

PERSPECTIVES

Teaching Legal Research and Writing

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TRIAL BY FIRE ... CREATING A PRACTICAL APPLICATION RESEARCH EXAM

BY BRIAN HUDDLESTON

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The word came down to me early in the fall semester. This year our library director, Mary Mahoney, wanted to use some sort of hands-on demonstration legal research exam for our first-year students. Realizing the advantages that such an exam would have over more traditional approaches, and deciding that the required structure and logistics were relatively straightforward, we decided to give it a try.

This article describes the development of the exam that resulted from that idea, as well as our experience in administering it for the first time to first-year legal research students at the Mississippi College School of Law in the fall of 1998.¹ Instead of a traditional written exam, students were required to demonstrate, in one-on-one sessions with a reference librarian, the actual research skills

¹ The first-year legal research and writing class is taught by the director of Legal Writing. Each first-year section of roughly 70 students meets twice a week. The library director and I teach the research component of this course. In 1998 we taught seven of the 23 class meetings, covering the following topics: 1) Finding Case Law: The Basics; 2) Legal Encyclopedias, Indexes, and Other Secondary Resources; 3) Shepard's®; 4) The *United States Code*; 5) Federal Legislative History; 6) The *Federal Register* and *Code of Federal Regulations*; 7) Treatises, Practice Materials, and Mississippi Resources. The seventh class was a catch-all in which we discussed a variety of resources. Our law school does not have a formal advanced legal research class, so this last class is a survey of what else is available in particular areas of practice, as well as an overview of Mississippi materials. Because it came late in the semester, this seventh class was the only one that had no homework. Therefore, the exam covered only the first six topics.

they were taught during the semester. Despite all the work and detailed preparation, everyone involved judged the exam to be a success.

Choosing a Format

In the past, we've tinkered with various formats and combinations for written exams: multiple choice, short answer, discussion, etc. But is a written examination the best test of a practical skill, whatever the format? Would the winner of a piano competition be as renowned if the contestants merely *described* in an essay *how* they would style and perform a particular piece?

A hands-on exam would let us test whether students had actually learned how to use the books. If they had to demonstrate, *mano a mano* with a librarian, specific research tasks, they would be judged on what they could do, not on how well

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they could *describe* what they could do. Studying their notes late into the night before the exam wouldn't work: you can't cram for or fake what we were going to test.

The first matter was the format of the exam. I planned to use a sampling technique: give the students a list of specific research tasks for which they would be held responsible, and then randomly select several from the list for them to demonstrate during their exam session. My thinking was that if they could complete a few randomly selected tasks, they probably had mastered all of them. Looking at the topics we were teaching and the homework we were assigning, we eventually came up with 10 research skills that represented what we expected the students to learn. We decided that for the exam, they would have a half hour to work through brief research problems demonstrating three of those skills. We would grade their performance both on the answers to the problems and on the procedures they followed to reach those answers. If they missed a required step—such as checking a supplement—but found the answer, they would still lose points. We would also deduct points if a student was floundering and needed a hint to get back on track. The students would not be allowed to use any notes, but they could consult a list of what states are covered by which regional reporters. And if they blanked out on the location of *Corpus Juris Secundum*® (CJS®) or some other set, they could ask for directions, just as they would be able to at any library with which they were unfamiliar. This exam was not going to be a treasure hunt or a test of what the students had memorized. Nor was it going to be a race: 30 minutes was the schedule, not a time limit. We would cut a student off only if it was obvious that he or she could not find an answer.

Selecting the Content

At our first class, we gave the students an overview of the research portion of the course. We also explained that instead of a written exam, they would be asked to actually demonstrate specific research tasks during a 30-minute “practical application exam.” I promised them that a few weeks prior to the exam period I would give them a list of the various tasks for which they would be responsible, along with sample questions and answers with which they could practice.

In the research classes themselves, we pointed out skills that we knew we would test. For example, after we covered the West topic and key number system, we said that using the digests to find case law on a particular issue would be one of the skills the students would be responsible for on the exam. The defined research “task” for this skill and the sample question were:

Task: Use the appropriate digest to find case law in a specific jurisdiction on a particular legal issue.

Question: Find a 1968 case in Mississippi that discusses the negligence of a surgeon who left a hemostat in a patient during a hernia operation.

The tasks were concise summaries of the skills we had selected, and the questions represented the application of the skills to particular problems.² The tasks were all straightforward, and the questions we used to test these tasks all had simple, definitive answers that the students should readily be able to find if they used the books as they had been taught.

After defining the 10 tasks, it occurred to me that a truly random distribution would not make for an effective exam. Of the 10 tasks, four involved basic case law skills (reporters, digests, and legal encyclopedias), three involved Shepard's, and the remaining three covered *American Law Reports* (ALR®), the *United States Code*, and the *Code of Federal Regulations* and *Federal Register*. I thought everyone should be tested on at least one case law question, and I didn't want someone to have more than one Shepard's question. So I lumped the tasks into these three groups and decided that everyone would get one question, randomly selected, from each group.

We realized from the beginning that there was a certain artificiality in considering any finite list of research tasks to be the ultimate indicator of basic legal research knowledge. We were not testing, and in this exam format could not test, their legal reasoning skills or their ability to perform broad, open-ended research that integrated multiple resources to provide a full answer to a complex

² Defining each research skill as a specific, objective task that could be measured and graded was inspired by my time in the Marine Corps, where practical application testing is used during training to demonstrate mastery of a skill. I even told the students that the research exam would be similar to boot camp, where you have to do things like fieldstrip and reassemble a rifle in 60 seconds to graduate. I did promise them, however, that we wouldn't be yelling in their faces while they Shepardized® a *U.S. Code* section.

legal question. Those skills were covered in the research homework we gave them and in the memos they were writing during the semester. We would be testing only book skills: how to correctly use specific legal bibliographic resources to find material based on given criteria.

Preparation and Practical Concerns

We planned to remind the students that despite its nature, this exam, like all others in the law school, was governed by the honor code. Trying to eavesdrop or observe a student taking the exam to get insight into specific questions, or talking about the exam afterward, were violations of the code. Still, we knew that some leakage was inevitable. After all, we would be conducting the exams throughout the library during the last two weeks of classes, when first-year panic was at epidemic strength. As a result, we decided to have three different exam questions for each of the 10 tasks. Thus, besides being randomly assigned three of 10 tasks, the students also would randomly receive one of the three questions we would prepare for each task. I also knew I still had to somehow make allowance for distributing the tasks and questions so that two students taking their exam with different librarians at the same time were not, for example, both working on an Am Jur® question.

In the middle of October the four librarians who would administer the exam³ met to discuss the details of the exam. I passed around copies of the sample questions and answers that I was going to distribute to the students for their use in preparing for the exam.⁴ We divided the responsibility for developing the actual 30 questions that we would need for the exam, and set a deadline that would give us time to double-check the questions for accuracy and appropriateness for the exam format.

We decided not to micromanage grading procedures. We would use a scale of 20 points because the research exam was 20 percent of the student's final grade in the course; each task was worth a third of 20 points. I told everyone to use their best judgment, deduct appropriate points for mistakes, and, if a student was obviously stuck, deduct a point or two

³ Besides me, this included Mary Mahoney and our two reference librarians, Karin Den Bleyker and Patricia Ice.

⁴ See *infra* Appendix: Sample Questions for the First-Year Legal Research Skills Practical Application Exam.

for the hint needed to get the student started again. I planned to take the average of each librarian's scores after the exams and correct any significant deviation from the overall average by weighting the grades appropriately. I hoped this would correct for any major grading disparities among the four of us.

Logistics

Two weeks. Four librarians. Individual sessions with 134 first-year law students at the end of the semester when the stress meter was already near redline. The scheduling difficulties weren't obvious until I belatedly started this task in late October. Although there is probably some moderately priced software that would do this automatically, I used WordPerfect tables to make a schedule for the two weeks, with each day divided into 30-minute time periods.

I started by blocking out all the first-year classes. I was adamant that no student's performance would be affected by watching the clock because he or she was worried about being late for his or her next class. So I took a deep breath and blocked out every half hour prior to a first-year class as well. In doing so, I already knew that some of us would be giving three and four exams in a row.

Next, I carefully counted up the available slots. Ninety-three? We would have to add another week, or schedule exams in the evenings! Then I remembered that many time slots would have two or three of us administering exams simultaneously. Okay, breathe again.

Taking all these factors into consideration, along with the reference desk schedule, I filled in the available student time slots with the first initial of the librarians who would be able to administer the exams during that half-hour period. I double-checked everything before counting up the total: 158 possible exam slots. Eliminating a few time slots in consideration of the director's heavy schedule, I decided that we would work with 150 time slots: 16 extra for 134 students would, I felt, provide them with a fair range of choices.

I created a QuatroPro spreadsheet with all the available time slots and used it to make sign-up sheets. After the students signed up, I plugged their names into the time slots to create a master data file for the exam. I printed one list with the records sorted in alphabetical order and posted it on my

“A hands-on exam would let us test whether students had actually learned how to use the books.”

“[T]hey would be judged on what they could do, not on how well they could *describe* what they could do.”

office door so students could check their time slot. A second list in chronological order went on my wall to use as a master schedule.

I still had to assign the tasks and questions to the time slots. The tasks (1–10) were paired with letters (A, B, and C) to indicate which of the three questions for that task would be used for a particular student. I added three fields, one for each of the three tasks they would complete, and used QuatroPro to randomly distribute the tasks and questions. Then I went over the entire list, looking at the time slots in which we had two or three students taking their exam at the same time and swapped any duplicated tasks so that no one would be using the same resources at the same time. Once this was complete, I had a spreadsheet with records for each student that looked like this:

Smith, Joe	Wednesday, 17th	1:30 p.m.	1C, 6A, 9C
[name]	[day, date]	[time]	[questions]

I printed this version of the spreadsheet, which I would use to fill out the grade sheets and distribute the questions during the exam.

There was one more thing to do. Looking over this master file, I noticed that occasionally two consecutive time slots used the same question. I took the easy way out on this problem and decided to have two copies of each question, so that we wouldn't be waiting for one exam to finish before we could start the next. The 30 questions we used, two copies each, were attached to index cards. They looked like this:

10-C c.1
Find the federal regulations on the filing of rate schedules for the Federal Energy Regulatory Commission. Check to see if there have been any recent changes to these regulations, and locate the text of the changes, if there are any.

The code at the top meant this was the third question (“C”) for task number 10, and that this was the first of the two copies of the card. Since these cards were the exam, they stayed locked up in my desk drawer when they were not in use.

Conducting the Exam

Here is the daily routine we followed during the exam period. First thing in the morning, and again in the early afternoon, I put the names of students scheduled for the next few hours of exams on grade sheets, sorted out the question cards each

student would be given, and used paper clips to attach the cards to the grade sheet. In my office, each librarian had her stack of grade sheets and question cards for her students, along with one of the three master lists of questions with the correct answers. The cards and completed grade sheets were returned to my office after each exam, and the next student's questions and grade sheet were picked up. Throughout the day, I would refile and distribute the cards for the rest of that day's exams, and enter the students' scores on my master spreadsheet. After the last exam of the day, I would inventory the 60 cards and answer sheets, and lock everything back up in my office.

During the first day of the exam period I was as nervous as the students. But I was as relieved at how smoothly the operation went as they were at how well most of them performed. After the first morning of six or seven exams, no surprises had come up to broadside me. In fact, only two modifications were made to our procedures throughout the entire two weeks. After a few days, we rephrased one task's three questions because of ambiguity. A more important procedural modification was to quickly establish a standard point structure for common mistakes, as we discovered that several of us were deducting a different number of points for the same mistake. Also, I had not anticipated using fractional final grades (e.g., 18.5), but we found ourselves uncomfortably limited by whole numbers. This was probably the worst lapse in my planning: we should have created a uniform grading scheme *before* exams started.

It turned out that the half-hour format was ideal. Many students finished in much less time. The next student on a librarian's schedule was often waiting and eager to start the exam, so we ran ahead of schedule about as often as we ran behind. Many students who used more than 30 minutes did so because they were overly cautious and extremely methodical. Only a few were actually stumped and missed important parts of the research procedures for a given question. The most common mistakes were on the Shepard's questions. Many of the target cases were in the most recent paperback supplements, and students often skipped the hardbound supplements after checking the main volumes of a set. We ended up docking them two points for this mistake.

The exams continued to go smoothly for the entire two weeks. No students forgot their time slot, I only had to reschedule one student due to an emergency, and no one had a panic attack—neither students nor librarians.

Overall, the students did quite well: 60 (45 percent) earned a perfect 20 points, and 116 (86 percent) made 18 points or better. A single student earned the lowest grade of 15. The average score was 18.99, and the greatest deviation from this average for any one of the librarian's average scores was +0.64. I concluded that this was insignificant and decided against adjusting the students' scores.

Conclusion

The librarians were unanimous in their assessment of the experience: although the exam kept us very busy for two weeks, we thoroughly enjoyed the interaction with the students and felt it was an accurate appraisal of what the students had learned. It took a lot of effort, but the work was front-loaded: the amount of preparation before the exam was probably less than the total effort required to grade 134 traditional, written exams. Also, because this was the first time we had done this, much of the work will carry over to next year and the preparation won't take so long the second time around.

More importantly, the exam was a success with the students. Many of them worked through the sample questions numerous times and were completely prepared for the exams. Most of them were very pleased with how well they did, and at how easy it was to finish the exam within the allotted 30 minutes. This exam format was also very time-effective for them: instead of a two-hour, sit-down exam in the final weeks of classes, they only gave up a half-hour of their study time. And I'm confident that a larger proportion of the students will retain a greater than average number of the research skills they learned than would have been the case if they had been tested with a more traditional written exam.

There are only a few things that I want to do differently next time. The first is to set up a consistent grading scheme *prior* to the exam. We wanted to avoid an extremely detailed grading checklist to allow for flexibility, but every student who makes the same mistake should be penalized equally. Also, in retrospect, I would take the deviations of the librarians' average scores into consideration, mainly because of the way the director of Legal

Writing determined the students' final grades. The research exam was indeed only 20 percent, but she used a total of 1,000 points for the entire course. On that scale, a tenth of a percent on our exam could make a difference in the borderline cases. And logistically, I don't know why I didn't think to use my QuatroPro data to automate the grade sheets by merging it with a form file. Then I could print them all with the student's name, exam date, and time already in place. Maybe next time.

TOP FIVE TIPS FOR PREPARING A PRACTICAL APPLICATION LEGAL RESEARCH EXAM

1. Start Planning Early

Especially the first time out, this type of exam requires a great deal of preparation.

2. Keep Students Informed

Let the students know throughout the course what will be expected from them on the exam.

3. Create Good Exam Questions

Check, double-check, and triple-check the questions to make sure they are appropriate and can be finished in the allotted time.

4. Standardize Grading Criteria

We overlooked it—don't you. Standardized criteria ensure that all students are graded equally and eliminate confusion for the graders.

5. Be Flexible

Some glitch will happen during the exams themselves—just adjust and drive on!

.....

Appendix:

Sample Questions for the First-Year Legal Research Skills Practical Application Exam

Below is a list of 10 research skills. Each skill is followed by a sample research question that applies to that skill. Three of these skills and their corresponding research questions will be randomly selected and presented to you during your half-hour exam period. One of the reference librarians will monitor and grade your ability to use the correct library resources to answer these questions.

1. Use the appropriate digest to find case law in a specific jurisdiction on a particular legal issue.

Find a 1968 case in Mississippi that discusses the negligence of a surgeon who left a hemostat in a patient during a hernia operation.

2. With one case, use the correct digest to find similar case law from a given jurisdiction.

Find a 1997 Mississippi case that discusses a similar or related point of law to that described in headnote 10 of 93 S. Ct. 705.

3. Find the discussion of a particular legal issue in a legal encyclopedia. Using Am Jur 2d, find a discussion of how treason against the United States includes giving aid and comfort to the enemy.

4. Find a case on a legal issue from a specific jurisdiction using a legal encyclopedia. Find a case from Minnesota, cited in CJS, which establishes that a rabbi is included within the term “clergyman.”

5. Shepardize® a case to ensure that it is a good precedent. You want to rely on 847 F. Supp. 306 at trial. Is it “good law”?

6. Shepardize a statute to look for a court’s treatment of that statute. Find a case that explicitly ruled on the constitutionality of 8 U.S.C. §1252 [1994].

7. Use Shepard’s to find a case that discusses a specific point of law in a case that it cites. Find a case that cites 451 So.2d 569 for the legal issue discussed in headnote 1 of that case.

8. Find an ALR annotation on a specific legal question. Find an annotation from ALR 2d, 3d, 4th, 5th, or ALR Federal on the meaning of the term “hotel” as it is used in zoning ordinances.

9. Locate a federal statute on an issue and find the public law that became that statute. Find, in the *United States Code Annotated*®, the code section that deals with the health warnings that are required to be on cigarette labeling and advertisements. Find the text of the original public law for this statute.

10. Find the federal regulations on a given issue and look for any recent changes to them. Find the federal regulations on the filing rate schedules for the Federal Energy Regulatory Commission. Check to see if there have been any recent changes to these regulations, and locate the text of the changes, if there are any.

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USING READ-ALOUND PROTOCOLS AS A METHOD OF INSTRUCTION

BY JUDITH ROSENBAUM¹

Judith Rosenbaum is the Assistant Director of Legal Writing at Northwestern University School of Law in Chicago, Illinois.

Brutal Choices in Curricular Design ... is a regular feature of *Perspectives*, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other "brutal choices" that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, (312) 503-8454, fax: (312) 503-2035.

Introduction

How often have your students come to you after you have graded a paper to tell you, sometimes apologetically and sometimes not, that they proofread their paper at least a dozen times and never caught the typos and ambiguities that you marked in their paper before you returned it to them? How often have your students railed at your school's honor code or plagiarism policy, telling you that it is unrealistic to forbid them to let someone else read their drafts before they hand them in and that they would like someone else to read their papers so that person can tell them whether the papers are clear.

One of the hardest things for writers to do is to put themselves into their readers' shoes and experience their writing as an outsider would. Most

writers read their texts with their own syntax already in mind. They pause at all the places needed to understand a long sentence, and they do not see ambiguities, because they know how their text is supposed to sound and what it is supposed to mean. This is particularly true of novice writers, who have not yet internalized the discourse of the profession and do not know how readers will understand their texts. Thus, our students have a point when they tell us that they did not see their mistakes and that they would have benefited if someone else had been allowed to read their drafts for clarity.

Our colleagues in English departments have known for quite a while that one way to gain insight about how an intended reader is experiencing a text is through a read-aloud protocol.² In the typical read-aloud protocol, students are asked to come to class with a draft of a work in progress. They are either assigned to a partner or allowed to choose a partner. Students are asked to read their partners' papers out loud, verbalizing their mental impressions and thought processes as they are reading. The pedagogical goal of this exercise is to let student writers experience readers other than themselves trying to make sense out of their drafts. The writer learns of potential difficulties intended readers might have with the text as they stumble over the long sentences or say out loud, as part of the protocol, that they don't understand what the writer means or that they haven't been convinced by a particular analogy. Once writers see these difficulties, which often pass unnoticed as they read the draft themselves, they are better prepared to revise the text so that the reader can understand it in the way that the writer intends.³

Deciding whether to use the read-aloud protocol in a legal writing class requires consideration of competing benefits and concerns. This column presents both sides of the case, and then offers a description of the "compromise" approach I followed recently in my legal writing class.

¹ I would like to thank Jo Anne Durako, Director of Legal Research and Writing at Rutgers School of Law at Camden, New Jersey, for her generosity in sharing a draft of her "Brutal Choices" column with me before its publication in the Winter 1999 issue of *Perspectives*. Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 *Perspectives: Teaching Legal Research and Writing* 73(1999). I would also like to thank Brian Williams, Director of Legal Research and Writing at Cornell University, for his thoughtful comments and Helene Shapo, Director of Legal Writing at Northwestern University School of Law, for supporting me in doing this exercise and for her valuable critique of a draft.

² I learned about read-aloud protocols at the Colloquium on Legal Discourse, organized by Theresa Phelps and Linda Edwards, and held at Notre Dame University in July 1998. At the Colloquium two dozen experienced legal writing professionals spent an intensive week meeting with scholars in the areas of composition, audience, narrative, ethics, and jurisprudence.

³ See James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 *J. Legal Writing Inst.* 35 (1991). These are sometimes called "reader protocols" or "think-aloud protocols."

“One of the hardest things for writers to do is to put themselves into their readers' shoes and experience their writing as an outsider would.”

“By hearing how a reader understands and reacts to their documents, law students can learn a great deal about the revisions necessary for the document to serve its intended purpose.”

Benefits

Real-World Simulation

A legal writing class should be an ideal place to incorporate read-aloud protocols, since the objective of a piece of legal writing is to enable someone in the real world to act on the basis of what the writer has written. Lawyers write memos to provide an assessment of the law so that a supervising attorney can determine whether to take a case or how to advise a client. They write briefs to convince judges that a client’s position is right. By hearing how a reader understands and reacts to their documents, law students can learn a great deal about the revisions necessary for the document to serve its intended purpose for its intended reader.

Encourages Preparation

Many students, even if they begin the work on a writing assignment immediately after it is assigned, tend to procrastinate about beginning to write the paper. A read-aloud protocol held several days before a paper is due encourages students to begin working on their papers early enough that they will have a draft to bring to the class. It also ensures that they will have sufficient understanding of the topic both to give and receive meaningful feedback. Although the read-aloud protocol certainly could provide useful feedback at any stage of the writing process, I particularly like using it toward the end, because in the earlier stages writers are more likely to see problems on their own since they are more obvious. In contrast, at the later stage, writers are often so used to their drafts that they have blinders on and are unable to see things that another reader notices immediately.

Process Oriented

The read-aloud protocol supports the current legal writing pedagogy that emphasizes “process” and not “product.”⁴ The rationale underlying the protocol is that difficulties that the reader has with the draft, such as gaps in logic or an inadequately explained analogy, are likely to be precisely those problems that student writers are unable to see because they are too close to the draft. However, the protocol offers them the opportunity to learn about these problems while the work is still “in process” and they have an opportunity to revise it.

⁴ See Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 51–56 (1994).

The protocol is a powerful tool in forcing students to wrestle on their own with difficulties in their drafts. They will learn far more from their own struggles with their drafts than they will from us identifying the problem and suggesting a solution after the fact as we grade the completed assignment.

Collaboration

An additional advantage of read-aloud protocols is that they allow students to work in a collaborative environment, one that is somewhat closer to the working world they will be entering than to the individualistic competitiveness of the typical law school environment. By giving assistance to each other and receiving assistance from each other, students learn how to accept constructive criticism from their peers, as well as how to give that criticism in a diplomatic yet helpful manner.

Easy to Implement

In an earlier “Brutal Choices” column, Jo Anne Durako discussed the merits of peer review, a similar type of collaborative learning experience. In her article, she observed that one potential drawback to peer review is the amount of time required both to set up and to give peer reviews.⁵ Read-aloud protocols offer the same benefits of collaboration but without the same heavy investment in time. They simply require a decision about how many pages may be read and short instructions telling the readers to verbalize any thoughts that come into their mind while reading.

Concerns

Honor Code

The most obvious concern about implementing a read-aloud protocol is that it might be an honor code violation if your code forbids students from showing their work to someone else or looking at someone else’s work before the paper has been handed in. Students may feel they are getting mixed messages if we introduce the read-aloud protocol in class as a good way to see their writing through the reader’s eyes and then tell them that the honor code prohibits the use of this technique outside of class.

⁵ Durako, *supra* note 1, at 73.

Student Resistance

Students might resist participating in a read-aloud protocol for different reasons. Some may be reluctant to share their drafts or ideas with another member of the class. They may take a proprietary view of their drafts and not want someone else to see and possibly appropriate these ideas. Others may be embarrassed to let someone see their ideas. A related problem, which often arises in collaborative endeavors, is that of the “free rider,” where students who have not done the work participate in the exercise largely to get ideas from other class members. Finally, the timing may not be right for some students. Some will not want to have a draft done any time earlier than the night before the paper is due. Others, however, may already have a draft done and may not want to feel obliged to go back and revise it.

Partner’s Abilities

Another potential problem with read-aloud protocols is the possibility that students of different abilities or learning styles might be paired together. Since students come to law school with different skill levels and learn at different rates, it is possible that a stronger student might be paired with a weaker student, and that they might not have much to offer each other. The weaker student might not be able to see problems in the stronger student’s draft or might see problems that aren’t really there. At the same time, the stronger student might not be able to explain problems in the weaker student’s draft that the weaker student can easily understand. Students can also be mismatched by learning styles. Since the read-aloud protocol is based on reading, speaking, and listening, it works best with visual and aural learners. It is probably less effective for kinetic learners. If a kinetic learner is paired with a visual or aural learner, the kinetic learner, simply by virtue of his or her learning style, may not be as effective at seeing problems in a partner’s draft or in fully processing the oral critique from his or her partner.

A Compromise

I tried to balance these competing issues in a read-aloud protocol I used in my Legal Writing class during the 1998–99 school year. Our first appellate brief assignment was due on a Monday. I planned to do the read-aloud protocol in the class scheduled for the preceding Friday.⁶ I chose that date because it was close enough to the due date of the brief that

most, if not all, of the class members would have at least part of a draft completed,⁷ and yet they would still have the entire weekend to revise their draft based on anything they learned from the read-aloud protocol.

To solve the honor code dilemma, I asked Helene Shapo, director of Legal Writing at Northwestern, if, as a class exercise, I could have each student read his or her draft out loud to a partner, who would comment on what he or she heard. This proposal was a compromise. Although no one would be showing a draft to anyone in the class or looking at anyone else’s draft, the students still would be reading their papers to someone else, which our honor code does not allow. We decided to do the exercise in my class as a pilot project and see how it worked. We reasoned that the exception to the honor code could be permitted for a class activity with a specific pedagogical goal done under the direct supervision of the instructor.⁸

I thought it was important for the students to understand the pedagogical goals of the exercise and spent some class time the day before the exercise discussing these goals. The first goal was to give them the benefit of someone else’s reaction to their work before they submitted it to me for grading. I told them that I hoped the feedback from their partners would stave off some of the frustration they feel when their papers are returned after grading and they see things they know they could have fixed if only they had known about them beforehand. I

⁶ We have a unified Legal Writing course in which each member of the Legal Writing faculty teaches according to the same calendar. This date, however, had been left open on our syllabus for individual faculty members to use as needed for their individual classes. From the beginning of the semester, I had told my class that we would be doing a read-aloud activity on this date and to be sure to have enough of a draft completed that they could bring some of it to class to read to another class member.

⁷ In fact, this turned out to be perfect timing. For the next brief, at the request of a student who found the first one unhelpful because she had already completed her brief and didn’t want to change it, I scheduled another read-aloud protocol for a full week before the brief was due. This timing turned out to be far too early, as almost no one was far enough along to bring a draft to class, including the student who had originally requested that I do the read-aloud protocol earlier in the writing process.

⁸ After the papers were graded I compared the papers of some of the partners and could find no extraordinary resemblance. In fact, in more than half of the groups, the students in the pairs received different grades from each other.

“An additional advantage of read-aloud protocols is that they allow students to work in a collaborative environment.”

“Students quickly understood that the read-aloud protocol potentially could help them improve a graded assignment before it was handed in.”

therefore encouraged them to bring a section of the draft that was causing them the most difficulty. The second goal was to improve their ability to critique themselves, since often, when we read something out loud, we hear it in a different way than when we read it to ourselves. I hoped that by hearing themselves as they read their own drafts, they might be able to solve problems on their own and improve their skills as self-critical legal writers.

My original plan was to assign each student a partner. However, when I announced that I would assign the teams, one student asked if I would allow them to pick their own partners. She explained that some of them were nervous about reading their papers out loud to someone else and would be more comfortable if they could work with someone they knew. I decided she was right and allowed them to choose their own partners, which, I think, encouraged their cooperation and enhanced the learning process.

On the day scheduled for the read-aloud protocol, we had nearly perfect attendance and all but one student had brought a draft.⁹ I debated banning the student who had come without a draft, but before I took action, I noticed that the students in one group had allowed this student to join them and listen to them reading their drafts. Thus, in this class, the free rider problem that materialized went away before it ever became an issue.¹⁰

Of our 50-minute class time, I allowed 10 minutes at the beginning for setup and reserved 10 minutes at the end to debrief. This left 30 minutes for the read-aloud exercise, approximately 15 minutes for each reader. The students had no trouble completing the assignment within that time frame.

In the debriefing session at the end of the class, the vast majority of the students thought their partners gave them ideas they had not thought of on their own. When we addressed the insight they gained from reading their own papers, they were less enthusiastic. Although they did not think it was completely unhelpful, only one student found it to be a big help in enabling him to see things that he hadn't seen when reading the paper to himself. Several students also mentioned that as listeners, they found it difficult to concentrate on the substance of what their partners were reading,

⁹ The student without the draft was a parent who had been dealing with a sick family for two weeks and who ultimately was given an extension on the due date.

concluding that they could have given better feedback if instead they had been allowed to read their partners' drafts and give them written comments. At the end of the discussion, one student asked if we could do a similar exercise on the next brief but let the students read each others' drafts. This change would have turned the activity into a peer review, and we did not want to do a peer review while the students were still working on their papers. Although we chose not to create a further exception to the honor code at that time, the student's inquiry generated a discussion of the pros and cons of doing a read-aloud protocol and of the various methods for doing one.¹¹

Conclusion

The read-aloud protocol is one of several active learning exercises that I have incorporated into my teaching in the past several years. Of these various exercises, which have included role playing, group writing, and student-led discussions, the read-aloud protocol was probably the most effective. Students quickly understood that, unlike some of the other active learning exercises, the read-aloud protocol potentially could help them improve a graded assignment before it was handed in. This awareness gave them the incentive to come to class prepared and to work very hard at offering each other constructive commentary. By investing themselves in the exercise, they took a lot away from it.

I intend to use the exercise again, and even to expand it to some first-semester work. For example, after the semester was over, one student told me that a read-aloud protocol would have been helpful in learning how to give specific reasons for analogies and distinctions. As a result of this suggestion, I plan to add a short writing exercise and a read-aloud protocol to my teaching of analogies.

At the same time, however, I would prefer to modify the way I used the read-aloud protocol. Rather than the “compromise” approach, where

¹⁰ This may have been due to the chemistry of the class. They were a wonderful class both in allowing me to experiment with different teaching methods and in giving feedback to me about what worked for them and what did not. However, it may have also been that we had been working in small groups since the beginning of the fall semester and they were used to collaborating and sharing ideas. In any event, I do not mean to suggest that all free rider problems will disappear so easily.

¹¹ The discussion was so spirited it became the genesis for this article.

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students read their own papers out loud, I want to use the more “traditional” method of having students read their partners’ papers out loud. I am convinced the reaction of the readers will be more thoughtful if they can react to what they are reading themselves, as opposed to reacting only to what they are hearing someone else read. This more traditional approach does create more ambiguity under our honor code, because we would be sanctioning an activity in class that is prohibited outside of class. However, the risk of ambiguity is outweighed by the benefits of the read-aloud protocol. It enables students to identify problems in their drafts when they still have a chance to edit their papers, and it reduces the frustration that comes when an obvious error they didn’t see is pointed out to them only after the graded paper is returned. In my opinion, the advantages sufficiently outweigh the drawbacks of the read-aloud protocol being incorporated into the Legal Writing curriculum.

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LEGAL RESEARCH AND THE SUMMER JOB

... ADVICE FROM THE LAW SCHOOL

BY NAZARETH A. PANTALONI III AND
LOUIS J. SIRICO, JR.

... ADVICE FROM THE LAW FIRM

BY ELLEN M. CALLINAN

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Editor's Note: *This article offers examples of documents that can be distributed to law students to help them succeed in their summer legal jobs. The first, **Legal Research Tips for the Summer**, is a model of advice that a law school might give to students prior to their summer employment. It is followed by **How to Survive Summer Associate Research ... and Thrive!**, an exemplar of what a law firm might tell new associates about summer legal research upon their arrival in the firm. Readers are encouraged to distribute copies of these documents "as is" or to modify them to meet their particular needs.*

Introduction¹

For law students, obtaining a legal position for the summer is a major professional step. Whether the employer is a law firm, a government agency, a judge, a business, or a public interest organization, the student knows that the job offers a chance to try out legal skills and gauge his or her aptitude

and ability. It also may offer an opportunity to gain a positive reference and even an invitation for a permanent position.

Of course, this foray into the "real world" can be intimidating. Most students probably are asking themselves unsettling questions: "Do I really have the ability?" "Do I know how to use the law books and electronic research tools efficiently?" "If I am given a research assignment, will I know where to start?"

As teachers, whether in the law school or the law firm, we can help. From our past experiences, we probably know the pitfalls into which other students have fallen and what measures students can take to sidestep dangers and succeed. We can pass on this advice to students in a variety of ways: individual conversations, a formal lecture on how to succeed, and a hand-out that gives guidance. (One example of a helpful handout is *Legends of the Fall: Begin with a Successful Summer*, a pamphlet published by the National Association for Law Placement, which can be reached at (202) 667-1666.)

What follows is some advice for students on completing summer research assignments, presented in the form of hand-outs that readers can easily duplicate and distribute to students as summer approaches (*Legal Research Tips for the Summer—Advice from the Law School*) or as they arrive in the law firm (*How to Survive Summer Associate Research ... and Thrive!—Advice from the Law Firm*).

¹ The introduction to this article was prepared by Nazareth A. Pantaloni and Louis J. Sirico, Jr.

Legal Research Tips for the Summer —Advice from the Law School

No matter what type of position you will have or what type of projects you will be tackling this summer, a big part of your job will be performing legal research. Although you have been well trained, you may have some butterflies caused by self-doubts and uncertainties about exactly what your assignments will be and how to execute them. These reservations are perfectly natural. They are much like the ones that plagued you when you first entered law school. Ultimately, you dealt with the transition to law school successfully, and now you can expect to make the transition to the “real legal world” successfully.

To guide you along, here are some suggestions on how to proceed. As you will see, the preparation begins before the summer starts.

Before You Leave for the Summer

Talk with a librarian at the law school. If you know what kind of work you will be doing, the librarian can review with you some of the important sources in particular areas of law. For example, if you expect to be working in the real estate field, the librarian can tell you about the major treatises, looseleaves, form books, and periodicals in that area. The librarian can also describe sources tailored to the law of the state in which you will be working. If you will be researching in an administrative law field, you will find it immensely helpful to learn or review administrative law sources, particularly statutes, regulations, and looseleaves.

Sign up for the review sessions provided for Westlaw® and LEXIS-NEXIS®. It’s easy to get rusty.

Where needed, review selected print sources. Again, it’s easy to get rusty.

Once You Arrive at Your Office

Find out what legal resources are available. You may find a full-service law library, with materials covering a wide range of subjects. Alternatively, you may find a small collection devoted to one or two areas of practice. No matter what the library includes, be sure to learn about the policies for using the firm’s legal resources. If there is a law librarian, plan an early meeting so that you can learn about the resources and whether there will be any orientation sessions. You may be relying heavily on a local bar association library or some other public law library. If so, inquire about its policies on accessing and borrowing materials. Find out whether the library will be holding an introductory session for summer associates.

Determine what access your office has to electronic sources. If it has access to Westlaw and LEXIS-NEXIS, acquaint yourself with the policies for searching, downloading, and printing. Depending on your office’s pricing plan, you may be limited in how much searching and downloading you can perform. For example, if the firm owns print copies of a reporter, you may be permitted to search electronically for citations, but not to print the cases. Also, be sure to check on the office’s collection of CD-ROM resources. Many practicing lawyers use CD-ROMs more frequently than do law students.

When Working on Projects During the Summer

When you receive an assignment, don’t be afraid to ask questions. Even if your supervisor seems impatient and brusque, be gracious but assertive in getting all the information you need. Without this information, you may fail to meet his or her expectations in completing the assignment. Here are some questions to ask: What sort of final work product would you like (e.g., a written memorandum of law or a short answer)? For purposes of format, can you show me a completed assignment that uses the format you prefer? (Don’t assume that each supervisor in an office prefers the same format.) Can you tell me more about the facts in the case? If a document is involved (e.g., a will, a contract, or a deed), could you give me a copy? Has anyone else already researched this issue or a related one? What is your deadline? (Seek as precise a deadline as possible. “In a few days” is open to multiple interpretations.) Would you like copies of sources of law that I find? Alternatively, would you like just a copy of a primary source, such as a statute or case, or would you like a copy of a secondary source, such as a law review article, to read for yourself?

When necessary, ask follow-up questions. Although you may want to show your employer that you are self-reliant, don’t spin your wheels for long periods of time. Your supervisor would rather have you admit that you’re stuck than waste lots of time and money getting nowhere. When you first get your assignment,

say that you would like to meet periodically to give updates and ask questions. Of course, you won't want to impose to the point of pestering your supervisor or revealing excessive insecurity. Save up your questions to reduce the number of meetings. In deciding what questions to ask and how frequently to speak with your supervisor, use good judgment.

When beginning a brand-new research project, try starting with a secondary source. Your question may have already been the subject of a law review article, an ALR annotation, or a treatise. The secondary source will give you the overview you need and the starting point for a more specific investigation. In either the text or the footnotes, you will find citations to primary and other secondary sources that you should examine and update.

If you are working in an area that is heavily regulated, look for a looseleaf publication on the subject. Examples of such areas include security, tax, labor, antitrust, and employment discrimination. Looseleafs bring all the current sources of law together in one place. Every looseleaf differs with respect to which sources it includes and which it excludes. Look for information on coverage in the beginning pages. Ask someone who has used the looseleaf before for an evaluation of its quality and for suggestions on how to use it.

Be sure to update all your primary sources of law. This is essential. It is the only way you can be sure that a case, statute, or regulation is still valid. With print sources, check the date of publication and examine all updates. With electronic research, check the dates of coverage for databases, CD-ROMs, and other such sources.

Don't begin your research with Westlaw or LEXIS-NEXIS unless you have permission to do so. Sometimes, efficiency and cost militate in favor of using printed books. Know your office's policy on when you can perform electronic research. Databases are not always the best place to start. Always look for statutes and regulations in print; they are much easier to find this way. Begin case research with the case digests. Before logging on, call the service's customer service to discuss a search strategy. Sometimes the service representative will run preliminary searches to let you know if you can expect to find anything. Also, before logging on, identify your issue of law precisely and decide which part of the database you will be searching. With a little forethought you can minimize costs by searching as little of the database as possible.

Find out if the office has access to the Internet. The World Wide Web gives access to many cases and some statutes and regulations—at no cost.

Never turn in a "rough draft." You run the risk of your supervisor treating it as a final draft—no matter how you label the document—and giving you a poor evaluation.

Before turning in a document, let trusted peers and mentors review it. You are working in a legal culture different from the culture with which you are familiar. As with all cultures, it has its own set of unspoken rules. The only way to avoid breaking those rules is to consult with people who know what those rules are. Even if you think your document is perfect, you may have used an inappropriate format or tone. Play it safe.

Go the extra mile. When researching a problem, you may recognize another argument worth pursuing or research in a neighboring jurisdiction worth investigating. Suggest your proposal to your supervisor. Your suggestion may show that you have initiative and imagination and are willing to do more than passively complete an assignment. However, do not do additional research until you receive permission. The supervisor may have already considered and rejected your proposed argument or decided that financial constraints do not justify the additional cost.

Call home. If you do not want to admit to your supervisor that you are stuck at some point in your research, call the reference desk at your law school library. Librarians typically won't be able to send you the resources that you need or do your research for you; however, they can help you decipher a citation, suggest some possible next steps with your office's resources in mind, or simply review what you have done to make sure you've covered everything. They want you to succeed.

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How to Survive Summer Associate Research ... and Thrive!—Advice from the Law Firm

The Bad News: A summer clerkship is like a three-month-long job interview!

The Good News: You have three months—not just three hours—to demonstrate all your talents!

Your clerkship will give you a taste of what it will be like to practice law, but the experience will probably still feel a lot like school. **That’s exactly what it’s supposed to feel like!** We in the law firms know that you’re still students and have a lot to learn. Everyone from your attorney mentor to the firm’s receptionist expects to help you master the nuts and bolts of practice—and we approach the summer associate season as if we were running a little school.

In law school, you’ve been learning to *think like a lawyer*. Teaching you to think like a lawyer enables you to succeed in practice by conditioning your mind to see analogies between existing precedents and new issues and facts.

This summer, you’ll start learning how to *act like a lawyer*. You’ll probably spend a lot of time doing research and organizing mountains of paper, which isn’t really very glamorous. Unfortunately, these activities make up a significant portion of legal practice. Therefore, if you approach these tasks with acceptance and enthusiasm, you’ll be happier and it will show in the quality of your work. All this translates into the brass ring at the end of the summer—that all-important job offer!

Typical Summer Associate Research Assignments

The Wild Goose Chase

The Scenario: “We think our matter is a case of first impression, but we won’t tell you because we think that knowledge will influence your research.”

Your Strategy: Start a research journal and record the entire process of your research—every resource, every search term, every search strategy. Submit a memo detailing your thorough research, thus demonstrating that this is a new and unique case.

The Survey

The Scenario: “For a large national client, we need to know how all 50 states handle a particular legal issue. If we make you research this issue 50 times, you’ll learn some substantive law and we’ll get a useful resource for quick advice to clients in the future.”

Your Strategy: Before you conduct the survey yourself, find out if someone else has already done the work. Ask your librarian for the following titles, and use them to see if anyone else has already compiled the information for you:

Subject Compilations of State Laws (Boast and Nyberg, 1981)

National Survey of State Laws (Gale, 1993)

Statutes Compared: A U.S., Canadian, Multinational Research Guide to Statutes by Subject (Hein, 1992)

Update My ...

The Scenario: Partners often teach courses, conduct seminars, and write articles or books to develop both new business and legal expertise. They use summer associates to support these endeavors.

Your Strategy: Obtain both the print and electronic versions of the document. Find CheckCite or WestCheck® automated citation-checking and retrieval software. Open the document from within the software and select the appropriate retrieval and citation options. Print the report and review it to identify the new decisions, statutes, and regulations you need to add. Finish up with a well-designed subject search in a current LEXIS-NEXIS or Westlaw database.

Golden Rules of Successful Research

1. **Plan your strategy.** A good strategy starts at the time of the assignment. By culling information from the person requesting your service, you can save yourself time and frustration. Use the mnemonic device *JUST ASK²* as a final checklist before exiting an assignment to ensure that you have the basic facts. Build your strategy around the information you collect.

² JUST ASK stands for the following components of research: J = Jurisdiction; U = Useful Tips; S = Scope of Research; T = Terms of Art; A = Acronyms; S = Sources; K = Key Cost Constraints

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2. **Assess your resources.** Before you begin legal research, inventory the materials at your disposal. Locate the librarian and find out how the organization's collection is developed and arranged. Ask about the specific subject collection you'll be using. See if there are local libraries with collections in your area of law and request visiting privileges.

3. **Put your research in a context.** Unless you're an expert in the area of law you need to research, you should start the process by identifying the location of your issue within the broader subject. Secondary materials are best for determining context. In a law library, start with the card catalog and locate the relevant collection of treatises on your subject. Aim to find at least one very broad treatise and one more narrowly focused title.

4. **Employ serendipity.** There is something to be said for the ameliorative effects of browsing. Sometimes the answer is sitting next to the spot where you expected to find it. Browsing opens your mind to possibilities that you might never contemplate by "staying in the box." Commercial legal publishers include little gems of information you might only find by turning one more page or flipping to a seemingly unrelated chapter just because it caught your eye.

5. **Don't reinvent the wheel.** The law does change rapidly, but the burden of uncovering every facet related to your issue need not rest entirely on your shoulders. Someone, somewhere, may have already examined the issue at great length, and the product of that effort awaits your discovery. It's worth the time to locate an expert, either in your organization or in the body of published legal works, to save yourself some time and your client some money.

6. **Open your mind to analogies.** Too many novice researchers spend endless hours searching for a case that matches their facts perfectly, only to give up in despair that no such case exists. If practicing law were simply a matter of locating factually identical precedents and matching them to client problems, many people wouldn't need lawyers. The challenge of practicing law is seeing the patterns in existing precedent and successfully arguing that those patterns include—or exclude—the circumstances at hand.

7. **Browse annotations, read full texts.** The temptation to rely on case annotations is strong, but to do so risks missing the subtleties embedded in dicta or suggested more by what is not stated than by what is. Use the annotations to serve the purpose for which they were designed—guidance. Develop a list of citations as you review the annotations, then go read the corresponding decisions carefully. Online databases can be most effective at this point because they allow you to collect the decisions you want to read quickly; however, make sure you understand your organization's pricing plan when it comes time to read decisions online.

8. **Don't limit your research to case law.** Although the ultimate goal of a good research strategy is to locate case law on point, starting with a statute or regulation can lead you to relevant decisions more effectively than the familiar paths of digest or database searches. Why? Even the best case-finding tools are subjective. When you start with a statute, you rely on an objective criterion for organizing and identifying relevant material—the number associated with the code section.

9. **Confirm the reliability of your source.** Not all law books are created equal, and it's wise to develop a healthy skepticism about the reliability of the tools you use for research. Seek independent confirmation of the currentness and accuracy of the information contained in a tool. The reputation of the author can be a good clue; look for the author's biography in the book for some insights. Note the breadth of sources of information. Review the table of authorities and the index. Check for *Bluebook* form in the citations and for a variety of sources. Poor citation form, a lack of authorities, and poor indexing are good clues about the reliability of the source.

10. **Have a backup.** Computer systems go down, books disappear from shelves, libraries close at certain times, printers fail, faxes blur, and even the Internet can slow to such a crawl during peak hours that the answer is not worth the wait. If you only know one way to locate the information you need, some day something will interfere with that approach and you won't have access to that information unless you have an alternative.

11. **Write down every citation you find when you find it.** When you come across a source that looks promising, write down its citation immediately! In the excitement of finding a relevant piece of information, it's easy to skip this important step, so make it a habit from the start of your career, or at least the start of your next research project, and you'll not regret its absence later.

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12. **Make the most of what you do find.** Squeeze every potentially relevant piece of information from any good source you locate. There's an odd phenomenon in research by which we tend to devalue a good source just because it's no longer elusive. Maximize what you do find and resist moving on just because you have something good in hand.

13. **Close the circle.** Knowing when to stop researching and start writing is surprisingly difficult. If you've found relevant information, you may be tempted to stop before you've fully explored every tangent. If you haven't found the correct authority, you may draft incomplete arguments for your case.

To "close the research circle," follow every lead to its logical conclusion. If you find a relevant case, verify that it is still good law. Read the cases cited within the text of that decision as well as those references in the citators you use to confirm its validity. If the cited cases turn out to be relevant, Shepardize them and read the cases cited within their text. Continue this process until you stop hitting relevant cases.

When you see repeating citations in both the primary and secondary sources you use, you can feel confident that you've identified the main line of cases on point. Use a secondary source you located in the initial phase of your research as a final checklist to ensure that you've uncovered all the possible angles.

If you haven't found relevant law, you will probably feel uncomfortable claiming that there are no cases on point unless you're absolutely certain you've exhausted all the possibilities. While you can't really prove the absence of relevant case law, in some situations, you can point to circumstantial evidence supporting your claim.

14. **Update your research.** You cannot be overly cautious when it comes to verifying the currentness of laws you cite to support your issues. Master the use of standard citators, such as Shepard's and KeyCite®. Remember that Shepard's is not the only publisher of citators. Smaller publishers include citators in looseleaf services and other case reporters, particularly in administrative areas of law.

15. **Have fun.** Legal research occupies an odd perch in the practice of law. Attorneys risk malpractice by failing to perform research sufficient to make informed judgments on behalf of their clients, yet within the hierarchy of law firm functions, legal research is delegated to the most junior attorneys. Just when a lawyer really learns how to perform legal research well, he or she graduates to more "desirable" tasks. It's no wonder this critical responsibility is perceived as drudgery.

The bad reputation that's attached to legal research overlooks one other critical factor—*it's fun to find information!* The popularity of the Web actually proves that many, many people are hooked on finding information for the sheer joy of it. There is thrill in the discovery and pleasure in the process.

Legal research offers practitioners the chance to experience these thrills and pleasures. Uncovering an obscure decision that makes your case inspires grinning and bragging. Meticulously tying up loose ends through the process of citation checking is uniquely satisfying. As with many valuable activities in life, with legal research, it's the journey as much as the destination. Enjoy the ride!

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“[F]ew ‘doctrinal’ teachers use materials that explicitly instruct students in the fundamentals of reading and writing the law that successfully learning the law requires.”

LEGAL ANALYSIS: THE FUNDAMENTAL SKILL

BY DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON

CAROLINA ACADEMIC PRESS, 1998

PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES

BY MARGARET Z. JOHNS

CAROLINA ACADEMIC PRESS, 1998

REVIEWED BY PENELOPE PETHER

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I am both an experienced law teacher and a relative newcomer to the U.S. legal academy; this history is frequently productive of a double vision. The arrival of these new offerings in the field of fundamental legal skills produced an equally divided response in me. On the one hand, the U.S. market for substantial textbooks on the fundamental legal skills of reading and writing the law is crowded with excellent titles by Calleros,¹ Edwards,² Neumann,³ Oates, Enquist, and Kunsch,⁴ to name only a few. On the other hand, in this particular part of the common law world, members of law faculties exhibit a general tendency to separate “skills” and “doctrine,” leaving the former to clinicians and legal research and writing (LRW) teachers, and likewise consigning “theory” to upper-class optional specialties. This way of seeing the teaching and learning of law is often described by my former colleague Les McCrimmon, Director of Clinical Programs at the University of Sydney and an

innovative teacher of torts, evidence, and land law, as embodying the “Pericles and the plumber” dichotomy.

One result of this is that few “doctrinal” teachers use materials that explicitly instruct students in the fundamentals of reading and writing the law that successfully learning the law requires. These include the theories and practices of statutory interpretation or of common law analysis when one is faced with a real case, rather than a tidy casebook extract. They also include the analytical and writing skills necessary to perform well in typical law school assessment genres, such as the nationally ubiquitous problem question, or in the range of genres that now confront those seeking admission to practice. Given the emphasis placed on such transferable personal skills by recruiting partners, they are critical to success in a legal career beyond the law school’s doors.

Any law professor interested in enabling his or her students to learn the law effectively might welcome these concise new offerings, then, as providing potential materials of appropriate size to construct a course that integrated skills and doctrine, rapidly becoming the norm in Australian law schools.

My response to each text was also divided. Each contained material that teachers of beginning law students will find useful. Equally, they both spoke to a hazard of niche marketing: addressing a range of relatively narrow potential audiences can mean that none of them is served as well as it might be.

Legal Analysis: The Fundamental Skill by David Romantz and Kathleen Elliott Vinson promises to provide “an overview of the foundations of legal reasoning” and to teach “the different levels of critical thinking necessary to develop a sophisticated analysis of legal problems.” It aims to lay out methods to teach strong analytical and writing skills. And its table of contents looks promising. For example, it devotes significant space to analogical analysis, the thing that law students find the hardest to grasp as they become members of a specialized legal discourse community. It offers a manageably sized chapter on statutory analysis, and another on policy, something doctrinal teachers frequently emphasize, and which students find distinct difficulty in coming to grips with. Finally, it sets out in step-by-step detail an alternative to IRAC, seemingly a boon to those many first-year students who have difficulty in fathoming and delivering what their doctrinal examiners expect of them.

¹ Charles R. Calleros, *Legal Method and Writing* (3d ed. 1998).

² Linda Holdeman Edwards, *Legal Writing: Process, Analysis, and Organization* (2d ed. 1999).

³ Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (3d ed. 1998).

⁴ Laurel Currie Oates et al., *The Legal Writing Handbook: Research, Analysis, and Writing* (1998).

My reservations about this text derive from the feature that excited me most about it in prospect. This is its promise of critical pedagogy of the kind that some of the most interesting research on legal professionals suggests is the way to “micro-inject” at law school level the sophisticated understanding of the law characteristic of those with high-level legal expertise. There is a gap between this objective and some troubling oversimplification. For example, we are told that legal decisions flow logically from existing precedents; for another, “policy” is both simplified and separated from “analysis.”

Lest it be said that this criticism betrays an excessively theoretical perspective, let me note that I recently read a paper on judicial decision making delivered by Australian Chief Justice Murray Gleeson. Before his elevation to the bench, Gleeson was widely regarded as the best lawyer in the nation by aficionados of the law’s supposed “black letter” (they do not number your reviewer among them). However, having briefed him when I was a young solicitor and he an eminent Queen’s Counsel, this estimation is not one I would dispute. Gleeson’s account of what it is that judges do was much closer to that of Duncan Kennedy than John Finnis. All this is to say that, despite institutional and other pressures to simplify, there is much to be gained in treating 1Ls as the graduate students they are.

Despite its wide-ranging promise, then, this book may be potentially more useful to students who are really struggling with law school than to those in the mainstream whom we want at the outset to train in habits of critical thinking and sophisticated analysis. And given what we know about correlations of race and gender with underperformance in U.S. law schools, the assistance it offers struggling students has some structural limitations. That said, given current institutional norms, this is a helpful book that aims to address some fundamental gaps in the materials available to teach legal analysis. Many law teachers across a range of subjects and specialties will find *Legal Analysis* a useful tool.

Margaret Johns’ *Professional Writing for Lawyers: Skills and Responsibilities* takes up the MacCrate challenge: crafting the business of the professional subject formation of lawyers in such a way as to make ethical conduct inseparable from the exercising of legal skills and competencies. Its publisher makes considerable claims for it: that it will introduce

readers to the responsibilities attached to every document a lawyer authors, and “bridge the gap between law school and practice, stressing the need for civility and professionalism in the practice of law.”

Let it be said at the outset that the achievements of this text are considerable. Its layout is excellent: as each genre of document is introduced, Johns systematically addresses questions of its specific audience and the ethical issues that attach to it. In the cases of some genres, Johns works the reader through the process of rewriting the document so as to learn more about how to do it well. It is studded with useful and concisely expressed techniques for working through the acquisition of skills that beginning law students find difficult. The section on research strategy is a particular gem, and the rewriting checklists are thoughtful and to the point.

I can imagine this book being useful in a range of different contexts: this is at once a strength and the text’s only significant weakness. It often implies that it may be used by beginning lawyers making the transition between law school writing tasks and the demands of practice. At other points it seems to lay out part of a course in advanced legal writing. At still others it gives instructions on genres that are fundamentals of first-year LRW courses: office memoranda and appellate briefs.

Its coverage of this last group of genres formalizes rewriting and deals explicitly with relevant professional responsibility issues, and thus adds dimensions to what the group of much larger and more detailed legal writing texts offer. On the other hand, given the brevity of these sections, it cannot hope to introduce the skills of writing these documents with the thoroughness and incremental skills-building emphasis that is the strength of the texts that have the lion’s share of the legal writing skills market in the United States.

A similar criticism may be made of the sections that address new lawyers. These jar with the sections that teach how to rewrite in the law school context. Given enough class time, designers of a legal writing course can build structured reflection into the process. We all have pious hopes about inculcating the desire as well as the skills for lifelong learning in our students. But many of us remember beginning legal practice well enough to realize that for overworked young lawyers this apparent “no-brainer” is a relatively hard sell.

“The section on research strategy is a particular gem, and the rewriting checklists are thoughtful and to the point.”

.....

How useful might it be to a lawyer in the first months of practice to have instruction on how to rewrite a document, after reflection and the production of subsequent documents involved in serving a client? Potentially very useful, but that potential is blunted in a text that at one point speaks to the beginning lawyer and the next to the beginning law student. Such a project would develop the lawyers' skills immeasurably; convincing them that the time involved is time well spent is another matter. After all, it would not generate billable hours; and the experience of having documents red-pencilled by a supervisor in law practice can reduce in retrospect the authority of law school learning of legal writing skills.

Johns rightly senses that beginning lawyers need transitional training that only a handful of forward-looking firms provide them with. A more explicit consideration of how different sections of the text might be used by different audiences would have added immeasurably to this innovative project.

With both these books, one is left with a sense of a good project that could have been an excellent one with more space, more time, and much more of the best kind of editorial assistance.

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JUST ONE DAMNED THING AFTER ANOTHER: THE CHALLENGE OF MAKING LEGAL WRITING “SPATIAL”

BY STEPHEN V. ARMSTRONG AND
TIMOTHY P. TERRELL

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One of our friends is a painter who, after the second martini, likes to boast about the superiority of his art to what he describes, with a sneer, as our carpenter-like craft. In sum, his argument amounts to this: A painting is a glorious gestalt, a whole you can grasp at a glance yet spend hours exploring in detail, roaming from one part to another without ever losing sight of its overall form. Writing, on the other hand, is just one damned thing after another—word after word, sentence after sentence, unrolling tediously and interminably across the featureless page with never a vantage point from which we can see the whole at once.

He's right, of course. The sequentiality of writing is a disadvantage all writers struggle against. Those who write prose we read for pleasure have to find ways to keep us moving happily from sentence to sentence, a trick most of them perform by telling us a story. Those who write professional prose—including briefs, letters, memos, and the like—face a more difficult task. True, they have less need to keep us moving, because our sense of responsibility does some of that work. But they have another goal that novelists don't need to worry about, a

goal that runs directly counter to the linearity of writing. By the time we reach a novel's end, if we have become confused about one or two threads of the plot, or forgotten a character or two, not much is lost. Legal writers, on the other hand, have to ensure that the reader emerges from the document with a grasp of the subject that is, as far as possible, somehow “present” all at once. The reader should be able to bring up before the mind's eye at least the skeleton, or the bird's-eye perspective, or the snapshot—choose your metaphor—of the analysis that unrolled step by step through the document.

The spatiality of these metaphors is no accident. Expository writers have to learn how to spatialize their prose, to draw its unrolling lines together into patterns that can be seen all at once. Novice legal writers, however, often fail to realize this. For them, a document is well organized if each sentence and paragraph unfolds logically from the preceding one, so that, step by step, they can justifiably claim that the reader never runs off the road. But a document can be well organized, in this linear sense, and still be frustrating to read—because it never satisfies the reader's craving for the bird's-eye view.

This is a point that many law students never grasp, to the great detriment of their careers as writers. One way to get them to focus on the difference is to explain, and demonstrate, the difference between logic and coherence. Logic is (for our purposes, at least) an objective quality that is judged by testing the link between one proposition and the next. Coherence is subjective: it is the reader's perception that things fit together, a perception that requires the reader to be able to see the gestalt, not just the unfolding sequence.

In general, writing courses teach students to create coherence by creating summaries, maps, or introductions. This lesson in itself is a painful one, because these summaries require intellectual strength and courage. As a result, we read many documents written by the best graduates of the best law schools, documents well written in almost every way, that fail to satisfy our craving for an overview because they skimp on the introduction. Here are two examples, one from a research memo and the other from a brief:

“[A] document can be well organized ... and still be frustrating to read—because it never satisfies the reader's craving for the bird's-eye view.”

“[Writers] have to find ways of spatializing at the micro as well as the macro level, by permeating their prose with mini-introductions, road signs, and predictors.”



Before:

JONES v. SMITH
ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

Both. In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones’ cause of action, however, would probably be considered to be brought in law, and therefore would be tried by a jury.

After:

ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones’ cause of action, however, would probably be considered to be brought in law because his complaint requests only money damages—a remedy at law—and because that remedy would be adequate restitution for his alleged loss.

To persuade a court otherwise, we would have to argue (1) that the case is too complex for a jury’s understanding; or (2) that the underlying issue is a breach of fiduciary duty of a kind (such as breach of constructive trust) that is a matter of equity rather than law; or (3) that the court should follow a minority line of cases that hold any action for “disgorgement” of excess profits to be a matter of equity rather than law.

None of these arguments is likely to succeed.

The revision has two virtues (in addition to abandoning “both” as its first word, an opening move that is suicidally foolhardy for a non-academic audience). First, it provides a précis of the analysis, something that is required not just on general principles, but because the “probably” demands some immediate explanation. Second, it provides a map for the rest of the memo.

Before:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff’s alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank that issued a letter of credit in connection with the transaction. Plaintiff’s attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations (RICO) Act claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6).

After:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the

letter could not be honored by First Citizens Bank (FCB), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations (RICO) Act claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff’s complaint should be dismissed as to FCB because it does not and could not allege that FCB—a Lebanese bank with no office or assets in the state of Panacea—has sufficient minimum contacts with the state for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to allege fraud against FCB with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure (FRCP).

Note that the revision contains both more and less than the original. It expands the story surrounding the case, so that we have a better idea of what the fight is all about. But it also clears out some underbrush at the end, disposing of a list of FRCP sections that is longer than anyone cares to see. For law students who have been trained to be detailed and thorough, and told again and again that their thinking is too rushed and superficial, it is particularly difficult to write introductions that strike the right balance between clarity and completeness. They have to learn the difference between the kind of completeness that results from accumulating details and the kind that results from distilling an analysis to its essence.

But writing good introductions isn’t enough to “spatialize” prose. Even writers who have mastered introductions—which means, of course, that they write them not just at the start of a document but wherever they are needed throughout it—often fail to take spatializing far enough. To do this, they have to find ways of spatializing at the micro as well as the macro level, by permeating their prose with mini-introductions, road signs, predictors—again, choose your metaphor—that make it easier for readers to rise above the unrolling words to glimpse an overview. Here are two examples:

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a nonforfeitable interest in a nonqualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less often than unfunded ones for two reasons. First, they have tax disadvantages: If

employees are given a nonforfeitable interest in a nonqualified trust, they will be taxed immediately on the amounts set aside for them. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a nonforfeitable interest in a nonqualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an “owner or operator” for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual “possession” of the vessel or facility. This requirement is open to interpretation, as the term “possession” is not defined. Under one reading, “possession” calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility’s ongoing operations. Under an alternative reading, taking “possession” may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired “operation, management, or control” without acquiring ownership. Under this construction, the legislature’s inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the “possession” requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment’s two-part test for liability is whether the lender exercises “actual,

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an “owner or operator” for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession.* First, the lender must take actual “possession” of the vessel or facility. Because the amendment does not define the term “possession,” this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, “possession” calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility’s ongoing operations.

Under an alternative reading, taking “possession” may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired “operation, management, or control” without acquiring ownership. Under this construction, the legislature’s inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the “possession” requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Actual control.* The second prong of the amendment’s two-part test for liability is whether the lender exercises “actual,

When we use these examples in programs for practicing lawyers, we make two points about them.

First, they demonstrate visibly the difference between logic and coherence. In each example, the sequence of information remains unchanged between the before and after versions. The revisions simply reveal the structure to the reader more quickly and clearly. Second, the revisions do not add new substance. Instead, they add “meta-information”: second-level information, or information about the underlying information.

For some novice writers, the concept of “meta-information” is illuminating. It helps them to understand that, to get from linear logic to true spatial coherence, the trick is not to add more and better information of the same kind, to fill in the gaps, to be more precise and thorough (although all of this may help). It is instead to add another kind of information, a kind they usually ignore. The good news is that, once they have written a document that is precise, logical, and thorough—that is, once they have done the really hard work—the process of “spatializing” it should be relatively quick and easy. On the other hand, if it turns out not to be so easy, this almost certainly means that the underlying substance has not yet been adequately thought through and organized. In other words, there are problems with logic as well as coherence.

The distinction between information and meta-information—between logic and coherence—has a

“[Y]ou can’t have meaningful meta-information until the underlying substantive information is in good shape.”

.....

further implication for the teaching of legal writing, which most instructors know intuitively even if they have not applied our jargon to it. As we just noted, you can't have meaningful meta-information until the underlying substantive information is in good shape. The challenge for legal writing programs, of course, is that students already have enough trouble trying to master the substance. Teaching them to "go meta" as well, then, will never be easy. In teaching writing as well as in writing, it should usually be a second step, not one you attempt at the same time you are struggling with substance.

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TEACHABLE MOMENTS...

EDITED BY BARBARA BINTLIFF

Barbara Bintliff is Library Director and Professor of Law at the University of Colorado School of Law in Boulder. She is a member of the Perspectives Editorial Board.

Teachable Moments ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a “teachable moment,” a brief window of opportunity when—because he or she has a specific need to know **right now**—the student or lawyer asking the question may actually **remember** the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. Readers are invited to submit their own “teachable moments” to Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, (303) 492-1233, fax: (303) 492-2707.

In this issue, **Jessica R. Hogan**, *Electronic Resources Specialist at the University of Denver Westminster Law Library in Denver*, offers advice on what to tell the individual who presents an ideal “teachable moment” by asking:

“Why won’t my Westlaw search work on Lycos?”

Legal researchers who use both Westlaw and LEXIS-NEXIS have learned that the two computer-assisted legal research (CALR) systems accept basically the same search commands and are remarkably forgiving if an incorrect connector is entered. Depending on the circumstance, the CALR services will either automatically correct an incorrect command or respond with an error message, highlighting the problem and suggesting how it can be corrected. However, the many search engines on the Internet each have their own command language, or syntax, and do not necessarily accept commands unknown to their syntax. Further, the Internet search engines won’t tell you if there is a problem with your search commands—they just produce unresponsive (or no) results.

Understanding the syntax of a search engine and the order in which search commands are processed is

crucial to effective online searching. This article explores the search connectors used by the two major commercial CALR systems, Westlaw and LEXIS-NEXIS, and on the Internet. Boolean search connectors, the order in which the search engine processes connectors, the use of parentheses to change the order of processing, and other search basics are reviewed. This is contrasted with the “New Boolean” language of the Internet. The goal is to explain how the CALR services produce their results, and highlight the differences between them and the Internet services.

Boolean Search Connectors

Traditionally, users of Westlaw and LEXIS-NEXIS have used Boolean¹ operators to structure their searches. The basic operators—AND, OR, and NOT—are the most commonly used connectors. They are also used by most Internet search engines.

Powerful commercial search engines such as Westlaw and LEXIS-NEXIS add numerical and grammatical Boolean connectors, such as “within a certain number of words” (W/N), “within the same paragraph” (W/P), and “within the same sentence” (W/S). Some search engines on the Internet add the Boolean connector NEAR. These terms serve to refine the capabilities of the more general AND, OR, and NOT.

Grammatical Versus Numerical Connectors

Basic Boolean connectors are used to search for key terms in the documents contained in a database. One advantage of using these connectors is that the order of the search terms in the document is irrelevant. For example, a search on Westlaw or LEXIS-NEXIS of

marijuana and smell and “probable cause”

will return documents that contain those three terms, regardless of their position in the document or their relationship to each other in the document. This is a very general type of search, and will usually return a large number of documents of varying relevance.

¹ George Boole (1815–1864), a 19th-century mathematician, first suggested that logical concepts could be expressed with algebraic symbols. The method he developed to illustrate his theory is used today to perform many computer searches, using words like “and” and “or” to direct the computer to identify relationships of words and phrases.

“Understanding the syntax of a search engine and the order in which search commands are processed is crucial to effective online searching.”

“Numerical connectors work best when the searcher is very familiar with the subject at hand and knows the relationship between the words.”

Grammatical connectors specify a relationship between the key terms. A search using grammatical connectors is more refined than one using just the basic Boolean operators. It allows the searcher to ask for a logical relationship between words. For example, the search

marijuana /p smell /p “probable cause”

containing the same search terms but linking them with paragraph connectors, is much more likely to retrieve documents in which the smell of marijuana gives rise to probable cause, since all of those terms appear clustered together in the same paragraph. Again, the order of the words in the paragraph is not important; all documents with the three terms in one paragraph will be retrieved. This eliminates many irrelevant documents, and returns a more responsive search result.

Numerical connectors require that the search terms be within a definite relationship to each other. Searching for

marijuana /10 smell /15 “probable cause”

will retrieve documents that have the word *marijuana* within 10 terms of the word *smell*. The word *smell* will be within 15 terms of the phrase “*probable cause*.” Results will not necessarily show a proximate connection between the terms *marijuana* and *probable cause*. If you guess the wrong order of the search terms, or if you use a number that is too small when you specify the maximum distance between the words, you may miss important documents. This paragraph clearly shows the risk of using numerical connectors improperly:

There was sufficient **probable cause** in this case. The **marijuana**, locked in the defendant’s trunk, was not in plain view. However, the officer who first arrived at the scene had his police dog with him. The officer had the dog **smell** the car, and the dog started barking.

Both the search using basic Boolean connectors and the search using grammatical connectors would return this document, but the numerical connector search would not. Numerical connectors work best when the searcher is very familiar with the subject at hand and knows the relationship between the words. Otherwise, numerical connectors should be used with caution.

Standard Order of Processing on CALR Systems

Once a search is transmitted to the CALR service, the search software starts to work on the parts of the request. Each online service has a standard order of

processing the Boolean search connectors.² They are essentially the same in that they move on a continuum from narrow to broad. If more than one numerical connector is used, they are processed from the smallest number to the largest.

On Westlaw, terms joined by Boolean connectors will be searched for in the following order:³

“”, SPACE (OR), +N⁴, /N, +S, /S, +P, /P, & (AND), % (BUT NOT)

On LEXIS-NEXIS, the order of processing Boolean connectors is:⁵

OR, W/N, PRE/N, NOT W/N, W/S, NOT W/S, W/P, NOT W/P, W/SEG (segment, or field search), AND, AND NOT

For example, in the search below, Westlaw will first process the OR connector (represented by a space between *harassment* and *discrimination*), and then will search for all documents with either *harassment* or *discrimination* within three words of *sexual*. From among the documents now identified, Westlaw will then retrieve those documents with the word *hostile* in the same paragraph:

sexual /3 harassment discrimination /p hostile

Changing the Order of Processing

Advanced online researchers have learned that they can change the order of processing Boolean connectors with parentheses in order to retrieve documents with more specificity. As an illustration, suppose you want documents to contain the terms *probable cause* or *reasonable suspicion*. The search

probable w/3 cause or reasonable w/3 suspicion

will first look for documents that contain *cause* or *reasonable* in the same document, then look for *cause* or *reasonable* within three words of *probable* and *cause* or *reasonable* within three words of *suspicion*. The results of this search will be quite different from what is actually intended. However, the searcher can correct the unintended grouping and retrieve the desired documents by using parentheses around logical groupings of words:

(probable w/3 cause) or (reasonable w/3 suspicion)

² Now most of the standard Westlaw and LEXIS-NEXIS connectors are interchangeable and using W/N will work on Westlaw and /N will work on LEXIS-NEXIS.

³ See *Discovering Westlaw* 37 (8th ed. 1998).

⁴ “N” represents the number chosen by the researcher to specify an adjacency. For example, the search would be written *jessica +3 hogan*.

⁵ See *Emmanuel’s LEXIS-NEXIS for Law Students* 2–11.

Results Ranking and Results Clustering

When a researcher uses Boolean commands on LEXIS-NEXIS and Westlaw, the results of the search are displayed in reverse chronological order; the most recent documents are listed first. These services retrieve only documents that fit the parameters of the search request. If only five cases have the terms *marijuana*, *smell*, and *probable cause* in the same paragraph, then only five documents will appear in the results list.

In contrast, if the researcher switches the search to Natural Language on Westlaw or Freestyle on LEXIS-NEXIS, the results ranking is not by date, but by the number of times the search terms appear in the text of the document. The document in which the terms appear most often will be first in the results ranking. In Natural Language searches, if a search term does not exist in any document, then the term is discarded and the remaining terms are searched.

The “New Math” on the Internet

It’s typical for Internet researchers to use the most basic of search strategies, entering a single word or two, often with no connectors. However, most of the major Internet search engines feature basic and advanced Boolean searching and even “nesting” (using parentheses to build a more complex search). A new syntax, variously called “search engine math” or “implied Boolean” has emerged on the Web. It uses the + and – symbols. This is in addition to the general availability of the standard Boolean AND and OR connectors often found on a Boolean template that is completed by the researcher.

Adding the + symbol before a word requires that the term appear in the document. Similarly, adding a – symbol before a word excludes that word from the document. So, the search

+attorney +jobs

will retrieve Web pages containing both words.

However, if you want to exclude a particular practice area, then you could search for

+attorney +jobs –criminal

On the Internet, the ranking of search results is like that of a natural language search. Even with advanced Boolean searches on the Internet, most search engines retrieve documents with the greatest number of search terms on the Web pages. Because

of this, Danny Sullivan, editor of the *Search Engine Watch* Web site, suggests that Boolean commands are “overkill for the average web user.”⁶

Results “clustering” is a feature on the Internet that retrieves only one page per site instead of multiple pages from one site. That is, the search result won’t list separately several pages that are really part of the same Web site. Some search engines allow the user to uncluster the results, showing the various pages available at one site. Other search engines provide a feature that allows the user to retrieve additional, similar Web pages. (On LEXIS-NEXIS, the two features “More Like This” and “More Like Selected Text” also allow the user to retrieve additional documents based on the original search.)

Phrase and Field or Segment Searching on the Internet

Although some search engines have automatic phrase detection, Internet searchers should enclose phrases in quotation marks to retrieve the exact phrase. The search

“occupational outlook handbook”

will retrieve Web pages with an exact match to that phrase. The searcher can even combine quotation marks with the + and – symbols as follows, requiring that the term *1998-99* appear:

“occupational outlook handbook” +1998-99

Like LEXIS-NEXIS, some Internet search engines have automatic phrase detection, even when the words are not surrounded by quotation marks. For example, on many Internet services the search *probable cause* retrieves documents in which these two words appear as a phrase.

Some of the Internet search engines provide for special field or segment searches, such as a title search. Using that capability, a researcher can search for the titles of Web pages.

Nesting and Wildcards on the Internet

“Nesting” on the Internet uses parentheses to create more advanced Boolean searches, such as jobs and (attorney or lawyer)

⁶ See Danny Sullivan, *Search Engine Watch: Boolean Searching* (visited June 2, 1999) <<http://searchenginewatch.internet.com/facts/boolean.html>> (suggesting that even advanced researchers are better served if they abandon Boolean searching on the Internet).

“Results ‘clustering’ is a feature on the Internet that retrieves only one page per site instead of multiple pages from one site.”

.....

The searcher must first click the “advanced” tab to run a Boolean search on the Internet. Once in the Boolean search mode, the user can then read the help menus that explain the syntax of that particular search engine.

A wildcard on the Internet operates similarly to wildcards on Westlaw and LEXIS-NEXIS. There are two wildcards on Westlaw and LEXIS-NEXIS, the ! symbol and the * symbol. The ! symbol acts as a universal root expander and will retrieve any variant of a root word. For example, the search *bank!* will retrieve documents containing the words *bank*, *banks*, *banker*, *banking*, *bankrupt*, and *bankruptcy*. The * symbol acts as a placeholder, like the blank tile in the word game Scrabble®.

The effect of these symbols is just the opposite on the Internet. The * symbol acts more like the ! symbol does in the CALR services because it retrieves various endings of the original search terms.⁷ For example, *play** may retrieve *plays*, *player*, and *playing*, depending on the search engine. Some search engines will automatically generate various word endings, like a Natural Language search does on Westlaw.

Conclusion

Researchers familiar with traditional Boolean search operators on Westlaw and LEXIS-NEXIS have transferable skills for Internet searching. However, unlike CALR, there is no standardization of Boolean operators on the Internet. Each search engine is slightly different in its approach to Boolean commands. Therefore, the Internet searcher must become familiar with the syntax of a search engine before relying on it. To do otherwise is to waste time and effort.

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⁷ This may be referred to as stemming.

COMPILED BY DONALD J. DUNN

Donald J. Dunn is Dean and Professor of Law at Western New England College. He is a member of the Perspectives Editorial Board. This bibliography includes references to books, articles, bibliographies, and research guides that could potentially prove useful to both instructors and students and includes sources noted since the previous issue of Perspectives.

Karen S. Beck, *One Step at a Time: The Research Value of Law Student Notebooks*, 91 Law Libr. J. 29 (1999).

“Law student notes and the note-taking process have always occupied a central place in American legal education. This article introduces law student notebooks and describes their purposes and uses. A bibliography of American law student notebooks accompanies the article.” Abstract at 29.

Robert C. Berring & Elizabeth A. Edinger, *Finding the Law* (11th ed. 1999). [Eagan, MN: West Group, due summer 1999]

This will be a new edition of one of the leading texts in the field of legal research. It will be substantially updated, including a complete rewrite of the chapter on citators. An appendix will be added to serve as a case study. A new set of *Legal Research Exercises*, prepared by Nancy Johnson and Susan Phillips, was recently published and can be used with this new edition and with Cohen, Berring, and Olson’s *How to Find the Law*.

Canadian Guide to Uniform Legal Citation (4th ed. 1998). [Scarboro, Ontario: Carswell Company, Ltd., 400 p.]

Prepared by the editors of the *McGill Law Journal*, this new guide for citing Canadian legal materials contains instructions for citing from electronic media and the Internet; all the rules for citing treaties, jurisprudence, NAFTA, and WTO documents; and rules for citing sources not addressed in the previous editions.

P. H. Collin, *Dictionary of Law* (2d ed. 1999). [Chicago, IL: Fitzroy Dearborn Publishers, 400 p.]

Provides a basic vocabulary of 7,000 words and expressions used in British, American, and international law. Also serves as a dictionary of comparative law.

Francis R. Doyle et al., *Searching the Law* (2d ed. 1999). [Ardsey, NY: Transnational Publishers, Inc., 567 p.]

Designed to simplify the search for current legal publications, this edition presents the major tools of the trade that will enable researchers to understand and apply legal research methods to the solution of legal problems. A subscription is available.

Kathryn C. Fitzhugh, *Arkansas Practice Materials II: A Selective Annotated Bibliography*, 21 U. Ark. Little Rock L.J. 363 (1999).

“[T]his bibliography contains: 1) general publications, including reference sources; legislation and legislative information; case reports; digests; executive and administrative materials; executive and administrative opinions; citators; court rules; and directories; 2) periodicals; 3) electronic sources . . . ; and 4) Arkansas treatises and practice materials.” *Id.*

Howard Gensler, *Law and Economics: A Topical Bibliography*, 26 Int’l J. Legal Info. 184 (1998).

This 80-page bibliography “collects the major and representative works in the area of law and economics, and a sample of current research. The material is then organized topically.” *Id.*

Delores A. Jorgensen, *South Dakota Legal Research Guide* (2d ed. 1999). [Buffalo, NY: William S. Hein & Co., 194 p.]

A substantial revision of a text designed for those conducting legal research in South Dakota. Contains illustrations.

Margaret Kerr, *Legal Research: Step by Step* (1998). [Toronto, Canada: Montgomery Publications, Inc., 184 p.]

This publication, which deals with the law in Canada, provides complete course coverage for college legal and public administration program courses.

Laurie Magid, *Awarding Fair Grades in a Process-Oriented Legal Research and Writing Course*, 43 Wayne L. Rev. 1657 (1997).

“This article focuses on a potential conflict between two of the most critical improvements in LRW courses: the shift from pass/fail to

graded status and from a product to a process view of the teaching of legal writing” arguing that the potential conflict “can be resolved by the addition to the curriculum of a particular assignment: the graded research report.” *Id.* at 1661.

Ronald I. Mirvis & Eva S. Wolf, *International Copyright: A Selective Bibliography*, 54 *Rec.* 234 (1999).

An unannotated, alphabetically arranged listing of recent materials on the topic of international copyright.

Marie Stefanini Newman, *Evaluation Criteria and Quality Control for Legal Knowledge Systems on the Internet: A Case Study*, 91 *Law Libr. J.* 9 (1999).

“[D]iscusses evaluation criteria for law-oriented Internet sites and how to use these criteria when launching new sites or improving existing sites” and “discusses the use of quality control procedures to ensure accuracy and reliability in Internet sites, and concludes with a case study of the Pace University School of Law’s Web site on the United Nations Convention on Contracts for the International Sale of Goods.” Abstract at 9.

Laurel Currie Oates et al., *The Legal Writing Handbook: Research, Analysis, and Writing* (2d ed. 1998). [New York, NY: Aspen Law & Business, 932 p.]

Offers coverage of legal writing, reasoning, research, and style—approaching the writing task in stages: prewriting, drafting, editing, and writing the final draft. Includes new sections on style and grammar and on how experts read cases.

Dieter Rauschnig et al., *Key Resolutions of the United Nations General Assembly 1946–1996* (1998). [Cambridge, Eng.: Cambridge University Press, 620 p.]

A collection of the most important resolutions of the first 50 years of the functioning of the United Nations General Assembly.

Jonathan Saxon, *Connecticut Practice Materials: A Selective Annotated Bibliography*, 91 *Law Libr. J.* 139 (1999).

Arranged according to general publications, periodicals, electronic resources, and Connecticut practice treatises and materials.

Patricia A. Tobin et al., *Practitioners’ Research Guide: An Update to Researching Government Contracts Law on the Internet*, 28 *Pub. Cont. L.J.* 247 (1999).

Presented in chart form, this revised version is organized into five sections: “1) Updated sites from the previous chart, 2) New Executive agency sites, 3) New Periodical sites, 4) New General sites, and 5) The Comprehensive Index.” *Id.*

Michael Whiteman & Peter Scott Campbell, *A Union List of Appellate Court Records and Briefs: Federal and State* (1999). [Littleton, CO: Fred B. Rothman, 136 p.]

Arranged in four sections—United States Supreme Court, United States circuit courts of appeals, state final appellate courts, and state intermediate appellate courts, with each section arranged by court—this guide shows the locations of available appellate court records and briefs.

Mark E. Wojcik, *Introduction to Legal English* (1998). [Washington, DC: International Law Institute, 501 p.]

This volume serves as an introduction to legal terminology, reasoning, and writing in plain English and is designed for law students, lawyers, and international executives who speak English as a second language.

World Law School Directory (2d ed. 1999). [Buffalo, NY: William S. Hein & Co., 519 p.]

This volume provides coverage for more than 1,400 law schools and institutions arranged under 143 countries. Includes a separate school name index. E-mail and Web site addresses are provided where available.

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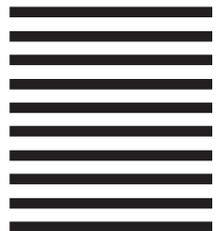
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