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LEGAL RESEARCH AND WRITING PEDAGOGY—WHAT EVERY NEW TEACHER NEEDS TO KNOW

BY JAMES B. LEVY

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New legal research and writing professors enter a tremendously rewarding career. In fact, we may have the best teaching job at law school. We enjoy the unique opportunity among the faculty to work closely with students to help them develop many of the skills they will need in practice. Because of this unique working relationship, we have all had the chance to watch students who struggled with the most basic tasks at the beginning of the year develop enough poise and confidence by year's end to successfully deliver a moot court argument that makes us look great as teachers.

Along with the rewards, however, come great challenges. Indeed, some have suggested that, pedagogically speaking, teaching legal research and writing may be the most difficult job at law school because of the breadth of techniques needed to successfully impart the requisite skills to students.¹ Not only do we teach students substantive law and analysis like our doctrinal

counterparts, but we must also teach them a wide range of other skills like clear written and oral expression, logical organization, legal research, and proper citation form.

Given these responsibilities, it is especially important that new legal research and writing professors understand the pedagogical techniques that work best to impart these skills. The American Bar Association Communication Skills Committee recommends that all new teachers receive training in several different teaching techniques before entering the classroom for the first time.² However, since most legal writing professors join academia after several years in

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¹ See Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 Fla. St. U. L. Rev. 1067, 1072 (1999); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117, 152 (1997) (teaching legal research and writing may very well be more demanding than the job of teaching other courses).

² See Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Sourcebook on Legal Writing Programs* 102 (1997) (asserting that new legal writing teachers should be trained in a "variety of classroom techniques—lecture, Socratic, collaborative group work, work in pairs, videos, role-playing, and in-class individual writing work").

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practice, few of us enter the job with relevant teaching experience.³ Accordingly, this article describes the basic pedagogical techniques every new legal writing teacher needs to know.

Become a Legal Research and Writing Coach

Legal research and writing professors primarily teach skills. One commentator has noted that “the skills of legal research and writing are akin to the skills of playing baseball and football.”⁴ Consequently, legal research and writing teachers may want to consider adopting a pedagogical approach that emulates the techniques successfully used by coaches to teach sports.⁵ A tennis instructor, for example, teaches her students how to hit a backhand by explaining the swing, demonstrating it for students, and then having them try it for themselves so she can critique their performance. Adopting this technique to the legal writing classroom means that teachers need to provide students with examples of the performance expected, give them a chance to try it for themselves, and then provide feedback so they can learn from their mistakes.

Just as no one would expect a tennis student to learn how to hit a backhand by reading a book about it, law students cannot learn how to write clear and concise sentences by listening to a class lecture. Instead, the coaching model suggests that a teacher should begin by explaining both the importance of good writing to the practice of law and then describing ways to do it such as using the active, rather than passive, voice and employing short, concrete words

³ Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 J. Legal Writing 1, 18 (1996) (legal writing professors have an average of four to seven years practice experience before entering teaching suggesting that most of our professional experience is comprised of work as lawyers, not teachers).

⁴ Wesley Gilmer, Jr., *Teaching Legal Research and Legal Writing in American Law Schools*, 25 J. Legal Educ. 571, 571 (1973).

⁵ See David Perkins, *Smart Schools—From Training Memories to Educating Minds* 55 (1992) (people learn a sport because the coach demonstrates the activity, observes the students’ performance, and then provides immediate feedback). Maureen F. Fitzgerald, *What’s Wrong with Legal Research and Writing? Problems and Solutions*, 88 Law Libr. J. 247, 263 (1996) (“Although there are a number of ways in which skills can be taught, most teachers would agree that, at the minimum, students should be permitted an opportunity to attempt the skill and receive feedback.”).

like “use” rather than “utilize.” Next, the teacher needs to show students how to write well by demonstrating the techniques of self-editing. For example, write some excessively wordy sentences on the board and then edit them so that everyone can see how to turn their writing into a model of pithiness. Finally, have students try it for themselves by asking them to edit other sentences you have written on the board or projected onto an overhead screen. You can then critique their performance so the whole class gets feedback on how to write more effectively.

The same approach can be used to teach students about legal research. For example, in connection with an open-universe writing assignment, begin by explaining that all research projects start with the formulation of search terms. Then brainstorm with the class about how to develop search terms for the research they’ll need to conduct for their own writing project. With the use of visual aids such as overhead transparencies or photocopied handouts, or by bringing the books to class, demonstrate for students how the search terms they just developed can be plugged into a descriptive word index that will lead them to applicable digest topics and then to relevant case citations. After showing students how to do this, take them into the library so they have the chance to use these materials for themselves while you make yourself available to answer questions and provide feedback on their mistakes.

This same approach can be used for all the other skills we teach, even using *The Bluebook*. For example, when teaching students about citation form, begin by explaining what *The Bluebook* is and how to use it. Then demonstrate for students how it works by using visual aids that show how to use the index to find the applicable rules on citation form. Finally, give students the opportunity to practice this new skill by calling on them and asking them to find the correct page in *The Bluebook* for the authorities you identify.

In the dark ages of legal writing programs when many of us who now teach the subject were students ourselves, the prevailing pedagogical approach often involved assigning a research and writing project and then setting students loose in the law library to figure it out on their own. This “sink or swim” approach was generally used in the belief that it instilled in students the kind of self-reliance so critical to the practice of law. The coaching model of research and writing pedagogy suggests, however, that it is a poor

teaching technique. Instead, students need a clear explanation about how to perform the skill being taught, examples that show them how to do it, and then a chance to try it for themselves along with an opportunity to receive feedback from the teacher. While other pedagogical approaches may work, becoming a legal research and writing coach is sure to provide new teachers with success in the classroom.

Encourage Active Learning

The Socratic method is still the most popular teaching technique in law school for good reason.⁶ It encourages active learning. Nearly all educators agree that a pedagogical approach that encourages students to participate in the learning experience is better than one that results in the passive absorption of information.⁷ Educational psychologists recognize that students who actively discover the concepts being taught learn it better than those who merely listen to an explanation of the same material. One commentator summed it up by noting: “Ideas cannot be handed to students as if they were bricks.”⁸ As a result, most agree that the lecture method is not an effective way to teach law students.⁹

Unfortunately, the typical legal research and writing curriculum is often not conducive to a purely Socratic teaching style. Many of the subjects we teach—like how to do legal research or write a brief—require extensive explanations. That often makes use of the lecture method unavoidable. In many instances, lecturing to students about key concepts or skills may be the most efficient way to impart that information to them.

Nevertheless, it is pedagogically important to incorporate the Socratic method into your teaching style whenever possible in order to actively engage your students in the material being taught. While it may be obvious how to do this in a doctrinal

class—by engaging students in a colloquy that requires them to identify the pertinent parts of a judicial decision—it is less obvious how to adapt that technique to the legal writing classroom.

Here are some suggestions. When teaching students how to begin their research for an open-universe writing assignment, for example, call on students and ask them to suggest appropriate search terms. Write their suggestions on the board and then ask others in the class to critique them. If anyone disagrees with those search terms, ask them to suggest alternatives and explain their reasons for doing so. In this way, the entire class learns in an interactive way how to formulate search terms for that assignment.

Use the same technique to teach the class about proper citation form. After explaining how to use the index at the back of *The Bluebook*, call on students and ask them to find the correct citation form for a list of research tools you suggest such as Am Jur®, ALR®, or any other secondary source. Ask them to identify the page number in *The Bluebook* where the rule appears and then call on other students to say whether they agree with those answers or not.

You can even use a Socratic approach to teach students how to write a research memorandum. After explaining to the class how to write a thesis paragraph for the open-universe writing project, for example, ask a student to write one on the board. Then ask others in the class to comment on that student’s effort and, if necessary, suggest revisions. In this way, the entire class sees how to write a thesis paragraph in a way that engages them. Adopting a Socratic approach to the legal writing classroom may require a bit more creativity and resourcefulness than a typical doctrinal course, but, pedagogically speaking, it is an important technique to incorporate into your teaching style in order to ensure a meaningful learning experience for the students.

Give Students Immediate Feedback

Another very important principle of effective skills pedagogy that every new teacher should know is that students need immediate feedback on their performance. That is true whether students are learning how to write, to research, or to perform any other skill we teach. Experts

“Just as no one would expect a tennis student to learn how to hit a backhand by reading a book about it, law students cannot learn how to write clear and concise sentences by listening to a class lecture.”

⁶ See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 Seattle U. L. Rev. 1, 28 (1996) (indicating that the Socratic method is still the universal pedagogy in American law schools).

⁷ See Ernest R. Hilgard, *Theories of Learning* 481, 562–63 (3d ed. 1966) (effective learning depends upon the students actively engaging in the activity, with frequent repetition of the skill followed by reinforcement by the teacher).

⁸ Stephen M. Fishman & Lucille McCarthy, *John Dewey and the Challenge of Classroom Practice* 19–20 (1998).

⁹ See Fitzgerald, *supra* note 5, at 258–59 (“The lecture method is not effective for teaching skills.”).

“[I]t is pedagogically important to incorporate the Socratic method into your teaching style whenever possible in order to actively engage your students in the material being taught.”

agree that feedback is most effective when it is temporally connected to students' efforts to learn that new skill.¹⁰

Using the tennis analogy again, students want feedback from their instructor right after they attempt a backhand shot, not two weeks later. Similarly, law students want feedback on how to write more clearly and concisely while the assignment is still fresh in their minds, not later. Given the high student-teacher ratios in most legal writing programs and the heavy workload most faculty must carry, it is not always possible to give students feedback as quickly as they would like or as sound pedagogy suggests. Many of the writing projects we assign, like the open-universe research memorandum, require a great deal of time to review. Of course, legal writing professors never want to compromise thorough and conscientious feedback just for the sake of returning papers quickly.

Nevertheless, it is pedagogically important to include opportunities during the semester to provide students with more timely feedback. With respect to teaching students how to write, for instance, consider doing some in-class editing exercises—like the one mentioned earlier—that give everyone in the class a chance to get immediate feedback from the teacher on how to make their own writing better. In addition, reserve some time during the individual student conferences to do a self-editing exercise that gives them quick feedback on how to write better. As you review the students' papers, demonstrate for them how to revise their own writing by editing a sentence while they look on. Then ask the students to try it for themselves by having them revise another sentence that you select. You can then critique their revisions so they get feedback from you at the moment they are engaged in the activity. Chances are, they will remember that feedback better than similar comments you may write on a paper that is not returned to them until much later.

The same approach works well for teaching

¹⁰ “Research ... demonstrates that students learn best if they receive feedback and reinforcement immediately after they study and practice the task.” Thomas M. McDonnell, *Joining Hands and Smarts: Teaching Manual Legal Research Through Collaborative Learning Groups*, 40 *J. Legal Educ.* 363, 364 (1990). See Ernest R. Hilgard & Gordon H. Bower, *Theories of Learning* 58 (4th ed. 1975).

students about legal research. After lecturing to them about how to use particular research tools, take students into the law library so they get an opportunity to ask you questions as they begin to work with those tools. It is important to create similar opportunities throughout the semester for all the skills we teach so that students can get immediate feedback from the teacher on what they need to be doing to improve.

Find Ways to Pique Student Interest

Another vital part of any good legal research and writing pedagogy is to find ways to make the subject matter more interesting to students. Educational theorists agree that effective learning cannot take place unless students are motivated to learn the subject matter.¹¹ That motivation can arise either because the material is inherently interesting to students or because it relates to the educational or professional goals they want to achieve. With adult students in particular, it is especially important that the teacher present the material in a way that shows them how it will be used in practice.¹²

Consequently, it is important to keep this in mind as you prepare your class lectures and exercises. Whenever possible, try to relate the assignments to the skills students will need in practice. The more realistic you can make the assignments, the better motivated students may be to learn the material. Therefore, when designing writing problems, try to select topics that are

¹¹ See Robert S. Redmount, *A Conceptual View of the Legal Process*, 24 *J. Legal Educ.* 129, 165 (1972) (“The subject matter ... must first seem to be or must become important and relevant to the student. ... Without [this], learning may not take place.”); Barry J. Wadsworth, *Piaget for the Classroom Teacher* 78, 158 (1978) (students must be interested in the material for effective learning to take place).

¹² Adults are characterized by a motivation to learn as they develop needs and interests that learning will satisfy. “Adult orientation to learning is life—or work—centered. Therefore, the appropriate frameworks for organizing adult learning are life- and/or work-related situations, not academic or theoretical subjects.” Frederic H. Margolis & Chip R. Bell, *Managing the Learning Process: Effective Techniques for the Adult Classroom* 17 (1984). See Ellen M. Callinan, *Simulated Research: A Teaching Model for Academic and Private Law Librarians*, 1 *Perspectives: Teaching Legal Res. & Writing* 6, 6 (1992) (“Relevance should be the guiding principle. ... That which is relevant is retained. That which is retained can be applied.”); Fitzgerald, *supra* note 5, at 263 (adult students need “to relate tasks directly to preparation for future social and professional roles”).

timely and realistic. Several articles have already been written that describe ways to find good ideas for writing projects.¹³ If you are still stuck for an idea, newspapers and other media sources are always a good place to start.

A simple technique I use to make the learning experience more realistic for my students is to turn the classroom into a law firm. I play the role of senior partner and refer to my students as associates. I explain our writing problems in terms of a client who has come to the class seeking our advice. We discuss the problem as if we are a group of lawyers trying to figure out a solution to our client's problem. In this way, I try to make the classroom experience as realistic as possible for them.

In addition to making assignments as realistic as possible, it is also pedagogically important to make them interesting and enjoyable. Try to choose writing topics that you enjoy and feel passionate about. The more interesting you can make the subject matter, the better students will learn it. When I talk to students about learning to use the law library, I try to make it sound as exciting as possible. With great enthusiasm, I explain that the law library holds the answer to every legal question they will ever encounter in a lifetime of practice. The trick is knowing how to find those answers. I try to make learning about the law library sound like a milestone in their legal education that marks the metamorphosis from lay person to the lawyers they want to become. I work very hard to instill in them a sense of excitement about all the material we cover and the law school experience itself. As teachers, it is our responsibility to find ways to make the material we teach come alive for students. Indeed, sound pedagogy requires it.

Have Fun

Last, but not least, make the class fun. Not only will it make the learning experience more enjoyable for you and your students, but it is also

part of a sound pedagogical approach. Studies show that new students find law school an extremely stressful experience. Indeed, law students, on average, experience more stress than students in any other graduate program, including medical school.¹⁴ Educational theorists note that students do not learn well when they feel stress.¹⁵ Students who experience stress lose confidence, which leads to lost motivation, and that results in an atmosphere in which no meaningful learning can take place.

With that in mind, try to make the classroom experience more enjoyable for students. Humor is one technique. If you can weave humorous anecdotes about the subject matter into your lectures, you will create an atmosphere more conducive to learning. However, using humor does have risks. Some teachers have a knack for humorous storytelling. If you are not one of those people, you may want to stay away from it. Nothing can bring the flow of a good class to a screeching halt quicker than a teacher who makes a botched attempt at humor.

So, if humor is not your forte, try thinking of other ways to make the learning experience more enjoyable for students. For example, to create a fun way to teach legal research, try an in-class game of "legal jeopardy" in which students compete in teams to answer questions about research tools. Hold up books at the front of class and then ask the teams to correctly identify them. Keep track of the points and award a winner at the end of class. The more fun you can make of otherwise mundane topics, the better success you will have as a teacher.

Finally, and most importantly, show enthusiasm for the subject. Students love a teacher who is passionate about the material. Enthusiasm is contagious: if you are able to project during class that you love what you do, the students will respond in kind. Do not be afraid to let the students know that you love to teach and look forward to every class.

“As teachers,
it is our
responsibility
to find ways
to make the
material we
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students.”

¹³ This periodical has published articles outlining sources for relevant and interesting writing topics. See, e.g., Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 Perspectives: Teaching Legal Res. & Writing 58 (1995); James B. Levy, *Dead Bodies and Dueling: Be Creative in Developing Ideas for Open Universe Memoranda*, 7 Perspectives: Teaching Legal Res. & Writing 13 (1998).

¹⁴ “Law students have higher rates of psychiatric distress than either a contrasting normative population or a medical student population.” Stephen B. Shanfield & Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. Legal Educ. 65, 69 (1985).

¹⁵ See Redmount, *supra* note 11, at 150 (“[A]n excess of anxiety, whether from personal or pedagogical sources, shatters confidence, incites fear and may inhibit or prevent performance.”).

“Another advantage to the simulated experiences is that students encounter the skills of research, writing, interviewing, and counseling as they would in practice.”

SHAKESPEARE IN LAW: HOW THE THEATER DEPARTMENT CAN ENHANCE LAWYERING SKILLS INSTRUCTION

BY MELISSA SHAFER¹

Melissa Shafer is an Assistant Clinical Professor teaching in the lawyering skills program at Southern Illinois University School of Law in Carbondale.

The lawyering skills program at Southern Illinois focuses on research, writing, and advocacy, and offers a basic introduction to interviewing, counseling, and negotiation. The course also deals with ethical issues arising in the practice of law, although it is not intended to substitute for the professional responsibility course.

In teaching the client interviewing and counseling segments of the two-semester, first-year course, we enlisted the assistance of the university's theater department. Specifically, we conducted simulated client interview and counseling sessions with our law students playing the role of attorneys and students from the theater department playing the role of the client.² The simulated experiences in interviewing and counseling are assessable parts of the course,

accounting for 15 percent of the student's grade each semester. The simulations have been a huge success, which is due to the enthusiastic participation of the theater faculty and their students, and especially to the ability of these students to role-play.

This article explains how we use theater students and faculty in the course, discusses the benefits of simulated experiences with theater students in a legal writing or skills course, describes problems encountered in our simulation experience, and offers suggestions for involving theater faculty in a legal writing or skills program.

Interviewing and Counseling Simulations

The simulated interviewing and counseling experience begins during the fall semester when students perform the client interview. They then research and write their open-universe memorandum based on the fact scenario presented in the simulated interview, and supplemented by an additional memo detailing the facts and issues presented for resolution.³ In the spring, students conduct the client counseling session based on the issue presented in the closed-universe memorandum from the fall.

Recruiting, organizing, and training theater students for the simulation process is no small task. First, a relationship between the theater department and law school must be established. When we began the program in fall 1998, the lawyering skills director contacted the theater department faculty and inquired about their interest in participating. We received an enthusiastic initial response, and the level of the theater department's involvement in this exercise has increased each semester. We now meet regularly with faculty from the theater department in order to plan upcoming simulations. Second, a system for scheduling the simulations must be created. In 1999–2000 we streamlined the scheduling procedure so that our teaching assistants now handle that task. Third, the theater students need a description of their fact scenario for the simulation. To meet this need, we created a document called the “client role sheet.”⁴

¹ I am grateful to Penelope Pether, formerly Director of Lawyering Skills and Assistant Professor of Law at Southern Illinois University School of Law and now director at American University, Washington College of Law, for her mentoring as well as for encouraging me to write about the value of using theater students for training simulations in a legal skills program. Also, many thanks to theater students Marlo Kennedy and Mollie Boliek for their helpful comments.

² See Dennis Turner, *Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal*, 24 U. Dayton L. Rev. 283, 300 (1999) (describing use of third-year law students and members of the community as simulated clients in exercises at the College of William and Mary School of Law). Turner also suggests employing theater students to play simulated clients and the possibility that theater students could earn credit in one of their classes. *Id.* at 309 n.179. This is exactly what has happened at SIU. Theater students now receive course credit from the theater department for their participation in our simulation process. Medical schools have also recognized the value of theater students to their training programs. See Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. Legal Stud. 693 (1998); Terri Kapsalis, *In Print*: Backstage at the Pelvic Theater, Chi. Reader, Apr. 18, 1997, at 46.

³ See *infra* Appendix A: Sample Initial Memo to Students and Appendix C: Sample Follow-Up Memo to Students.

⁴ See *infra* Appendix B: Sample Client Role Instructions.

Finally, theater students must be trained on how to be effective clients. Specifically, they need basic training on how much they can deviate from the client role instructions they are given, how much emotion they should display, how demanding or difficult they can be as a client, what types of questions they can ask the law student acting as attorney, how to respond to questions posed by the law student, and what kind of advice they can seek in the simulation. Our teaching assistants, working in cooperation with the theater faculty, have provided this training to theater students. For example, in training the theater students in how much they can deviate from the facts, we explain to them which facts are legally significant in the client role instructions. For legally significant facts, we ask them not to deviate in any way in their communication to the student attorney. For background facts that are not legally significant, we allow the theater students to change them to suit the character they are portraying.

Benefits to First-Year Law Students

The benefits of using simulated interviewing and counseling experiences are well worth the time and effort it takes to organize them. First and foremost, there is an integration of legal research, writing, and problem-solving skills with the areas of interviewing and counseling. Another advantage to the simulated experiences is that students encounter the skills of research, writing, interviewing, and counseling as they would in practice. The simulations allow students to be practitioners of law because they are encountering legal research and writing problems in practical ways. The typical legal-writing memo assignment does not adequately prepare students for practice because they don't receive any experience in fact gathering and thus often fail to grasp its role in the research and writing process. In simulations, however, the student begins to assume responsibility for the gathering and mastery of facts.⁵

Furthermore, in simulated experiences,

students deal with ethical issues in a practical context. Every simulation has an ethical issue built into the factual scenario. For example, in the simulation dealing with custody modification set out in Appendix B, the client seeking the modification has been denied a significant amount of visitation with his children. The theater student playing the role of the client is instructed to ask the student attorney in the interview whether he can keep his children an extra two and a half months after his next visit to make up for the visitation he claims he was wrongfully denied. The theater students are specifically instructed to pose questions like this to our students: "My wife isn't following the terms of the Marital Settlement Agreement that state that I get a certain amount of visitation, so why should I follow it? In the last year alone, she has denied me at least 80 days of visitation. Can I just keep them 80 days to make that up?" Students must then counsel and advise the client to obey the court's present order. Forcing students to grapple with professional conduct issues head-on does far more to promote ethical conduct than learning the rules of professional responsibility in isolation.

There are particular benefits that result when theater students are used for these simulations. Specifically, our first-year students benefit from the theater students' ability to portray realistic clients. When we first began the simulations, we didn't have enough theater students to serve as clients for all our simulations. As a result, we enlisted second- and third-year law students to assist. While the law students had the ability to role-play, their special training in the law prevented them from reacting to a client interview or counseling session in the way an actual client would. Professor Rebecca Fishel, a faculty member in SIU's Department of Theater, has explained why theater students are better "clients":

These exercises require much of the actor: skill in immersing into a character both intellectually and emotionally, skill in thinking on their feet, and skill in in-the-moment observation and retention that allows

“[O]ur first-year students benefit from the theater students' ability to portray realistic clients.”

⁵ We do provide a set of facts for all students to work from for the open-universe memorandum after all the interview simulations have been completed. See *infra* Appendix C: Sample Follow-Up Memo to Students. This is necessary because a small percentage of students simply fail at the interviewing process and do not elicit all the determinative facts. Additionally, on rare

occasions, a client will deviate from the facts in a legally significant way. Even though a set of facts is provided to students after the simulation, they still take the gathering of facts seriously, as their ability to elicit the most important facts affects their interview assessment.

“Theater students have special training in communication, and these feedback sessions allow us to exploit that knowledge base.”

them to give valuable feedback after the simulation. The “thinking on their feet” goes beyond the traditional “improvisational” skill of a quick, appropriate answer. The exercise demands the actor think quickly, make training-based judgments, and respond in a way that maximizes the educational experience for the law student. For example, the actor is trained to listen to what is said and reply directly to the question without volunteering information that the law student needs to probe for as part of their training. This requires developing an instructional judgment on the part of the actor.

Another advantage of using theater students is the advice they can give during the feedback session.⁶ After the client interview is concluded, the theater student, with the assistance of the lawyering skills instructor, conducts a debriefing session in which the theater student identifies the body language and interpersonal communication skills used by the law student in the interview. One approach to the feedback session is to have the instructor pose questions such as these to the theater student after the interview: 1) How did the attorney make you feel as a client? 2) Did the attorney empathize with you and your legal problem? 3) What were the nonverbal messages sent by the student attorney? 4) What suggestions do you have for improving the communication exchange in the interview? Our students have found this type of information invaluable in improving their communication skills. Theater students have special training in communication, and these feedback sessions allow us to exploit that knowledge base. Our students have learned about communication concepts such as open versus closed body posturing, active listening, and nonverbal communication from these feedback sessions.

Benefits to the Theater Department

The partnership that has formed between the two disciplines is beneficial not only to our students but also to theater faculty and students.⁷ When asked about the value of the simulations for her students, Professor Fishel commented, “From a

⁶ These feedback sessions began as an informal discussion between the instructor, the law student, and the theater student. Once we realized how much solid feedback the theater students had to offer our students, we began formalizing and structuring the sessions.

⁷ When making initial contact with the theater department, you might want to mention the specific benefits

practical standpoint, this exercise gives the actor an experience that can be used in a variety of venues. Any practice in moment-to-moment give-and-take between people is directly applicable to the development of their skills in interpersonal communication. The opportunity to hone their skills in observing, making judgments, and responding from an educator’s viewpoint will also be applicable to work in educational theater, whether it is the traditional venue of primary and secondary education, or the growing field of business theater education. Learning to work as an actor is an invaluable experience that opens the way for work in medical personnel training, a variety of training work in law, and first-person interpretation work.” Additionally, theater students report that the simulations give them unique opportunities to refine their skills of improvisational acting, reinforce their training in nonverbal communication through the feedback session, and practice working with a small audience. Finally, at least in our program, theater students receive a course credit from the theater department for their participation in the simulations.

Problems and Troubleshooting

After our initial experiences with using theater students in simulations, we met with faculty and students in the theater department to determine how we could improve the process. Some items, like having refreshments and a place for theater students to relax between simulations, have been easily dealt with. However, we are still experimenting with the best way to resolve other problematic issues. One area of concern posed by theater students is how they should go about relating the facts of their case in the simulated client interview. Some theater students simply began the client interview with a complete recitation of their factual scenarios. Others told part of the facts and then forced the law student to ask appropriate questions to fill in the gaps in the story. This is an area of real concern to us as

theater students can derive from participation in law school simulations. We were fortunate to receive an enthusiastic response to our initial inquiry to the theater faculty; you might need to “sell” your theater department on the idea. If you aren’t successful in recruiting theater students, you might try community theater groups as an alternative.

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instructors since we want each law student to receive an equally simple or challenging experience in interviewing. Consequently, we plan to restructure the way in which theater students are trained as clients for future interview simulations. We will instruct them on which facts should be directly communicated to the law students and which facts the law student must obtain through appropriate questioning techniques.

Another problem related by the theater students was that some of our factual scenarios for the simulations were not fertile ground for them to develop their acting and improvisational skills. The theater students found it much easier to get into character when something personal to the client was at stake. Our simulations dealing with a family law problem were most beneficial to the theater students. In the last set of simulations, we had a few scenarios in which a large business was sued and the acting president of the company was the client for the interview. The theater students told us that it would have been much easier for them to play their role as client if we made the business a small, family-owned one. In future simulations we will tailor the facts to create an issue of personal concern to the client. This will not only accommodate the theater students' concern, but also better enable us to evaluate our student's ability to empathize with the client and his or her legal problem.

Enhanced Involvement

We continue to discover more ways to involve theater in our lawyering skills program. There is much about its discipline that can help our students become more effective practicing attorneys. One area that we will try to address with the help of the theater faculty is how to effectively use nonverbal communication, including how to dress professionally. Perhaps it is our changing society or the influence of television's *Ally McBeal*, but a fair number of our students do not dress professionally for their simulations. Some wear unironed shirts, and extremely short skirts are a frequent occurrence. With the help of the theater faculty, we plan to produce a video displaying various styles of dress for both sexes and discussing the effects of dress on client perception.

“The theater students told us that it would have been much easier for them to play their role as client if we made the business a small, family-owned one.”

In the spring semester we cover appellate advocacy and provide training in both verbal and nonverbal communication skills. We will continue to enlist the assistance of theater faculty in developing this training for our students. We have found the theater faculty to be a tremendous resource for materials and ideas to help equip our students with better communication skills. Last spring, faculty from the theater department hosted a workshop aimed at overcoming fears in public speaking. We targeted this workshop to precede the first-year oral advocacy rounds. Our students learned basic relaxation techniques and other presentation tips that were useful to them in preparing for their first argumentation experience.

Conclusion

The theme for the Legal Writing Institute 2000 Conference is preparing students for life after the first year. If we truly desire to equip students with the ability to perform research, think analytically, and write with precision, then we must teach these skills in a practical context. Students who have simulated client interviewing and counseling experiences, especially with theater students playing the role of clients, are better able to ascertain the connections between these various skills, which in turn eases the transition from law school to practice.

Appendix A: Sample Initial Memo to Students

To: Law Clerk #3329
 From: Melissa Shafer
 Date: October 28, 1999
 Re: Rathford

I would like you to meet with Jordan Rathford, a prospective client, on an initial consultation basis sometime between November 1 and 4, 1999. Jordan is seeking our firm's assistance regarding a possible modification of child custody. Attached you will find a copy of 750 ILCS 5/610. You should review this statute

⁸ As discussed in this article, we will be revising these client role instructions for the next set of simulations. Specifically, we will break the role instructions into two parts: (1) facts that the theater student should automatically recite to the attorney, and (2) facts that the theater student should withhold unless the attorney asks questions pertaining to them.

prior to the interview. The statutory provision will give you a basic understanding of what is at issue as well as assist you in asking the client questions. However, this statutory provision will not give you all the answers and you should not advise the client about matters to which you have no legal knowledge or informed opinion.

Appendix B: Sample Client Role Instructions⁸

General instructions:

Thank you for agreeing to play the role of Jordan Rathford in this client interview simulation. Please make sure you do all of the following in preparation for this simulation:

1. Attend the training session.
2. Call Melissa Shafer at 453-8647 if you have any questions.
3. Bring your role to the simulation so that you can refresh your memory in the event you forget important facts. If necessary, you may take this sheet into the simulation with you and refer to it.

Specific instructions for playing your role:

Your name is Jordan Rathford. You will be meeting with Attorney_____. (Each law student will be introducing themselves to you at the beginning of the interview.) Three years ago, you and your wife, Kelly, divorced. Custody was not contested in your divorce from Kelly and you agreed that she would be the sole custodian of the children and that you would have visitation of every other weekend and one week night per week in addition to four weeks in the summer and alternating holidays. You were also ordered to pay \$500.00 per month child support for your two children, Jimmy and Sarah. Jimmy is ten years old and Sarah is nine. Jimmy and Sarah visited with you regularly for the first two years following your divorce. One year ago, Kelly remarried and since that time you believe your visitation has been purposely limited by Kelly. Kelly has allowed the children to visit with you only about 25% of your court ordered time over the past year. There have been various reasons Kelly has given for her denial of visitation to you, including that the children are sick, have school activities they must attend, and finally that the children don't want to see you. You have kept a record in your diary of each time Kelly has denied you visitation as well as the reason she

gave for the denial. To your knowledge, the children have not gone to the doctor for anything other than regular check-ups or common colds over the last year. You have copies of all the children's medical bills for the last year. Also, you feel that over the last year the children have acted excited to see you when you arrived to pick them up. Jimmy and Sarah always run to greet you and tell you they have missed you since the last visit. You believe that Kelly's new husband is trying to poison the children's minds against you. You believe this is what is occurring since Jimmy recently told you that his stepfather said you were a bad person and didn't love Jimmy or Sarah as much as Kelly does.

You are outraged at this point since you have regularly paid your child support for the last three years and now Kelly isn't holding up her end of the bargain. For a year now, you have begged Kelly on many occasions to let you have your scheduled time.

You have decided that Kelly will not change and that the only way to prevent the children from growing further apart from you is to file for custody yourself. If you aren't successful in your custody suit, you would at least like to know if you can stop paying \$500.00 a month in support for the two children if they continue to refuse to visit.

In the last year alone, Kelly has denied you at least 80 days of scheduled visitation time. You will be picking them up for visitation this weekend. You want to know whether you can just not return the children this weekend to make up for the 80 days Kelly has denied you visitation time. You want to express to your attorney that "Kelly isn't following the terms of the Marital Settlement Agreement that state that I get a certain amount of visitation, so why should I follow it? In the last year alone, she has denied me at least 80 days of visitation time. Can I just keep them 80 days to make that up?"

Finally, you want advice on the following three questions: 1. Will you be able to obtain custody of Jimmy and Sarah? 2. If you fail in trying to obtain custody, can you stop paying child support if the children refuse to visit? 3. Can you keep the children 80 days past this Sunday to make up for the time Kelly has wrongfully denied you?

Appendix C: Sample Follow-Up Memo to Students

To: Law Clerk #3329
From: Melissa Shafer
Date: November 5, 1999
Re: Rathford

Thank you for conducting the intake interview in this matter. I conducted a short additional interview of the client yesterday, and we are going to act for him.

As you know, Jordan and his wife, Kelly, divorced three years ago. By consent of the parties, Kelly was awarded sole custody of the children and Jordan was awarded visitation of every other weekend and one week night per week in addition to four weeks in the summer and alternating holidays. Jordan was also ordered to pay \$500.00 in child support for the two children, Jimmy and Sarah. Jimmy and Sarah are aged ten and nine, respectively. Jimmy and Sarah visited regularly with Jordan for the first two years following the divorce. One year ago, Kelly remarried and since that time Jordan claims his visitation has been purposely limited by Kelly. Jordan claims that Kelly has allowed the children to visit only about 25% of the time over the past year. Jordan stated that Kelly has claimed the children are sick, have school activities, or that they don't want to come for the visit. Jordan has a record in his diary that lists each time Kelly has denied visitation as well as the reason given for the denial. Jordan states that to his knowledge, the children have not gone to the doctor for anything other than regular physicals or a common cold over the last year. Jordan has copies of all the children's medical bills for the last year. He further states that the children are always excited to see him when he has had visitation over the last year. Jordan said the children always run to greet him and said they have missed him since the last visit. Jordan believes that Kelly's new husband is trying to poison the children's minds against him. He believes this is what is occurring since Jimmy recently told Jordan that his stepfather said he was a bad person and didn't love Jimmy or Sarah as much as Kelly does.

Jordan is outraged since he has regularly paid his child support for the last three years and now Kelly isn't following the terms of their agreement.

“First-year students should be given full access to LEXIS and Westlaw the day they enter law school.”

GIVE STUDENTS FULL CALR ACCESS IMMEDIATELY

BY PAUL BENEKE

Paul Beneke is Associate Director of the Legal Research and Writing Program at the University of Oregon School of Law in Eugene.

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, phone: (312) 503-8454, fax: (312) 503-2035.

For the past several years, my school, like most others, has made it a practice to delay distribution of Westlaw® and LEXIS® passwords to first-year students until they have learned how to research using print sources. Furthermore, even when first-year students were given passwords, they were so-called “limited” access passwords, providing access to some, but not all, of the databases and functions on Westlaw and LEXIS that are available to second- and third-year students, who have “full” access.

While I used to agree with this practice, I think it is time for law schools to end it. First-year students should be given full access to LEXIS and Westlaw the day they enter law school. They should be taught to use these computer-assisted legal research (CALR) services at the same time they receive instruction on print sources. Moreover, students should be allowed to complete all research assignments using whatever sources they choose, especially if they can explain the reasons for their choices.

I explore the reasons for my change of heart in this article. In the end, I believe limiting access to Westlaw and LEXIS creates more problems than it solves.

Limiting Access Is Irrelevant

Limiting students’ access is increasingly irrelevant; nearly all of the most important databases and functions available on Westlaw and LEXIS are now available free on the Internet. This is probably the best reason for allowing students immediate access to Westlaw and LEXIS. For instance, the federal government and many state governments maintain Web sites where users can access statutory or case law databases. Thomas, a Web site maintained by the Library of Congress, has databases that contain federal legislative history.¹ The United States Supreme Court itself very recently announced that it is opening its own Web site, where the public will have access to its decisions.

Many commercial Web sites not only maintain legal databases themselves, but also collect and provide links to databases maintained by governmental and educational entities. These sites, better known as “portals,” are similar to Westlaw and LEXIS in that they allow access to multiple legal databases through one Web site. Perhaps the best known of these portals is FindLaw.² While the databases available through these Web sites lack the editorial enhancements offered by Westlaw and LEXIS, such as West’s headnotes for cases, they typically do allow users to conduct free-text searches of legal databases in much the same fashion they can search a database on Westlaw or LEXIS.

Westlaw and LEXIS are not completely irrelevant, of course. The citators available on these services—KeyCite® and Shepard’s®—are important tools not freely available on the Internet. However, even these citators may not be essential. For instance, for a student to find every case in a given jurisdiction that has cited a particular case, all the student need do is run a free-text search in a case law database for that jurisdiction using the name of the case. Assuming that the database is up-to-date, the search should list every case that a citator would. The list admittedly would not describe the treatment the

¹ Library of Congress, Thomas: Legislative Information on the Internet (visited Apr. 15, 2000) <<http://thomas.loc.gov/>>.

² FindLaw (visited Apr. 15, 2000) <<http://www.findlaw.com/>>.

cited case received in the citing case, as KeyCite and Shepard's would. However, as I teach my students, reliance on these descriptions alone is at best risky. Students should read the citing cases for themselves.

Limiting Access Is Ineffective

Password limits often prove ineffective. Each fall representatives for Westlaw and LEXIS explain that the passwords they distribute to our students will provide the students with only limited access until a specified date, at which point the limitations will be removed. However, experienced teachers have learned that supposedly limited-access passwords have in fact allowed students full access. This problem is magnified when some, but not all, students have such access; students with limited access naturally feel that they are at a disadvantage.

I do not believe that the representatives with whom we deal intentionally mislead us. Rather, the problem is due to a lack of quality control at the home office. Either the passwords are delivered to the representatives without the limitations, or, if they are delivered with limits, the limitations are later deactivated prematurely at the home office unbeknownst to the representative. The bottom line is that once the passwords are in the students' hands, law faculty no longer control the access students have to the databases and functions on Westlaw and LEXIS. And, as experience has taught, West Group and LEXIS have no interest in limiting students' access to their services.

Limiting Access May Interfere with Goals of Non-LRW Faculty

Limiting students' access to LEXIS and Westlaw runs the risk of interfering with the goals of non-legal research and writing (LRW) faculty. Other faculty who teach first-year students want those students to have access to Westlaw and LEXIS at the beginning of the year. They often assign students to read cases or other authorities that are not in the students' casebook. Understandably, it is far easier to provide students with a citation and expect the students to find the

authority on their own, using Westlaw and LEXIS, than it is to make copies of the authority.

The risk of interfering with the interests of other faculty by denying students access to Westlaw was heightened during the 1999–2000 school year, due in large part to West's decision to integrate Westlaw with The West Education Network® (TWEN®). This online service allows law school faculty to create Web sites for their classes. For the 1999–2000 school year, students could access TWEN only by using the same passwords they used to access Westlaw. The main advantage of tying TWEN to Westlaw for students and faculty is that once students have entered the faculty member's Web site, they can link directly to an authority within a Westlaw database without entering another password. Because most law faculty who used TWEN during the 1999–2000 school year began using it the first day of class, students of those faculty needed Westlaw passwords the first day of class. If some first-year students are given access to Westlaw, fairness dictates that all first-year students be given access to Westlaw, even if some of those students are not taking a class from a faculty member who is using TWEN.

LEXIS offers a service similar to TWEN, called Virtual Classroom. In contrast to TWEN, for the 1999–2000 school year students could access Virtual Classroom even if they did not have a password. However, this distinction does not really mean that it is possible to delay distribution of LEXIS passwords to students. First, just as TWEN allows students to hyperlink to an authority within Westlaw, Virtual Classroom allows students to link to an authority in a legal database maintained by LEXIS. Before they can do this, however, students must enter a LEXIS password. Thus, even though students do not need a LEXIS password to enter a faculty member's Web site on Virtual Classroom, students do need one to link to any authority that is cited on the site. Second, once students are provided with Westlaw passwords for TWEN, the same students must be provided with passwords to access the LEXIS research service.

“Limiting students' access to LEXIS and Westlaw runs the risk of interfering with the goals of non-legal research and writing faculty.”

“Rather than limiting students’ access to Westlaw and LEXIS ..., I recommend that we teach research strategies for online sources at the same time we teach research strategies for print sources.”

Print Resources Are Becoming More Scarce

Limiting students’ access to Westlaw and LEXIS is becoming increasingly more difficult to defend as print sources become more scarce. Many law school libraries now order fewer copies of print sources, largely, if not totally, in response to the fact that many of these same sources are available online through Westlaw and LEXIS. For instance, law libraries have decreased their subscriptions to Shepard’s. The resulting scarcity of print sources frustrates students who are asked to complete research assignments without using an online source.

Limiting Access Can Lead to the Appearance of Unfairness

Limiting students’ access to Westlaw and LEXIS can lead to the appearance of unfairness. Many law schools ask Westlaw and LEXIS to provide first-year students with limited access in the fall, and then to expand that access to full access in the spring. Under this system, students who complete but do not pass LRW in the fall return the next year to retake the class with full access to Westlaw and LEXIS. First-year students, rightly or wrongly, perceive these returning students to be at an advantage. A related problem arises when first-year students become friends with second- or third-year students who have full access. The first-year student in this situation is naturally tempted to “borrow” the friend’s password. I may be overstating the problem, but, like my students, I worry as much about the appearance of fairness in my classes as I do about its reality.

Recommendations

Rather than limiting students’ access to Westlaw and LEXIS and focusing on print sources first, I recommend that we teach research strategies for online sources at the same time we teach research strategies for print sources. Given the increasing prevalence and importance of the Internet and the number of resources available for free on the Internet, it no longer seems justifiable to delay instruction of online sources. The Internet is fast becoming the research tool of

choice in many professions. The law should be no different.

Online instruction should include Westlaw and LEXIS. However, it should not be limited to these services. Students should be educated about the availability of free resources on the Internet and about how to use these resources efficiently.

At the same time we teach students about Westlaw and LEXIS, we should also emphasize the various costs associated with using these services. Even if students have access to Westlaw and LEXIS when they enter the marketplace, their access may be limited because of the relatively high cost of these services. We should educate students regarding how they can use free online resources to supplement or supplant the traditional services and hold down their costs. Regardless of the access students will have to online sources after their first year, they still need to learn the utility of print sources. For certain kinds of research, it is still easier to use print sources. When I am researching administrative regulations, I find it far more convenient to use a print source. The print source allows me to easily move back and forth between the pages of the volume where the relevant regulations can be found. The print source also allows me to see the context within which a specific regulation appears. When I’m researching regulations online, by contrast, I experience delays moving from one regulation to the next because of the time it takes to download each regulation. In addition, context is often lost online because the online source is usually capable of displaying only one regulation at a time.

For other kinds of research, however, some combination of print and online sources is the most efficient way to research. For example, when I’m researching case law online for a particular statute, I find it convenient to have a copy of the print volume where the statute can be found sitting next to me.

Students should understand the benefits of using print sources; they should be shown that their understanding of print sources will increase their understanding of online sources. Indeed, in my opinion, teaching print sources and online sources at the same time—rather than

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separately—has the effect of increasing students’ understanding of research strategies generally. For instance, I have found that students more easily understand how to use the West Key Number System® if instruction on how to use the system in print digests is immediately followed by instruction on how to use it online.

Our goal should be to teach students how to be smart consumers of print and online resources in combination. Limiting access to Westlaw and LEXIS is not only ineffective and ultimately irrelevant, but also runs counter to this goal. Instead of limiting access, we should provide first-year students with immediate and full access to Westlaw and LEXIS, let students know about the drawbacks and benefits of these services in light of the other resources available to them, and allow them to make intelligent and informed decisions about their research strategies.

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“Our goal should be to teach students how to be smart consumers of print and online resources in combination.”

“As I investigated the MPT and learned its aims and content, I decided that it, or an exam like it, could be an effective teaching tool.”

USING THE MULTISTATE PERFORMANCE TEST IN AN LRW COURSE

BY STEVEN D. JAMAR¹

Steven D. Jamar is Professor of Law and Director of the Legal Research and Writing Program at Howard University School of Law in Washington, D.C.

The advent of the Multistate Performance Test (MPT) caused me to consider giving a final examination in Howard's first-year Legal Reasoning, Research, and Writing (LRRW) course.² As I investigated the MPT and learned its aims and content, I decided that it, or an exam like it, could be an effective teaching tool. This article retraces my thinking about it, starting with a short summary of the MPT and Howard's version of it in the Legal Research and Writing (LRW) Program, continuing with an articulation of the educational and political justifications for giving an MPT-like exam in an LRW course, and concluding with an analysis of Howard's experience with the test in spring 1999,³ the first time it was administered, and with some assessment of the results from the administration of the spring 2000 exam.

The MPT

The Multistate Performance Test was created in part to respond to concerns of the bar and bar examiners that traditional multiple-choice and

essay questions do not adequately test certain kinds of skills important to being a competent lawyer.⁴ As described by the National Conference of Bar Examiners (NCBE), the “Multistate Performance Test is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish.”⁵ It is being adopted quickly—in merely three years, at least 27 states have adopted the MPT or an MPT-type test as part of the bar exam and even more are considering adopting it.⁶

The MPT is quite different from traditional multiple-choice and essay tests. While there is some inevitable overlap in the skills tested (e.g., reasoning and issue spotting), for the most part the skills targeted by the MPT are different from those required to do well on the other parts of the bar exam. These include some of the skills necessary for the effective practice of law, particularly some that are taught in effective, modern LRW courses. As described by the NCBE:

The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for relevant principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; (6) complete a lawyering task within time constraints.⁷

On the MPT, test takers review a fact file and a small “law library” and then perform one of a variety of lawyering tasks. The NCBE's

¹ I wish to thank the LRW faculty at Howard—Jala A. Amsellem, Gregory A. Berry, Arnette L. Georges, Marvin H. Lett, and Gwen Roberts Majette—for contributing data and insights, and further I wish to thank Professor Nancy L. Schultz for her helpful comments on an earlier draft.

² LRRW is a four-credit, year-long, graded first-year course. To review the syllabus and course handbook, see Legal Res. & Writing Program, Howard Univ. Sch. of Law, *Legal Reasoning, Research & Writing Course Home Page* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/LRRWindex.html>>.

³ Steven D. Jamar, Howard Univ. Sch. of Law, Legal Res. & Writing Program, *LRRW 1999 Final Exam* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/LRRW1999FinalExam.html>> (Includes “the 1999 Final Exam given in Legal Reasoning, Research, and Writing, HUSL's LRW program's first-year course. ... The exam booklet is divided into four sections: general instructions, record, law library, and briefs filed by the attorneys representing the parties.”).

⁴ See National Conference of Bar Examiners, *Why the NCBE Developed the MPT* (visited May 6, 2000) <http://www.ncbex.org/Tests/mpt_be1.htm> [hereinafter NCBE, *Why the NCBE Developed the MPT*].

⁵ National Conference of Bar Examiners, *The MPT Multistate Performance Test, Description of the Examination* (visited May 6, 2000) <<http://www.ncbex.org/Tests/testuse.html>> [hereinafter NCBE, *Description of the Examination*].

⁶ National Conference of Bar Examiners, *Multistate Examination Use* (visited May 6, 2000) <<http://www.ncbex.org/Tests/mptstuse.html>> (chart). The first MPT was given in 1997, although both California and New Jersey gave practical skills-type tests prior to 1997.

⁷ NCBE, *Description of the Examination*, *supra* note 5. The MPT list of skills was “based in part on the ‘Statement of Fundamental Lawyering Skills’ from the Report of The Task Force on Law Schools and the Profession, ABA, July 1992 (the MacCrate Report).” National Conference of Bar Examiners, *Skills Tested by the MPT* (Dec. 22, 1999) <<http://www.ncbex.org/Tests/mptspecs.htm>>.

description of the fact file also works as a good description of the materials for a typical first-year LRW closed-memo⁸ problem:

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include, for example, transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, and lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.⁹

The library consists of two or three cases and, if appropriate, a statute, rule, or Restatement section. The cases are not necessarily real ones, though they are often adapted from reported decisions.

The NCBE describes the written document to be produced as follows:

Although it is not feasible to list all possibilities, examples of tasks applicants might be instructed to complete include writing the following: a memorandum to a supervising attorney; a letter to a client; a persuasive memorandum or brief; a statement of facts; a contract provision; a will; a counseling plan; a proposal for settlement or agreement; a discovery plan; a witness examination plan; a closing argument.¹⁰

The Howard LRRW final exam was modeled

after the MPT, but with some significant differences derived from my sense of what is needed for an effective evaluative and teaching tool. By placing the problem in a real jurisdiction, the exam could use actual statutes and court decisions, not fictitious ones. I also wanted a test that was harder than the MPT and that would spread the class more, so Howard's LRRW exam had a somewhat more complex set of documents from which facts had to be extracted and a larger library than is typical for the MPT. In order to be able to work through the materials thoughtfully, students were given four hours for the exam, as contrasted with the MPT's 90 minutes.¹¹ The LRRW final exam was essentially an LRW closed-memo assignment to be done in four hours instead of the typical two or three weeks. The final exam counted for 10 percent of the final grade.¹² This was approximately the same weight given to each of the main LRW writing projects for the year.

Justifications for Giving an MPT-Type Exam in LRW

The question is not whether teaching practical lawyering skills, including the MPT-tested skills, is appropriate—the unequivocal answer is yes. Rather, the question is whether preparing students to do these same tasks in a time-pressured setting is valuable not only to help students prepare for the MPT,¹³ but also as a way to teach the content of the LRW course. Again, my answer is yes. Although the existence of the MPT makes the decision to give an MPT-type final easier, giving such a timed skills test is justifiable for other educational and political reasons.

One educational justification relates to the importance in the practice of law of being able to

“While certainly not the full measure of a lawyer, being able to analyze situations quickly, read and understand unfamiliar law quickly, and develop reasoned and reasonable responses to problems quickly are attributes of the most effective lawyers.”

⁸ In the LRW community a “closed memo” problem refers to one in which the sources of law that the students are to use have been restricted to a closed set of materials chosen by the professor. Among the reasons to use a limited universe of legal sources are to allow the student to focus on analysis and synthesis in a controlled way and to make class or small-group workshops easier since all of the students will have read the same material at the same time. The adoption of the closed-universe-based MPT adds another reason to use closed-universe problems in LRW courses, i.e., to familiarize students with this sort of problem.

⁹ NCBE, *Description of the Examination*, *supra* note 5.

¹⁰ NCBE, *Why the NCBE Developed the MPT*, *supra* note 4.

¹¹ The 2000 LRRW exam was shortened to three hours with a 16-page booklet, compared with four hours and a 22-page booklet used in the 1999 LRRW exam.

¹² Sixty-five percent of the grade was based on writing assignments, 5 percent on an oral argument, 5 percent on an objective test (which included some citation questions), 10 percent on a collection of research exercises not tied to the writings, and 5 percent on class participation and other discretionary factors.

¹³ See Nancy L. Schultz, *There's a New Test in Town: Preparing Students for the MPT*, 8 *Perspectives: Teaching Legal Res. & Writing* 14 (1999).

“Thinking through the skills they have learned in a holistic fashion and then developing their own strategies for employing the skills quickly can help students integrate and internalize their learning.”

work quickly and accurately. While certainly not the full measure of a lawyer, being able to analyze situations quickly, read and understand unfamiliar law quickly, and develop reasoned and reasonable responses to problems quickly are attributes of the most effective lawyers. Lawyers who are masters of their craft, just like other masters of their respective arts, be it playing the guitar, cooking, playing soccer, or performing surgery, are able to perform not only better, but faster. A limited-time exam tests students on their level of mastery as well as on their basic ability to use the tested skills.

Giving a timed exam not only allows assessment of mastery, but also may help bring about greater mastery. After students complete a semester or year of learning the skills, a test may induce them to review the course. Thinking through the skills they have learned in a holistic fashion and then developing their own strategies for employing the skills quickly can help students integrate and internalize their learning. Knowing that the test is time-limited may induce students to go beyond merely learning the skills to reach a level of mastery that allows them to use the skills quickly and instinctively.

There is some anecdotal evidence supporting this expectation. After the 1999 LRRW final exam, a few students reported that they felt they finally understood what was expected when they reread the textbook and their notes in preparation for the test. They would not have done this end-of-course review without a test looming. One student stated that the advice sheet (concerning how to take the test)¹⁴ distributed before the exam helped him crystallize the legal reasoning paradigm and the problem-solving approach to lawyering.¹⁵

¹⁴ See Steven D. Jamar, *Tips for Taking the Multistate Performance Test* (visited May 6, 2000) <<http://www.law.howard.edu/lrw/MPBExamTips.html>>. The list, which covers “general skills being tested . . . competencies required for answering an MPT-type exam question . . . [and] recommended process for taking an MPT-type exam,” was created from various sources, including the MacCrate Report, the NCBE Web site, and a presentation made to Howard faculty by Elliot Milstein and Ann Shalleck, both professors at American University Washington College of Law who serve on the committee that drafts MPT problems.

¹⁵ See Richard K. Neumann, *Legal Reasoning and Legal Writing* § 20.3 (3d ed. 1998); Stefan H. Krieger et al., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis*, ch. 2 & § 4.1 (1999).

In addition to inducing review, the test can also help students master the material because taking a well-crafted skills test can itself be instructive. Since the students need to analyze the facts, analyze and synthesize the law, and produce an end product in an intense, short burst of effort, students may see relationships between the facts and the law and problem solving in ways they may have missed before.

A related educational justification derives from how people learn. When a person is learning a piece of music, a technique sometimes used is to play it slowly (to learn the notes and fingering), then very quickly (to cement and internalize the learning), and then at the right tempo. After playing it too fast, it seems easy at the right speed. This same phenomenon exists with video games—after playing one at a higher, faster level, one finds that the lower, slower levels are easy. Similarly, the intense, pulsed experience of a test can help cement the knowledge learned over the year.

Another educational justification relates to giving feedback to the students after the exam is taken. Some mistakes may show up more clearly on a timed exam than on an out-of-class effort. For example, a student who has difficulty stating the law clearly and simply will almost certainly have the same difficulty on the exam and it may be even more visible to the student in the exam context.

Reviewing students’ work to help them see their writing and reasoning strengths and weaknesses is not unique to reviewing exams—the value of review exists for all written work. What gives the timed-exam review special value is that the student may find the feedback on exam writing itself to be more readily and obviously transferable to other essay exams. Furthermore, exam-writing feedback from LRW faculty members may have across-the-board value that will be transferable to exams in other courses because they know each student’s writing and reasoning intimately, having worked with the student throughout the year, and are specially skilled at providing specific feedback on writing problems per se.

The exam has educational value not only for the students who take it, but also for future students. LRW faculty members can incorporate

it into their teaching in the following year. Something as simple as being able to say to the students, “Look at the final exam from last year. By the end of this year you should be able to do in just three hours what we are teaching this year” will motivate some students. Furthermore, using a past year’s exam for in-class exercises—perhaps timed ones—will also reinforce the relationship between class sessions, writing assignments, and the final exam.¹⁶

Another educational justification relates not so much to the students directly as it does to the information that the LRW faculty member receives. The test can serve as a diagnostic tool both for assessing individual student performance and for assessing the effectiveness of the course itself. Although the primary means to assess student accomplishment and course effectiveness properly remains the regular writing assignments, useful information can be learned from student performance on an MPT-type examination. The final exam provides a useful, unique window because, unlike most LRW assignments in which students can discuss the problem among themselves and even in class workshops, on the exam each student must do all of the reading, thinking, and writing completely on his or her own.

There are at least two other educational justifications for giving the test. One is that it is legitimate to help students prepare for the bar exam by familiarizing them with the sort of exam questions they will face. A student should not fail the bar exam because of a lack of familiarity either with the skills and knowledge being tested or with how they are being tested. The bar exam should distinguish on the basis of who knows the law and possesses the necessary skills and who does not, rather than on the basis of unfamiliarity with the form of the test. Familiarizing students with the MPT by giving them one or more MPT-style tests in law school helps make the bar exam a more fair test of what it is seeking to test.

The final educational justification relates to the personal accountability of the individual

students. Many LRW programs (including Howard’s) use cooperative learning techniques and provide a large amount of help through class workshops, individual conferences, and modeling processes of analysis and synthesis for regular writing projects. These approaches are sound when focusing on learning the skills. However, they have a weakness—the degree of mastery by a particular student can be masked by the amount of help the student received in preparing the writings.¹⁷ The timed exam may help identify the students who need to develop their ability to do the work more independently.

In addition to educational justifications, there are political reasons for giving such a test. Giving a final exam as in other courses makes LRW seem less different, less outside the curriculum, than LRW may otherwise seem. Another political justification is that by giving an MPT-type exam, the LRW program is doing the students and the law school a service that it is well positioned, even ideally positioned, to provide. Law schools are expected to prepare students for the practice of law and, often less explicitly (except from the student’s perspective), are also expected to prepare students to pass the bar exam. With the advent of the MPT, law schools must adapt their curricula to ensure that graduates possess the skills necessary to practice law and, to the extent that the MPT tests what it purports to test, to pass the MPT. Having an MPT-style test given through a mandatory LRW program ensures that all students will have had at least one exposure to such a test. These political justifications are not sufficient grounds in themselves to give these sorts of tests, but they add some weight to the scales.

Howard’s Experience with the LRW Final Exam

Based on Howard’s first year’s experience with an MPT-style final exam, I consider the exam to be a valuable addition to the program. As discussed in the previous section, I expect it to

“The test can serve as a diagnostic tool both for assessing individual student performance and for assessing the effectiveness of the course itself.”

¹⁶ The value of past exams does not have to be limited to future LRW students. If past exams are made generally available to all students, they can use them to become familiar with such tests and can use them as study aids.

¹⁷ This concern is one reason that some programs have strict rules prohibiting collaboration. However, our experience at Howard has been that intensive guidance from LRW faculty and teaching assistants as well as the ability to work with peers significantly improves the pace and quality of learning for most students.

“Other than the grades on the exam being generally a few points lower than on end-of-year papers, the scores on the test correlated fairly well with student performance in the course overall.”

become a valuable teaching and learning tool. As discussed below, I also expect it to be helpful to LRW faculty as a diagnostic tool not only for particular student problems, but also for the course as a whole.

The exam answers for both the 1999 and 2000 exams showed some positive things. For example, nearly all of the students demonstrated at least basic ability to use the general Neumann paradigm we teach for structuring legal arguments (state the conclusion, state the rule, develop and explain the rule, apply the rule).¹⁸ In addition, most of the students demonstrated at least basic competence in analyzing the facts and law and in explaining how they fit together in the assigned task.

Nonetheless, the students performed overall somewhat less well than I had hoped. The 1999 exam will be considered first and in some detail. Assuming that a score of 70 would be a passing grade on the bar exam, and assuming that the grading by Howard’s LRW faculty approximates that of the bar examiners, 12 percent (nine of 77 students for whom the data are being examined) would not have passed. Another 10 percent (eight students) were uncomfortably close to the 70 mark. This means that approximately one-fifth of the class is performing at a level below what is acceptable for the bar exam and well below the level we target for the course. This sobering number may be helpful in motivating students to work more diligently on their LRW skills and may encourage the LRW faculty to develop exercises that target the lower end of the class for work on these skills.

The students who performed poorly generally did so in one or more of the following ways: (1) using factual details, (2) providing complete explanations, or (3) understanding the legal issue and law. In addition to those weaknesses, too many of the students still had (and have) writing weaknesses that were more visible on the exam than in drafts they could write and rewrite outside of class. These writing weaknesses adversely affect student performance on all law school essay tests.

Not too surprisingly, the students did less

well overall on the exams than they did on the out-of-class assignments. Indeed, the number who did poorly (12 percent received a D or F on the exam) far exceeds the number receiving comparable grades in the regular written assignments by the end of the year (3 percent). This suggests to me that too many students are dependent upon help from others (both LRW faculty members and classmates) for analysis of the law for their regular LRW papers and that they still need substantial time to reflect on and recheck their work. (I should note that most of the students felt that four hours was more than sufficient for the exam; some finished in under three hours—but a few students felt that the four hours was not enough.) They have not yet learned to analyze and synthesize the law quickly and well enough on their own.

Other than the grades on the exam being generally a few points lower than on end-of-year papers, the scores on the test correlated fairly well with student performance in the course overall. Nonetheless, fewer scores corresponded with the overall coursework than I had expected. To determine the extent to which the exam scores were consistent with the rest of the graded material, I initially set a limit of plus or minus five points as a measure. That is, if the adjusted exam grade¹⁹ was within five points ($\frac{1}{2}$ grade) of the final course grade, I considered them to be consistent. On this standard, 53 percent (41 of 77) of the grades on the exam were consistent with the final grade. Using nine points (just under a full grade difference) as the consistency measure cut-off point results in 74 percent of the exam grades being within one letter grade of the overall grade.

The number of exams that deviated by a full grade or more (10 points or more) from the final grade was 20 of 77, or 26 percent. Four of the grades (5 percent) deviated by two full grades or more (20 points or more). Of this last category, three of the grades on the exam were higher (A instead of C) and one was lower (C instead of the

¹⁹ I adjusted the exam grades so that the average of the exam grades and the average of the non-exam grades were the same. This reduced the effect of potential differences in grading standards across sections and reduced the differences based upon the type of project.

¹⁸ Neumann, *supra* note 15, §10.1.

overall A). The extremely divergent lower grade seems to me to be explainable by simple exam panic. The three other extremely divergent higher grades are more puzzling.

Performance on the 2000 final exam was similarly somewhat disappointing, as reported by the Howard LRW faculty.²⁰ Though students grasped the problem and the law, they did not address the problem with sufficient sophistication and attention to detail. Part of this is related to their lack of actual practice experience, but the bulk of it seems to show that we as faculty have some additional work to do to inculcate certain attitudes and values toward this sort of legal work if our students are to succeed at the level at which they are capable. The students took the test seriously and diligently applied themselves, but were not as attuned to the need for attention to fine distinctions as they need to be. This year we also required them to draft a contract paragraph. We introduce contract drafting in the first year, but do not expect them to master it. My hope is that when students know they may be tested on drafting, at the end of the year and on the bar exam, they will be motivated to work harder on learning some basic principles of drafting.

Conclusion

Testing students in a timed setting is a legitimate means of assessment and instruction in LRW courses, provided, of course, that it is not the sole means of assessment. I believe that over time, as students come to expect the test and to prepare for it, their performance on it and, I would expect, on the MPT will improve. To the extent the exam actually tests a student's ability to analyze and pull together facts and law quickly, and I believe it does, improvement on the test should reflect improvement by students in mastering these very important lawyering skills.

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²⁰ I do not yet have statistics on, nor have I personally reviewed, the 2000 exams. The information about student performance contained in this paragraph is based on conversations with the LRW faculty who graded the 2000 LRRW final exam.

“[L]ive sites best demonstrate how the Internet works (or doesn’t work!).”

“INTRODUCTION TO THE INTERNET”: A TRAINING SCRIPT

BY DIANA GLEASON

Diana Gleason is the Law Librarian at Davis Wright Tremaine LLP in Portland, Oregon.

Technology for Teaching ... is a regular feature of Perspectives, designed to introduce and describe the ways in which teachers of legal research and writing are using technology to enhance their teaching. In this issue, we present a training script designed for teaching Internet research to attorneys and staff in a law firm setting. Readers are invited to submit their own “technological solutions” to the editor of the column: Christopher Simoni, Associate Dean for Library & Information Services and Professor of Law, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611-3069, phone: (312) 503-0295, fax: (312) 503-9230, e-mail: csimoni@nwu.edu.

I invited the attorneys and staff members in my firm to attend a lecture titled “Introduction to the Internet” in November 1998. This article consists of the script I used and the URLs¹ for the Web sites visited during the presentation. The lecture was followed by a weekly hands-on class that focused on the Web evaluation and search methods provided in the latter part of the script. The class was given for several months until approximately one-third of the firm had been trained on the Internet. Individual training was also provided to those who could not attend the hands-on class.

I decided to use live Web sites instead of a PowerPoint presentation for two reasons. First, live sites best demonstrate how the Internet works (or doesn’t work!). Second, live access provides the ability to link to and search other sites if there are questions for which such a search would be useful. However, if you are not up to living dangerously, you can create a PowerPoint demonstration of the sites. At the very least, bookmark sites first to avoid typing pauses in the lecture.

Whether static or live, the use of Web sites

with the script serves several functions. It demonstrates that much of the information provided in the lecture has been obtained from the Internet, it gives credit to the information source, and it allows for collaboration by having another person operate the equipment. Finally, using Web sites provides a constant stream of action—sometimes very entertaining—to keep the audience’s attention. One caveat: watch out for being upstaged!

Introducing the Internet

1. Davis Wright Tremaine LLP

www.dwt.com²

I am very pleased to see such interest in the Internet. And well we should be interested. The Internet is changing the way we do business, the way we communicate with each other, and the way we practice law. It’s changing our expectations about information, freedom of speech, and how we view politics.

2. Report of the Office of the Independent Counsel

<http://icreport.access.gpo.gov/report/2toc.htm>

For instance, does the name Monica Lewinsky mean anything to you? Some experts believe that President Bill Clinton’s relationship with Lewinsky would not have had such political ramifications were it not for the Internet. The story was first published on the Internet, the Internet allowed for full coverage of Kenneth Starr’s report, and traditional media had to follow suit to compete. But nothing can compete with the Internet as a communication medium.

3. President’s Information Technology Advisory Committee, PITAC – Interim Report to the President: Information Technology: Transforming Our Society

www.ccic.gov/ac/interim/section_1.html

Print, CD-ROMs, video, television, radio, fax, and the telephone are being supplemented and, in some instances, replaced by the Internet. Shopping, banking, and even medical diagnosis are available online. In legal practice, the Internet is used to file cases, briefs, and trademark applications, for voir dire preparation, for due diligence searches, and to discover information uncovering fraud.

¹ The URLs were updated as of March 15, 2000.

² Use the Internet or intranet page for your institution.

4. Next Generation Internet (NGI) Initiative, *Potential NGI Applications* <www.ngi.gov/apps>

These uses of the Internet do not begin to address the research being done on the Internet in biomedicine, environmental monitoring, manufacturing, engineering, education, national security, and energy.

5. Barry M. Leiner et al., *A Brief History of the Internet* <www.isoc.org/internet-history/brief.html>

How did the Internet arise? In 1957 the Soviet Union launched Sputnik, the first artificial earth satellite. The potential a satellite gave the Russians to command and control missiles and bombers during a nuclear attack was not lost on the U.S. Department of Defense. In response, the federal government formed the Advanced Research Projects Agency (ARPA) to establish the United States as a leader in science and technology for military applications. Charged with the task of creating a more sophisticated communication system than that of the Russians, ARPA developed a backbone of communication centers with a loose association of networks hooked up to computers that share information. The idea was that if a command were sent to a communication center that had been decimated by a nuclear attack, it would automatically be shunted on until it reached its destination.

6. CNET, *What Is the Internet?* <www.cnet.com/Content/Features/Techno/Networks/ss01.html>

Over the next 40 years, technology made it possible to hook up millions of computers to a loose association of thousands of networks, and advances in software made it possible for just about anyone to access information on the Internet. During this time, government agencies, educational institutions, and commercial enterprises worked together to support Internet research. Yet no one person, company, institution, or government organization owns, governs, or has a controlling interest in the Internet. It remains a collaborative, collective effort. What began as a communication system for use in a nuclear attack became, in the words of Judge Dalzell in an opinion holding the Communications Decency Act unconstitutional, “the most participatory

marketplace of mass speech that this country—and indeed the world—has yet seen.”³

7. Philip Greenspun, *Why Bill Gates Is Richer Than You* <<http://photo.net/philg/humor/bill-gates.html>> Much has happened since Sputnik. Global leadership has shifted from a measurement based on military strength to a measurement based on economic strength. And what determines economic strength? Having, knowing, selling, and using science and technology. And what software is almost ubiquitous, and who is the richest man in the world? Microsoft® Windows® and Bill Gates, respectively. But the rapid increase in Internet use may change this picture.

8. CommerceNet, *CommerceNet and Nielsen Media Research Issue Results of Spring 1999 Internet Demographic Survey: Electronic Commerce Grows 40% in Nine Months with 55 Million Internet Users Shopping Online* <www.commerce.net/news/press/ann061699.html>

According to the Nielsen Media research report of June 17, 1999, nearly half of the population of North America uses the Internet.

9. A.C. Nielsen, *Who Is Using the Internet?* <<http://acnielsen.com/products/reports/netwatch/pg2.htm>>

Approximately 25 percent of the U.S. population is online.

10. CNET, *Who Controls the Net?* <www.cnet.com/Content/Features/Techno/Networks/ss06.html>

If you’ve managed to stay awake during this history lesson, you will have a head start toward knowing how to search the Internet. Knowing that the Internet is a largely unregulated global community providing access by anyone with an Internet connection to a wide range of information regardless of location helps to explain why the core competencies in searching the Internet require creativity, problem-solving ability, intuition, sociability, active learning, and the wisdom to know when to give up!

³ American Civil Liberties Union v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

“[U]sing Web sites provides a constant stream of action—sometimes very entertaining—to keep the audience’s attention.”

Advantages

What advantages do legal professionals gain by using the Internet? Let's look at a few.

11. Washburn University School of Law, *StateLaw: State Govt. & Legislative Info.* <www.washlaw.edu/uslaw/statelaw.html>

- **Timely access to original sources** —

Every state has one or more Web sites on which it typically publishes the most current appellate court opinions, statutes, legislative information, agency documents, and attorney general opinions. Many federal agencies also have Web sites, and there is discussion that someday federal agencies will publish *only* on the Internet, saving printing and distribution costs and providing more timely public access to government documents.

- **Timely communication** — How many of you check your e-mail first thing in the morning? Instant communication is already revolutionizing how we conduct business, and the Internet revolutionized timely communication by changing our expectation of access to the most current and complete information.

12. Chicago-Kent College of Law, *United States Court of Appeals for the Seventh Circuit* <www.kentlaw.edu/7circuit/1995/95-1292.html>

In a 1995 case from the Seventh Circuit, the court rejected the plaintiff's claim of the great burden imposed to uncover fraud, saying the information was easily accessible on the Internet.⁴

13. INFACT, *Campaigning for Corporate Accountability* <www.infact.org>

In Minnesota, a biology professor was selected as a juror in a trial against a number of tobacco companies. After voir dire, the attorneys for the tobacco companies went online to check out an organization called INFACT to which the professor belonged. The attorneys found that INFACT was, in fact, a "staunchly anti-tobacco" group. The attorneys made a motion to exclude for cause, which the county district court denied.

- **The Internet is an inexpensive source of information** — While the Internet is not a substitute for all print and online materials, it does give a heck of a punch for your information dollar, particularly as a general information and

communication tool.

14. *The Internet Lawyer* <www.internetlawyer.com>

- **Some information is only available on the Internet** — Issues in new areas of the law—the Internet or computer and telecommunications law— as well as new issues in existing areas of law are readily found on the Internet. Moreover, a growing number of e-journals, discussion groups, and newsletters are found only on the Internet.

15. Microsoft <www.microsoft.com>⁵

- **Use the Internet to keep up with your clients and other professionals** — It is good business practice to be familiar with your clients' business by looking at their Web sites and to know what information they and their adversaries are accessing on the Internet.

Disadvantages

16. White House home page <www.whitehouse.net>

The most important reason not to use the Internet is that the information is not always credible or accurate. Every Web site must be evaluated to make sure it is objective, authoritative, accurate, authentic, and current. Here are questions to ask and things to look for when evaluating a Web site:

Ask ...

- Is the information authoritative so that it can be cited in court?
 - Is it from an authoritative jurisdiction?
 - Is the case, law, or other information the most current?
 - Can a slip opinion be cited in your state?
 - Is the information authentic? Were the persons who published on the Internet who they said they were?
 - Does the information appear to be objective, opinion, or propaganda?
 - Is the information source reliable?
- Look for documentation of ...
- Author's or publisher's credentials: education, experience, other publications, cited in other sources, reliable government agency, educational institution, commercial enterprise
 - Jurisdiction
 - Publication date

⁴ Whirlpool Financial Corp. v. GN Holdings, Inc., 67 F.3d 605, 610 (7th Cir. 1995).

⁵ Use a client Web site of your choice.

- Date of the most recent update and frequency of updates
- Database coverage
- Rules on whether slip opinions can be cited as authority
- Names, addresses, and contact information for persons, agencies, institutions, and businesses
- Links to other information about contacts
- Objective information: information that appears well researched and supported by evidence, reasonable assumptions, and an objective and impartial point of view
- Integration of Web sites, ease of use, accessibility, and customer support

17. CNET, *Internet Errors Explained*
<www.cnet.com/Resources/Tech/Advisers/Error/index.html>

The second disadvantage to using the Internet is that it requires a computer system that works! Power outages, system failures, server crashes, bandwidth blues, underpowered computers, and other technical difficulties can preclude Internet access. Next Generation Internet or Internet 2 should help alleviate some of these problems, but technology is not yet foolproof.

The third disadvantage is that not all information is available on the Internet, notwithstanding the popular misconception to the contrary. Typically, archival materials and full-text secondary materials, such as encyclopedias and treatises, are not on the Internet. This is changing because of two developments: (1) better screen resolution, which makes online reading easier on the eyes, and (2) authors publishing “carrots” on the Internet with the hope of hooking readers into subscribing to other materials.

18. Scroll down on Web site 17, CNET, *Internet Errors Explained*, to show 404 example

The fourth disadvantage is that information on the Internet can be difficult or impossible to locate. The Internet has been likened to a library with all the books on the floor. Accessibility is hampered for three main reasons: (1) the Internet is not cataloged, although there has been talk of such a project; (2) Internet indexes can be haphazard and are only as good as the data available and the skills of the indexer; (3) sites can be volatile: they change addresses, are under

construction, need a password, or are fee-based, or the host or proxy servers may be busy or down.

The fifth disadvantage to using the Internet is that not all of it is free. You need to consider the cost of hardware, software, research time, Internet service provider (ISP), and communication line, among other things. You also need to perform a cost/benefit analysis to determine the best research tool: some Internet sites charge for premium information. Westlaw or LEXIS, print, or CD-ROM might be the better search tool depending on what you need and how fast you need it.

19. Center for On-Line Addiction
<www.netaddiction.com>

The sixth disadvantage is that it can become addictive!

Search Methods

20. ZDNet, *Net E-Z User, Getting Around the Web*
<www.zdnet.com/yil/content/surfschool/howto/basic/basicoc.html>

There are more than 300 million uncataloged pages on the Internet, and the number is growing as we speak. How do you find anything?

[Conduct a show-of-hands survey of the participants]:

- How many have been on the Internet?
- How many have found what they were looking for on the Internet?
- How many have been frustrated by the Internet?

The easiest way to find something is to have a direct address to the site. One finds the URLs for sites everywhere—radio, television, newspapers—and some of the most useful sites are produced by special-interest groups, whether professional or recreational. Much of the information in this presentation was found on Web sites I got from the law library listserv. There is a Web site in the bibliography for finding listservs. There are thousands to serve your every need.

21. Search Engine Watch
<www.searchenginewatch.com>

Search engines are another way to find information. A search engine is a discrete database with its own index and search term capabilities. Its advantages are relevancy ranking and

sophisticated syntax.

Relevancy ranking — The problem with searching on computers is that they're not very bright when it comes to understanding meanings of words. What computers can do, and do very well, is count. Computers use an algorithm, or mathematical formula, to count the number of times a search term appears in a document and then applies a statistic. This is called relevancy ranking. There is software developed that allows natural language searching, but it still works on the same principle. Relevancy ranking is a useful tool but not foolproof.

Relevancy ranking can be skewed by "spoofing" and paying for ranking. Spoofing is the act of putting frequently searched words such as "sex" in the white space of a document during the construction of the Web site. The result is that the word is not visible but it is still searched. For instance, in a search for sexual harassment, many irrelevant documents that have to do with sex and not sexual harassment will be retrieved. Some search engines say they use "anti-spoofing," the practice of assigning a document a lower relevancy ranking if it's suspected of being spoofed, to ensure that such documents are not retrieved by as many searches.

Syntax — Syntax is the structure that binds words into a sentence. In online searching, syntax refers to the structure needed for software to interpret search terms. Search engines use tools such as Boolean operators and quotations to form exact phrases and meta-tags to limit searches by fields such as domain, date, or language. The term Boolean comes from George Boole, a 19th-century mathematician who had the idea of representing information with only two logic states: true and false. Thus was created the rudiments of the binary system upon which electronic circuits and, ultimately, computer processing units are based. Today Boole is known for the Boolean operators AND, OR, and NOT.

22. FindLaw <www.findlaw.com>

Meta-sites, meta-indexes, meta-databases — The newest search strategy uses huge indexes and multiple search engines. These sites profess to "search the Web" by running a search query through a number of search engines, compiling the results into a relevancy ranking, and sending them back to the searcher in a cohesive manner.

Indexes can cover either general or specific information, such as law. Examples of legal meta-sites are FindLaw, CataLaw, Cornell Law School's Legal Information Institute, and LawRunner. Typically, these sites provide links to international, federal, state, and local law; judicial opinions; government agency information; law journals; bar and legal practice directories; bar associations; and law library catalogs.

Meta-indexes are a great tool if you don't know where to start, or if you need unique information and your search terms are simple. The problem is that they can't handle complex searches like search engines because they reduce the search to its simplest form so that multiple search engines can read and translate it.

Guessing —

- Determine name of subject, search engine, commercial enterprise, government agency, educational institution
- If not finding by name, try abbreviation or acronym (www.kbb.com)
- Add domain name: gov, edu, com, mil, net, org, int (international)
- 404 backup: try backing up when address isn't found:
 - drop the file name (.html), directory names (between slashes) to stem name
 - typical stem name: machine name (www), institution identifier, domain name

Conclusion

The only way to learn about the Internet is to play around, so happy surfin'!

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WRITING TIPS...

WELL BEGUN IS HALF DONE: THE FIRST PRINCIPLE OF COHERENT PROSE

BY GREGORY G. COLOMB AND
JOSEPH M. WILLIAMS

Gregory G. Colomb is a Professor of English at the University of Virginia in Charlottesville. Joseph M. Williams is a Professor of English at the University of Chicago. Both are visiting professors at the National Judicial College. They are regular contributors to the Writing Tips column in Perspectives.

In our three earlier columns,¹ we showed you how to achieve a clear and direct style. But individually clear sentences don't much help a document that seems intrinsically disorganized or even incoherent. In fact, we can work our way through dense prose if we understand the overall structure of a document. Fortunately, we can apply the same general principles we used to explain the style of individually clear sentences to the organization of paragraphs, sections, even whole documents: How you begin those units of prose strongly influences your reader's experience of clarity and coherence.

As you will recall, you can generally predict how readers will judge the clarity of your sentences by looking at how they begin. In their first few words, they want to see four things:

1. Readers want to see a short, specific, relatively concrete subject that names a major "character" in the story you are telling, whether that character is a flesh-and-blood human (e.g., Smith, plaintiff, Congress) or a familiar abstraction (e.g., recovery in equity, constitutional protection, fraudulent misrepresentation).

2. They want each subject to be familiar, or at least unsurprising; the subject should name something that they expect to see in the context of

your subject matter, either because it is common knowledge or because they've seen it mentioned in immediately preceding sentences.

3. They want that short, specific subject to be followed immediately by a verb expressing a specific action associated with that subject (not vague words like have, make, do, constitutes, is, are).

4. Finally, they want to see in the subjects of those sentences a relatively consistent, limited set of characters; they don't like widely varying subjects in a series of sentences.

You can test those four principles on the following two passages. The first is taken from a patent application; the second is our revision. You can easily see which one fails, if you just look at the way they begin, particularly at their subjects and verbs. Here's the original:

Design improvements for fixed-bed adsorption systems depend on the development of reliable mathematical models for prediction of the entire cycle of bed performance, because large energy requirements for thermally regenerated beds make complete, regeneration rarely possible and reverse flow heating leaves a heel of undesorbed solute remaining in the bed. The determination of optimal operating conditions involves an assessment of the extent of heel for maximum energy efficiency.

Here's our revision:

To *design* more efficient fixed-bed adsorption systems, we must develop reliable mathematical models to predict how beds perform during an entire cycle. Since beds that are regenerated thermally require large amounts of energy, they are rarely regenerated completely and after reverse flow heating are left with a heel of undesorbed solute. We must assess the extent of heel for maximum energy efficiency to *determine* a bed's optimal operating conditions.

We could use this column to continue to discuss more details of sentence style, from punctuation and rhythm to word choice and grammar. Instead, we'll devote this and the next several columns to presenting principles for organizing individually clear sentences into larger coherent units, from paragraphs to sections to whole documents. The specific principles differ from those we apply to sentences, but they are basically the same. They all demonstrate the truth of the adage "Well begun is half done." Just as your readers want each of your sentences to begin with a short, specific, easily grasped subject, so do they want each of your paragraphs, subsections,

“[Y]ou can generally predict how readers will judge the clarity of your sentences by looking at how they begin.”

¹ Joseph M. Williams & Gregory G. Colomb, *Telling Clear Stories: A Principle of Revision That Demands a Good Character*, 5 Perspectives: Teaching Legal Res. & Writing 14 (1996); Gregory G. Colomb & Joseph M. Williams, *Shaping Stories: Managing the Appearance of Responsibility*, 6 Perspectives: Teaching Legal Res. & Writing 16 (1997); Gregory G. Colomb & Joseph M. Williams, *The Writer's Golden Rule*, 7 Perspectives: Teaching Legal Res. & Writing 78 (1999) [hereinafter Colomb & Williams, *The Writer's Golden Rule*].

sections, and whole documents to begin with a short, clear, compact segment that sets them up for what follows.

In subsequent columns, we'll show you how this general principle applies to the different kinds of legal writing: memos, court documents, client communications, even law review articles. In a space as short as this, we cannot illustrate our principles with whole briefs or client letters, so we'll illustrate the basic structures with shorter examples. You will have to imagine our short examples as multipage documents. And we'll begin with a single short paragraph to lay out the principles in general.

In a moment, we will ask you to read two paragraphs. If we were explaining this matter of structural coherence in the kinds of seminars we offer to law firms and court systems, we'd divide you all into two groups and ask one to read passage (1a) quickly and the other to read (1b) just as quickly. Then we'd ask the groups to answer four questions:

1. How would you rate the clarity of your passage on the "reader friendliness" scale (10 = reader friendly, absolutely clear and coherent; 1 = reader unfriendly)?
2. Without looking back, what three- to five-word title would you give the passage you read in order to inform readers about its central concepts?
3. If you had to pick out one sentence that constituted the "point" of your paragraph, which one would it be? You have five seconds to find it.
4. Suppose you had to divide this paragraph into two parts: (1) a short introductory part that "frames" what follows, and (2) the main body that follows it. Where would you make that division? (The analogy is dividing a sentence between its subject and everything that follows.)

You can roughly replicate that little experiment as you read the following two paragraphs. After you finish (1a), *quickly* assign it a rating from 1 (unclear) to 10 (clear). Then, just as quickly, answer the other three questions. (This experiment fails if you spend a lot of time rereading and thinking).

1a. There is but one case construing Section 2943, *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), and it has no application to this matter. The legislative history is not very helpful. Originally Section 2943 was enacted to allow junior lienors to ascertain the amounts owing on

property so they can protect themselves. Later the statute was amended to entitle escrow agents to receive a beneficiary's statement. It is not, however, intended to substitute for a promissory note, for it does not by its terms call for a reproduction of the note existing on the property. Under this Section, if a lender knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to provide that knowledge. It does not on its face call for a disclosure of penalty and prepayment provisions. The only statement in the statute which arguably calls for a statement of an acceleration or demand provision is subdivision (c) which requires notice of "The date on which obligation is due, in whole or in part."

1b. Under Section 2943, if a lender knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to disclose that knowledge to junior lienors, escrow agents, or buyers. Originally Section 2943 was enacted to allow junior lienors to protect themselves by ascertaining the amounts owing on property. Later the statute was amended to entitle escrow agents to receive beneficiary's statements. The only statement in the statute which now arguably calls for disclosure of an acceleration or demand provision is subdivision (c). It requires a lender to disclose "The date on which obligation is due, in whole or in part." It does not on its face require the lender to disclose penalty and prepayment provisions. Nor does the statute intend that the statement substitute for a promissory note, for it does not require that a note on the property be disclosed to a buyer. There is only one case construing Section 2943: *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), but it does not apply to this matter, and the legislative history is not very helpful.

Here are the results we generally get:

- Readers regularly rate (1a) low, typically 2–4. They also give passage (1b) fairly low ratings, but usually higher than (1a), typically 3–6. And when they see the two of them together, they elevate (1b) several more points above (1a).
- Readers of (1a) often struggle to think of a title; they come up with titles like "Section 2943," "Legislative History," or "Black v. Sullivan." Readers of (1b) regularly capture the central idea of that paragraph in titles that include the term "disclose" and often the character "lender"; the best readers come up with three central concepts: "Lender's Obligation to Disclose."
- Some readers of (1a) identify its point as the sentence in the middle beginning "Under this Section, if a lender knows ...," and they are right. But most can't find it, at least not quickly. Most readers of (1b) quickly identify the same sentence as the point of the paragraph both because it is first and because they see in it the key terms.
- When asked to divide the paragraph into

two parts, a short introductory frame and the rest, readers of (1a) disagree on where to divide it. The readers of (1b) regularly agree—right after the first sentence.

These answers show us not just that (1b) is more readable than (1a), but why. Readers assign a lower “readability” score to (1a) *because* they cannot quickly and easily answer questions 2 through 4. They cannot recall its key concepts, they cannot quickly locate its point, and they cannot identify its opening segment.

Here’s the principle: **When we begin a paragraph (or document, section, or subsection), we look for a few key pieces of information to help us mentally prepare for everything that follows.** We rarely do that consciously, of course: Most of the process of reading is unconscious. But we intuitively “know” what information we need in order to understand how a text is organized as we read it. That information consists of these three items:

- Since we read a passage better when we know why we are reading it, we want to know right away what we’ll learn or gain from it. In short, what’s its point?
- Since readable passages seem conceptually coherent, we want to know as soon as we start reading the passage what central concepts the rest of it will develop.
- We can find that information most easily when we see it all in a distinct, easily identifiable opening segment, when we can recognize where an opening ends and the rest of the development of the body begins.

If we look back at our two paragraphs, we can see why most readers rate (1b) as more readable than (1a) and why readers of both passages answer the questions as they do. First, we can more easily identify in (1b) a short, distinct unit that previews what we are about to read. In (1a), all we find at the beginning are two seemingly random sentences with little obvious connection to what follows and that what’s at stake is learning only about that case or its legislative history. But in (1b), we find the main point of the paragraph in the opening sentence, and we clearly know what’s at stake in reading it: understanding a legal obligation:

1a. There is but one case construing Section 2943, *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), and it has no

application to this matter. The legislative history is not very helpful. Originally Section 2943 was enacted ...

1b. Under Section 2943, if a lender knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to disclose that knowledge to junior lienors, escrow agents, or buyers. Originally Section 2943 was enacted ...

Second, the main characters in the paragraph are the statute and the parties to the transaction: lenders, junior lienors, escrow agents, and buyers. In (1b), the opening previews all of those characters; (1a) mentions only a statute:

1a. There is but one case construing Section 2943, *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), and it has no application to this matter. The legislative history is not very helpful. Originally Section 2943 was enacted ...

1b. Under Section 2943, if a lender knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to disclose that knowledge to junior lienors, escrow agents, or buyers. Originally Section 2943 was enacted ...

(And if you apply our first-eight-word test to the sentences in both versions,² you can see that (1b) passes with a higher score than does (1a)).

Third, the paragraph repeatedly develops two connected central concepts: that the lender has an “obligation to disclose” and that he must disclose “indebtedness” or “encumbrances on real property.” In (1b) the opening previews both; (1a) mentions neither:

1a. There is but one case construing Section 2943, *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), and it has no application to this matter. The legislative history is not very helpful. Originally Section 2943 was enacted ...

1b. Under Section 2943, if a lender knows the amount of INDEBTEDNESS and any ENCUMBRANCES on real property, he is under limited obligation to disclose that knowledge to junior lienors, escrow agents, or buyers. Originally Section 2943 was enacted ...

When we highlight the elements we need to organize the information in the paragraph into a coherent whole, we see clearly that all of those connecting threads come together in the opening sentence of (1b), but not in (1a):

1a. There is but one case construing Section 2943, *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), and it has no application to this matter. The legislative history is not very helpful. Originally Section 2943 was enacted to

² See Colomb & Williams, *The Writer’s Golden Rule*, *supra* note 1, at 80.

allow *junior lienors* to ascertain the AMOUNTS OWING on property so *they* can protect *themselves*. Later the *statute* was amended to entitle *escrow agents* to receive a BENEFICIARY'S STATEMENT. *It* is not, however, intended to substitute for a PROMISSORY NOTE, for *it* does not by *its* terms call for a reproduction of the NOTE existing on the property. Under this *Section*, if a *lender* knows the amount of INDEBTEDNESS and any ENCUMBRANCES on real property, *he* is under limited obligation to provide that knowledge. *It* does not on its face call for a disclosure of PENALTY AND PREPAYMENT PROVISIONS. The only statement in the *statute* which arguably calls for a statement of an ACCELERATION OR DEMAND PROVISION is subdivision (c) which requires notice of "The date on which obligation is due, in whole or in part."

1b. Under *Section 2943*, if a *lender* knows the amount of INDEBTEDNESS and any ENCUMBRANCES on real property, *he* is under limited obligation to disclose that knowledge to *junior lienors, escrow agents, or buyers*. Originally *Section 2943* was enacted to allow *junior lienors* to protect *themselves* by ascertaining the AMOUNTS OWING on property. Later *the statute* was amended to entitle *escrow agents* to receive BENEFICIARY'S STATEMENTS. The only statement in the *statute* which now arguably calls for disclosure of an ACCELERATION OR DEMAND PROVISION is subdivision (c). *It* requires a *lender* to disclose "The date on which obligation is due, in whole or in part." *It* does not on *its* face require the *lender* to disclose PENALTY AND PREPAYMENT PROVISIONS. Nor does the *statute* intend that the statement substitute for a PROMISSORY NOTE, for *it* does not require that a NOTE on the property be disclosed to a *buyer*. There is only one case construing *Section 2943*: *Black v. Sullivan*, 48 Cal. App. 3d 557 (1975), but it does not apply to this matter, and the legislative history is not very helpful.

Now we can see how paragraphs are like sentences: we read them faster and understand them better when they begin with a short, distinct opening segment that we can hold clearly in mind. That distinct opening segment should prepare us for what follows by (1) introducing main characters and key concepts, and (2) telling us what's in it for us to read on.

Now "point first" is our default preference. But many readable paragraphs preview key concepts while saving the point for the end:

1c. *Section 2943* spells out what INFORMATION *lenders* must disclose to other parties in a real estate transaction. Originally *Section 2943* was enacted to allow *junior lienors* to protect themselves by ascertaining the amounts owing on property. Later the statute was amended to entitle *escrow agents* to receive beneficiary's statements. The only statement in the statute which now arguably calls for disclosure of an acceleration or demand provision is subdivision (c). It requires a *lender* to disclose "The date on which obligation is due, in whole or in part." It does not on its face require the *lender* to disclose penalty and prepayment provisions. Nor does the statute intend that the statement substitute for a promissory note, for it does not require that a note on

the property be disclosed to a buyer. Under *Section 2943*, if a *lender* knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to disclose that knowledge to *junior lienors, escrow agents, or buyers*.

It's easier for us to see how this principle of beginning well applies to sentences, because sentences have distinct structural parts with familiar names, like *subject* and *verb*. We don't have equally specific language to describe the parts of longer units of discourse, so we have to invent some. You already know common terms for the units: the whole document, sections, sub(sub)section, and paragraph. We have a common term for the one sentence that tells us the most important information in a unit: it is *point*. We'll use the term *opening* as our technical term to name that opening segment to a paragraph, section, or document (for documents we more commonly call it an *introduction*). And we'll use the term *development* to name the rest of that unit. Finally, we'll use the term *theme* for words that name the concepts that a section of a text or its whole centrally develops.

Some readers may wonder why instead of *point* we don't use the term *topic sentence* to apply to a paragraph and *thesis* to apply to whole documents. Two reasons: First, we want one word to apply to the most important sentence in all units of discourse, from paragraphs to (sub)sections to whole documents. But if you are more comfortable with *thesis* and *topic sentence*, think of those words when we use the term *point*. Second, in example paragraph (1c), we could call its opening sentence a "topic" sentence, because it does introduce the key topics, i.e., its key themes. But that first sentence is in fact not the point sentence of that paragraph—if you look back at (1c), you will see that it is the last sentence: "Under *Section 2943*, if a *lender* knows the amount of indebtedness and any encumbrances on real property, he is under limited obligation to disclose that knowledge to *junior lienors, escrow agents, or buyers*." That opening sentence does, however, serve as a kind of topic sentence because it announces the key words that the paragraph goes on to develop: Information lenders must disclose to other parties. So we see that a topic sentence is not necessarily a point sentence.

In the next several columns, we'll explain how

.....

to use this principle of beginning well in different contexts and in different kinds of documents.

We'll show you what you must almost always do in the opening of a whole document, sometimes in the opening of sections, but rarely in paragraphs. We'll show you how to apply specific principles to different kinds of legal documents—what is expected by judges and other decision makers, by clients, even by law review editors. And we'll give you some simple, “quick and dirty” ways to diagnose and revise your documents so that, even if they don't get every detail right, readers will nevertheless start off with an understanding of what is to come clear enough to help them through the rough spots.

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“We concentrate their attention on the application of the *what, why, who, when, and how* questions that are essential to good roadmapping—and good legal writing.”

ROADMAPPING AND LEGAL WRITING

BY BRADLEY G. CLARY AND DEBORAH N. BEHLES

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As instructors of legal analysis and writing, we are familiar with the concept of roadmapping.¹ We also know that one of the trickier things for beginning legal writers to do is to convey effectively to a reader how to get to a desired destination. They have trouble explaining the component steps from the reader’s standpoint, the order in which they should go, and the process that is involved.

To help beginning legal writers become acquainted with the kind of “roadmapping” that

they will be doing for the rest of their career, we literally ask our students on the first day of class to give directions to a “traveler” on how to reach a particular endpoint.

Preparation

First, we divide students into three- or four-person groups. We match local residents with recent arrivals to develop community building among the students and to ensure that each group includes students who are familiar with the metropolitan area.

Then we ask each group to pick a destination or an event in the metropolitan area where they would send a visitor. The students select the destination or event, and then must write down how the visitor will get to that destination or event from the law school. Next, each group of students presents its roadmap on the chalkboard.

Two hypothetical “maps” taking a visitor from the University of Minnesota Law School in Minneapolis to the State Fair Grounds in St. Paul might look like these:

Example A [No title]

1. Out of law school parking lot, follow South 2nd Street to Seven Corners.
2. Turn on Washington Avenue.
3. Go over the bridge.
4. Turn left on the continuation of Washington Avenue.
5. Cross the river.
6. Take Washington to University Avenue (the best route if you don’t like freeway driving).
7. Take University to Snelling Avenue.
8. Turn left on Snelling.
9. Turn left onto Fair Grounds.

Example B “State Fair Grounds”

1. Turn left out of law school parking lot.
2. At first stoplight, turn left onto 19th Avenue.
3. Go past Carlson School.
4. At second stoplight, turn left onto Riverside.
5. Take Riverside to sixth stoplight (Perkins Restaurant will be at the corner).
6. Turn left onto entrance to East I-94 (the fastest route if not rush hour).
7. Stay on I-94 going east.
8. Watch out for merging traffic on the left.
9. Go 3.4 miles to Snelling Avenue.
10. Exit from right lane at Snelling. Turn left at the end of the exit onto Snelling.
11. Go through six stoplights.
12. At approximately the seventh light, the Fair Grounds will be on your left. Look for the big gate, exhibition buildings, State Fair sign, and the space needle. (It’s fun to go up.)

¹ See, e.g., Kathy L. Cerminara, *Metaphors Help Students Write More Logically*, Law Tchr., Spring 1997, at 2; Brian S. Williams, *Road Maps, Tour Guides, and Parking Lots: The Use of Context in Teaching Overview and Thesis Paragraphs*, 7 Perspectives: Teaching Legal Res. & Writing 27 (1998).

Once we have examples of student-drafted roadmaps, we then explore the process they used to create their maps, focusing both upon how they created them and how a visitor would react to each. As we do so, we also begin to introduce students to the idea that “roadmapping” is an integral part of legal writing. We concentrate their attention on the application of the *what*, *why*, *who*, *when*, and *how* questions that are essential to good roadmapping—and good legal writing.

What

Our opening questions to the students are two “what” inquiries: “*What* is your goal?” and “*What* did you do first in your discussion?” The ultimate answers to those questions are that the goal is to help a visitor get to a specific place with the least amount of trouble, and the students first decided upon the identity of the place, such as the State Fair. Similarly, we tell the students, the odds of taking a visitor, such as a court, a client, or a partner, with you to a particular legal destination are significantly improved if first you figure out the destination before embarking on the journey. If a writer has no destination, the reader will not arrive at one except by accident. Your results should not depend upon fortuity.

Why

Our second question to the students is “*Why* did you pick that particular event or destination?” In our experience, the answer is inevitably that the students are sending the visitor to a place or event the visitor would like to go to. Similarly, in a persuasive writing, students should be looking for ways to send their reader to a conclusion the reader will *want* to reach. Students should be looking for arguments to convince the reader that good will come from the result.

Who

Our third question to the students is “*Who* is your visitor?” Does the visitor know something about the area or lack any prior knowledge? Why will this particular visitor think the State Fair is a good place to go? We tell students to know their audience and to make decisions based on the reader’s perspective. Legal writing is audience-based. Writing for a judge, for example, whose existing opinions demonstrate a prior knowledge

of a legal issue, will be different from writing for a judge who has apparently never considered the question before.

When

Our fourth question to the students is “*When* are you sending the visitor to the destination?” The typical answer is “We are doing the exercise today, aren’t we?” But the “when” question is not mere redundancy. If the legal writer is taking a reader to a conclusion under today’s law, the writer must pick a currently permissible route. If the writer is sending advance instructions to a “visitor” who is coming to town in six months, the writer must predict a future permissible route. In neither case is it helpful for the writer to describe the route to the destination that was good 10 years ago, unless the comparison helps the visitor understand the relevant current route.

How

Our fifth question to the students is “*How* are you going to send the visitor to the chosen destination?” At this point, we turn to the roadmaps on the chalkboard. They provide rich opportunities for commentary and comparison to legal writing.

Did students write down the name of the destination or event at the top of their map? (Compare examples A and B.) It helps to tell a visitor at the beginning where he or she is going. Stating the destination in advance comforts the visitor and enhances student credibility as a guide to a known place. The same is true in legal writing because stating the conclusion at the beginning makes the writing more persuasive and clear. The conclusion provides a reference point for the legal reader to understand the direction in which the argument is going. The typical legal reader, whether a court, a client, or a colleague, wants to know what resolution he or she should arrive at.

Did students list in order each sequential piece of the map? Students should not assume that the visitor, especially a visitor with no prior knowledge, knows what direction to turn at the Seven Corners intersection. (See example A, steps 1 and 2.) If the students skipped a step, they should go back and put it in. No visitor should be lost *because of* the roadmap. Then the visitor is not only lost, but also angry. The same is true in legal

“We tell students to know their audience and to make decisions based on the reader’s perspective.”

“Descriptive examples, analogies, charts, graphs, and other similar devices bring alive to a reader the concepts that the writer is trying to convey.”

writing because a brief, to be effective, needs to include each sequential step. We stress to students that legal writing is audience-based. Especially if your reader lacks prior knowledge about an issue, the writer cannot assume that the reader follows the argument when there are missed steps.

Did students offer the visitor a permissible route? If there is road construction standing in the way, the students cannot take the visitor by that route. Or if there is no left turn at the Washington Avenue intersection during certain hours, students could not properly tell the visitor always to turn left. The same is true for legal writers—they must ensure that their authorities are reliable. Thus, they should continually check that cases have not been overruled or modified, and that statutes have not been replaced, amended, or repealed.

Have students identified for the visitor any landmarks to comfort the visitor regarding the correct route? If the visitor should look for a landmark such as a Perkins Restaurant to mark the turn (see example B, step 5), have students adequately and clearly described that step to the visitor (just as they would tell a legal reader about a court decision that marks a legal route)? Writers must connect their authorities to their arguments, and must make evident the connection. The better the explanation of the landmarks, the more likely it is that readers will head in the correct direction.

Did students consider drawing any pictures to supplement their list? Visual aids and word pictures are helpful to many visitors (and legal readers). Descriptive examples, analogies, charts, graphs, and other similar devices bring alive to a reader the concepts that the writer is trying to convey.

Did students use commonly accepted terminology? If the freeway entrance is labeled I-94, students should not tell the visitor to look for the “freeway,” unless they have first identified what that means. Legal readers will expect to see citations to facts and legal rules in commonly

accepted legal formats, such as those described in *The Bluebook*² or the *ALWD Citation Manual*.³ Readers also will not find shorthand labels to be persuasive if the writer has not first explained the shorthand. This is why, we tell the students, they should always give a full citation to an authority first, and only thereafter use short citations.

Did students select the best route for their visitor’s purpose? There are often multiple ways to take a visitor (legal reader) to a particular destination. Some routes are long, some short. Some routes are picturesque, some bland. Some routes are safe, some dangerous. Some routes are fast (the freeway), some have lots of stoplights (University Avenue). So what are the visitor’s goals? Have the students thought about distinguishing among the routes depending upon the goals? In the case of legal writing, has the writer told the reader that a particular route was picked over other choices because of the goals? Many legal readers are busy and must confront every day a huge volume of material. As a result, they want the shortest, straightest, safest route to a proposed legal destination.

Have the students been precise? If the Snelling Avenue exit is 3.4 miles down the road, say so (example B, step 9). Precision helps a visitor (legal reader) avoid incorrect turns. It also enhances credibility from the outset. For example, if four circuit courts of appeals have ruled a particular way on a particular issue, the legal writer should identify those meticulously and not just say “several courts” have ruled on the question. Similarly, the legal writer should not just cite to the cases in general, but should cite to the specific pages in the opinions where the reader can find the relevant specific material.

Conclusion

We find that this map-making exercise provides a useful analogy to the essentials of legal writing. It helps students think about the what, why, who, when, and how of taking a reader to a desirable destination. (And it has a side benefit: Students now know how to get to the Minnesota State Fair.)

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² *The Bluebook: A Uniform System of Citation* (16th ed. 1996).

³ Darby Dickerson, Ass’n of Legal Writing Directors, *ALWD Citation Manual: A Professional System of Citation* (2000).

MATERIALS FOR TEACHING PLAIN ENGLISH: THE JURY INSTRUCTIONS IN PALSGRAF, REVISITED

BY LOUIS J. SIRICO, JR.

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As some legal writing professionals have recognized, jury instructions can be a useful tool for teaching the importance of writing in plain English.¹ In addition, the close study of jury instructions teaches that writing in plain English requires more than mechanically applying a well-known set of rules, such as “use the active voice” and “favor short sentences.” It also requires sophisticated judgment in determining how to explain complex legal concepts as simply as possible.

The drafter of jury instructions must decide how to convey the meaning of legal doctrines to lay people. This can be a daunting task. The drafter must explain concepts not only simply, but also with the precision that the law demands. To understand the degree of difficulty, try drafting jury instructions that define such terms as “proximate cause,” “preponderance of the evidence,” and “beyond a reasonable doubt.”

In this article, I offer materials that a legal writing teacher can use for a class in plain English. I take the jury instructions given in a case known to all students of tort law, *Palsgraf v. The Long Island Railroad Company*.² After each paragraph of the actual instructions, I offer my best effort at a redraft in plain English. Students can compare the

two versions to decide why I made the revisions that I did and to offer suggestions for improving upon my work. I then offer some notes for prompting further classroom discussion.

The Jury Instructions in *Palsgraf*

The Original Instruction: Gentlemen, in this case there is no dispute of facts. Everybody says that on the day in question the plaintiff was on the platform of this railroad company, the defendant, and while she was thus upon the platform some fireworks fell from the hand of a passenger who was entering a car, which was then in motion, to the platform or the track, an explosion occurred, and that subsequently the plaintiff developed a nervousness which still persists and which, according to her claim, will persist for some time in the future.

Redraft: Members of the jury, both Mrs. Palsgraf and the Long Island Railroad Company agree on what happened on August 24, 1924. While Mrs. Palsgraf was standing on the railroad company’s platform, a passenger boarded a moving train and some fireworks fell from his hand onto the platform or the train track. There was an explosion. Afterward, Mrs. Palsgraf developed a nervousness that she still has and expects to have for some time.

The Original Instruction: There was no duty upon the part of the defendant to examine each passenger as he entered the platform to see what was in any package he might be carrying. The plaintiff herself carried a package, and she might just as well complain if a uniformed man had come up to her and insisted upon her opening her package and showing him what she had in it. No such duty devolves upon the railroad company in this case, and no negligence can be predicated upon the failure of the defendant to stop a passenger while moving across its platform

“The drafter of jury instructions must decide how to convey the meaning of legal doctrines to lay people.”

¹See Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 263–71 (3d ed. 1998); Ellen Platt, *Jury Instructions: An Underutilized Resource*, 7 Perspectives: Teaching Legal Res. & Writing 90 (1999).

²248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). The record of the case, including the jury instructions used in this article,

appears as an appendix to Austin Wakeman Scott & Sidney Post Simpson, *Cases and Other Materials on Civil Procedure* 891–940 (1951). For a discussion of the record, see John T. Noonan, Jr., *Persons and Masks of the Law* 111–51 (1976). I have written about the case before. See Louis J. Sirico, Jr., *Cardozo’s Statement of Facts in Palsgraf, Revisited*, 6 Perspectives: Teaching Legal Res. & Writing 122 (1998).

and examining what he might have with him. If every passenger was examined who was entering a railway or trolley car or subway train, and searched for what he might have upon him, none of us would be able to get anywhere. The purpose of railroad travel is that we can get some place. That is not what the plaintiff claims was the negligence of the defendant that caused her injury.

Redraft: First, I want to explain to you what Mrs. Palsgraf is not claiming. She is not claiming that the railroad has a duty to find out what every passenger has in every package that he or she is carrying. If every passenger entering a railway or trolley car or subway train had to be searched, none of us would be able to get anywhere.

The Original Instruction: She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration. Did those men omit to do something which ordinarily prudent and careful train men should not omit to do? Or did they do something which an ordinarily prudent and careful officer in charge of a railway train in the station platform should not have done? If they did, and the plaintiff met with her injuries through the careless act upon the part of the trainmen of the defendant, then she would be entitled to recover. If they were not at fault, if they did nothing which ordinarily prudent and careful employees should do in regard to passengers moving upon their trains, then there can be no liability. If they omitted to do the things which prudent and careful trainmen do for the safety of those who board their trains, as well as the safety of those who are standing upon the platform waiting for other trains, and that the failure resulted in the plaintiff's injury, then the defendant would be liable.

Redraft: Mrs. Palsgraf is claiming that the guard on the station platform and the guard on

the train platform were careless and negligent in the way that they handled this particular passenger. She is claiming that because the guards failed to act with ordinary care in how they handled this passenger, Mrs. Palsgraf was injured and developed a nervous condition. Here is the question that you must answer: Did those guards fail to do something that ordinarily careful guards should have done to protect people like Mrs. Palsgraf standing upon the platform waiting for other trains? If the guards failed to do something that ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf and if the guards' failure caused Mrs. Palsgraf's injury, then the railroad owes Mrs. Palsgraf money as compensation for her injury. On the other hand, if the guards did what ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf, then the railroad owes Mrs. Palsgraf no money.

The Original Instruction: You should first discuss the question of the liability of the defendant, under the rules that I have given you, and if you should find the defendant guilty of no negligence, then your verdict would be for the defendant and you would not be concerned with the question of the amount of the plaintiff's injury.

Redraft: When you meet, you should first reach an answer to this question: Did the guards do what ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf? If you answer yes, then you have found in favor of the railroad, and you have finished your work.

The Original Instruction: If you should find, under the rules that I have given you, that the defendant is liable, then you would pass to the question of the amount that the plaintiff is entitled to recover.

Redraft: However, if you decide that the guards failed to do what ordinarily careful guards should have done to protect the safety of Mrs. Palsgraf, then you must decide how much money the railroad owes Mrs. Palsgraf.

The Original Instruction: If you reach that point in your discussion, you will give her a

sum which will fully and fairly compensate her for the pain and suffering which came to her as a result of any physical injuries—bodily injuries—she may have sustained, and which she has endured from that time down to the present time; and if you find from the evidence that she will suffer in the future, then, such sum as you shall say will compensate her for that future suffering, and in addition to that such sum as she lost in earnings during the time that she was incapacitated, and such reasonable sum as she was required to pay for medicines and medical attendance. Those are the elements or items which go to make up her claim for damages, but first settle the question of liability before you discuss the question of damages at all.

Redraft: If you decide that the railroad owes Mrs. Palsgraf money, you must decide how much money would fully and fairly compensate her for the injury she has suffered. The money should compensate her for any pain and suffering that she may have suffered from the time of the incident down to the present time. If you find that she will suffer in the future, then the amount of money that you decide upon should also compensate her for future suffering. The money should compensate her for two additional costs: first, the amount she lost in wages during the time that she could not work; second, the money she had to pay for medicines and doctor's bills. Thus, if you decide to award Mrs. Palsgraf any money, the amount should cover past and future pain and suffering, lost pay, and medical costs.

The Original Instruction: The burden of proof is upon the plaintiff. She must satisfy you by a fair preponderance or greater weight of the testimony that the accident happened solely through the fault of the defendant, through its trainmen or platform-men in the control of passengers going upon its trains.

Redraft: If you decide in favor of Mrs. Palsgraf, you must do so based on the testimony of the witnesses in this trial. You may find for Mrs. Palsgraf only if you decide that, on the whole, the testimony in her favor is stronger—the testimony that the accident happened solely because of the

fault of the railroad's guards in charge of controlling the passengers going on its trains.

The Original Instruction: The plaintiff and defendant are both interested. The plaintiff is seeking money and the defendant is seeking to avoid paying money, and each has that interest, which is apparent.

Redraft: Omit this part of the instruction.

Notes for Further Discussion

1. What are the primary techniques used in translating these jury instructions into plain English?

2. The revised version defines a number of legal terms, including “negligence,” “liability,” “burden of proof,” and “preponderance of the evidence.” In the revision, are the definitions both understandable and accurate? Should the revision include the legal terms of art?

3. After Judge Burt Jay Humphrey gave the jury instructions, the attorney representing the Long Island Railroad Company made this request: “I ask your Honor to charge the jury that if they find that the defendant's servants were assisting the passenger upon the train and in so doing knocked a bundle from his hand, that that act of the servants is not the proximate cause of the plaintiff's injuries.” The judge declined to give the requested instruction. Suppose the judge had agreed to give an instruction on proximate cause. Please draft the instruction. As you may know, different courts and commentators vary in how they would define causation with respect to notions of duty and foreseeability. Whatever wording you choose reflects one of several viewpoints. For an interesting discussion of the rhetorical implications of the various formulations, see Walter Probert, *Torts and Language*, 48 Fla. L. Rev. 841, 846–55 (1996).

4. Both the original and revised versions of the jury instructions contain a fair amount of repetition. How much of the repetition is justified?

5. Does either version of the jury instructions seem to favor one litigant over the other? If so, how? If so, how would you revise the instructions to make them more neutral?

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“[W]e felt that a “what you need to know” list would have more credibility if it came from frontline firm librarians instead of the law school librarians the students were so used to hearing.”

THE TOP 10 THINGS FIRM LIBRARIANS WISH SUMMER ASSOCIATES KNEW

BY KELLY BROWNE¹

Kelly Browne is Head of Reference Services at the University of Connecticut School of Law Library in Hartford.

For our first “Bridge the Gap” session here at the University of Connecticut School of Law (presented in conjunction with the Career Services office), we decided to grab the summer clerks’ attention by beginning the hour-long class with a graded “pre-test.” If all went as planned, they would fail the pre-test and then be so desperate to know the right answers that they would fall all over each other to hear what we had to say. In essence, we hoped to generate our own “teachable moment.”

In developing the pre-test, we felt that a “what you need to know” list would have more credibility if it came from frontline firm librarians instead of the law school librarians the students were so used to hearing. So I posted a message to law-lib, the law librarians’ discussion list, asking firm librarians for the “top 10 things” they wished their summer associates knew. The list was fairly easy to compile because most of the responses were eerily similar.²

The Top 10

In true Letterman style, here is the countdown on the “top 10 things law firm librarians wish summer associates knew.”

Number 10 ... Computerized research costs money. “I had a summer associate print out the Taxpayer Relief Act from LEXIS last year when we had several copies in the library and he could

have gotten it off the Web for free. Westlaw and LEXIS have many different pricing plans—tell them to find out in the first three days which plan their firm has.”

Number 9 ... Looseleafs are great resources. “Tell them when to use looseleafs instead of Westlaw or LEXIS. Tell them how to use them, e.g., tell them there’s a difference between a page number and a paragraph number.”

Number 8 ... Saying thank you to the support staff and librarians is a great way to be remembered (“and helped out when you are in a jam or trying to get something done yesterday”).

Number 7 ... Don’t be afraid to ask questions—of the firm librarian and the assigning attorney. “The only stupid question is the one you don’t ask. Sometimes you don’t even know enough to ask, that’s why you go learn something and come back and ask more questions.”

Number 6 ... Librarians are your friends, your “information partners,” “on your side,” “here to make you look like stars,” “helpful and knowledgeable and willing to help.”

Number 5 ... Know about the state administrative code (“What is it? How does it relate to the state’s version of the *Federal Register*?”) and state legislative history (“Know how to do it.”).

Number 4 ... Not everything is online; LEXIS and Westlaw do not hold all the answers. So “know how to use the books!”

Number 3 ... Practice guides are fantastic, but “there are few forms written exactly the way you want to them. Use your common sense.”

Number 2 ... Don’t forget administrative law decisions. Know what they are, how they are published, and who publishes them.

And, if I may have a drum roll, please . . . the number one thing firm librarians wish summer associates knew ... **How to use the Code of Federal Regulations (CFR).** “Know what it is, how it is laid out, and how it is updated. Know how CFR sections relate to the *Federal Register*, to statutes, and to administrative agency pronouncements. Finally, know the difference between a statute and a regulation.”

¹ The author wishes to thank the following librarians for their contributions to this article: Steven Anderson, Gretchen Asmuth, Carol Bean, Laura Bell, Donna Cavallini, David Clark, Cynthia David, Nanna Frye, Melanie Kelley, Mindy Klansky, Peg LaFrance, Victoria Lynch, Mary Mahoney, Lynn Merring, Sheryll Rappaport, David Rogers, Barbara Selby, Staci Steadman, Carrie Utterback, and Cindy Weller.

² The “Research Skills Pre-Test” that we developed with the assistance of these responses is included as an appendix to this article.

Honorable Mentions

Never let it be said that librarians don't have a sense of humor (or of the absurd). Herewith, the "top five honorable mentions."

Number 5 ... "Pizza does not make a good bookmark!"

Number 4 ... "Joining the Century Club by getting 100 Zagat stars in restaurant reviews sounds like fun ... but gets noticed every year."

Number 3 ... **Golf**. "It may be the key to your success. Learn the lingo, learn how to lose to the partner by two strokes."

Number 2 ... "If you are **ironing your own shirt**, work inward from the corner of the collar to avoid odd wrinkles."

And the most frequent response to any discussion list survey ... *Number 1* ... "I'm doing a similar seminar. Can you please summarize the results of your survey for the list?"

Conclusion

We may have to revise our idea about the pre-test. There are enough issues in item number 10 alone to fill up the hour we have scheduled for our session. But the exercise does show that there is a desperate need for some sort of training to "bridge the gap" between what our students learn in first-year legal research and writing classes and what they need to know in order to practice law effectively.

Appendix

University of Connecticut School of Law Library Success on Your Summer/Permanent Job

Research Skills Pre-Test

- A search on Westlaw costs:
 - Approximately \$4 per minute
 - Depends whether pricing plan is flat rate, transactional, or hourly
 - Depends on which database you run the search in
 - All of the above
 - A reference to 85 Lab. L. Rep. (CCH) 187 is a reference to a:
 - Page number
 - Headnote number
 - Paragraph number
 - None of the above
 - Before you leave the assigning attorney's office, you should know the following about your assignment:
 - How much time to spend on it
 - What format it should be in
 - When it is due
 - Whether you can use LEXIS or Westlaw
 - Which jurisdiction controls
 - All of the above
 - Your best friend in a law firm is:
 - The other summer associates
 - The hiring committee
 - Your senior associate mentor
 - The librarian(s)
 - The *Federal Register* is to the *Code of Federal Regulations* what the:
 - Statutes at Large* is to the U.S.C.
 - GSCA is to the Conn. Pub. Acts
 - Conn. Agencies Regs. is to the Conn. L.J.
 - None of the above
- *****
- Final Connecticut state agency regulations first appear in/on:
 - Connecticut Law Journal*
 - Connecticut Law Tribune*
 - Regulations of Connecticut State Agencies*
 - Westlaw and/or LEXIS
 - Match the following items of legislative history with the sources in which they appear:

a) Hearings	1) <i>U.S. Code Congressional & Administrative News</i> [®]
b) Floor debates	2) CIS microfiche
c) House and Senate reports	3) <i>Congressional Record</i>
 - The best place to do research on Connecticut state legislative history is:
 - UConn School of Law Library
 - The Internet
 - The Connecticut State Library
 - LEXIS and/or Westlaw

.....

4. If you were stranded on a desert island but knew you were going to have to appear in a Connecticut state court tomorrow (a magic carpet will transport you there and back after your appearance) and could only choose one set of books to have with you, would it be:

- a) West's Connecticut Practice Series
- b) Connecticut Practice Book Annotated, with Forms
- c) Official Connecticut Practice Book
- d) Connecticut Legal Forms

5. Federal administrative decisions can be found in/on:

- a) LEXIS and/or Westlaw
- b) The Internet
- c) Official agency reporters
- d) Commercial reporters

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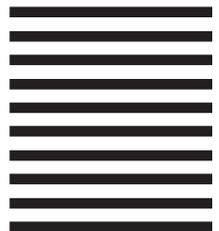
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Teaching Legal Research and Writing

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