a reader must use to read and interpret a piece of writing.<sup>61</sup> Communicating this point, Hugh Blair stated:

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<sup>52</sup> *Id.* at 12.

<sup>53</sup> EXPECTATIONS, *supra* note 8, at 379.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 379.

<sup>57</sup> STRUCTURE, *supra* note 8, at 67, 96, 109-10.

<sup>58</sup> *Id.* at 108.

<sup>59</sup> EXPECTATIONS, *supra* note 8, at 384 (quoting ARISTOTLE, ON RHETORIC 3.14.6 (George A. Kennedy trans., 1991)).

<sup>60</sup> EXPECTATIONS, *supra* note 8, at 380 (quoting MARCUS FABIVS QUINTILIAN, INSTITUTES OF ORATORY Bk.III, Ch. III 2 (John Selby Watson trans., 1892) (addressing the structural location of arguments)).

<sup>61</sup> EXPECTATIONS, *supra* note 8, at 10-11.

If we are obliged to follow a writer with much care, to pause, and to read over his sentences a second time, in order to comprehend them fully, he will never please us long. Mankind are too indolent to relish so much labour. They may pretend to admire the author's depth, after they have discovered his meaning; but they will seldom be inclined to take up his work a second time.<sup>62</sup>

and

We are pleased with an author, we consider him as deserving praise, who frees us from all fatigue of searching for his meaning; who carries us through his subject without any embarrassment or confusion; whose style flows always like a limpid stream, where we see to the very bottom.<sup>63</sup>

As a final example, readers have a need for, and expect, closure at the end of a piece of discourse.<sup>64</sup> This concept was articulated, in the first century, B.C., by Cicero, a Roman rhetorician,: "My ear, at any rate, rejoices in a full and rounded period; it feels a deficiency, and does not like an excess. Why say '*my ear*'? I have often seen the whole assembly burst into a cheer, in response to a happy cadence. For the ear expects the words to bind the sentence together."<sup>65</sup>

#### E. Reader Expectations and Discourse Communities

In addition to generally shared expectations of readers of English, individual professional communities have their own particular sets of expectations. For example, there are unique discourse communities—groups "of individuals who share a common language, common knowledge base, common thinking habits, and common intellectual assumptions"—for the medical, scientific, and legal discourse communities.<sup>66</sup>

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<sup>62</sup> EXPECTATIONS, *supra* note 8, at 385 (quoting HUGH BLAIR, 1 LECTURES ON RHETORIC AND BELLES LETTRES 185 (Harold F. Harding ed., 1965)).

<sup>63</sup> *Id.* at 385 (quoting BLAIR, at 186).

<sup>64</sup> STRUCTURE, *supra* note 8, at 126.

<sup>65</sup> EXPECTATIONS, *supra* note 8, at 382 (quoting MARCUS TULLIUS CICERO, ORATOR 1.168 (H.M. Hubbell trans., 1971). *See also* EXPECTATIONS, *supra* note 8, at 385 (quoting fourth century Greek philosopher Aristotle in ON RHETORIC 11 (George A. Kennedy trans., 1991)).

<sup>66</sup> MCKINNEY, *supra* note 2, at 14; *see also* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 158 (1999) (discussing

Discourse communities expect their conventions to be adhered to, in effect directing their community members that "this is the way we do things here."<sup>67</sup> Relying on a certain amount of communal certainty in communications assists discourse communities in functioning effectively.<sup>68</sup> Thus, learning to write well depends on learning to recognize and utilize the expectations of the discourse communities to which one belongs.<sup>69</sup>

F. The Legal Profession's Community Conventions and Expectations

In the legal profession, as in other professions, the types and style of documents written are "founded on a similarly indigenous set of community expectations."<sup>70</sup> Thus, scholars of rhetoric "would call the unique world inhabited by lawyers a 'discourse community.'"<sup>71</sup>

The rhetoric of legal discourse is clear, orderly, linear, and rational.<sup>72</sup> It follows a "methodical march": a reader should know when you leave home, your route, your destination, and your time of arrival.<sup>73</sup> Further, in legal writing a writer's purpose is usually to persuade a reader to believe something or to do something.<sup>74</sup> To have that type of effect on readers, writers must work through not only what they have to say, but also how it can best be heard by readers.<sup>75</sup>

Legal readers are frequently busy, skeptical, and impatient with delay in getting to the bottom line.<sup>76</sup> They value clear organization and

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the new rhetoric outer-directed school which analyzes the conventions of particular discourse communities).

<sup>67</sup> Berger, *supra* note 65, at 159.

<sup>68</sup> EXPECTATIONS, *supra* note 8, at 10.

<sup>69</sup> *Id.*

<sup>70</sup> STRUCTURE, *supra* note 8, at 146.

<sup>71</sup> MCKINNEY, *supra* note 2, at 14; *see also* Berger, *supra* note 65, at 158 (discussing the new rhetoric outer-directed school).

<sup>72</sup> Berger, *supra* note 65, at 155.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 181.

<sup>75</sup> *Id.* *See also id.* at 169 ("The 'outside reader's eye' predominates when the focus shifts to reviewing the emerging text to see whether it meets the purposes of an outside reader, and the 'outside writer's eye' is used when the writer concentrates on having an intended effect on an outside reader.").

<sup>76</sup> EDWARDS, *supra* note 4, at 263.

road maps.<sup>77</sup> Because they need to be informed or persuaded, writers need to send them instructions for how to pull together the information communicated.<sup>78</sup> Those instructions are sent mostly by depositing information in the structural locations where readers will look for it.<sup>79</sup>

Law-trained readers expect the macro-organization of a legal document to be structured around the overarching, applicable rule. Once the overarching rule is identified and broken down into its component parts, those components can serve as the "backbone" for the organizational structure.<sup>80</sup> And, those components also provide topics that can be used for headings within a legal document. Using headings conforming to the component parts of an overarching rule makes legal documents reader-friendly.

For each issue addressed in a legal document, law-trained readers expect the structure of a legal analysis to be based on deductive (or syllogistic) reasoning. Indeed, deductive reasoning provides the structure for legal analyses in almost all legal writing—whether one is writing law school assignments, bar exam answers, or documents produced in legal practice.<sup>81</sup>

Deductive reasoning is the statement of a logical relationship: a major premise (for example, a rule), minor premise (for example, an application of that rule), and conclusion.<sup>82</sup> Law students are usually taught to follow the deductive reasoning process with paradigms like "CRAC"—Conclusion, Rule, Application, Conclusion.<sup>83</sup> Whatever terminology is used, the purpose of these paradigms is to ensure that students' writing is logical and adheres to the expectations of law-trained readers.

Utilizing the CRAC paradigm, legal writers should begin an analysis by stating their conclusion first. By stating a conclusion at the

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<sup>77</sup> *Id.*

<sup>78</sup> STRUCTURE, *supra* note 8, at xii.

<sup>79</sup> *Id.* at xii-xiii. As noted above, structural placement is also a valuable technique for writers to use to generate, organize, and revise their thoughts. *Id.* at 45.

<sup>80</sup> *See, e.g.*, EDWARDS, *supra* note 4, at 30-36.

<sup>81</sup> *See, e.g.*, EDWARDS, *supra* note 4, at 8, 87-88 (explaining rule-based reasoning; providing paradigm based on the deductive reasoning process); JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 3-13 (1993) (explaining how legal writing is based in the deductive reasoning process).

<sup>82</sup> GARDNER, *supra* note 81, at 4.

<sup>83</sup> Or "IRAC"—Issue, Rule, Application, Conclusion.

beginning of a unit of writing, writers provide readers context. Readers have a pressing need for contextualizing information before they have to deal with new information, and context helps readers understand all that follows.<sup>84</sup> In addition, establishing context makes readers receptive to the arrival of subsequent information.<sup>85</sup>

An initial conclusion provides context by informing a reader about the area of law involved in a specific case and what result is being predicted or advocated. Additional context may be provided by using an introductory section after the initial conclusion to provide an applicable procedural standard or appellate standard of review, or to set out overarching rules (for example, elements of an offense) that will be discussed in an analysis.

After providing context, legal writers should explicitly state the applicable rules. Law-trained readers want to know what law applies in a given situation, and then how the law applies to a specific factual scenario. The end of an analysis should restate a writer's conclusion to meet readers' needs for closure.<sup>86</sup>

In addition, writers should use transitions to lead readers through a piece of discourse. Whenever a reader departs from a unit of discourse, the possibilities of where the next sentence or paragraph may go in any piece of discourse are infinite.<sup>87</sup> Accordingly, it is important for writers to provide readers connections to make it clear how they are to proceed; in other words, a writer's mission is to "[t]ake your reader with you."<sup>88</sup> When readers are told the direction in which a writer is proceeding and which way they should turn, they are pleased, relieved, and willing to follow.<sup>89</sup>

### III. Using the Reader Expectation Approach to Write Effective Bar Exam Answers

#### A. Bar Exam Writing Tasks

There are three common types of bar exam questions: multiple-choice, essay, and performance questions. Only the last two, essay and performance questions, require students to utilize writing skills; both of these types of questions are explained below.

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<sup>84</sup> STRUCTURE, *supra* note 8, at 108-10.

<sup>85</sup> *Id.* at 67.

<sup>86</sup> *See id.* at 126.

<sup>87</sup> *Id.* at 136-37.

<sup>88</sup> *Id.* at 144.

<sup>89</sup> *Id.* at 137, 141.

1. Bar Exam Essay Questions<sup>90</sup>

All states use essay questions on their bar exams. About a third of the states have adopted the National Conference of Bar Examiners ("NCBE") essay exam, the Multistate Essay Exam ("MEE"),<sup>91</sup> as a part of their bar exams.<sup>92</sup> Other states use state-created essays. For either, students must understand the types of questions used and subjects tested on their exams.

The MEE is a three-hour exam consisting of six, thirty-minute essay questions.<sup>93</sup> The NCBE states that the purpose of the MEE is for students to:

- a. Identify legal issues raised by a factual situation;
- b. Separate relevant from irrelevant information;
- c. Present a reasoned analysis of the issues raised in a clear, concise, and well-organized manner;
- d. Demonstrate an understanding of the law relevant to resolve the factual situation; and
- e. Demonstrate an ability to communicate effectively in writing.<sup>94</sup>

Although the MEE is written by the NCBE, the weight accorded the exam is determined by individual states and, like state-created essays, the MEE is graded by state examiners—there is no national grading.<sup>95</sup> The NCBE provides detailed exam information, topical outlines for

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<sup>90</sup> See generally RIEBE & SCHWARTZ, *supra* note 7, at chapters 5 and 15.

<sup>91</sup> See NATIONAL CONFERENCE OF BAR EXAMINERS, THE MULTISTATE ESSAY EXAM 2005 INFORMATION BOOKLET (2005), *available at* [http://www.ncbex.org/tests/Test%20Booklets/MEE\\_IB2005.pdf](http://www.ncbex.org/tests/Test%20Booklets/MEE_IB2005.pdf) [hereinafter MEE INFORMATION BOOKLET].

<sup>92</sup> National Conference of Bar Examiners, *2004 Statistics*, THE BAR EXAMINER 6, 26 (May 2005), *available at* <http://www.ncbex.org/stats/pdf/2004stats.pdf> [hereinafter *2004 Statistics*]. In 2004, the MEE was used in seventeen jurisdictions: Alabama, Arkansas, the District of Columbia, Guam, Idaho, Illinois, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, the Northern Mariana Islands, South Dakota, Utah, and West Virginia. *Id.* See the NCBE's Web site for the most current information about which states use the MEE. *Id.*

<sup>93</sup> MEE INFORMATION BOOKLET, *supra* note 91, at 1.

<sup>94</sup> *Id.* at 1-2.

<sup>95</sup> *Id.* at 1.

subjects tested,<sup>96</sup> and sample essay questions<sup>97</sup> on its Web site. Students can order additional sample essay questions from the NCBE.<sup>98</sup>

For states using state-created essay questions, students should ask their states' licensing entities which subjects are tested as well as for information about the format, length, number of questions, and time allotted for the essay portion. Most states provide sample essay questions. They may be available directly from states' licensing entities, from bar review companies, or through law schools (for example, many schools have sample questions on reserve in their libraries).<sup>99</sup>

Although essay questions vary from state to state, they tend to be fairly similar.<sup>100</sup> In general, they are more specific and concrete than the long hypothetical questions traditionally used on law school essay exams. They do not ask students to analyze broad questions of public policy or theorize; rather, they tend to use relatively short hypothetical situations followed by a specific question or "call" and require students to identify issues, apply rules to facts, and predict outcomes. This is not surprising given the fact that most bar examiners are practicing lawyers with a "real-world" perspective.

Because bar exam questions tend to be specific and concrete, many students find them easier than those typically found on law school exams. On the other hand, bar exam questions provoke anxiety in some students because their specificity leaves less margin for error.

Another unique aspect of the types of questions asked on bar exam essays is that, unlike law school questions, which focus on one law school course at a time and come with subject labels ("Contracts Exam"), bar exams often combine multiple law school courses in a single essay question. Again, this is more similar to what attorneys actually do in practice than what students experience in law school.

Frequently, questions combine a procedural standard or appellate standard of review together with an area of substantive law. For example,

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<sup>96</sup> *Id.* at 1-14. The following subjects are tested on the MEE: agency, commercial paper, conflict of laws, corporations, decedents' estates, family law, federal civil procedure, future interests, limited liability companies, partnership, sales, secured transactions, and trusts. *Id.*

<sup>97</sup> *Id.* at 15-30.

<sup>98</sup> *Id.* at 31-32.

<sup>99</sup> For more information about state-created essay exams, see RIEBE & SCHWARTZ, *supra* note 7, at chapter 15.

<sup>100</sup> Society of American Law Teachers, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446 n.1.

questions might ask: “Did the trial judge err in granting the motion to dismiss on the contract claim?” or “Should the trial judge grant Defendant’s motion for summary judgment on the tort claim?” or “Did the court err in denying Defendant’s motion for judgment of acquittal?” Consequently, students must be prepared to address procedural postures and standards of review.<sup>101</sup>

## 2. Bar Exam Performance Questions<sup>102</sup>

Performance tests require bar takers to perform practical lawyering tasks. Just as with essay questions, states can either use state-created questions or the NCBE's performance test, the Multistate Performance Test ("MPT"). For either, students should understand the types of questions typically asked, review sample questions and answers, and develop their own system for answering performance questions.

The MPT has been adopted by a little more than half of the states as a part of their bar exams.<sup>103</sup> The NCBE provides three ninety-minute

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<sup>101</sup> Commonly tested motion standards and appellate standards of review are: Rule 12(b)(6) motion to dismiss, Rule 56 summary judgment, Rule 41 motion to dismiss, Rule 50 motion for a directed verdict, Rule 50 motion for a judgment notwithstanding a verdict (“JNOV”), motion to compel discovery, evidentiary rulings (i.e., admitting testimony, striking an affidavit, using interrogatories, suppressing evidence), criminal motion to dismiss, criminal defendant’s request for jury instructions on a defense, criminal case request for jury instructions for lesser included offenses, *de novo* standard of review, any competent evidence standard of review, abuse of discretion standard of review, and substantial evidence standard of review. RUTH ANN MCKINNEY WITH KENNETH S. BROUN AND RICHARD ROSEN, GUIDE TO NORTH CAROLINA STANDARDS FOR CONSIDERATION OF TRIAL COURT MOTIONS (Feb. 2000) (unpublished handout available from the Writing and Learning Resources Center at the University of North Carolina Law School and on file with author) [hereinafter GUIDE TO NORTH CAROLINA STANDARDS]; KAREN GWALTNEY, AS EDITED BY RUTH ANN MCKINNEY, GUIDE TO NORTH CAROLINA’S APPELLATE STANDARDS OF REVIEW (2001) (unpublished handout available from the Writing and Learning Resources Center at the University of North Carolina Law School and on file with author) [hereinafter GUIDE TO NORTH CAROLINA’S APPELLATE STANDARDS].

<sup>102</sup> See generally RIEBE & SCHWARTZ, *supra* note 7, at chapters 5 and 16.

<sup>103</sup> In 2004, thirty-one jurisdictions used the MPT—including all states except Arizona, California, Connecticut, Florida, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming. 2004

MPT questions per exam administration.<sup>104</sup> States using the MPT may include one, two, or all three of the questions as part of their exams. Each state determines the weight given the MPT portion of its exam and grades the exam—there is no national grading.<sup>105</sup>

The MPT is like a closed office memorandum assignment. Students are given a client “File” and a “Library” with applicable law (including cases, statutes, regulations, or rules) and are required to perform a specific lawyering task for a client’s case.<sup>106</sup> The MPT doesn’t test substantive knowledge; rather, the library materials provide sufficient substantive information to complete the lawyering task.<sup>107</sup>

Examples of performance tasks that students might be asked to complete include an office memorandum, a client letter, a motion memorandum, an appellate brief, a statement of facts, a contract provision, a will, a client counseling plan, a settlement agreement, a discovery plan, a witness examination plan, or a closing argument.<sup>108</sup>

The NCBE states that the aim of the MPT is to test students’ ability to use fundamental lawyering skills, including:

- a. Separating relevant from irrelevant factual information;
- b. Extracting relevant principles of law;
- c. Resolving a client’s problem by applying applicable law to relevant facts;
- d. Identifying and resolving ethical dilemmas;
- e. Communicating effectively in writing; and
- f. Completing a lawyering task within time constraints.<sup>109</sup>

Samples of previously administered MPT exams, including information about issues students should discuss and suggested resolutions of the problems, are on the NCBE Web site and may also be ordered from

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*Statistics, supra* note 92, at 27. See the NCBE Web site for current information regarding which jurisdictions use the MPT. NCBE, [ncbex.org](http://ncbex.org) (last visited May 7, 2005).

<sup>104</sup> See NCBE, THE MULTISTATE PERFORMANCE TEST 2005 INFORMATION BOOKLET 1, *available at* [ncbex.org/tests/Test%20Booklets/MPT\\_IB2005.pdf](http://ncbex.org/tests/Test%20Booklets/MPT_IB2005.pdf).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1-2.

<sup>107</sup> *Id.* at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

the NCBE.<sup>110</sup> In states using state-created performance exams, students should ask their licensing entities whether any sample questions are available and, if so, obtain them.

B. Bar Examiners' Expectations for Bar Exam Answers

The purpose of legal writing is usually to persuade a reader to believe something or to do something.<sup>111</sup> In the context of the bar exam, writers' goals are to persuade their readers—bar graders—that they are competent,<sup>112</sup> and to give them a passing score. As with other types of writing, to achieve that effect, bar takers must consider how what they write will best be received by their readers.<sup>113</sup>

The specific audience for bar exam answers depends on who will be grading the answers, which is a question students should ask their states' licensing entities. In general, bar exam graders are fairly similar. Graders are often practicing attorneys, who grade hundreds of essays rapidly. Like other legal readers, bar graders are frequently busy, skeptical, and impatient with delay in getting to the bottom line.<sup>114</sup>

Bar graders who are practicing attorneys also have a "real-world" perspective: they are used to dealing with specific clients' situations and are concerned with resolving those specific situations. And, as in "real life," they expect bar takers to be able to address multiple subjects that are implicated by a single factual situation and to address a procedural posture or appellate standard of review appropriately. Thus, students must be prepared to meet graders' expectations by demonstrating they are competent to analyze specific clients' cases, integrating all applicable subject areas, handling any procedural posture or standard of review appropriately, and providing direct and concise answers to the questions asked.

"Concise," however, is a relative term; thus, it is often just as confusing to students as it is helpful. Bar takers should not make the

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<sup>110</sup> NCBE, *NCBE Free Publications*, [ncbex.org/pub.htm](http://ncbex.org/pub.htm) (last visited May 7, 2005).

<sup>111</sup> Berger, *supra* note 65, at 181.

<sup>112</sup> See, e.g., Cabrera, *supra* note 5, at 1172; Society of American Law Teachers, *supra* note 100, at 447; State Board of Bar Examiners, *How the Bar Exam is Written and Graded*, 9 NEV. LAWYER 26, 26 (2001).

<sup>113</sup> See Berger, *supra* note 65, at 181. The "outside reader's eye" predominates when the focus shifts to reviewing an emerging text to see whether it fulfills its purpose and has its intended effect on an outside reader. *Id.* at 169.

<sup>114</sup> See EDWARDS, *supra* note 4, at 263.

mistake of being too concise—writing so little that they cannot get full credit on essay questions. After all, bar graders are not mind readers; students can only get credit for what appears in their answers.

Achieving the correct level of conciseness requires the exercise of judgment regarding which issues to discuss and in what depth. Students should aim to spot all issues, spend the largest amount of time on the most significant issues, and spend the least amount of time on the least significant issues

There are a couple of additional factors that can guide the exercise of judgment. First, students should be aware that law-trained readers expect a certain structure—it is simply how we communicate in the profession. To meet the expectations of examiners, law-trained readers, students should structure their writing according to the steps of the deductive reasoning process as reflected in the CRAC paradigm.

Second, students should use the full time allotted to each question. Third, examiners often provide a certain amount of space to write answers. If so, students should use the allotted space—not less or more. In short, by exercising good judgment, structuring essays to meet the expectations of law-trained readers, and adhering to the time and space allotments for each bar exam question, students are likely to achieve the correct level of conciseness.

As with other types of legal writing, bar exam graders value clear organization and road maps.<sup>115</sup> And, because they need to be informed or persuaded, bar takers need to send them instructions for how to pull together the information being communicated.<sup>116</sup> Those instructions are sent mostly by depositing information in the structural locations where the graders will most readily look for it.<sup>117</sup>

To meet the expectations of bar exam graders, bar takers should structure the macro-organization of whatever document they are asked to write consistent with the structure of the overarching, applicable rule.<sup>118</sup> The components of the overarching rule can also be used as topics for headings to make bar exam answers reader-friendly. The analysis in each component part should be based on the deductive reasoning process as reflected in the CRAC paradigm.

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<sup>115</sup> *Id.*

<sup>116</sup> See STRUCTURE, *supra* note 8, at 155.

<sup>117</sup> See *id.* at 155. Structural placement is also a valuable technique for bar takers to use to generate, organize, and revise their thoughts. See *id.* at 45.

<sup>118</sup> *E.g.*, EDWARDS, *supra* note 4, at 30-36; Darrow-Kleinhaus, *supra* note 6, at 31-32.

Students should create their own templates, or default structures for writing bar exam answers, based on the deductive reasoning process as reflected in the CRAC paradigm.<sup>119</sup> Using a template including the CRAC paradigm will help ensure that students cover all the bases of a solid legal analysis and that their essays have a logical, easy-to-follow flow.

Legal professionals have templates for various types of legal documents. For example, any legal professional could likely immediately visualize the structure of an office memorandum or appellate brief if asked to do so. Having mental templates for documents makes it easier to write them: one does not need to spend time imagining what one might look like. By using a template, students should have an easier time structuring their answers, and their writing should flow smoothly—almost on autopilot. More importantly, on exam day students should be able to focus most of their efforts on the substance of their essays rather than the writing process.

As with the organization of other legal documents, students' answers should begin with a conclusion; provide an introductory section to address a procedural standard, appellate standard of review, or to set out overarching rules that will be discussed in the body of the answer; state the applicable rules; apply the applicable rules to the factual situation presented; and provide an explicit conclusion. Students should also use transitional phrases to lead their readers through their answers.

Creating professional-looking answers is also important. A professional appearance provides an impression of credibility and may help readers reach the conclusion that students are competent to practice law. Professional-looking essays are neat and organized, include sufficient white space in between paragraph and to create margins, have paragraphs with half-inch indentations, and use headings to lead bar graders through them.

### C. Recommended Writing Processes

By creating and utilizing a process to answer each type of bar exam question, students can minimize their focus on the writing process and maximize their focus on the substance of their answers. By doing so, students can also focus on ensuring that the substance of their answers

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<sup>119</sup> For examples of essay answers using the deductive reasoning process as reflected in the CRAC paradigm, see RIEBE & SCHWARTZ, *supra* note 7, table 15-3 and the sample answers to exercise 15-5 essay questions in appendix F.

meets their readers' expectations. For example, for a bar exam essay question, a student could proceed as follows:

1. Allot time for each question;
2. Answer the questions in the order presented;
3. Read the call of the question;
4. Read the entire question, highlighting key information;
5. Identify the applicable rule's structure and use it as the macro-organizational structure for the answer;
6. Outline the issues, rules, and key facts for an answer;
6. Use the deductive-reasoning process (as reflected in the CRAC paradigm) to structure the legal analysis of each issue;
7. Create a professional-looking essay by being neat, providing white space to create margins and in between paragraphs, clearly indenting paragraphs, and using headings to make answers reader-friendly;
8. Proofread answers if there is time to do so, making any revisions as neatly as possible; and
9. Take a deep breath before beginning each new question.

Similarly, for a bar exam performance question, a student could proceed as follows:

1. Allot time for the question, writing down both when the first half of the time (to read question materials and organize an answer) and the second half of the time (to write an answer) expire;
2. Skim the instructions;
3. Identify the specific lawyering task students are asked to perform;
4. Skim the file and library materials;
5. Read the library materials, discarding irrelevant material and organizing relevant materials by noting rules and, for cases, key facts and reasoning;
6. Use the rule's structure to create a macro-organizational structure;
7. Use the deductive-reasoning process (as reflected in the CRAC paradigm) to structure the legal analysis of each issue;
8. Write the specified document, being clear, concise, and precise;
9. Create a professional looking document by being neat, creating margins with white space, indenting paragraphs one-half inch, and using headings to make the document reader-friendly;

10. Proofread the answer if there is time to do so, making any revisions as neatly as possible; and
  11. Take a deep breath before beginning a new question.
- D. Writing Practice Bar Exam Answers and Receiving and Reflecting on Feedback

Just like the learning of any other skill, learning to write effective bar exam answers requires practice.<sup>120</sup> There is no shortcut to learning to write effective answers through practice, for only by learning by doing will students "own" the information learned at a depth that is not possible when information merely passes before them in a passive fashion.<sup>121</sup>

In addition to writing practice answers, the evaluation and reflection loop is essential. Students learn and improve their writing through self-evaluation or evaluation by others, reflecting on their performance, and integrating what they have learned in subsequent writing tasks.<sup>122</sup>

Self-evaluation is a difficult task.<sup>123</sup> It is challenging for students to be clinical, objective, and critical of their own writing. Some students are too hard on themselves. Others have a hard time being critical of their own work because, once they write something down, they feel attached to it. They struggle to get enough distance from their writing to judge the likelihood of its communicative power and accuracy.<sup>124</sup> Because writers know exactly what they intend their writing to mean, when they read their own writing, they remember their intended meaning—thus, memory, not objective perception, produces approval of their own work.<sup>125</sup> In short, writers simply can not read their own writing from the fresh, unengaged vantage point from which outside readers begin.<sup>126</sup>

Writers need input from "new eyes."<sup>127</sup> Students are likely to get more constructive feedback from an outside reader—a peer, professor, or bar review provider—because it is easier to evaluate writing decisions in the work of others.<sup>128</sup> Accordingly, students should be encouraged to seek out opportunities for practice and feedback from outside readers.

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<sup>120</sup> See MCKINNEY, TEACHER'S MANUAL, *supra* note 8, at 5.

<sup>121</sup> *Id.* at 12.

<sup>122</sup> SCHWARTZ, *supra* note 8, at 8-9, 30-31, 71-78.

<sup>123</sup> EXPECTATIONS, *supra* note 8, at 15.

<sup>124</sup> *Id.* at 16.

<sup>125</sup> STRUCTURE, *supra* note 8, at 16.

<sup>126</sup> *Id.*

<sup>127</sup> Berger, *supra* note 65, at 179.

<sup>128</sup> *Id.* at 179-80.

Although some students are hesitant to have others look at their practice efforts, most students feel satisfied when they get feedback letting them know whether they have, in fact, accurately integrated material they are trying to master.<sup>129</sup> Given the limitations of faculty resources, students should be encouraged to team up with friends to engage in peer reviews of practice essays.

Both receiving and providing feedback will help students improve their writing. By receiving feedback, students will increase their chances of writing passing answers because critical feedback is a prerequisite to improvement. In addition, if students learn to accurately and constructively assess another person's work, it will increase the likelihood they will be able to produce effective answers, too. Additional benefits of peer review are that students avoid the isolating effects of studying alone and gain confidence about their abilities because they usually discover that their practice attempts are in the same ballpark as their peers.

The reader expectation approach provides a method for evaluation and revision.<sup>130</sup> For example, bar takers may ascertain whether they will meet the expectations of their bar graders by asking questions like the following:<sup>131</sup>

1. Is the appearance professional, giving the reader the impression that the student is competent to practice law?
2. Will the reader find the tone and writing style confident, clear, and concise (not uncertain, rambling, and difficult to follow)?
3. Is the reader provided explicit answers to the call(s) of the question?
4. Is the macro-organization based on the structure of the applicable rules, consistent with the expectation of law-trained readers?
5. Does the micro-organization adhere to the deductive reasoning process as expected by law-trained readers?
6. Is the reader contextualized at the beginning of the answer (with the conclusion, communicating the issue and result

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<sup>129</sup> MCKINNEY, *TEACHER'S MANUAL*, *supra* note 8, at 33.

<sup>130</sup> STRUCTURE, *supra* note 8, at 45.

<sup>131</sup> See RIEBE & SCHWARTZ, *supra* note 7, exercises 15-1 (checklist for effective bar exam essays) and 15-3 (self-evaluation or peer-evaluation checklist); DENISE RIEBE & BOBBI JO BOYD, *PEER REVIEW EVALUATION* (Mar. 2001) (unpublished handout used at the University of North Carolina School of Law's bar preparation workshops; on file with the author).

- predicted or advocated, as well as the overarching rules of law)?
7. Is the reader provided an explicit statement of the applicable rules of law?
  8. Is the reader told how the applicable rules apply to the specific situation presented?
  9. Is the reader provided a sense of closure with an explicit conclusion?
  10. Are transitional phrases used to direct the reader through the answer?
  11. Are headings used to make the answer reader-friendly?

Finally, to maximize the learning opportunity that writing practice answers presents, students must take time to reflect on their performance and feedback.<sup>132</sup> It is tempting for students to skip this step because, once they finish a task, they often want to move on to something new.<sup>133</sup> It is erroneous to do so, though, because reflection is a prerequisite to improvement and plays a large role in determining students' success when writing future exam answers.<sup>134</sup>

Students should use a four-step process to reflect about writing their practice answers.<sup>135</sup> First, students should engage in self-evaluation, considering how well they thought they performed and how well they in fact performed.<sup>136</sup> Second, students should consider what factors explain their learning results.<sup>137</sup> When doing so, students should look for correctable causes of undesirable results (for example, failure to maintain focused attention or insufficient persistence) and attribute successes to personal competence.<sup>138</sup>

Third, students should consider their self-reactions, how their performance makes them feel and how their performance compares with similar tasks performed in the past.<sup>139</sup> Finally, students should consider what adjustments, if any, should be made to ensure successful completion of similar tasks in the future.<sup>140</sup>

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<sup>132</sup> See, e.g., SCHWARTZ, *supra* note 8, at 8-9, 30-31, 71-78.

<sup>133</sup> *Id.* at 71.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* See also RIEBE & SCHWARTZ, *supra* note 7, exercise 15-4 (reflection exercise for analyzing practice essay feedback).

<sup>136</sup> SCHWARTZ, *supra* note 8, at 72-74.

<sup>137</sup> *Id.* at 75.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 76-77.

<sup>140</sup> *Id.* at 77.

#### IV. Conclusion

Although law students are generally “good writers,” bar exam answers require a specific type of legal writing. Accordingly, students must understand the types of writing tasks required on bar exams and adapt their writing to the type expected by bar exam graders. By using the reader expectation approach and adhering to the conventions of the legal profession's discourse community, students' writing is most likely to be well received by their bar exam graders. More importantly, doing so will increase students' likelihood of success on their bar exams.