

PERSPECTIVES

Teaching Legal Research and Writing

WHEN DOES HELP BECOME A HINDRANCE: HOW MUCH SHOULD WE ASSIST STUDENTS WITH THEIR GRADED LEGAL WRITING ASSIGNMENTS?

BY CHRISTINE G. MOONEY

Christine G. Mooney is a Legal Writing Instructor at Villanova University School of Law in Villanova, Penn.

Introduction

After three years of teaching, I continue to ask myself what kind of help and how much of it I should be giving my students with their graded assignments. Which is the better way to learn how to research and analyze a legal issue: baptism by fire or witnessing a step-by-step demonstration of the process by an experienced legal writer? This question is unique to those of us who teach legal writing. Although students approach all of their professors for help, in most doctrinal classes students do not have the opportunity to question the professor as to the specific exam questions on which they are being evaluated. As legal writing professors, we evaluate our students on the basis of written assignments they have prepared over a period of weeks. Inevitably, therefore, our students are more pragmatic in their approach to our subject and tend to ask questions that are focused on the specific assignment at hand rather than on a general topical matter. In a sense, we are working toward a different goal from that of our students. Our goal is to help students become confident and self-sufficient legal thinkers and communicators, while theirs may be more immediate—determining how to execute the specific assignment on which their grade will be based.

Deciding how much assistance we should give students with their graded assignment requires consideration of what will be expected of them after they leave our classroom. For example, with what skills do employers expect students to arrive at their first legal position? Is our course the only writing course the students are required to take, or will other courses build on the foundation laid in the first-year course? If additional writing courses are required, what are students expected to know when they enter them? I know excellent teachers who have very different philosophies on the most effective way to teach writing. Some strongly believe that students must be thrown into the water and made to struggle if they are to

VOL. 10

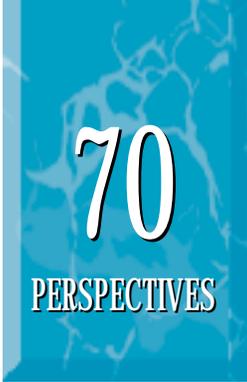
NO. 2

WINTER

2002

CONTENTS

When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments? <i>Christine G. Mooney</i>	69
Generation X Goes to Law School: Are We Too Nice to Our Students? <i>Helen A. Anderson</i>	73
BRUTAL CHOICES IN CURRICULAR DESIGN ... Start with Enacted Law, Not Common Law <i>Paul Beneke</i>	76
TEACHABLE MOMENTS FOR STUDENTS ... Are <i>You</i> Positive About "Positive Law"? <i>Druet Cameron Klugh</i>	81
"To Note or Not to Note" <i>Bradley G. Clary</i>	84
Being a Beginner Again: A Teacher Training Exercise <i>Sue Liemer</i>	87
Training Users on Internet Publications Evolved From (And Still In) Print <i>Alea Henle</i>	89
WRITING TIPS ... Framing Pleadings to Advance Your Case <i>Gregory G. Colomb</i>	92
LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS <i>Donald J. Dunn</i>	98



Perspectives: Teaching Legal Research and Writing

is published in the fall, winter, and spring of each year by West Group.

Mary A. Hotchkiss
Editor
University of Washington
School of Law and the
Information School
Seattle, Washington

Editorial Board
Barbara A. Bintliff
University of Colorado
School of Law Library
Boulder, Colorado

Donald J. Dunn
Western New England College
School of Law Library
Springfield, Massachusetts

Penny A. Hazelton
University of Washington
School of Law Library
Seattle, Washington

Frank G. Houdek
Southern Illinois University
School of Law
Carbondale, Illinois

Mary S. Lawrence
University of Oregon School of Law
Eugene, Oregon

Judith Meadows
State Law Library of Montana
Helena, Montana

Helene S. Shapo
Northwestern University
School of Law
Chicago, Illinois

Louis J. Sirico
Villanova University School of Law
Villanova, Pennsylvania

Craig T. Smith
Vanderbilt University Law School
Nashville, Tennessee

Kay Todd
Paul Hastings Janofsky & Walker
Atlanta, Georgia

Opinions expressed in this publication are those of the authors and should not be attributed to the Editor, the Editorial Board, or West Group. Readers are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. Manuscripts, comments, and correspondence should be sent to Mary A. Hotchkiss, University of Washington School of Law, 1100 N.E. Campus Parkway, Seattle, WA, 98105-6617, (206) 616-9333, Fax: (206) 616-3480, E-mail: hotchma@u.washington.edu

To subscribe to Perspectives, use the card on the back cover of this issue or write or call: Beckie Burmeister, West Group, Product and Client Communications, D5-5354, 610 Opperman Drive, Eagan, MN 55123, (651) 687-5702

become the kind of thorough and strategic-thinking lawyers we aim to help them become. Others believe that the better approach is to closely supervise students and ensure that they are staying on track and, if necessary, walk them through the research and writing processes, step by step.

Two fundamental questions emerge when evaluating this issue: first, what is the most effective way to teach legal writing and, second, what methods are fair to the students? Although I continue to revisit these questions, I believe that, after a thorough explanation of the nuts and bolts of legal writing and, where appropriate, some hands-on exercises, students are better off if, before the course is over, they are forced to struggle through the writing process largely on their own. I believe that while this approach may be more painful for the students in the short term, ultimately they will emerge from their struggle as more confident and experienced legal writers. In this article, I will outline the rationale that has led me to this conclusion.

What Is the Most Effective Way to Teach Legal Writing?

The *process* of legal writing is at the heart of what students must learn if they are to become effective advocates. They must learn to dissect a problem, identify the appropriate issues, and present a succinct legal analysis. The graded assignments we give, memo writing and brief writing, are vehicles in which students demonstrate their ability to construct and communicate that analysis. Accordingly, knowing the specific answer to a particular legal problem is, for purposes of what we are trying to teach, secondary and valuable primarily as a means for demonstrating one's analytical skills. It is essential that students be able to work through the analytical process on their own with a variety of legal issues. Once in practice, lawyers are not expected to be experts in all legal areas. In fact, lawyers often collaborate on different aspects of a case in order to provide a client with representation that pools the expertise of many professionals. Within the confines of a lawyer's assignment, however, every lawyer must be capable of presenting a complete and autonomous analysis. The legal writing skill is, therefore, a non-negotiable part of the competent lawyer package.

Assessing the kind of help that will best serve students requires more than evaluating their level of confidence about their own abilities. The fact that students may be uncomfortable with their task and find it daunting does not necessarily mean that we, as teachers, should supply them with answers. Providing students with help may temporarily ease their fears and feelings of incompetence, but, in the long run, they cannot become effective writers without experiencing some feelings of insecurity. Insecurity is an inescapable part of the learning process. Agonizing over whether one has researched an issue adequately or struggling to decide which is the strongest argument are parts of the thoughtful consideration required to craft sound legal analysis. Although showing students examples of good legal writing can be enormously helpful in teaching, students cannot learn how to synthesize the law and apply it to their case merely by looking at expertly written memorandums any more than they can learn how to ride a bike by observing a champion cyclist. There is simply no substitute for finding the law, reading it, and assessing its relevance without anyone else's input. After a certain amount of explanation, demonstration, and discussion, providing students with answers merely defers the time when they will have to discover them on their own and impedes their ability to develop into mature legal writers.

An additional problem that results from providing students with too many answers is that it may leave them ill equipped to handle assignments when they get to their first legal position. For students at schools that have no writing requirement beyond the first year, legal writing may be the only opportunity they have to learn how to compose legal analytical documents before they have to demonstrate their skills to an employer. Depending on the employer's environment, the student may be expected to know how to delve into a legal issue with minimal assistance. If a student's only experience in written legal analysis has involved significant help by the professor, that student may not be capable of meeting the employer's expectations. A student who has not been required to independently produce a legal document will be forced to either

admit his inability or try to learn on the job. If the student attempts to complete the assignment on his or her own, and the employer is generally familiar with the law in that area, the employer may immediately recognize the inadequacy of the student's work. The consequences could be far worse if the employer is not familiar with the area of law and acts on the student's faulty analysis. By failing to require students to take full responsibility for the legal writing process, we are creating an artificial environment that may distort students' perception of their abilities. Moreover, if students are not required to do the research themselves or are provided substantial assistance, they may know how to find the answer to the particular problem assigned, but that knowledge may not be transferable to another legal question. Ultimately, this lack of preparedness could cost students employment opportunities.

The kind of assistance we should provide to our students depends upon the stage of the course and the type of assignment. Certainly, we must guide students through the initial assignments. It is unreasonable to expect students to handle an entire memorandum or brief on their own without instruction and lots of discussion. Nonetheless, we should be facilitating independence from the very beginning of the first semester by assigning problems that students can manage without significant assistance. Early ungraded assignments should be quite simple, focusing on just a few skills and leaving others until later. For example, at Villanova, as with many other schools, the students' initial assignment is a closed memo and the issue is clearly spelled out. Students are provided with only three short cases and a simple statute upon which to base their analysis. With this framework, students can concentrate on the structure and substance of the analysis.

At Villanova, the second assignment is also ungraded and relatively simple, but this time, students are required to do the research themselves. A week or so after the problem has been assigned, students are required to submit a research report. The report is used to identify those students who are off track with their research. I meet with those students individually,

discuss their research steps with them, and, hopefully, steer them in the right direction. They then report to me a day or two later to ensure that their new strategy has been successful. If the student is still having difficulty, we talk about the problems he or she is experiencing and I continue to monitor that student's progress until we are both satisfied that the student is on the right track. When students turn in this assignment, they receive extensive comments on both the form and the substance. Every student is required to meet with me individually to review those comments and discuss areas for improvement. Each student then rewrites the same assignment and submits it for an additional round of comments.

Having had extensive feedback on the ungraded assignments, students are then expected to handle the graded assignments substantially, although not entirely, on their own. As a class, we discuss the assigned issue in general terms and review basic research strategies. In addition, students are permitted, but not required, to submit an outline of their argument and meet with me individually to discuss it.

Understandably, first-year students are insecure about their legal writing abilities and seek assurance that they are on the right track. Both within their individual conferences and on an ad hoc basis, student questions range from "Can you tell me if I'm going in the right direction?"; "Which issue should I discuss first?"; "Where do I find the standard of review?"; "I've written my Summary of Argument section. Will you review it?" to the inevitable "How many cases should I use?" While all of these questions are predictable, they are not necessarily equally appropriate. For example, some students try to alleviate their insecurity by asking the professor to review a draft of their graded assignment. I believe this is an inadvisable practice and I have a policy against reviewing drafts (as opposed to outlines) of graded assignments. First, I have found that it is impractical to give general comments without implying that anything

“Understandably, first-year students are insecure about their legal writing abilities and seek assurance that they are on the right track.”

“It is important to try to avoid unwittingly providing some students with an advantage over others.”

I do not comment upon is acceptable. Second, it is inappropriate to comment on the students' work when that work is the basis for the grade they will receive. While, hopefully, the students will learn a great deal from doing their graded assignments, the primary purpose of a graded assignment is not to teach. Rather, the purpose is to test the students' ability to apply what we have tried to teach them.

Fairness Considerations

The second fundamental consideration involved in deciding how much assistance to offer students is fairness to the students, individually and as a group. With respect to individual fairness, I have found that the most important element is communication of our expectations. We must communicate our expectations clearly and repeatedly. If we are going to walk students through the earlier assignments and then expect them to complete the graded assignments wholly independently, we must be sure that they are aware of this. Regardless of how much help we provide to students, it is important that they understand that at some point, they will be expected to stand on their own two feet. Therefore, there must be some transition that launches them from collaborative work to independent responsibility.

In addition, students must understand that the standards by which we will evaluate them will change throughout the year. Unlike their doctrinal classes where students are judged by one standard at the end of the course, in legal writing, students are submitting their work and receiving feedback on an ongoing basis. With each submission, more is expected and the standard is raised. For example, in reviewing an early assignment, I do not expect the level of case analysis to be as sophisticated as I will for the later graded assignments. Likewise, I am not overly concerned about citation form at the beginning of the year, yet citation form is a substantial part of the technical evaluation of the graded assignments. Because the standards are raised with each assignment, I do not grant students' request to tell them what grade I would assign to their early, ungraded work if I were assigning grades. Although it is important to alert a struggling student to the fact that his or her work is below that of the other students, it can be

misleading to imply that good performance on a particular assignment is the benchmark by which students should measure their work on future assignments.

The second fairness issue we should be concerned with is fairness to our students as a group. Although in an ideal world, legal writing would be taught one-on-one, legal education institutions cannot afford this luxury. As a result, we must be cognizant of the fact that our students are competing for grades, and in many schools, are ranked against one another. Realistically, if grading on a curve, we can assign only so many A's. Therefore, we need to consider whether it is fair to meet with some of our students five or six times and others only once. After all, we cannot really represent that we are offering the same opportunity to all of them since, despite our best intentions, there probably are not enough hours between the date we distribute an assignment and the due date to meet with all of our students five or six times. It is important to try to avoid unwittingly providing some students with an advantage over others. Therefore, if a student poses a specific question that I consider appropriate about a graded assignment, generally I repeat that question to the entire class (in person or by e-mail) and provide the answer to all the students.

Perhaps more than any other class they will take in law school, students must actively participate in legal writing in order to learn it. While we can provide the knowledge and teach the principles students need in order to succeed in legal writing, we cannot give them the experience that is such an essential part of the learning process; this they must obtain for themselves. Although I expect to continue to revise and refine my teaching approach as I gain more experience, I believe that part of my job is to ensure that my students leave my class having had the experience of drafting a legal memorandum and brief largely on their own. While, admittedly, this approach has caused both my students and me some angst, I have found that the students' progress and confidence in their abilities when they complete their first year of law school make the struggle extremely rewarding and worthwhile for all of us.

© 2002 Christine G. Mooney

GENERATION X GOES TO LAW SCHOOL: ARE WE TOO NICE TO OUR STUDENTS?

BY HELEN A. ANDERSON

Helen A. Anderson is a Senior Lecturer and Basic Legal Skills instructor at the University of Washington School of Law in Seattle.

A legal writing colleague mentioned that she had seen an interesting book and wanted to read it. The book was *Generation X Goes to College* by Peter Sacks (1996). Always on the lookout for a good read, I bought it a few days later. I was unable to put it down for two days, and would read aloud sections of it to whomever I could snag. Sacks recounts his experiences teaching journalism in a community college, and the parallels to teaching legal writing are astonishing.

Much of what Sacks observes centers on the migration of power in American education to student from professor. Much of this power is wielded through student evaluations and the ability to “make life difficult” for faculty by complaining to the administration. He also struggles with the modern student’s need to be entertained and what he sees as the expectation of ever-increasing amounts of hand-holding. He claims that many students have developed an overblown sense of their own abilities after years of undeserved positive feedback in the name of building self-esteem. Sacks does not hate his students, nor does he really blame them for the current state of affairs. He comes to believe that they are the ones who are being cheated by grade inflation and a loss of rigor in education.

Of course, there are many differences between Sacks’ experiences and mine. The law school where I teach has high admissions standards, and my students are for the most part disciplined and motivated. There is still a “Paper Chase” mystique around law school so that first-year students expect a tough time and they expect to work hard. Sacks, on the other hand, taught many students who really were marking time in their seats.

Nevertheless, there are many similarities. Like Sacks, I teach a writing course, and thus must give feedback and grades before student evaluations. Like Sacks, I face many students who are unprepared for rigorous, constructive criticism, and who seek a great deal of hand-holding. I have felt the tension between keeping students happy and getting them to confront the real problems in their work. My colleagues and I have discussed how we sometimes feel pressured to “guarantee” success for every student purchasing a legal education.¹ After seven years of teaching, I have become accustomed to this system and generally feel positive about my students and the work they do. I feel that I have struck the right balance between accommodating students and challenging them. But Sacks’ book caused me to wonder whether my experiences are part of some larger educational trend, and what the implications are for legal education in the long run.

Sacks’ Experience in Community College

Sacks began teaching journalism with, he admits, only a dim idea of what was ahead. Initially he was awkward in front of the class, believed students should value his real-life journalism experience, and tended to be strict about deadlines, writing quality, and attendance. His rapport with students was poor, and so were his student evaluations. A few students accustomed to working the system complained that he was too tough, and Sacks learned that the administration expected him to “cut a deal” with these students to make the problem go away. In short, Sacks’ first year of teaching was very rough.

Sacks learned that he would not get tenure unless his student evaluations improved. He briefly considered going on Prozac in an effort to change from an introvert to a more “outgoing, vibrant, dynamic personality”²—the kind of entertaining personality he imagined would garner

“He briefly considered going on Prozac in an effort to change from an introvert to a more ‘outgoing, vibrant, dynamic personality.’”

¹ Sacks discusses extensively the way education is viewed as a consumer good in the modern American college. He says that students see themselves as paying customers who should demand satisfaction, while administrators compete for customer dollars in the form of higher enrollment. Sacks, *supra*, at 70–81, 158–162.

² Sacks, *supra*, at 82.

“Much of this is a welcome reaction to the old ‘hide the ball’ teaching style that many of us now teaching suffered under.”

better student responses. Fortunately, his wife talked him out of medication. Instead, together they devised what Sacks calls the sandbox experiment.”³

Briefly, the sandbox experiment entailed giving the students whatever they wanted. If a student needed to rewrite a paper for a better grade, fine. If a student needed an extension, no problem. Tardiness or absences were no longer remarked upon. Class time was spent working in groups or actually doing assignments that students had not completed outside of class. Most important, he decided to give “outrageously good grades.”⁴

Sacks describes this as an “experiment” designed to show whether he could get tenure by catering to student wishes, and describes himself as working undercover to expose the realities of modern education.⁵ I found this explanation a little disingenuous. After all, he did get tenure, and he was still teaching at the time the book was published. It is clear that the ethical implications of the experiment troubled Sacks as well, and he believes that by “confessing” and writing this book he has justified his behavior.⁶

In any event, the experiment worked. Sacks’ student evaluations soared, the administration smiled upon him, and he was rewarded with tenure. He concluded,

And thus, my little sandbox experiment worked, just as [my wife] and I had hypothesized it would. That was how the system worked. Teachers like me dished out high grades for mediocre work.⁷

Yet Sacks remained convinced that high standards could have worked, even in a community college, had there been any support for them.

I still don’t think I was expecting too much of my students; in a less corrupt system, in which students themselves were not empowered, by virtue of their mediocrity, to essentially define their own standards and curriculum, there would have never

been a problem; they would have performed at the college level, or would have been forced to find something else to do with their lives.⁸

From Community College to Law School

What does all this have to do with law school? Law students, as a whole, are more motivated and competent than community college students—they’ve graduated from college and navigated the law school admissions process. Unlike Sacks’ journalism students, most of whom never expected to be journalists, almost all law school students are seeking preparation to practice law. I don’t see law students working as hard as Sacks’ students to dumb down the curriculum. Nevertheless, there are important parallels.

“Hooked on Hand-Holding”⁹

Sacks recounts his surprise at learning that students expected an end-of-the-semester “review session” in which they would be told exactly what to expect on the test. I also was surprised, upon returning to law school to teach, to find that “review sessions” were expected for all doctrinal classes. I’ve noticed other kinds of hand-holding: professors posting course outlines on the Web, upper-class tutors assigned to provide extra help for each first-year course. Much of this is a welcome reaction to the old “hide the ball” teaching style that many of us now teaching suffered under. But too much hand-holding may give students the erroneous impression that they don’t need to learn how to analyze course material on their own.

In legal writing, the hand-holding takes the form of extensive pre-drafting conferencing, classes where issues and key authorities are spelled out, and the general “availability” of legal writing faculty to answer any question, no matter how trivial. I like talking to students, and I like getting to know my students during office hours. True, I sometimes wonder whether when I “give away” the key issues and authorities, or when I suggest the proper order of analysis in a memo, I am

³ Sacks, *supra*, at 83–86.

⁴ Sacks, *supra*, at 85.

⁵ Sacks, *supra*, at 83–86.

⁶ Sacks, *supra*, at 86.

⁷ Sacks, *supra*, at 102.

⁸ Sacks, *supra*, at 101.

⁹ Sacks’ phrase. Sacks, *supra*, at 60.

discouraging independent analysis and encouraging a kind of “learned helplessness.” Yet students seem to really appreciate the tips, and perhaps they learn enough from this modeling of how to go about the important steps of researching and outlining. I also see that no matter how much I think I am “giving away,” students are still left with more than enough research, analysis, and writing to work out for themselves. My colleagues and I have debated this point. I know that some other schools have tried to move away from hand-holding by having some assignments done with no consultation whatsoever with faculty—a kind of final exam.

Grades and Evaluations—The Mutual Admiration Pact

Sacks’ sandbox experiment struck a chord with me because I have had a similar experience with the effect of grading on evaluations. Where I teach, there is a mandatory grade distribution scheme for first-year courses. For my first few years, I therefore followed a policy of grading each assignment on a strict curve, thinking that students needed to know where they stood and what kind of grade they were likely to get in the course. My student evaluations were not as high as I wanted, however, so two years ago I finally decided to see whether a change in grading policy would have any effect. I did this after a student commented that just raising the median would improve student morale, even if it did not change students’ positions on the curve. And I had also heard that an important factor in student evaluations was how well a student believed he or she had done in the course. I therefore raised the median for early assignments, and bunched grades at the high end of whatever numerical scale I used for a particular assignment. Whereas before I had reserved high grades for particularly good memos, I now made sure that a sizable group received high scores. The final assignment for the course then became more determinative of the course grade. Since the final assignment was returned after student evaluations, I could feel less restrained about making distinctions when grading it.

Unlike Sacks’ sandbox experiment, my grading experiment was not part of an all-out effort to

please students on every level. I continued to provide the same kind of constructive criticism and tough writing standards in my written comments. I noted where students had been successful and how they could improve. I simply wanted to see if raising the scores on assignments would make a difference.

I was amazed at the results. My evaluations improved markedly and students seemed much, much happier. What had taken me so long? I am actually convinced that my “improved” grading system *is* an improvement. Students on the bottom half of the curve are not demoralized and can make the effort to improve their writing. Much as teachers can be demoralized by poor evaluations (witness Sacks’ thoughts of Prozac after his first evaluations), students who get consistently poor grades can become depressed and unable to learn. It may be that with higher grades some students are lulled into a false sense of achievement, but if they pay attention to the written comments, they will know what further work they need to do. I still give poor grades to those few people in every class who do not or cannot make the effort. And I can’t say that I have observed any overall difference in the quality of student work under my current and former grading practices.

However, it was eye-opening to see that grades have such an enormous effect on student evaluations, especially considering how important those evaluations are to faculty careers. In light of Sacks’ book, I wonder about the combined effect of increased hand-holding and “happy” grades. Are students being cheated out of a real challenge? In our efforts to help students and make them feel better, are we lowering expectations and compounding the sense of entitlement many already think exists in Generation X? Sacks clearly thinks that is true for many colleges. I like to think that my colleagues and I have struck the proper balance between high standards and student-centered teaching. But Sacks’ book is somewhat unsettling.

© 2002 Helen A. Anderson

“In light of Sacks’ book, I wonder about the combined effect of increased hand-holding and ‘happy’ grades.”

“The term *enacted law* may be better understood by what it is not, namely common law, or so-called judge-made law.”

START WITH ENACTED LAW, NOT COMMON LAW

BY PAUL BENEKE

Paul Beneke is the former Associate Director of the Legal Research and Writing Program at the University of Oregon School of Law in Portland. He currently practices criminal defense.

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.

There has long been a debate in the legal writing academy about the best starting point and pedagogical structure for a first-year legal research and writing course. One side of the debate holds that it is best to start with primary sources. The other side believes that the better approach is to teach secondary sources first.

This debate, in my opinion, misses the mark because of how the sides have framed the issue. While each side of the debate advocates beginning with a different category of books (or, in this electronic age, databases), both sides assume the issue is about books, and which should be taught first.

The more crucial issue, however, is how best to introduce beginning law students to sound research and analysis strategies that they can apply to clients' problems. Framed in terms of such strategies, the debate shifts to whether instruction should start with enacted law or with common law. I contend that legal research instruction should start with and emphasize enacted law. So too should instruction in legal analysis and writing.

In this sense, those who advocate the teaching of primary sources before secondary sources are only half right. They understand that if a legal

writing course begins with primary sources, students can more easily understand the role of secondary sources in legal research. Those who advocate teaching primary sources first, however, often list the major legal primary sources starting with cases. They typically fail to examine whether students should research and read statutes before cases, enacted law before common law.

By “enacted law” I mean not only statutory law, but also constitutional law, administrative law, rules of evidence and procedure, municipal ordinances, and any other rule with fixed terms that has a general, prospective application. The term *enacted law* may be better understood by what it is not, namely common law, or so-called judge-made law.

While enacted law is the proper starting point, any first-year course that starts with and emphasizes enacted law should focus initially on statutes to the exclusion of other forms of enacted law. This is not to say that other forms of enacted law should be ignored; to the contrary, every legal writing course should explain the basic structure of the American legal system at the outset, including the various forms the law takes, and the relationships between those forms. Such an explanation should address the federal nature of American government. It should clarify that all law must be constitutional. It should ensure that students have a basic understanding of the role of the courts and *stare decisis*. After this short explanation, however, the course should move to instruction focusing exclusively on statutory analysis, including instruction in research and writing skills relevant to that kind of analysis.

Instruction that begins with statutes naturally evolves into research and analysis of administrative law. Similarly, students who have first acquired the ability to research and analyze statutes and who have learned to find and read with precision judicial opinions interpreting and applying statutes can readily learn constitutional law and analysis.

Starting with and emphasizing enacted law, particularly statutes, makes sense for several reasons. Today, statutory law is far more prevalent than common law. Many common law rules have been codified. Thus, sheer pragmatism should lead to an emphasis on statutes. Second, dealing first

with statutes forces students to read carefully and to think critically. Finally, and perhaps most important, starting with and emphasizing statutes provides students with a framework for legal analysis, and, by extension, legal research and writing.

Of course, students must not be led to believe that the common law is unimportant. Our legal system is a common law system. But there are several reasons why a course should not begin with common law and principles of common law analysis. Beginning law students struggle to understand the nature and relative importance of common law. Common law often has an indeterminate quality. By contrast, the terminology of a statute is fixed.

More than a few students think that all case law is common law. They reason that anything a judge writes must be common law. A course that starts with statutes corrects that perception. Many students have a hard time evaluating the importance of common law rules relative to other sources of law. They often have more questions than answers. For instance, when a common law rule and a statutory rule conflict, which prevails? What about a statute that codifies a common law rule? Do the cases brought under that common law rule still have any effect? What about a statute that codifies merely part of a common law rule? What is the status of the part of the rule that was not explicitly codified? Is it still good law?

When a legal writing course emphasizes statutes at the outset, students readily learn to distinguish among the various forms of law. Starting with statutes emphasizes that common law can be subordinate to statutory law. Students are thereby provided with a basis for evaluating the relative importance of common law in the legal system. They receive a grounding in basic legal concepts before they are forced to confront the kinds of questions and complexities that accompany common law analysis, particularly the relationship between common law and statutes.

In sum, a legal research and writing course should begin and proceed in a manner that reflects the world in which students will practice law, that builds sound reading and thinking skills, and that reinforces sound research and analytical strategies.

Starting with and Emphasizing Enacted Law, Particularly Statutes:

1. Reflects Reality

Perhaps the best reason to start with enacted law, particularly statutes, is volume. Today, enacted law predominates over common law. Not only are 51 legislatures hard at work creating new law on an almost daily basis, but, driven in no small part by special interests, they are stepping into areas of the law, such as tort law, that have long been the exclusive province of the common law. As more than one legal commentator has observed, common law is undergoing “statutorification.”¹

Similarly, administrative agencies continue to expand their reach. This trend will likely continue. The energy “crisis” of 2001, whether real or not, soured much of the public on the promises of deregulation; in fact, it led to calls for reregulation. The events of September 11, 2001, suggest, as a very general matter, that the role of government in our daily lives will only increase.

At the state level, voters are using the initiative process at an accelerating rate to enact both statutory and constitutional law. For instance, in Oregon 26 citizen initiatives qualified for the ballot in 2000; nine were passed. In California during the same year, 21 citizen-sponsored initiatives made the ballot; 12 were enacted.

The bottom line is that today’s students will in all likelihood practice in a world that will be even more dominated by enacted law than it is today. It only makes sense to emphasize enacted law in light of that reality.

Other practical reasons support starting with and emphasizing enacted law. Students can understand more easily the material covered in their other first-year courses, which, in turn, gives them greater confidence in their ability to research and analyze legal problems. Some subjects in the first-year curriculum, criminal law, for example, deal almost exclusively with enacted law. The

“Perhaps the best reason to start with enacted law, particularly statutes, is volume. Today, enacted law predominates over common law.”

¹ Guido Calabresi, *Common Law in an Age of Statutes* 1 (1982); William Eskridge Jr. & Philip Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691 (1987); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 13 (1997).

“Starting with and emphasizing statutory text also forces students to develop the critical thinking skills they will need to succeed as lawyers.”

Uniform Commercial Code is routinely taught in first-year contracts courses. Most first-year courses, even those that deal with statutes, however, use the case method, which focuses on judicial opinions and tends to blur the distinction between enacted law and common law. The texts used in these classes often jump back and forth between judicial opinions interpreting enacted law and those in which common law is at issue. Starting with and emphasizing enacted law provides students with a means to recognize the distinction and better comprehend the cases they are reading.

2. Teaches Critical Reading and Thinking Skills

Starting with and emphasizing enacted law, particularly statutes, forces students to develop the critical reading skills they will need to succeed in practice. Because every word in a statute is presumed essential to the statute, statutory analysis requires students to parse statutory language in order to determine how it applies to the facts of the client's problem. Simply put, starting with statutes makes students more careful readers. Students must read denotatively, cataloging the possible meanings of each term they come across. More important, students must examine the context within which each term appears. To determine the intended meaning of each term, students are often required to look to other, related statutory provisions that use identical terms.

Starting with and emphasizing statutory text also forces students to develop the critical thinking skills they will need to succeed as lawyers. When faced with a client's problem, novice researchers often look for cases first in a futile search for a case with an identical fact pattern. Students who learn to always look for statutes first are more efficient and accurate researchers.

When confronted with a statute, a typical student's first instinct often is to consult another source, perhaps a secondary source, to determine what the statute means and how it might apply. After consulting the source, the student (from lack of confidence, perhaps) will adopt the position of the writer without analysis, even though the writer's interpretation may be wrong, out of date, or at least subject to question.

By contrast, when students are asked to read statutes in isolation, they tend to think more

critically. They begin to ask questions about the policies underlying the statute, even when those policies are implicit. They think about the implications of a particular interpretation or application of the statute and reflect on the meaning of the statutory text in light of those implications. They use their common sense, and as a result they gain confidence in their own legal reasoning skills.

3. Provides a Framework for Analysis and a Strategy for Research

The primary goal of a legal research and writing course is to teach analysis. Yes, the students learn to use research tools. Yes, they practice writing. But at the heart of both the writing and the research is legal analysis.

If our goal is to teach students legal analysis, then the most logical place to start is with statutes. Starting with statutes provides students with a framework within which to analyze a legal problem, regardless of the kind of law that governs the problem or the sources that are relevant to the research.

Beginning law students have difficulty synthesizing the various kinds of law and the actors who make law. To many, the law is an undifferentiated mass. For instance, some students do not grasp that a legislature can nullify a common law rule, but that a court cannot do the same to a statute (absent constitutional problems). Others believe that common law includes anything said in a judicial opinion, including anything said about a statute. Some have a hard time understanding the role of administrative law. Many have trouble distinguishing between levels of authority.

Starting with and emphasizing statutes provides students with a framework in which they can more easily grasp these difficult concepts. Students more readily understand that there is a hierarchy in the law. Starting with statutes reinforces the idea that the legislature has primary lawmaking authority and that if the legislature enacts a statute that conflicts with a common rule, the statute prevails. Students come to see that administrative agencies and the rules they create are the offspring of statutory law. They learn to look for enabling legislation and to examine whether an adminis-

trative rule exceeds the authority granted to the agency by the legislature.

Starting with statutory law makes sense for other reasons. It helps students understand the role of the judiciary and, more specifically, the role of judicial opinions in statutory analysis. Introducing judicial opinions construing and applying statutory law only after students have read and analyzed the relevant statute for themselves enables students to see that a judicial opinion is a tool, one that can help them analyze the meaning of a statute and whether it applies to the facts of their case. Students come to understand that a legislature retains the right to rewrite a statute if it does not concur with the reading a court has given it. Starting with statutes, therefore, helps students to synthesize the relationship between the legislature and the courts.

At the practical level, starting with statutes provides students with a research strategy that they can apply to any legal problem. It reminds students that when researching a legal problem, they should look first for relevant statutory authority. They should find the most recent version of the statute. Such a strategy leads to more efficient research. For instance, in a client's problem where a recently enacted statute has changed a line of common law cases, if the lawyer researching the problem knows to always look for statutory law first, he or she is much less likely to look directly for case law and thus much less likely to spend time reading common law cases that no longer pertain.

More generally, starting with statutes provides students with a research strategy they can use when they do not know whether the problem is governed by enacted law or common law or both. First-year law students do not come to law school knowing which legal problems tend to be governed by enacted law and which tend to be governed by common law. By starting with statutes in every case, instead of jumping into research without a strategy, students are more likely to engage in accurate research and, consequently, accurate analysis.

Curriculum

The curriculum for a legal writing course that starts with and emphasizes enacted law, particularly statutory law, mirrors the pedagogical structure of the course. The curriculum for such a course proceeds incrementally by introducing new sources of law and new actors as they become relevant. It starts with exercises that involve only statutes and simple fact patterns. Later exercises introduce administrative rules and judicial opinions, and increase in complexity. The sequence of exercises requires students to engage in increasingly complex statutory analysis. Exercises are sequenced to underscore the primacy of statutes and the relationship of other forms of law to statutes. Each exercise builds on the previous exercise, in terms of both skills and subject matter.

After a brief introduction to the American legal system, students start by reading statutes to solve simple client problems. Students analyze how the terms of the statutes apply to the facts. They then can write their analyses. These first exercises should be as simple as possible, with a clear outcome; the statute either clearly applies or clearly does not.

Later exercises involve some uncertainty regarding the outcome. They require the student to use principles and techniques of statutory interpretation. Students analyze the text and context of the statute, including the text of related statutes. Students are introduced to legislative history. In their writing, students must explain and justify their conclusions through analysis and counter-analysis.

Simultaneously, students are learning about the tools needed to research statutory law. This instruction need not be limited to print sources. Because students understand that the focus is on the law itself, and not on the books, they come to understand how to do research in any jurisdiction, not just in those select few in which they are asked to research.

Only after students have been introduced to the basics of statutory analysis do they start reading judicial opinions. These cases are, of course, limited initially to issues relating to the construction and application of statutes. The cases

“Later exercises involve some uncertainty regarding the outcome. They require the student to use principles and techniques of statutory interpretation.”

“When they write their analyses, students learn how to synthesize the language of statutes and judicial opinions.”



can at first involve the statutes with which the students are already familiar. Students learn how to use research tools to find cases interpreting and applying statutes. When they write their analyses, students learn how to synthesize the language of statutes and judicial opinions.

Next, students learn about administrative law and the relationship between administrative and statutory law. They learn about the role and power of the judiciary with respect to administrative law. At the same time, they learn about research tools for administrative law.

Finally, only when students have a good command of statutory research and analysis, including the role of legislative history, are they introduced to common law reasoning and the relationship between enacted law and common law. By this time, students are well prepared for the common law. They understand the place of common law in the American legal system and they are already familiar with the basics of judicial opinions, the source of common law rules.

This curricular model works well in both courses where legal writing instruction is limited to the first year, and in those in which instruction continues into the second or third year. It is designed to help students master sound research and analysis strategies—strategies, moreover, that have broad application beyond the law school classroom.

© 2002 Paul Beneke

ARE YOU POSITIVE ABOUT “POSITIVE LAW”?

BY DRUET CAMERON KLUGH

Druet Cameron Klugh is a Reference Librarian at the University of Colorado Law Library in Boulder.

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

The topic of “positive law” relates to the ultimately controlling version of laws enacted by our Congress. Most researchers can put their hands on a copy of the USCA or the USCS. Yet is that enough? Positively not! Those annotated editions are unofficial versions of the *United States Code*. The language of the *Code* itself is the final authority for some titles only. For others, one must review the *Statutes at Large*. The split between these two sources has a long and convoluted history.

Among the concepts that law librarians nationwide try to instill in researchers is, ascertain what law controls. Typically, the discussion of primary and secondary sources is straightforward with myriad examples of statutes, regulations, and precedential case law in the former category. It sounds easy enough to remember, but when the pressure is on, can researchers put their hands on

the sources they need? Many legal work environments may have limited library materials, so it is particularly important that the opportunity be taken in an academic setting, where primary resources are usually abundant, to acquaint researchers with what law is authoritative.

This column deals with determining the controlling version of federal legislation, the United States statutes. It is not unusual for the interpretation of a statute to be extremely important, hence our delicious forays into legislative intent (but that’s another topic!). It is less common for the *actual*/wording of a statute to be the crux of an issue, but the situation may arise.¹ When it does, the researcher needs to know where exactly to turn.

Congress has given us direction in Title 1 of the *United States Code* (USC) at section 204. Subsection (a) states that the current version of the USC with its supplement “shall ... establish prima facie the laws of the United States.” However, the USC provides **legal evidence** (emphasis added) of the laws only when “titles of such Code shall have been enacted into positive law.” *Black’s Law Dictionary*[®] indicates that positive law typically consists of enacted law.² In this context, then, there are steps through which an act may go that will determine which final version is the “ultimate” version to be looked to for understanding and interpretation. It will be enacted as a slip law, included in the *United States Statutes at Large* (*Statutes at Large*), and then may be subsequently enacted again. Helpfully, the *Code* reproduces a list of titles enacted as positive law following 1 USC § 204.³

In order to understand this process better, let’s look at the history behind it.⁴ Currently, at the end of each congressional session, all slip laws are

¹ See, e.g., *Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438 (D.C. Cir. 1988) and *Tripp v. Executive Office of the President*, 200 F.R.D. 140 (D.D.C., April 5, 2001).

² Bryan A. Garner, Ed., *Black’s Law Dictionary* 1182 (7th edition 1999).

³ The following titles of the *Code* have been enacted into positive law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 44, 46, 49, and the Internal Revenue Code (Title 26).

⁴ For an excellent recap of the process and history of federal legislation, see J. Myron Jacobstein, Roy M. Mersky & Donald J. Dunn, *Fundamentals of Legal Research* Chapter 9 (7th edition 1998).

“The topic of ‘positive law’ relates to the ultimately controlling version of laws enacted by our Congress.”

“The bad news is that the revision process is only half completed—24 of the 50 titles of the USC have been enacted into positive law.”

published in numerical order in the *Statutes at Large*. As this set was first published in 1846, the legislation from 1789 forward was published retroactively and included at that time. Of the set, volumes 1–5 cover the public laws, volume 6 the private laws, and volumes 7 and 8 the treaties, from 1789 to 1845 (1st to 28th Congresses); volume 9 covers the 29th–31st Congresses; volumes 10–12 cover the 32nd through the 37th Congresses. Starting in 1936 (75th Congress 1st Session), one numbered volume was issued per session; that pattern continues today. When the statutory volume is published, its contents supersede the slip laws as authoritative.

There are several drawbacks to the *Statutes at Large*:

- They are arranged chronologically, rather than by topic, with no cumulative subject index.
- Amendments and repealers are not integrated.
- Publication runs about two years behind.

To remedy these problems, the statutes are codified, thus bringing the current text of public laws together by subject. This process was initiated in 1866 when Congress authorized President Andrew Jackson to appoint a revision commission to review federal law. That first time, the *Statutes at Large* were codified as the *Revised Statutes of the United States*. You may see the title referred to alternately as

- *The Revised Statutes of 1873* (indicating the last year of laws contained therein)
- *The Revised Statutes of 1874* (indicating the date of enactment)
- *The Revised Statutes of 1875* (indicating the date of publication)

These *Revised Statutes of 1873/4/5* were submitted to Congress as a bill, and became public law. The bill included a title specifically repealing each prior public law that it encompassed. After it was passed and signed by the president, the *Revised Statutes of 1873/4/5* became positive law and thus superseded the *United States Statutes at Large* as the final law of the land.

Unfortunately, this first edition included many mistakes and unauthorized changes. In 1878, a second edition was authorized to bring the *Revised Statutes*' contents up to date, include intervening

legislation that had been passed into law, and correct all errors of the first edition. Again unfortunately, this second edition was never enacted into positive law, and remained only prima facie evidence of the laws up to that time. It would be almost 50 years before Congress would again authorize the publication of codified law.

During that time, the first edition of the *Revised Statutes of 1873/4/5* and the subsequent volumes of the *Statutes at Large* composed the controlling positive law of the nation. In 1926, and again in 1934, 1946, 1952, 1958, 1964, 1970, 1976, 1982, 1988, and 1994, those laws were cumulated and integrated as the *United States Code*. Yet no edition of the USC has been passed into positive law. Rather, in 1974, Congress established the Office of the Law Revision Counsel⁵, in the House of Representatives, whose responsibilities include revising the USC, one title at a time, for enactment as positive law and classifying newly enacted sections of law for their proper inclusion in the USC (2 U.S.C. § 285b).

The good news is that the revision process is almost half completed. The bad news is that the revision process is only half completed—24 of the 50 titles of the USC have been enacted into positive law. That leaves researchers checking to see if the laws they are working with have been enacted into positive law in the USC or must be reviewed in *Statutes at Large* from the legislation's first enactment.

The question of which version is positive law can come up in other ways as well. It reared its head on the law-lib e-mail list back in January 2001 with an inquiry regarding the weight to be given a statutory note.⁶ In that scenario, the section of a public law had been assigned by the Law Revision Counsel as a note in the USC, but that didn't change its status as positive law.⁷ A

⁵ See <<http://law2.house.gov/uscode.htm>> for current information on this project.

⁶ See the thread on Statutory Notes on the law-lib archives at <<http://lawlibrary.ucdavis.edu/LAWLIB/Jan01/subject.html#start>>.

⁷ See the fine compendium of legislative information put together by the Law Librarians Society of Washington, D.C., Inc. in their Legislative Source Book at <www.llsdc.org/sourcebook/index.html>.

.....

similar question was featured in the “Questions and Answers” section of the *Law Library Journal* back in 1986.⁸ In that case, it was noted that “[e]xclusion of a statute or section of a statute from the *Code* in no way affects the validity of the statute. . . . Mistakes involving exclusion from or inclusion in the *Code* by the Office [of the Law Revision Counsel] do not operate to change the construction or effect of laws.”⁹ To see if a statutory section has been encoded, refer to the Tables volumes of the USC, *United States Code Annotated*[®] (USCA[®]), or *United States Code Service*.

© 2002 Druet Cameron Klugh

⁸ See the well-detailed answer compiled by Alice I. Youmans, Joan S. Howland, and Myra K. Saunders at 78 *Law Library Journal* 585, 590 (1986).

⁹ *Ibid.* at 592.

“The debate is over whether to put citations to authorities in footnotes rather than in textual sentences in court opinions and briefs.”

“TO NOTE OR NOT TO NOTE”

BY BRADLEY G. CLARY

Bradley G. Clary is Professor of Clinical Instruction and Director of the Legal Writing and Research Program at the University of Minnesota Law School in Minneapolis.

Sunday, July 8, 2001, was a slow news day. Publication on the front page of the *New York Times* of an article on legal citation format conclusively demonstrates this.¹

The debate is over whether to put citations to authorities in footnotes rather than in textual sentences in court opinions and briefs. Proponents of the Bryan A. Garner theory of legal writing argue that citations clutter a text.² Other commentators reject the advice, saying that it downplays the significance of precedent, and causes a reader's eye to jump up and down a printed page.

At one level, the debate seems relatively inconsequential. Indeed, this author is surprised by the vehemence with which the debate proceeds. However, for those of us who are legal writing teachers, a potentially important point arises: What do we tell our students to do? It is to that subject that this article now turns.

Distinguish Between Lawyer Briefs and Court Opinions

Much of the debate over the great footnote controversy appears to assume that the use of a footnote device is either a good or a bad idea in both court-prepared opinions and lawyer-prepared briefs, without distinguishing between the two. This is a mistake. Briefs and opinions are written for different purposes and for different audiences. Because of those differences, one should not assume that, if placing citations to authorities in footnotes rather than in text is a good or bad idea in court opinions, such placement is similarly good or bad in briefs.

¹ William Glaberson, “Legal Citations on Trial in Innovation v. Tradition,” 150 N.Y. Times 1 (July 8, 2001).

² Bryan A. Garner, *The Winning Brief*, 114 (Oxford U. Press 1999).

Court Opinions

The argument for using footnotes to cite authorities in court opinions is that citations in the text are distracting and tend to make the text less readable for lay people. To the extent that the purpose of a court opinion is at least in part to educate the general public as to how the law looks at a particular subject, the argument for the use of footnotes instead of textual citations is legitimate, to a point. The use of citation footnotes does cut down on clutter. The typical member of the general public does not need detailed citation knowledge. Further, removing citations from the main text can be a useful device in causing judicial opinion writers to improve the flow of their expression, without pause.

At the same time, one may legitimately wonder about the premises of the argument. Does the average lay person actually read court opinions? One would expect that the most avid lay readers would be persons who are parties to a given case. However, my own experience as a practicing lawyer for 25 years is that clients mostly want to know who won; they figure it is my job to determine the legal “why.”

A further premise of the pro-footnote argument is that the typical reader will scan text, without looking down at footnotes. Is that really true? My natural tendency as a reader, when I see a number in the middle of a discussion, is to look down to see what the number represents. Is that actually less of a pause than if the citation had been in the text?

Additionally, are we saying that court opinions should look more like law review articles? Is that the style we wish to emulate? When the general public thinks of documents with footnotes, they may well think of the high school and college research papers they had to prepare and mostly want to forget. That association will not stimulate lay readership of court opinions.

Finally, court opinions are increasingly being published electronically, on the Web. If one assumes that our society will someday go “paperless,” then we have to think about how footnoted citations in court opinions will look electronically. Such footnotes would not improve the flow of the documents when there are bottomless pages.

Lawyer Briefs

Most legal writing students will never be judges. Certainly, it is unlikely they will become judges immediately after law school. Thus, the debate over whether court opinions should use citation footnotes instead of citations in text is almost entirely irrelevant to the teaching of legal writing to a typical law student. Of considerably more interest is the question of whether lawyers preparing briefs for courts should use citation footnotes or citations in text. As to *that* question, the dispositive answer is that lawyers need to know their audience. If a given judge likes citations in footnotes, use them. If the judge does not like citations in footnotes, then do *not* use them. Even Garner ultimately recognizes this; he just treats this proposition as an aside,³ whereas it is in fact the single most determinative criterion. Most judges with whom I have talked do not like legal authorities cited in footnotes.

That said, there are a number of reasons why lawyers preparing briefs could rationally decide to place their citations to authorities in the main text of their documents (as has been traditional practice), as opposed to using citation footnotes. These reasons include the following:

First, unlike a court opinion, a brief's purpose is expressly argumentative. The lawyer's task is not to explain the law objectively; the lawyer's job is to persuade a court that a client's view of the law is correct, and should be applied to specific facts to arrive at a particular pro-client result. One of the lawyer's principal tools in this process is *stare decisis*. The lawyer does not want to relegate an important case's citation to a mere footnote. The lawyer wants the citation inescapably staring the court in the face. In a brief, citations are not merely incidental to the main purpose of the documents; they are *integral* to that purpose.

Second, many of the points made above as to footnote citations in court opinions are equally applicable to lawyer-prepared briefs. Do we really want legal briefs looking like law review articles? Do we want legal briefs containing lots of citation footnotes in an age when briefs will increasingly be filed electronically?

³ Garner, *The Winning Brief*, at 117.

Finally, the *real* problem with bad prose, more often than not, is that the writer has not figured out what to say, so the prose reflects that. *There* is the problem that should be on the front page of the *New York Times*.⁴

Postscript

Following the original submission of this article for publication, a point/counterpoint discussion of the great footnote debate appeared in volume 38, issue 2, of *Court Review* (Summer 2001). Bryan Garner argued in favor of citation footnotes. Judge Richard Posner argued against them. Justice Rodney Davis argued in favor of them, while recognizing some of the practical difficulties they present.

There are two points about the *Court Review* debate worth adding for present purposes. The first is that the entire discussion in *Court Review* relates to the use of citation footnotes in judicial opinions. The discussion is not directed to the separate question of whether such footnotes are a good idea in lawyer briefs.

The second point is that the debate in *Court Review* ultimately revolves around the following Garner contention: "[Most judicial writers] interrupt their prose with *lots* of names and *meaningless* numbers. These are serious impediments to *readability*."⁵ (Emphasis added.) My response is as follows: (a) To the extent the perceived problem is *lots* of case names, one solution is to avoid string citations. They are not useful except in "weight of the authority"

⁴ Those readers most interested in the debate may wish to review the following additional sources: K.K. DuVivier, *Footnote Citations?*, 30–May Colo. Law. 47, 48 (2001) (concluding that footnote citations are not currently the "best remedy for concerns about the readability of a brief."); Paul F. McAloon, *Defending the Lowly Footnote*, 73–Apr. N.Y.St. B.J. 64 (2001); Edward R. Becker, *In Praise of Footnotes*, ABA J (July 1996) at 104 (arguing for the proper use of footnotes to convey citations and other information to make them "readily available without getting in the way."); R. Aldisert, *Opinion Writing* 178 (West 1990) (suggesting the use of footnotes "to set forth multiple citations in order to support a single proposition in the text."); Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 648, 652 (1985) (generally describing the use of footnotes in judicial opinions as an "abomination," but describing authority citation footnotes as "the easiest to defend.").

⁵ Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Rev. 4, 16 (Summer 2001).

“In a brief, citations are not merely incidental to the main purpose of the documents; they are *integral* to that purpose.”

.....

arguments. The best solution is not to simply move them to footnotes. (b) To the extent the perceived problem is *meaningless* numbers, that is not a problem for lawyer briefs in which the audience is a judge and where an advocate's pinpoint citation to an important authority that says exactly what the advocate claims it says is integral to the credibility of the advocate's argument. The problem in lawyer briefs is not meaningless *numbers*; it is citation to meaningless *authorities*. (c) To the extent the perceived problem is readability, is the solution to use footnotes? Isn't a better solution to have a clear point to make, to make it in short, plain sentences, to cite only to genuinely material authorities, and to put the citations to those material authorities at the end of sentences rather than in the middle?

© 2002 Bradley G. Clary

BEING A BEGINNER AGAIN: A TEACHER TRAINING EXERCISE

BY SUE LIEMER¹

Sue Liemer is Assistant Professor and Director of Lawyering Skills at Southern Illinois University School of Law in Carbondale.

Teaching lawyering skills to first-year law students requires acculturating them into new processes and new jargon. It is easy for law professors to forget just how tough it is to assimilate so much new information so quickly. At the 1998 Legal Writing Institute conference in Ann Arbor, Mich., Professor Charles Calleros presented a wonderful plenary session in which he reminded the audience what it is like to be a beginner.² Professor Calleros taught us legal writing professors how to do a little flamenco dancing. An authentic flamenco band accompanied him, and before he finished, a few hundred professors were literally dancing in the aisles. As Professor Calleros taught us the lingo and the rhythms of flamenco dancing, he also explained in depth the techniques he was using to teach this new skill to us beginners.

A week later I was planning a training day for legal research and writing (LRW) and academic support program (ASP) teaching assistants, and I wondered how I could convey to them the same sense of being a beginner that I felt while flamenco dancing. I only knew a very tiny bit about flamenco, and I only had 20 extra minutes in the training session schedule. There was no way I could even come close to replicating Professor Calleros' excellent presentation.

I started thinking about what other skills I had outside of the law, other skills I could use as the basis of a training exercise. I considered everything

from snow skiing to calligraphy to making banana bread from scratch. I finally decided on classical ballet, because I suspected few of my teaching assistants (TAs) knew anything about it. Like flamenco, ballet has its own vocabulary in another language. And like flamenco, ballet has a cultural history that can deepen your understanding of it. I decided that the parallels to learning law, with its foreign jargon and historic underpinnings, would work.

You do not need to know anything about a dance form to create your own exercise similar to the one I used. You also do not need to be a true expert at the skill you decide to use. Perhaps you played chess in high school or played golf in your law practice days. Perhaps you know a variety of embroidery stitches or three ways to build a campfire. Any skill you are pretty good at could serve as the basis of an exercise to remind TAs or new professors what it is like to be a beginner.

Once you choose a skill, write out an exercise that you think will take about 10 minutes to figure out. Make the actual activity you are teaching very, very simple. It should be something you could just *show* someone how to do in a minute, if you were showing them instead of asking them to figure it out. But do use all the jargon associated with the activity; throw in lots of technical words. Then create a glossary of those terms on a separate sheet of paper. This glossary, of course, will serve as an analogy to the law dictionary to which first-year students constantly have to refer.

It may also be helpful to omit from your glossary one or two words that are so basic to your chosen endeavor that everyone who already possesses the skill would forget that beginners do not know their meaning. Let your teachers-in-training remember what it feels like to struggle with and be stumped by foreign terminology.

In the instructions that you write for your exercise, be sure to mention that it is an easy, simple, or basic exercise. Find a way to allude to the fact that there is a more difficult aspect to even this first step, but that the trainees need not worry about it for now. These types of instructions reinforce beginners' awareness that they know nothing and have a lot of difficult things to learn. As you write your exercise, make sure your trainees will experience similar daunting messages. Law

“Once you choose a skill, write out an exercise that you think will take about 10 minutes to figure out.”

¹ The information in this essay was presented at the Southeastern Regional LRW Conference held at Stetson University College of Law, St. Petersburg, Fla., on September 8, 2001.

² Charles R. Calleros, *Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking About Teaching Legal Method and Writing*, 5 *Legal Writing* 2 (1999).

“Most small groups will quickly devolve into the same dynamics seen in groups of first-year law students.”

professors and TAs frequently give first-year students just such messages, heightening their apprehension about their ability to learn successfully. Of course, these messages are counterproductive to learning, because students who are not confident they can succeed are much less likely to do so.

When I used my ballet exercise with a large group of TAs, I did not tell them anything about it ahead of time. On the printed training schedule for the day, all I wrote for that time period was “Training Exercise.” I split the TAs into groups of three ahead of time and told them I was going to give them an activity to figure out. Before handing out the exercise, I asked each group to select the person who would show all of us what his or her group had figured out. I mentioned casually that it was a physical activity, so they might want to pick someone athletic. (One year these oral instructions resulted in the ballet steps being presented by a former state wrestling champion and a marine captain.) I also said that those who were already familiar with this activity should recuse themselves and just observe what the groups were doing.

It is helpful to the point of the exercise to have trainees work in small groups. If you are only training a small group to begin with, let them work together to figure out the activity, and then perhaps let each present what he or she learned. Most small groups will quickly devolve into the same dynamics seen in groups of first-year law students. One person in the group will say “I think that means this,” the others will assume she knows what she’s talking about, and soon the blind will be leading the blind, with the rumor mill in full operation.

After all groups have had 10 minutes to figure out the activity and then time to present what they learned, discuss with them why they think they were asked to do the exercise. The first question I always ask is “How did you feel when you were doing this?” These accomplished adults reply with words like “awkward,” “stupid,” and “lost.” They will probably be able to articulate why, and you may also want to show them how you stacked the exercise to elicit that result. Then ask them to articulate the analogies to the experiences of first-year law students and how law teachers can help make the acculturation process smoother.

The actual exercise and glossary I have used follows. Please note that the technical terms that I have not defined are “first position” and “downstage front.” If you know what those terms mean, feel free to borrow this exercise. If you do not know what they mean, you probably will be better off creating a similar exercise for a skill with which you are more familiar.

Training Exercise

Instructions:

In this exercise, you will learn the first eight counts of a simple ballet. Read the steps below and work with your group to figure out how to do them. Do not worry about arm movements or head and shoulder alignment for now. To assist you, a glossary of terms you may not be familiar with follows. Remember to count.

Exercise:

Facing downstage front, in first position.

Two counts for each step.

Plié.

Tendu right, à la second.

Tendu left, à la second.

Sauté.

(tip: You need to do a quick plié before the sauté.)

Glossary

à la second (from the French “as in second [position]”): To the side.

plié (from the French “to fold”): Bend your knees, while keeping your feet flat on the floor. Remember to keep your heels down on the floor.

sauté (from the French “to jump”): Jump up. Land in plié.

tendu (from the French “to extend”): Point your foot, keeping your toe on the ground at all times.

© 2002 Sue Liemer

TRAINING USERS ON INTERNET PUBLICATIONS EVOLVED FROM (AND STILL IN) PRINT

BY ALEA HENLE

Alea Henle is Senior Researcher and Organizational Learning Coordinator at the law firm of Wilmer, Cutler & Pickering in Washington, D.C.

“Neither Fish Nor Fowl Nor Good Red Meat”: The Early Stages of Evolution

Electronic publications are evolving out of print resources. What they’ll evolve into isn’t clear, though their paper origins are plain. In the meantime, users deal with interim products of questionable utility and stability: this is the Web-world, after all, where functions *can* change without warning, whether or not they actually do so. Individuals familiar with the print version often prefer it. Web surfers find searching the online version as drawn from the legacy of the print text frustrating.

Training researchers to make the best use of electronic publications requires addressing the electronic versions’ dual natures and allowing for individual trainee backgrounds. The print user and the Internet-savvy user face the Web version from different angles. The former needs a reason to favor the Web; the latter needs help recognizing the print-based nature of the resource and using the publishers’ navigation tools. The Internet-savvy book user combines both of these conflicting needs. What’s a trainer to do now? Start with the fact that, print or Web, a book is still a book and a journal a journal.

Organization

A glance at the first few electronic screens is enough to gauge how far into the electronic world a print publication has gone. In most cases, it is not far. The print format usually rules. If the original table of contents had several layers, so does the electronic version. If indexing is lacking or

poor in the printed version, the electronic one reflects the same fault.

The operative idea seems to be that if the organization worked in print, it will work on the Web, and the converse is equally true. Individual articles or book sections are available by searching or browsing the book or journal issue to which they belong. Some publishers are beginning to offer users the ability to reorganize content, but such efforts are still labor-intensive for the user who selects every publication or part of a publication to be searched (or browsed or clustered) together *individually*. The time this takes ensures that only the most dedicated or desperate researchers use this function.

Separate print publications, no matter how closely related, are kept separate on the Web even when offered by the same publisher. The Bureau of National Affairs (BNA) publications don’t mix. *Banking Daily* and *Corporate Counsel Weekly* have distinct subscriptions, search engines, and archives. Both are independent of the *Daily Report for Executives* and the rest of the electronic publications. An individual interested in searching the archives of more than one publication must do so one at a time or go to a third-party provider.

CCH goes further. Its publications are divided several times before appearing on the Web. They are sorted by division: business, tax, labor and employment, etc., then arranged by category: securities, banking, trade, etc., and again by subcategory: securities law news, federal materials, state materials, etc. While it is possible to search across all publications in a given division, the effect is daunting. Users can narrow their search to only certain types of documents, from a list of document types in the double digits. Duplicate listings, such as forms, only add to the confusion. On the plus side, CCH offers “My CCH”: a page users can customize to include the publications or portions of publications of interest. Once again, it can be customized only within a division. Tax, Business, and Employment are distinct and separate subscriptions.

Peripheral vision is lost on the Web. Computer screens display limited information at a time. When reviewing an index, users see only the “relevant” portion. Only select publication(s) can

“Training researchers to make the best use of electronic publications requires addressing the electronic versions’ dual natures and allowing for individual trainee backgrounds.”

“The drawback of browsing an electronic book is the number of steps and/or clicks required to drill down to a desired section.”

be searched or browsed at any one time. The possibility of noticing something potentially relevant or of interest on a facing index page is gone. Patrons selecting books from an electronic shelf don't see relevant publications by different publishers. Third-party providers regularly keep publications separated by publisher. The opportunity to find the perfect source that the user wasn't looking for or didn't know to look for is lost.

Navigation: Browsing and Searching

The upside to electronic versions of books is browsing. Most publishers create as many internal hypertext links to referenced documents as possible. The ability to jump quickly from one relevant section to another in a different volume is valuable. Indexes are user-friendly. Users are not required to recognize the difference between paragraph and page numbers. Links lead to referenced text without side trips. There are limitations: the links lead only to other portions of the publication in question or to other items provided by the same publisher.

The drawback of browsing an electronic book is the number of steps and/or clicks required to drill down to a desired section. The layout is almost uniformly hierarchical. One click of the mouse opens the list of chapters in a volume. The next click opens the list of sections in the chapter. Another click is required to access the list of subsections, and on and on. Depending on the provider, once a text section is attained, the user has to back out to the list of sub(sub)sections to get to the next section. Increasingly, publishers are providing internal navigation tools that enable individuals to move directly between text sections.

If books have better-developed browser functions, serials have better search functions perhaps because they are competing with third-party providers that also offer their content. BNA is an excellent example: its search engine includes date restrictors, field searching, and different sorting mechanisms. The advanced search page is the *default* search page; users have to take an extra step to access the simple search page rather than the other way around. The search page features a clean design. Publishers offering fewer serial

publications usually have more simplified search functions, sometimes merely internal versions of popular Internet search engines.

Book publishers are working toward adding search functionality, but many of their search pages are complex and less intuitive. The search page for Books OnScreen, a site that sells books in electronic format, integrates some directions on the page. It offers fewer bells and whistles than BNA, but includes the ability to search just a portion of a book or all the books in the library. CCH, on the other hand, has a deceptively simple-looking search bar across the top of the screen.

The search options are less intuitive, and valuable information is hidden in the fine print. The help function is detailed and requires users to dig for answers. Unless the option is deselected, CCH automatically looks for synonyms of search terms, but the definition of *synonym* is too wide. A search for *Internet training* results in documents discussing e-mail.

The display of search results varies widely from publisher to publisher. Books OnScreen lists hits in relation to where, in a given book, they come from. Both BNA and CCH offer sorting by relevance as determined by the search mechanism. Taking a cue from third-party providers and the Internet, they also usually show the terms in context. The browse function also applies to search results for many book sites. Users are able to navigate not only between search results, but also between a given result and the text sections that, in the book, surround it.

Training from All Perspectives

Training users on electronic products is a Herculean task. One format does not fit all and probably never will. But certain techniques or approaches cut across the various publications' evolutionary lines. First and foremost, if time and staffing allow, is flexibility. The fewer people trained at a time, and/or the more similar they are, the easier it is to tailor the training to take them from the familiar to the unfamiliar.

Training for journals is a simpler matter, especially if the trainee knows how to navigate third-party databases. The focus is on searching. Techniques used to teach Westlaw® or LexisNexis

can be applied here, limited by the search functions included. Interest in browsing is usually restricted to the current version, easily at hand.

The case with books is a little more complex. The first thing is to ascertain who is being trained.

- Is the trainee familiar with the print version?
- Is the trainee Internet-savvy?

The individual accustomed to the print version can still recognize it on the Web. People still prefer print, but electronic versions serve a purpose. Users can access publications from out of the office, supplement missing or checked-out volumes, and search at levels an index cannot address. Showing the book user how the electronic version mimics the print allows for a level of comfort. They know how to browse from the print; whether or not they like the electronic layout, it is based on the print. Searching introduces a new level and a way to counter print limitations such as poor indexing. The electronic version provides added features; the convenience is key.

The Internet-savvy user, unfamiliar or less familiar with the print version, requires a different approach. Searching is the place to start. The search options are comparable to Internet search engines and databases (Westlaw, LexisNexis). Many offer Boolean or free-text searching and field restrictions. Emphasizing a resource's print nature grounds the user, especially when the results are displayed by volume. Moderated expectations result in a more positive experience. Internet versions of journals provided by the publisher often include graphics and tables from the print (more applicable to nonlegal publications), providing an incentive to favor the publisher's version over a third-party provider.

Both approaches combine for Internet-savvy users familiar with the print. Browsing is a first step, but the search functions offer enhanced use. Familiarity with the print facilitates choice of search terms and helps narrow the search to selected volumes. Just-in-time access is the primary incentive.

The Next Stage in the Evolution

Keeping up with an electronic Web site is a never-ending task. Updates and upgrades occur unpredictably and rarely offer advance warning. Sometimes the print version may be more current than the online, due to the method of updating. Currentness should improve for electronic variants, as information is increasingly digital in nature. Changes involving more factors are harder to pinpoint in the specific, but hard to miss in general, for instance, publisher consolidation.

Mergers in the physical world affect the electronic as do alliances between publishers and third-party providers. Exclusive contracts and actual ownership of subsidiary publishers increasingly differentiate third-party providers. Pricing for unique or exclusive (not necessarily unique) content is often separate from pricing for the remainder of a third-party's content and encourages direct access to the publisher's version, as available. Increasing numbers of mergers and alliances may exacerbate this trend. Per-document pricing, within or without negotiated fee contracts, may take longer to become a normal mode of purchase.

Consolidation and third-party providers have begun to reorganize content by subject. Reclustering information by subject and relation offers reduced search time and increased efficiency. The new arrangements are based on decisions made by the providers, but it's a start.

Search functions should improve. Browsing may involve fewer clicks. Innovations in Internet search engines will filter through to publishers' Web sites. Given the investment in and preferences for the print version, changes may occur in real time rather than Internet time.

Until the Internet versions are more evolved, the incentive to thrive in a research-dependent environment will divide those who master the electronic and those who resist using online resources. Focused, product-based training is ultimately the key to success.

© 2002 Alea Henle

“Mergers in the physical world affect the electronic as do alliances between publishers and third-party providers.”

“Introductions like these help readers know what to expect as they read; more than that, they help readers understand why they should read at all.”

FRAMING PLEADINGS TO ADVANCE YOUR CASE

BY GREGORY G. COLOMB

Gregory G. Colomb is a Professor of English at the University of Virginia in Charlottesville. He is also a visiting professor at the National Judicial College and a regular contributor to the Writing Tips column in Perspectives.

In two previous columns¹, Joe Williams and I explained how writers make the readers' task easier by framing and structuring documents to meet their needs. We meet their needs *as readers* by beginning with a framework that helps them know what to expect and then structuring the body to help them find it. Specifically, the framework should announce

- the main characters that form the connecting threads for the story,
- the key concepts that form the connecting threads for the argument, and
- what's at stake, the issue(s) that the body will address.

The body should then explicitly and evidently focus on those characters, concepts, and issues. These principles apply not just to documents but to all the units within them, from sections down to paragraphs.

Readers expect us to do more, however. Since few people read legal documents for the fun of it, readers also expect us to show how our document serves the needs that led them to read it in the first place. In most documents, we typically do that by stating in the introduction a problem that readers have and our document will solve. These problem statements have a standard form:

Common Ground	The situation as the reader already knows it.
Problem Condition	The new or newly relevant state of affairs that disrupts the common ground.
Consequence	The costs that the reader will face if the disruptive condition is not resolved.
Resolution	The solution or a promise of a solution to come later in the document.

Here is an example:

As you recall, in a conference call from 2:12 to 2:51 p.m. on June 26, 2000, we discussed the exclusivity and first-refusal proposals with representatives of Clearlines.com. **[common ground]**

I will be negotiating the final wording of the contract next week, and I may have to rely on certain representations you made in that conversation. **[condition]** In order to ensure that my notes correctly reflect what you said, **[consequence]** please review the following summary of that conversation.

Let me know by Monday the 12th if I have misunderstood any of your positions.

[resolution / recommended action]

Introductions like these help readers know what to expect as they read; more than that, they help readers understand why they should read at all.

These principles of organization apply to documents of all kinds. In most documents, including some legal ones, effective writers implement the principles by using standard organizational tools such as prototypical problem statements. But many legal documents are used in ritualized situations with special rules and practices—and with distinctive genres. This column and the next will address the specialized tools that effective legal writers use to organize the kind of documents collectively known as *pleadings*—documents written by an advocate to convince a court or other decision maker to decide a certain way, documents such as briefs, motions, memoranda supporting motions, filings for

¹ Gregory G. Colomb and Joseph M. Williams, *Well Begun Is Half Done: The First Principle of Coherent Prose*, 8 Perspectives: Teaching Legal Res. & Writing 129 (2000) and Gregory G. Colomb and Joseph M. Williams, *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

commissions, and so on. The next column will explain the tools for **structuring** the body of such documents; this one will explain the tools for **framing** them.

The Special Importance of Framing a Pleading

In business and the professions, most readers are overworked and distracted, so most writers have to design documents that are easy to read and remember. For that, a good beginning is essential. But few professionals write in an environment as challenging as a legal contest. Not only do you compete for the time and attention of busy readers, but also you have to compete for their understanding—against your opponents’ arguments, against their responses to yours, and, if they are cunning, against irrelevancies that muddy your case without affecting theirs. For that, beginning well is doubly important.

You start out ahead of the game if, in the first page or two, your pleadings give readers a strong framework that helps them know how to read and understand the arguments that follow.

- **A strong framework protects your document against “noise” in the environment.**

Give a decision maker a clear, focused, and appropriate framework for understanding your argument, and he or she will be more likely to block out competing information as you make your case.

- **It can undermine your opponents’ arguments.**

If your framework is more focused and more compelling than your opponents’, it is likely to influence how the decision maker reads their documents as well as yours. (That’s why all your pleadings in a case should present if not the same then at least mutually supporting frameworks.)

- **Finally, it helps the decision maker to get your argument right.**

Decision makers want to be able to scan your document once quickly, understand it easily, and remember it accurately. Offer them that kind of document and you benefit twice over. Not only do you gain a foothold in their memory and understanding, but also you help them do their job well—a valuable element of persuasion.

Your goal in establishing a framework should be to start readers out with a disposition to agree—or at least to take your arguments seriously. You want readers to see enough of your argument at the beginning that not only do they know what to expect, but also they think to themselves, *If you can prove what you say here, then yes, I will decide as you ask.*

The Parts of Pleadings

Many courts and commissions have rules stipulating that pleadings must have specific parts in a specific order. In all but the rarest cases, those stipulated forms do not prevent writers from designing effective documents, with a clear frame at the beginning and a body structured to match what that frame promises. So whatever the names of the parts you must work with, you can still use them to offer readers a framework for understanding your arguments, even if you may have to compromise between your persuasive goals and the substantive demands of stipulated units.

To help you focus as much on your readers’ need for a framework as on those substantive demands, what follows is organized not around specific units (which vary) but around the questions that your readers need you to answer (which do not). These questions also map out a default structure that you can follow when you are free to create your own.

What kind of decision do I need to make? **Caption + Introduction**

What specific issue do I have to decide? **Issue**

What decision do you want and why should I give it to you? **Summary of the Argument**

Don’t get caught up on these specific names. You use any headings you want for these sections, and for a short pleading, you can put them together under the single heading “Introduction.” When a court or commission has stipulated a specific form, your goal is to accomplish these tasks within the structure of the stipulated form. To help you do that, after explaining what information readers need, I’ll also indicate which units can best accommodate it.

“Your goal in establishing a framework should be to start readers out with a disposition to agree — or at least to take your arguments seriously.”

“Issues help lay readers distinguish what is relevant in a complex body of facts and reasoning.”

.....

The Overarching Question: *Why should I read this?*

For most documents, readers' most important question is whether they have to read it at all. Normally, writers answer that question by showing readers that they have a problem the document will solve. But readers of your pleadings already know why they have to read them: their job is to make the decision your document advocates or opposes, often a decision you forced on them. So readers don't need an explicit problem statement to motivate them to read; it's their job, like it or not.

But even if a pleading doesn't need a problem statement, you still have to design it around your reader's problem: to make and defend a good decision. Too many advocates focus only on their problem as writers, to muster all the arguments they can in support of the decision they want. Effective advocates know that their efforts at persuasion are more successful when they not only push the buttons that motivate a decision maker to make a specific decision, but also provide a good argument for the decision maker to explain and defend that decision. When they are different, as they often are, the argument makes the motives more persuasive.

What kind of decision do you want me to make?

Your readers will know why they have to read your documents as soon as they know what kind of decision you seek and what party you represent. These you should make clear in the caption or, if the decision maker is not a court, in the title, subject line, or opening sentence. Sometimes, the caption has all the information your reader needs to understand what task you bring him or her. But your reader may also need an introduction with a bit of procedural history to know why your document is before him or her—for example, that you are responding to a response to a response to your opponent's third motion on the same question. Space at the beginning of a document is precious, so don't waste much of it on procedural history. Stick to the minimum information a reader needs to understand how your document bears on the decision he or she has to make.

Add more only if you intend to argue about the procedures themselves or if you think a fuller account makes your opponent look bad in a way that supports your own arguments.

What specific issue do I have to decide?

The statement of the issue can be your most important persuasive tool. A decision maker with legal training is long accustomed to focusing decisions around them. If he or she accepts your version of the issue (and the facts are on your side), you are halfway to gaining his or her agreement. But a clear statement of the issue is even more important to a decision maker who does not have legal training. Issues help lay readers distinguish what is relevant in a complex body of facts and reasoning. If you state the issue so that the decision maker begins with a clear understanding of the elements of the decision you ask him or her to make, you help the decision maker remain focused on what is most relevant to the outcome you want. And if you have chosen the issue well, the facts and the reasoning will seem to fall into place as he or she reads.

Many stipulated forms include a distinct section for "Issues" or "Questions Presented." Otherwise, you can easily include a statement of the issue in a section titled "Introduction" or "Statement of the Case." You can even use it to begin a "Summary of the Argument." When you include a statement of the issue in a larger section, explicitly signal readers what you are doing:

The issue is ...

The decision turns on the question ...

This commission has to decide three questions ...

Wherever you put it, an effective statement of an issue has four characteristics:

1. Forecast not just the outcome but the elements of the argument supporting it.

You want to lead the decision maker to the specific outcome you seek: "Did Jones commit fraud?" But every responsible decision maker will only get there by working through the argument you offer to support it. So you help him or her see things your way when you state the issue in two parts: a **judgment** part that frames the outcome

you want and a **reasons** part that frames your supporting argument. Be sure to use substantive terms that anticipate the key elements of your argument:

Did Jones **fraudulently misrepresent** the property [**judgment**] when he **encouraged** Kim to **rely** on his advice to lease it and **falsely claimed** that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones **knew** there was none? [**reasons**]

It is better to put the judgment before the reasons: the judgment clause frames the reasons, and is almost always shorter and simpler. For example, the issue statement above has greater impact than this one:

When Jones encouraged Kim to rely on his advice to lease it and falsely claimed that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones knew there was none, [**reasons**] did he **fraudulently misrepresent** the property? [**judgment**]

Most of all, don't cram all the reasons into a long, complex subject:

Did Jones' encouragement of Kim to rely on his advice to lease it and his false claim that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones knew there was none, **fraudulently misrepresent** the property?

Although some think that the issue must be a single sentence, you can always revise a too-long issue into one or more sentences. You'll have to put the reasons before the judgment, so begin with a brief heading that forecasts the issue your concluding question will raise:

Fraudulent misrepresentation: [forecast of judgment] Jones encouraged Kim to rely on his advice to lease the property and falsely claimed that he could not answer Kim's question whether it carried a deeded right-of-way, even though Jones knew there was none. [**reasons**] Did Jones **fraudulently misrepresent** the property? [**judgment**]

2. State the issue in the specific terms that support your case.

Some will say that you should state the issue in neutral terms, without names or details, because the issue should be a matter of law, not advocacy:

Non-compete: Does a covenant not to compete prevent an ex-employee from working only for a direct competitor or for all generally related businesses owned by the parent of a direct competitor?

Such a neutral stance may make sense for a judge who wants to seem fair in reporting his or her decision, or when you want to contrast your measured argument against an opponent whose advocacy goes too far. But in most circumstances, you do better to state the issue using the specific details that support your position. Compare these two versions of the non-compete issue:

Protection of proprietary information:

Can DataCorp enforce against Jones a covenant not to compete when Jones left a sensitive position designing telephone switching equipment for DataCorp to work for the Memory Chip Division of Datamation, whose separate but related Switching Division is DataCorp's chief competitor?

Scope of non-compete covenant: Does Jones have the right to leave DataCorp to work in a new industry when his new employer does not compete with DataCorp and has no use for DataCorp's proprietary information, but its parent owns a separate division that does?

When you decide how strongly to word the issue, be sure to match your overall rhetorical posture—fierce advocate, just-the-facts expositor, patient reasoner, etc. You have to show some restraint (see below), but you've generally made a mistake if a reader cannot tell which side you represent from your statement of the issue alone.

3. Avoid excessively judgmental language.

What will carry the day with a decision maker is the substance of your argument, not the heat of your language. In fact, heated language almost always hurts your case, unless the decision maker

“It is better to put the judgment before the reasons: the judgment clause frames the reasons.”

“Experienced writers state their main point early, typically at the end of the introduction.”

already shares your strong feelings *and is willing to indulge them*. Even an exasperated judge will often strain not to let those feelings enter his or her deliberations. And if you guess wrong and go too far, you will only make him or her suspicious. Avoid this:

Did Officer Friendly **brazenly** violate the plaintiff’s constitutional protection from unreasonable search and seizure when without permission **or even a single word of explanation** he **brutally ripped** plaintiff’s backpack off of his back and **dumped** its contents **all over** the ground?

A more balanced account will almost always be more persuasive:

Did Officer Friendly violate the plaintiff’s constitutional protection from unreasonable search and seizure when he did not ask plaintiff to remove and open his backpack but forcibly removed it and spilled its contents on the ground?

You advance your cause more with specific details in plain language than with language overcharged with your judgments. When you let the details speak for you, your case seems to be grounded more in the facts than in your assertions.

4. State the question as a complete sentence rather than a fragment beginning with *whether*.

Issues are traditionally stated in a sentence fragment beginning with *whether*:

Whether Jones fraudulently misrepresented the property when ...

Whether DataCorp can enforce against Jones a covenant not to compete when ...

Whether Officer Friendly *violated* the plaintiff’s constitutional protection from unreasonable search and seizure when ...

But most readers react better to issues stated in complete sentences, as in the examples above. (Begin with *do/did/does/is/are/can/will*, etc.) It’s a small change, but complete sentences are marginally easier to process. Besides, to help create in your reader a disposition to agree, you want your issue to invite a decisive “yes” or “no”; a noncommittal *whether* does not.

What decision do you want me to make?

In ordinary documents, readers want to know most of all what you want them to do (or think) and how you propose to help them solve their problem: that’s the *main point* of almost all professional documents. And they want to know it sooner rather than later. Experienced writers state their main point early, typically at the end of the introduction. In that way, readers are in more control of their reading: not only do they get the most important information quickly, but if they accept the point, they don’t have to read on. When, however, writers save their main point for the end, they seem to put their readers at their mercy:

Reader, now that I have shown you a problem that you need to solve, settle in and get comfortable. I’ll share my solution, but not until you have read every word I wrote.

Of course, most busy readers reject that offer and turn to the end to find the point they wanted to see at the beginning.

In a pleading, however, readers usually know what you want them to decide as soon as they read the caption or other front matter, sometimes before. That leads some writers to assume that they don’t have to say it:

Plaintiff Harlan Jones (hereinafter “Jones”) filed his Complaint against defendants Tarik and Tanya Smith (hereinafter collectively “the Smiths”) and Abco, Inc., on February 28, 1993. Jones’ Complaint seeks compensation for merchandise sold and delivered to defendants on consignment and account. (Complaint ¶¶ 1–3, 9–11, 22.) The Smiths and Abco filed their Answer to Jones’ Complaint on April 1, 1993. On that same date, they also asserted a six-count verified counterclaim against Jones. Since the filing of this action, the parties have engaged in extensive discovery. No final pretrial or trial dates have been set.

Even if readers already know what you want, they react better when you state it up front: we are all too accustomed to thinking of documents that

withhold the point until the end as rude and unhelpful. Besides, it cannot hurt your effort to create a disposition to agree if you can remind your readers, in a way that feels helpful, exactly what you want them to decide. It is always a mistake if a reader cannot tell which party you represent just from the way you state the case.

Why should I decide as you ask?

It is not enough, however, just to state the decision you seek. Responsible decision makers will not make a decision simply because it seems right at first blush, or because they already thought it best, or worst of all, just because you asked. What matters most is *why* they should decide as you ask. So when you state the decision you want without any indication of why you should get it, you seem as rude and unhelpful as those who withhold their point to the end:

Reader, I know that you need good reason to make the decision I seek, and so I also know that what you most want to know are the reasons I can offer to support what I ask, but you'll have to read every word I wrote before you find out what they are.

It doesn't help simply to refer your reader to the body of the document:

For the reasons stated below, the court should ...

That adds insult to injury.

Of course, you cannot state *all* your reasons up front. But you help readers grasp the main contours of your argument if you forecast the most important and dispositive ones. Your goal is to present enough of the outlines of your argument that your reader will think:

If you can prove all that you say, I'll decide as you ask.

Not only does this make it easier for readers to understand and recall your argument, but also it starts them out in a favorable frame of mind. Rather than read to find out what case you will make, they read to see whether you can support a position they already understand and accept.

The most obvious place to include your reasons is a "Summary of the Argument." But you can just as easily include them in an "Introduction" or "Statement of the Case." Be sure to end your summary with the specific decision you seek, not only as the culmination of the argument you summarize but as a launching point for the detailed reading that follows.

Your pleadings will be most persuasive when they start decision makers off with a clear framework that both helps them know what to expect and disposes them to accept your argument. If you then structure the body of your document to deliver on the promises you make at the beginning, your documents will win more than they lose. In our next column, we will show you how to structure the body so that it delivers.

© 2002 Gregory G. Colomb

“Your pleadings will be most persuasive when they start decision makers off with a clear framework that both helps them know what to expect and disposes them to accept your argument.”

COMPILED BY DONALD J. DUNN

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

Robert J. Ambrogi, *The Essential Guide to the Best (and Worst) Legal Sites on the Web*, 2001 [New York, NY: ALM Publishing, 353 p.]

Discusses and rates Web sites using one to five stars based on overall usefulness to legal professionals, content, design and presentation, accessibility and ease of use, and innovation.

Joshua Bauchner & Rekha Ramani, *International Regulatory Devices: Legal Research Guides to the E.U. Data Protection Directive and the Convention on Biological Diversity*, 2001 [Buffalo, NY: William S. Hein, 46 p.]

Contains two research guides as described in the subtitle of this book.

Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Cal. L. Rev. 1673 (2000).

Compares the cited references in an 1899 volume of *U.S. Reports* with those in a 1999 issue of *U.S. Law Week* to illustrate how the nature of authority used by the Supreme Court has changed. The author then discusses the role of computer-assisted legal research (CALR) services and the Internet in legal research, predicting the ultimate demise of the National Reporter System®.

Robert C. Berring, *Legal Research, Legal Information, and the First Year of Law School*, 2001 (West Group, audiotape and CD-ROM format).

Consists of four lectures: "Legal Research and the First Year"; "Cases"; "Citators and Statutes"; and "Legal Research Strategy."

Veda R. Charrow et al., *Clear and Effective Legal Writing*, 3d ed., 2001 [New York, NY: Aspen Law & Business, 456 p.]

Consists of three parts: "Learning to Read Legal Materials"; "Learning to Write Legal Documents"; and "Creating Specific Legal Documents" (intraoffice memo, memorandum of points and authorities, appellate brief).

Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Legal Educ. 562 (2000).

After describing the findings of two surveys that show lower pay and status for women directors of legal writing programs, the article compares the data with women teaching doctrinal courses. The author next discusses adverse consequences that can result from the bias and suggests how law schools can respond.

Carol Ebbinghouse, *Portals to the Future of Legal Information*, Searcher: The Magazine for the Database Professional, July/Aug. 2001, at 10.

Describes how portals (jumping-off points for finding sources on the Internet) facilitate access to legal information. The author describes her favorite portals.

Stephen Elias, *Legal Research: How to Find and Understand the Law*, 9th ed., 2001 [Berkeley, CA: Nolo Press, various pagings]

Intended as a self-help how-to guide to conducting legal research in a law library. Includes review questions at the end of each chapter.

Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises*, 2001 [Chicago, IL: University of Chicago Press, 227 p.]

The foremost authority of good legal writing has provided a book that takes a practical approach to the subject. In 50 sections, with each section concluding with basic, intermediate, and advanced exercises.

Pearl Goldman, *Legal Education and Technology: An Annotated Bibliography*, 93 Law Libr. J. 423 (2001).

This is a bibliography of articles “that examine the impact of computer technology on law schools and legal education.” *Id.* The sources are arranged under topics and subtopics.

Joseph Goldstein: *A Selected Bibliography*, 110 Yale L.J. 941 (2001).

A listing of books and articles of the late Joseph Goldstein, a Yale law professor for more than 45 years.

Robert Haibin Hu, *A Guide to Resources on Careers in Foreign and International Law*, 93 Law Libr. J. 479 (2001).

“[D]escribes resources in print and electronic formats that can assist an individual seeking information about career opportunities in foreign and international law. *Id.*”

Bonnie L. Koneski-White, *Increasing Affordable Housing and Regional Housing Opportunity in New England: Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law: A Selected Bibliography*, 22 W. New Eng. L. Rev. 431 (2001).

Identifies state statutes, regulations, cases, articles, books and book chapters, and reports relevant to the topic of this Housing Conference. Covers primarily sources from Massachusetts, Connecticut, Rhode Island, and New Jersey.

James B. Levy, *Escape to Alcatraz: What Self-Guided Museum Tours Can Show Us About Teaching Legal Research*, 44 N.Y.L. Sch. L. Rev. 387 (2001).

Discusses ways prerecorded, self-guided tours can be used in legal writing courses to instruct students in the use of the law library. The idea came from a tour of Alcatraz Island. Contains an “Alcatraz-style

research exercise” involving creating a research log for an open memo assignment.

John Maxymuk, *Government Online: One-Click Access to 3,400 Federal and State Websites*, 2001 [New York, NY: Neal-Schuman Publishers, 323 p.]

Focuses primarily on federal documents and secondarily on state documents. Each chapter begins with a written narrative by a subject expert.

Alvin M. Podboy, *The Shifting Sands of Legal Research: Power to the People*, 31 Tex. Tech L. Rev. 1167 (2000).

Uses a “who, what, when, why, where, and how” approach in discussing the ways research techniques and users have changed over the years.

Mary Miles Prince, *Bieber's Dictionary of Legal Abbreviations*, 5th ed., 2001 [Buffalo, NY: William S. Hein, 1,103 p.]

Contains more than 35,000 abbreviations used in legal encyclopedias, law dictionaries, law reporters, looseleaf services, law reviews, legal treatises, legal reference books, and citators. Now includes *Bieber's Dictionary of Legal Abbreviations Reversed*, formerly a separate publication.

Mary Miles Prince, *Prince's Bieber's Dictionary of Legal Citations*, 6th ed., 2001 [Buffalo, NY: William S. Hein, 391 p.]

Revised to reflect the changes in the 17th edition of *The Bluebook*, this edition includes rule references for citing cases according to local rules in different states. The treatment for citing electronic and other nonprint sources has been greatly expanded.

J. Clay Smith Jr., *Lynching at Bensonhurst: A Bibliographic Essay*, 4 Howard Scroll 97 (2001).

References to sources discussing the killing of Yusuf K. Hawkins in 1989 by a band of teenagers in Bensonhurst, New York. Arranged chronologically.

.....

Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secret*, 16 Berkeley Women's L.J. 1 (2001).

Argues that in-house discrimination and disparate treatment of faculty based on gender shows up most when studying the legal writing faculty.

N.O. Stockmeyer Jr., *Beloved Are the Storytellers*, 18 T.M. Cooley L. Rev. 1 (2001).

A brief article that illustrates the storytelling skills of Lord Denning and Justice Cardozo.

William L. Thomas, *Select Bibliography of Articles and Books in International Environmental Law (1997–Present)*, 13 Geo. Int'l Env't'l L. Rev. 47 (2000).

This extensive bibliography, covering more than 200 pages, is arranged under 11 headings. The heading "County/Region Materials" is further subdivided into eight geographical locations.

Jacqueline Woollam, *Bibliography on British and Irish Legal History*, 31 Cambrian L. Rev. 39 (2000).

Covers items published over the last several years dealing with British and Irish legal history. Unannotated and arranged by subject.

Jacqueline Woollam, *Devolution and the New Legislative Studies in the UK (since 1997)*, 31 Cambrian L. Rev. 89 (2000).

Covers secondary sources concerned with the devolution within the United Kingdom and to the working of the various legislative/executive bodies in the U.K.

Women's Annotated Legal Bibliography, 7 Cardozo Women's L.J. 83 (2000).

Describes, under 12 subjects, sources published over the past year related to women's issues.







ATTN: B. BURMEISTER, D5-S354

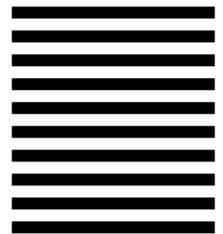


NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL
FIRST-CLASS MAIL PERMIT NO. 21 ST. PAUL, MN

POSTAGE WILL BE PAID BY ADDRESSEE

WEST GROUP
620 OPPERMAN DRIVE
PO BOX 64833
ST PAUL MN 55164-9777



PERSPECTIVES

Teaching Legal Research and Writing

All articles copyright 2002 by West Group, except where otherwise expressly indicated. Except as otherwise expressly provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed at or below cost, (2) author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the editor of *Perspectives* is notified of the use. For articles in which it holds copyright, West Group grants permission for copies to be made for classroom use under the same conditions.

This newsletter contains articles on ways to develop and improve legal research and writing skills, and provides critical information on electronic legal research and solutions to legal research problems. Beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at www.westgroup.com/customerservice/newsletters/perspectives.

The trademarks used herein are the trademarks of their respective owners. West Group trademarks are used herein under license.



© 2002 West Group

W-101755/1-02
Material #40038049



- Yes, I would like to start receiving *Perspectives* — free.
- Yes, I would like to change my *Perspectives* distribution.



Account number _____ (optional)
(first nine digits on your mailing label)

Name (please print) _____

Organization Name _____

Address _____

City _____ State _____ ZIP _____

Phone (_____) _____

PLEASE SEND ADDITIONAL **FREE** COPIES OF *PERSPECTIVES* TO THE FOLLOWING INDIVIDUAL(S):

PLEASE **REMOVE** THE FOLLOWING INDIVIDUAL(S) FROM THE MAILING LIST:

